



**Kibogy v Kerio Valley Development Authority (Appeal E023 of 2021)
[2023] KEELRC 2173 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2173 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL E023 OF 2021
MA ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

ROSE CHEPKOECH KIBOGY CLAIMANT

AND

KERIO VALLEY DEVELOPMENT AUTHORITY RESPONDENT

*(Being an appeal from the Judgment delivered on 5th November, 2021
by the Hon. L. N. Wairimu S.P.M. in Eldoret Chief Magistrate's
Court Employment and Labour Relations Cause No. 43 of 2019)*

JUDGMENT

1. The appellant is a former employee of the Respondent, Kerio Valley Development Authority, a state corporation established under Cap. 441 of Laws of Kenya, with capacity to sue and be sued. The Respondent's regional offices are in Eldoret.
2. In her claim as filed in the Trial Court the Appellant pleaded that she was employed by the Respondent as an accountant on 15th March, 1988 and was earning a basic salary of Ksh. 34,069.
3. It was the Appellant's case that in February, 2018 the Respondent offered its employees a Voluntary Early Retirement (VER) package which was open for acceptance by any employee. That the Appellant accepted the offer which included a tabulation of her severance pay which amounted to Ksh.1,539,471.08 based on her years of service.
4. It is the Appellant's case that she was surprised when the terms of the VER were varied and/or reviewed to severance pay of Ksh.306,690.96 ostensibly based on remaining years of service.
5. It is further the Appellants case that the Government gave a tax waiver on the VER package which the Respondent nevertheless deducted from her package in the total sum of Ksh. 555,665.74.



6. The Appellant further claims payment in respect of 30 days leave allowance for the financial year 2018/2019 and salary for the months of August to October 2018 which was her exit date but which was not paid by the Respondent.
7. In its Statement of Defence to the claim the Respondent admitted that the Claimant was its employee as pleaded in her claim and that she voluntarily accepted the VER Programme. The Respondent further pleads that pursuant to a consent order entered into on 7th June, 2018 in **Nakuru ELRC Cause No. 68 of 2018** between the Respondent and Kenya Plantation and Agricultural Workers Union in which the Claimant was a member, the Appellant was paid in terms of the consent and retired on 30th June, 2018.
8. It is further the Respondent's averment that the Appellant was paid three months salary in lieu of notice and encashed all her outstanding leave days as captured in her individual VER Package statement and the consent order dated 7th June, 2018.
9. The Respondent further averred that the suit filed by the Appellant was res Judicata, the issues therein having been settled in Nakuru ELRC Cause No. 68 of 2018.
10. Upon hearing the parties, the Learned Senior Resident Magistrate dismissed the entire claim with costs. The learned Senior Resident Magistrate found and held that the Appellant was a member of the Union and was bound by the consent entered into between the Kenya Plantation and Agricultural Workers Union and the Respondent in Nakuru ELRC Cause No.68 of 2018.
11. Aggrieved by the decision the Appellant appealed to this court citing the following grounds of appeal in her Memorandum of Appeal dated 30th November, 2021:
 - a) The Learned Trial Magistrate erred in law and fact in selectively applying the provisions of Section 59 of the Labour Relations Act hence dismissing the Appellant's Cause.
 - b) The Learned Trial Magistrate erred in law and fact in relying on an unregistered Collective Bargaining Agreement between Kenya Plantation and Allied Workers Union (KPAWU) and the Respondent while arriving at its decision to dismiss the Appellant's cause.
 - c) The Learned Trial Magistrate erred in law and fact in finding that the Appellant herein was a unionisable employee of the Respondent while arriving at its decision.
 - d) The Learned Trial Magistrate erred in law and fact in finding that the Appellant was bound by the terms of the consent order entered into between the Respondent and KPAWU on 8th June 2018.
 - e) The Learned Trial Magistrate erred in law and fact in failing to take into account the evidence tendered by the Appellant while arriving at its decision.
 - f) The Learned Trial Magistrate erred in law and fact in failing to take into account the submissions by the Appellant counsel while arriving at its decision.
 - g) The Learned Trial Magistrate erred in law and fact in failing to allow the counsel of the Appellant a chance to finish cross examining the Respondent's witness after the latter lost internet connectivity during cross-examination hence denying the Appellant the right to fair hearing.
 - h) The Learned Trial magistrate erred in law and fact in finding that the Appellant was not entitled to the reliefs sought in the statement of claim.



12. The appeal was disposed of by way of written submissions. The Appellant filed submissions dated 9th May, 2023 through D.K. Korir & Associates Advocates while the Respondent filed its submissions dated 12th June, 2023 through Kipkenda & Company Advocates.
13. The Appellant extracted the following issues for determination –
 - (i) Whether the Appellant was a unionisable employee of the Respondent and whether she was bound by the consent order dated 8th June, 2018 arising from Nakuru ELRC Cause No. 68 of 2018 entered into between the Respondent and the Kenya Plantation and Agricultural Workers Union;
 - (ii) Whether the Appellant is bound by the Collective Bargaining Agreement in light of sections 59(5) of the Labour Relations Act;
 - (iii) Whether the Appellant was entitled to the reliefs sought in her statement of claim;
 - (iv) Who should bear the costs.
14. The Respondent on its part set out the following as its issues for determination in the instant appeal-
 - a) Whether the Appellant was unionisable and whether she was bound by the consent order;
 - b) Whether there was a valid Recognition between the Respondent and the Union and whether the CBA is binding;
 - c) Whether the Appellant is bound by her decision to retire under the Voluntary Early Retirement Program;
 - d) Whether the Appellant is entitled to the reliefs sought; and
 - e) Who bears the costs of the Appeals?
15. The parties submitted in line with the issues as set out in their respective submissions.

Appellant's Submissions

16. On the first issue the Appellant submitted that she was not a unionisable employee and was therefore not bound by the consent order entered into between the Kenya Plantation and Agricultural Workers Union and Kerio Valley Development Authority in Nakuru ELRC Cause 68 of 2018.
17. The Appellant further submitted that the CBA relied upon by the Trial Court to make a finding that she was unionisable is not registered by the Court in accordance with Section 59(f) of the Labour Relations Act and is thus unenforceable. For emphasis the Appellant relied on the decision in Charles Kambo Wamai v Bamburi Cement Limited [2013] eKLR cited with approval In Amos Kioko Musyoka & 7 others v Moors Group Limited [2021] eKLR where the court held that a CBA is only binding on the workers in the job groups covered by the CBA. It was the submission of the Appellant that in the CBA between the Respondent and Kenya Plantation and Agricultural Workers Union the job grades covered were KV4 to KV8 while the Appellant was in job grade KV10.
18. On the 2nd issue the Appellant submitted that the Trial Court relied on section 59 of the Labour Relations Act selectively by excluding section 59 (5) which specifically provides that a collective



agreement becomes enforceable and shall be implemented upon registration by the Industrial Court (sic) and shall be effective from the date agreed by the parties.

19. The Appellant further relied on the decisions in *Kenya Union of Commercial Food and Allied Workers v Kenya National Library Services* [2016] eKLR and *Kenafic Industries Limited v Bakery Confectionary Food Manufacturing and Allied Workers Union* [2014] eKLR. In the cases the court restated that a CBA attains legal enforceability upon registration by this court as provided in section 60 of the Labour Relations Act which provides for registration process for CBAs.
20. On its 3rd issue the Appellant submitted that the offer for VER to her stated that she would be paid severance pay of Ksh. 1,539,471.08 while the payment she received was Ksh. 306,690.96 which was based on the consent in Nakuru ELRC Cause No. 68 of 2018. That she is therefore entitled to the difference of Ksh. 1,232,780.12.
21. The Appellant submitted that she is further entitled to Ksh. 557,665.74 being tax deducted by the Respondent against the tax waiver as per Legal Notice No. 234 of 2018.
22. She submitted that she is entitled to the prayers sought in her claim in Eldoret Chief Magistrates Court Employment and Labour Relations Cause No. 43 of 2019 together with costs. She urged this court to allow the appeal.

Respondents Submissions

23. For the Respondent it was submitted that the CBA between the Kenya Plantation and Agricultural Workers Union and the Respondent provided that the terms and conditions therein contained shall cover all unionisable employees. That the Labour Relations Act defined unionisable employees as the employees eligible for membership of that trade union. Further, that the Industrial Relations Charter 1984, Clause B (11) and Appendix C provide for the level of unionisation of employees to exclude the categories set out therein.
24. It was submitted that employees in management are excluded from union membership as was held in *Kenya Chemical and Allied Workers Union v Bamburi Cement* [2017] eKLR.
25. The Respondent submitted that as an accountant the Appellant was not in Management and was therefore Unionisable and thus was covered under the terms and conditions in the collective bargaining agreement between the Respondent and the Union.
26. That even though the Appellant was not paying union dues she was Unionisable as was held in *James Mutisya Nzokila & Others v Kenya Nut Company Limited* [2019] eKLR.
27. It was submitted that the Appellant benefitted from the Union's CBA by way of salary increments. That the Appellant was therefore bound by the decision in Nakuru ELRC Cause No. 68 of 2018.
28. On its second issue the Respondent submitted that the validity of the CBA was not raised in the trial court and is an afterthought. That in *Kenya Union of Commercial Food and Allied Workers v Machakos Water & Sewerage Company Limited & 2 others* [2022] KEELRC 13518 (KLR) the Court observed that registration and recognition of a trade union are prerequisites to entering into a CBA, and collective bargaining.
29. It was further the submission of the Respondent that in Nakuru ELRC 68 of 2018 the court made a determination that there was a valid recognition agreement between the parties who had negotiated several CBAs, the last one covering the period 2012/2013. The Respondent concluded that there was a valid recognition agreement between the Respondent and the Union and the consent order was binding on both the union and Respondent.



30. On whether the decision to roll out the VER programme was binding upon the Respondent, the Respondent submitted that the VER programme was rejected by the union and replaced by the consent order in Nakuru ELRC Cause 68 of 2018.
31. Relying on Scarf V Jardine [1982] 7 App Cas 345 quoted with approval by the Court of Appeal in Praful Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Ltd (In Liquidation) & Another 2019 eKLR the Respondent submitted that the Appellant was estopped from denying the same.
32. The Respondent further relied on the decision in Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR where the Court stated:
- "It therefore follows that where one party by his word or conduct, made to the other party a promise or assurance which was intended to affect the legal relations between them and to be acted on and the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced."
33. The Respondent further relied on the decision of Abuodha J. in Kipkutol Wilson v Kerio Valley Development Authority in Eldoret ELRC No. 12 of 2019 where the court held:
- "The Claimant despite a significant reduction between the first Voluntary Early Retirement Package and the second offer made after the consent in Nakuru ELRC 68 of 2018 accepted the second offer.
- The foregoing being the case and the Claimant having applied for Voluntary Early Retirement while knowing it only concerned unionizable employees and accepting the package cannot turn around and claim that he was not bound by the consent recorded in the Nakuru case. Nothing prevented the Claimant from contesting the reduction in the initial offer and rejecting the same and continuing in employment or seeking legal redress as the unionizable employees did via Nakuru ELRC No. 68 of 2018. To this extent the claim is found to be without merit and is rejected."
34. In conclusion the Respondent submitted that the Respondent had demonstrated that the Appellant, a unionisable employee, chose to retire under the Voluntary Early Retirement Program after the court order and was paid her dues accordingly. That therefore her appeal was unmerited and should be dismissed. That costs should follow the event as was decided in Stanley Kaunga Nkarichia v Meru Teachers College & Another [2016] eKLR where the court held.
- "As a matter of general principle, costs follow the event and the successful party will always have costs of his success unless the Court has good reason to order otherwise."

Analysis and determination

35. In a first appeal as this one, the duty of the Appellate Court is to evaluate the evidence before the trial court as well as the Judgment and arrive at its own independent judgment on whether or not to allow the appeal (see Bwire v Wayo & Sailoki Civil Appeal 032 of 2021) [2022] KEHC 7(KLR) (24th January, 2022) (Judgment).
36. The Trial Court, after hearing the parties, framed 3 questions for determination being; whether the Appellant was a member of Kenya Plantation and Agricultural Workers Union; whether the consent



order issued on 8th June 2018 emanating from Nakuru ELRC 68 of 2018 was applicable to the Appellant and whether the Appellant was entitled to the reliefs sought in the Statement of Claim.

37. These were also the issues framed by the Appellant for determination before the Trial Court.
38. It is not in dispute that on 5th January, 2018 the Respondent rolled out a Voluntary Early Retirement (VER) Programme under which all its employees were invited to participate. Each employee was given a breakdown of the package they would be entitled to should they opt for the VER.
39. For the Appellant the package was as follows: -

Staff Details

PF No.	378
Staff Name	Kibogy Rose Chepkoech
Job Grade	KV10
Job Title	Accountant 1
VER Application Form Serial No.	Serial No. 234
Basic salary	34,069.00
Date of Birth	30 June, 64
Date of Joining KVDA	15-March, 88
Age in years	53.83
Years of Service	30.12
Years of Service Remaining – Above 55 years	N/A
Leave Balance	12.00

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3 months Payment in Lieu of Notice	102,207.00
Severance pay	1,539,471.08
Encashment of Outstanding Leave Days	13,431.72
Transport Allowance	40,000.00
Golden Handshake	360,000.00
Total VER Package	2,055,109.80



Provisional Provident Fund

Provident Fund amount staff is eligible for	180,811.88
Tax charge on the Provident Fund	68,021.77
Net Provident Fund	1,118,790.05
Grand Total	3,173,899.84

40. From the pleadings on record it would appear that the VER was opposed by Kenya Plantation and Agricultural Workers Union in Nakuru ELRC 68 of 2018 although none of the parties availed the pleadings in the suit to the Trial Court or this court. During the pendency of the suit a consent was recorded as follows: -

1. THAT Respondent be and is hereby at liberty to proceed with the voluntary early retirement of 314 employees who have agreed to the terms offered by Respondent for voluntary retirement and which terms are;
 - i. 3 months basic salary in lieu of notice;
 - ii. One and half months' basic salary for every year served for all employees below age of 50 years;
 - iii. One and half months' basic salary for remaining years to retirement for all employees above age of 50 years;
 - iv. Baggage allowance of Kshs. for every employee;
 - v. Golden handshake of Ksh. 360,000 for every employee;
 - vi. Provident Fund as entitled to each employee.

41. Following the adoption of the consent and order of the court the Respondent revised the offer made to the Appellant as follows:

Staff Details



PF No.	368
Staff Name	Kibogy Rose Chepkoech
Job Grade	KV10
Job Title	Accountant 1
Basic salary	34,069.00
Date of Birth	30 June, 64
Date of Joining KVDA	15-March, 88
Age in years	54.00
Years of Service	30.29
Years of Service Remaining – Above 55 years	6
Leave Balance	12.00
Off days Balance	-

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3 months Payment in Lieu of Notice	102,207.00
Severance pay	1,539,471.08
Encashment of Outstanding Leave Days	13,431.72
Transport Allowance	40,000.00
Golden Handshake	360,000.00
Note Total VER Package	872,329.68
TAX Charge - Waived	202,831.70

Total VER Package Does Not include Provident Fund amounts



Deduction 1	90,000.00
Deduction 2	120,000.00
Deduction 3	25,000.00
Deduction 4	36,00.000
Deduction 5	68,000.000
Total Individual Deductions	339,000.00
Net Ver Package	533,329.68

42. It is further not in dispute that vide Legal Notice No. 234 dated 23rd November, 2018, the Cabinet Secretary for the National Treasury exempted the severance pay, salary in lieu of notice, payment of accumulated leave days, transport allowance and golden handshake for the three hundred and fifteen employees of the Respondent who qualified to leave service under the Voluntary Early Retirement Programme.

43. The Legal Notice is reproduced below-

The Income Tax Act

(cap. 470)

Exemption

In Exercise of the powers conferred by section 13 (2) of the Income Tax Act, the Cabinet Secretary for the National Treasury and Planning directs that the severance pay, salary in lieu of notice, payment of accumulated leave days, transport allowance and golden handshake to three hundred and fifteen employees of the Kerio Valley Development Authority who qualify to leave service under Voluntary Early Retirement Programme shall be exempt from the provisions of the Act: Provided that—

- (a) this exemption shall not apply to employees who have attained the age of sixty years or have less than one year before they retire from service;
- (b) this exemption shall not apply to any payment received from the Provident Fund;
- (c) any employee who shall' retire under the Voluntary Early Retirement Programme and benefit from this exemption shall not be re-employed by the Kerio Valley Development Authority in any capacity or under any terms whatsoever before the expiry of five years from the date of retrenchment;
- (d) the Kerio Valley Development Authority shall comply with any condition imposed on it by the Commissioner of Income Tax; and
- (e) the Kerio Valley Development Authority shall provide the Commissioner of Income Tax with the name of each employee who retires under the Voluntary Early Retirement Programme, the date that the retired, the total amount paid to the employee and a copy of, the letter from the employee confirming the employee's retirement, dated the 23rd November, 2018



44. Membership of unions is provided for under the Industrial Relations Charter. Appendix C thereof provides that the following employees are excluded from union membership –
- (i) Executive Chairman; Managing Director; General Manager (and his Deputy) and Functional heads;
 - (ii) Branch Manager (and his Deputy);
 - (iii) Persons in charge of operations in the area and their Deputies;
 - (iv) Persons having authority in their organisations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances;
 - (v) Persons training for above positions including understudies; vi. Personal secretaries to persons under (i) above;
 - vii. Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.
 - viii. Any other category of staff who may, in the case of any particular undertaking, be excluded from union representation by mutual agreement.
[Emphasis added]
45. In the CBA between the Respondent and Kenya Plantation and Agricultural Workers Union, clause 4 provides for General Wage increase as follows: -
- General Wage Increase
- All unionizable employees of Kerio Valley Development Authority shall receive a salary increase of 14% to cover the two (2) years which will be implemented at the rate of 7% increase for each year with effect from 1st January 2012 and shall remain in force for a period of two years up to 31st December 2013.
- See Appendix A
46. Appendix A referred to in clause 4 of the CBA provides for wage increases for job grades KV4 to KV8. The title of Appendix “A” at page 82 of the Record of Appeal reads.
- Kerio Valley Development Authority Wage Increase for Scales KV4 to KV8.
47. It is not in dispute that the Appellant was in Job Grade KV10. Her grade was therefore not covered under the CBA between the Respondent and Kenya Plantation and Agricultural Workers Union.
48. As was stated in *Amos Kioko Musyoka & 7 Others V CMC Motors Company Limited (Supra)* only employees who benefit from a CBA are unionisable. Paragraph viii of Appendix C of the Industrial Relations Charter provides that parties are free to exclude any category of staff from union representation. The CBA clearly excluded employees outside job grades KV 4 and KV 8 as is evident from Appendix “A” thereof. The Claimant who was in job grade KV 10 was evidently not unionisable according to the CBA between the Respondent and the union. As submitted by the Respondent, the Appellant was also not paying union dues.
49. Having not been a member of the union and/or unionisable, the Appellant was not a party to Nakuru ELRC Cause No. 68 of 2018. The consent order between the Respondent and the Union dated 8th June, 2018 could not therefore apply to or be binding upon the Appellant as it was only applicable to the staff in grades KV4 to KV8 of the Respondent.



50. It is also important to note that the VER offer made by the Respondent to the Appellant in February 2018 and which she accepted on 16th February 2018 was materially and substantially different from what the Respondent annexed to its acceptance letter dated 28th June 2018. The original offer was for severance pay for her years of service which was 30.12 years.
51. What was referred to as severance pay in the acceptance letter from the Respondent dated 28th May 2018 was not severance pay as defined in section 40(1)(g) of the Employment Act which defines severance pay as payment for years served. What the Respondent paid was based on remaining years of service which is alien to the law as a basis for payment of severance.
52. If the Respondent wished to pay at the rate agreed in the consent order which was based on remaining years of service it should have made a fresh offer to the Appellant based for her to accept the new terms of offer.
53. It is also worthy to note that the consent was discriminatory based on age as older employees were subjected to inferior terms compared to their colleagues who were below age 50.
54. For these reasons I find that The Learned Trial Magistrate erred in law and in fact in holding that the Appellant was a unionisable employee and that the terms of the consent entered into between the Respondent and Kenya Plantation and Agricultural Union were binding on the Appellant.
55. The Appellant however did not adduce any evidence in support of grounds 5,6, and 7 or the Memorandum of Appeal, that is, that:
 4. The Learned Trial Magistrate erred in law and fact in failing to take into account the evidence tendered by the Appellant while arriving at its decision.
 5. The Learned Trial Magistrate erred in law and fact in failing to take into account the submissions by the Appellant counsel while arriving at its decision.
 6. The Learned Trial Magistrate erred in law and fact in failing to allow the counsel of the Appellant a chance to finish cross examining the Respondent's witness after the latter lost internet connectivity during cross-examination hence denying the Appellant the right to fair hearing
56. On the contrary the Trial Magistrate considered the pleadings and evidence by both parties at pages 1 and 2 of the Judgment and in her conclusion clearly analysed the issues as set out by the Appellant in her submissions.
57. I further find that there was no evidence to prove that the CBA in issue was not registered as the issue was never pleaded nor ventilated in the Trial Court, or that the Appellant was not allowed to finish cross examining the Respondent's witness.

Conclusion

58. Having made the findings as set out above, I find merit in the Appeal. I accordingly allow the same, set aside the orders of the Trial Court dismissing the Appellant's suit and substitute the same with the following orders: -
 - (a) I award the Appellant Ksh. 1,232,780.12 being the difference between the initial VER offer which she accepted and the revised amount paid.
 - (b) The appellant is entitled to tax waiver as per Legal Notice No. 234 of 2018.



(c) The Appellant shall have costs of the suit both in the appeal and in the lower court.

(d) Interest shall accrue on the decretal sum from the date of Judgment of the Trial Court.

DATED, DELIVERED VIRTUALLY AT ELDORET THIS 21ST DAY OF SEPTEMBER, 2023.

M. ONYANGO

JUDGE

