



**Kenya Union of Commercial, Food and Allied Workers v Pavan Auto Hardware
(Cause E022 of 2023) [2024] KEELRC 13413 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13413 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E022 OF 2023
MA ONYANGO, J
DECEMBER 11, 2024**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**
AND
PAVAN AUTO HARDWARE RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the [Labour Relations Act](#) to represent the employees in the commercial sectors as more specifically set out in the membership clause of its Constitution.
2. The Respondent is described in the Memorandum of Claim as a hardware shop operating in Eldoret.
3. The Claimant stated in the Memorandum of Claim that it is the right union to represent employees of the Respondent as set out in its constitution.
4. It is the Claimant’s case that on 19th September, 2023 it wrote to the Respondent enclosing check-off forms signed by unionisable employees of the Respondent authorizing the Respondent to deduct union dues on their behalf and remit the same to the Claimant.
5. The Claimant states that on 21st September, 2023 it sent a letter to the Respondent enclosing a draft Recognition Agreement seeking for a meeting with the aim of signing a Recognition Agreement. The Claimant states that it had by then recruited 27 unionisable employees of the Respondent between February, 2021 and July, 2023, which constituted 90% of the Respondent’s unionisable employees.
6. The Claimant avers that the Respondent blatantly refused and/or ignored to sign the Draft Recognition Agreement. That the Respondent also refused and/or ignored to deduct and remit union dues as per check-off forms served upon it by the Claimant



7. The Claimant states that it made every effort to resolve the issue at the parties' own level in vain as the Respondent remained adamant.
8. The Claimant stated that in the face of the adamant by the Respondent it invoked section 74(a) of the Labour Relations Act which authorizes a trade union to move this court under certificate of urgency in disputes concerning recognition of a trade union.
9. The Claimant avers that the Respondent started victimizing its employees who had joined membership of the Claimant. It pleaded that if the orders of protection sought in the Claim were not granted the unionisable employees of the Respondent who were its members would continue suffering from acts of bad labour practices including outright denial of their fundamental labour rights contrary to Articles 36 and 41(c) of the Constitution of Kenya and relevant ILO Conventions.
10. In the Memorandum of Claim dated 2nd November, 2023, the Claimant seeks the following orders:
 - i. Do declare that the Respondent's refusal to sign Recognition Agreement is unlawful and order the Respondent to Recognize the Client as the sole Trade Union claiming representation of its employees.
 - ii. Engage the Claimant in collective bargaining upon signing Recognition Agreement.
 - iii. Do find that the Respondents failure to comply with the Order or Notice issued under part (VI) of the Labour Relations Act, 2007 contravened this section thus committing an offence as prescribed under section 50(10) of the Act under reference.
 - iv. Order payment of quantified costs of this claim to the Claimant.
 - v. That this Honourable Court do grant any other relief it finds appropriate to meet the ends of justice.
11. The Memorandum of Claim was filed together with an application by way of a motion seeking the following orders:
 - a. That this Application be certified as urgent and be heard *ex parte* in the first instance.
 - b. That service of this Application/Claim upon the Respondent be dispensed with.
 - c. That this Hon. Court orders the Respondent to recognize the Claimant/Applicant as Trade Union representing the interest of all unionisable employees of the Respondent.
 - d. That pending hearing and determination of this matter, this Honourable Court be pleased to issue Orders restraining the Respondent from victimizing, intimidating, coercing, harassing, terminating, dismissing or disciplining the Claimant/Applicant's members whose names appear on the check-off sheets on account of their Trade Union membership.
 - e. That pending hearing and determination of this matter, this Hon. Court do direct the Respondent to deduct and remit union dues as already authorized by Union members through the check off sheets.
 - f. That this Honourable Court sets this matter for hearing and determination on priority basis.
 - g. That costs of this application be provided for.
12. On 16th November, 2023 when the motion came up for inter partes hearing the court directed that the Claim and application be heard together in view of the fact that the orders sought by the Claimant in the application and in the Claim were similar.



13. The Respondent filed a Memorandum of Response to the Memorandum of Claim dated 1st January, 2024 in which it denies the allegations in the Memorandum of Claim.
14. According to the Respondent, the Claimant does not have locus standi to recruit its employees. It states that there is no evidence that the check off forms and Draft Recognition Agreement were received by the Respondent.
15. The Respondent further states that upon receiving the check-off forms and draft recognition agreement and sharing with the staff, they wrote letters indicating that they have never been in contact with the Claimant union before August, 2023. That the employees have disassociated themselves with the Claimant union.
16. The Claim was disposed of by way of written submissions. The Claimant's submissions are dated 7th December, 2023 while the Respondent's submissions are dated 31st January, 2024.

The Claimant's submissions

17. The Claimant submits that section 54(1) of the *Labour Relations Act* requires employers to sign recognition agreement with a trade union which has recruited a simple majority of unionisable employees. That on 19th September, 2023, the Claimant forwarded to the Respondent check-off forms with 23 out of a possible 30 unionisable employees of the Respondent, attaching a draft recognition agreement.
18. The Claimant further submits that its constitution covers the sector in which the Respondent operates and the Claimant is therefore the right trade union to represent employees of the Respondent.
19. It states that even before the Claimant filed the instant suit the Respondent had started victimising its employees who joined membership of the Claimant union as is evident in the letter dated 16th October, 2023 from the advocates of the Respondent in respect of unfair termination of Mr. Moses Kiptoo at Exhibit 4 of the Claimant's Bundle of Documents.
20. It is the Claimant's case that the moment it served the court orders herein upon the Respondent, it started interrogating its employees on the issue of union membership as is evident from Exhibit 7 of the Claimant's Bundle of Documents.
21. The Claimant submits that section 48 of the *Labour Relations Act* governs deduction of union dues while section 50(8) of the Act makes it an offence for an employer to fail to deduct union dues or to remit deducted union dues to the union.
22. The Claimant submits that it has met the threshold for deduction and remittance of union dues and there is no reason for the Respondent to refuse to comply by deducting and remitting the union dues of the employees whose names are in the check-off forms served upon it by the Claimant.
23. The Claimant submits that it has recruited over 50% of the Respondent's unionisable employees and is entitled to recognition. That it is also entitled to union dues from employees of the Respondent whose names are in the check-off forms and that it is the right union to represent employees of the Respondent.

The Respondent's submissions

24. The Respondent submits that it was never served with check-off forms and letters dated 19th and 21st September, 2023. It wonders why the Claimant, after recruiting employees in 2021 as reflected in the check-off forms did not serve the same upon the Respondent until 2023.



25. The Respondent submits that upon receipt of the Claim the Respondent asked its employees about the same and the employees responded in writing stating that they became members of the union in August, 2023 but did not join membership of the union and did not wish to be associated with the union.
26. The Respondent framed the issues for determination to be:
 - a. Whether there is any recognition agreement between the Claimant and the Respondent, and whether the same was served upon the Respondent and what are the parameters of entering into a recognition agreement'
 - b. Who should bear the costs of the suit.
27. On the first issue the Respondent submits that the Labour Relations Act does not give the parameters which the court can use in determining whether an employee is unionisable. That under rule No. 5 of the Claimant's constitution filed in court the Respondent's employees are not eligible to join membership of the Claimant.
28. It is submitted that the employees of the Respondent have stated that they did not sign the check-off forms. Relying on the decision in *Transport Workers Union v Etihad Airways* [2019] eKLR, the Respondent submits that the Claimant has not proved that it has recruited a simple majority of the Respondent's unionisable employees.
29. The Respondent prays that the Claim be dismissed with costs.
30. In the supplementary submissions dated 9th February, 2024 filed by the Claimant with leave of the court, it reiterates the original submissions. The Claimant further submits that in an attempt to pressure the Claimant's members out of union membership the Respondent forced 14 employees to write statements as a means of withdrawing from union membership.
31. The Claimant adds that the said statements do not meet the threshold for withdrawal from union membership as they are not addressed to anyone. That the statements further look as if they were drafted for the employees to sign or were dictated to the employees or originated from the same source and employees were forced to sign.
32. The Claimant states that even if it were to be assumed that the 14 employees withdrew from union membership there are still 12 employees who are members and in respect of whom the Respondent should deduct and remit union dues.
33. The Claimant states that the Respondent's action was malicious and mischievous. That the same was intended to defeat the purpose of the suit herein. The Claimant relied on the decision in *Kenya Quarry and Mine Workers Union v Transfleet Limited Cause NO. 306 of 2020* in which the court stated that letters of withdrawal from membership of a union written after the suit was filed in court were mischievous and aimed at remedying the non-compliance with section 48(6) and (8) of the Labour Relations Act as there was no notice in writing and the union was never served with the resignation notices.
34. The Claimant submits that by forcing 14 employees to resign the Respondent was trying to reduce the numbers in order to defeat recognition.

Analysis and Determination

35. Having considered the pleadings and evidence on record as well as the submissions by the parties, the court finds that the issues falling for determination herein are:



- i. Whether the Claimant is the right union to represent the Respondent's employees;
 - ii. Whether the Claimant had recruited a simple majority of the Respondent's employees at the time of seeking recognition;
 - iii. Whether the Claimant is entitled to the orders sought in its claim.
36. The Claimant's constitution provides for membership at Rule No. 5(a)(vi) to include "Supermarkets, shops, retail and wholesale outlets, distribution and supply companies".
37. At paragraph 4 of the Replying Affidavit of Sandip Kumar Janu Bhai Patel, a director of the Respondent, sworn on 10th November, 2023, he states:

That the business we operate is a hardware as acceded by the Claimant ..."

38. The Respondent thus operates within a sector covered by *the constitution* of the Claimant. The Claimant is therefore the correct union for representation of the employees of the Respondent.
39. On the threshold for recognition section 54 of the *Labour Relations Act* provides:

PartVII Recognition Of Trade Unions And Collective Agreements

54.

- (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
- (2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.
- (3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.
- (4) The Minister may, after consultation with the Board, publish a model recognition agreement.
- (5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.
- (6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.



- (7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.
- (8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

40. In the instant case the Claimant has demonstrated through the check-off forms filed with the Claim that it recruited 22 employees of the Respondent as at 21st September, 2023 when it sought recognition by its letter of the same date. The Claimant later, through its List of Documents dated 23rd January, 2024, submitted a further list with 3 names bringing the total number of employees of the Respondent that it had recruited to 25 and not 27 as stated in the Memorandum of Claim.

41. The Respondent has submitted that there is no criteria in the Act to determine who a unionisable employee is. Under definitions in section 2 of the [Labour Relations Act](#), unionisable employee is defined thus:

“unionisable employee” in relation to any trade union means the employees eligible for membership of that trade union.”

42. The Act further defines at section 2, Industrial Relations Charter as:

“Industrial Relations Charter” means a tripartite agreement between the Government, the most representative employers’ organisation, and the most Representative employees organisation for the regulation of labour and industrial relations in Kenya.”

43. Appendix C of the Industrial Charter excludes the following persons from union representation:

- a. Persons who are formulating, administering, coordinating or controlling any aspects of the organisation’s policy.
- b. Staff performing work of confidential nature as shall be defined by a tripartite committee.
- c. The executive chairman, managing director, general manager and his deputy, and financial heads, that is, departmental heads and their deputies.
- d. The branch manager and his deputy.
- e. Persons in charge of operations in an area and their deputies.
- f. Persons having authority in their organisations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Charter, clause No. 11-1.
- g. Persons training for the above positions (including under-studies).
- h. Personal secretaries to persons under (a) above.
- i. Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.



- j. Any other category of staff who may, in the case of any particular undertaking be excluded from union representation by mutual agreement.
44. In the instant case when reference is made to unionisable employees it is in the context of Appendix “C” to the Industrial Relations Charter. It means that all employees are unionisable unless they are excluded in Appendix “C” of the Industrial Relations Charter or by agreement of the parties.
45. The Respondent further submitted that the Claimant did not prove that it had recruited a simple majority of the unionisable employees of the Respondent citing the decision in the case of *Transport Workers Union v Etihad Airways* [2019] eKLR. This decision is distinguishable from the instant case as the case related to an undefended claim in which case the union was under obligation to prove all the facts alleged by it.
46. In the instant case it was the responsibility of the Respondent to rebut the averments of the Claimant that the employees the Claimant had recruited did not constitute a simple majority of its unionisable employees, which it has not done.
47. In the absence of a rebuttal by the Respondent, I find that the Claimant has proved on a balance of probabilities that it recruited a simple majority of the Respondent’s unionisable employees.
48. The Respondent further raised the issue about resignation of its employees from membership of the Respondent. As submitted by the Claimant, the letters produced by the Respondent as resignation letters are not addressed to anybody. They are further uncharacteristically similar in both wording and handwriting as to raise doubt whether the employees personally and voluntarily wrote the letters or the letters were written by the Respondent and the employees compelled to sign the same. Be that as it may, all the letters acknowledge that the writers joined the membership of the Claimant union. Almost all the letters have the following wording:
- I, (name of employee) ID NO. (.....) do hereby acknowledge to have joined a union around JULY/AUGUST 2023. I have decided now henceforth to directly deal with my employer Pavan Auto Hardware Ltd and not through the union going henceforth.”
49. It is clear from the wording of the letters that they were drafted by the same person and then given to the employees to adopt and sign. It is further noted that all the letters bear both a signature and a thumb print, which is an uncanny coincidence.
50. The letters are obviously not resignations as they are not addressed to either the employer or the union. A valid resignation is provided for in section 48(6) of the *Labour Relations Act*.
51. From the foregoing I find that the Claimant has proved on a balance of probabilities that it recruited more than a simple majority of the Respondent’s employees.

Remedies

52. Having found that the Claimant has proved that it recruited more than a simple majority of the unionisable employees of the Respondent, I make the following orders:
- a. I declare that the Claimant is the relevant union to represent the employees of the Respondent.
 - b. The Claimant has recruited more than a simple majority of the unionisable employees of the Respondent.
 - c. The Respondent is directed to immediately commence deduction and remittance of union dues from its employees who have signed check off forms in favour of the Claimant.



- d. The Respondent is directed to immediately sign a recognition agreement with the Claimant.
53. The Respondent shall bear the Claimant's costs of this suit which I assess at Kshs. 50,000 as the Claimant was represented by one of its officers and is not eligible to tax its costs under the Advocates Remuneration Order.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 11TH DAY OF DECEMBER, 2024

MAUREEN ONYANGO

JUDGE

