



**Kenya Union of Commercial and Food Allied Workers v Jamii Distributors
E.A. Ltd (Employment and Labour Relations Cause E056 of 2020)
[2023] KEELRC 3268 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3268 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE E056 OF 2020
MA ONYANGO, J
DECEMBER 7, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL AND FOOD ALLIED
WORKERS CLAIMANT**

AND

JAMII DISTRIBUTORS E.A. LTD RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the *Labour Relations Act* and is mandated in its constitution under Rule No. 5 to represent employees in the commercial and food sector.
2. The Respondent is a registered company under the laws of Kenya carrying on business of wholesale and retail in Eldoret and its environs.
3. By virtue of its constitution the employees of the Respondent fall within the purview of the Claimant's membership and it is the right union to represent the employees of the Respondent in labour matters.
4. The Claim herein was filed by the Claimant vide a Statement of Claim dated 11th December 2020 and filed in court on 24th December 2020 seeking the following orders:
 - i. That the Honorable Court award in favour of the Claimant Union and order the Respondent to recognize the Claimant union with immediate effect.
 - ii. The Respondent to deduct and remit union dues.
 - iii. That union arrears from March 2019 be remitted by the Respondent from his own account.
 - iv. That parties do engage in a collective bargaining within 30 days upon signing of the Recognition Agreement.



- v. Costs of the suit is awarded to the Claimant.
- vi. Any other remedy that the Honorable court may deem fit.
5. The Claimant avers that it approached the employees of the Respondent on various dates between March 2018 and July 2020 and recruited 52 members out of a possible 70 unionisable employees voluntarily translating to about 74% of the Respondent's employees.
6. The Claimant further avers that it wrote to the Respondent forwarding the check off forms and a standard recognition agreement for the purposes of effecting trade union deductions and signing the Recognition agreement but the Respondent refused.
7. The Claimant states that faced with the unrelenting response from the Respondent, it reported a dispute to the Ministry of Labour on 24th September 2019 and consequently, a Conciliator was appointed. It is the Claimant's claim that the Conciliator made her findings but the respondent remained adamant.
8. The Respondent filed a Response to the Statement of Claim in which it averred that the Claimant union does not hold a simple majority of the unionizable employees outsourced by the Respondent in view of the records held by the Claimant from the outsourcing company.
9. The Respondent admitted that it was approached by the Claimant seeking recognition. However, it is the Respondent's contention that it referred the Claimant to Real Careers Limited and Saruja Supplies Limited, the former and current employers of the Respondents workers respectively but that the Claimant refused to engage them.
10. The Respondent maintained that it lacked the legal capacity to recognize the Claimant as it is not the employer of the employees recruited into membership of the Claimant.
11. On 14th June 2023, the court directed that the claim to be disposed of by way of written submissions.

The Claimant's submissions

12. The Claimant in its submissions dated 6th July 2023 and filed on 13th July 2023 identified the issues for determination to be:
 - i. Whether the Respondent followed the procedure in transferring the employees to an outsourced labour company;
 - ii. Whether the outsourced company can remit union dues on behalf of the Respondents;
 - iii. Whether the Respondent should recognize the Claimant Union.
13. On the first and second issue, the Claimant submitted that at the meeting convened by the Conciliator on 3rd May 2023, the Respondent stated that they signed a contract with an outsourcing company known as Saruja Supplies Limited on 1st July, 2020 but never showed how the employees who were transferred from the Respondent to the outsourced company were handled including their terminal benefits that had accrued prior to outsourcing. In this regard, it was the Claimant's submissions that the employment contract was between the Respondent and the employees and averred that the Respondent should have engaged the employees before transferring them to an outsourced firm.
14. It is the Claimant's case that the Respondent never consulted the employees when it transferred them to the outsourced company. The case of *Kenya Airways Limited v Satwant Singh Flora* (2013) eKLR



was cited to support the position that rights are not realized through coercion, misrepresentation or outright illegalities.

15. According to the Claimant, the Respondent cannot seek enforcement of a right that was done through falsehood, misrepresentation or illegalities as the Court must direct itself to examine the facts and the evidence presented, and to make a finding on whether the Respondent participated in any irregularities in its attempt to have a right asserted.
16. The Claimant maintains that the Respondent started deducting and remitting union dues from April 2023 through an outsourced firm, Saruja Limited but that when the Claimant union and the Respondent were verifying the list of the employees who are still in employment from the check off list filed in court, the said Saruja Limited was not involved in the process at all and that as such Saruji Limited cannot be said to be the employer of the Respondent employees.
17. On the issue whether the Respondent should recognize the Claimant union, it was the Claimant's submission that the Respondent's employees are covered under Articles 36 and 41 of *the Constitution* as well as International Labour Conventions Nos. 87 and 98 on Freedom of Association and the Right to Bargain Collectively.
18. The court was urged to consider the provision of section 54 of the *Labour Relations Act* in granting the reliefs as sought by the Claimant

The Respondent's submissions

19. The Respondent filed its submissions dated 14th September 2023. In the submissions, the issues for determination were framed as follows;
 - i. Whether the Respondent is the employer of the alleged employees;
 - ii. Whether the Respondent should recognize the Claimant's Trade Union;
 - iii. Whether the Respondent should deduct and remit union dues and remit to the Claimant, remit union arrears from March 2019 and engage in a collective bargaining with the Claimant within 30 days of signing the Recognition Agreement;
 - iv. Whether the Respondent declined to attend to the Conciliation meeting as scheduled;
 - v. Who bears the costs of this suit.
20. On the first issue whether the Respondent is the employer of the alleged employees, the Respondent submitted that it is not the employer of the alleged employees and that all the workers are outsourced from Saruji Supplies Limited. The Respondent submits that all the affairs of the said employees including their welfare and payroll are managed by Saruji Supplies Limited. According to the Respondent it is only obligated to pay the outsourced firm consolidated payments inclusive of salaries/ wages, redundancy benefits, terminal benefits and union dues as evidenced by the Labour Outsourcing agreements dating from way back in the year 2017. It is submitted that the employees are employed by Saruji Supplies limited and all their contractual agreements including payment of salaries are met by Saruja supplies limited.
21. On the issue whether the Respondent should recognize the Claimant, it is the Respondent's submission that since it is not the employer of the alleged employees, it has no legal capacity to recognize the Claimant's trade union. The case of Abyssinia Iron& Steel limited v Kenya Engineering Workers Union (2016) eKLR.



22. On the third issue the Respondent submitted that it has on a balance of probabilities proved that it is not the employer of the alleged employees and that the prayer for deduction of union dues by the Respondent and remit to the Claimant has no basis. It is the Respondent's submission that on the same balance of probabilities it has proved that a simple majority of employees was not attained to enable the Claimant trade union to enter into a recognition agreement with the Respondent or Saruji Supplies Limited.
23. On the fourth issue, the Respondent acknowledges that it was invited at the Labour Office for a conciliation meeting but since it is not the employer of the alleged employees, it requested a representative from Saruja Supplies to attend the meeting and convince the Claimant that Saruji Supplies Limited was the right party to address their grievances but that the Claimant denied the said representative audience.
24. On the last issue, the Respondent submitted that this suit was brought as a result of the Claimant's failure to approach Saruj Supplies Limited to address their grievances as the Respondent has no legal capacity to address the Claimants grievances, that it was wrongly sued in this suit and incurred expenses to defend the suit. It is therefore the Respondent's submission that the Claimant should meet its the costs of defending this cause.

Determination

25. From the pleadings herein, the submissions of the parties as well as the authorities cited by the parties, the issue that are pertinent for my determination are:
 - i. Who between the Respondent and the Outsourcing company, Saruji Supplies Limited should recognize and remit union dues to the Claimant.
 - ii. What reliefs should issue?
26. The issue of outsourcing of employees in the Kenyan context is a contemporary issue that our laws have not addressed.
27. The Claimant has alleged that on various dates between March 2018 and July 2020, it recruited 52 out of a total possible 70 unionisable employees of the Respondent but before a recognition agreement could be signed by the parties, the respondent transferred employees to the outsourcing company, Saruji Supplies Limited.
28. I have perused at the Labour Outsourcing Agreement between the Respondent and a company known as Saruji Supplies Limited signed by the parties and note that it is dated 26th June 2020. The claim herein was filed on 11th December 2020. It therefore means that the agreement between the Respondent and Saruji Supplies Limited came into force before the Claim herein was filed.
29. However, from the documents filed by Claimant in its bundle of documents, and particularly the check off forms signed by the Respondent's employees, it is evident that the Claimant had attained the 50% simple majority as at the time it was seeking recognition from the Respondent.
30. Section 48 of the [Labour Relations Act](#) provides for deduction and remittance of union dues. The Act is clear on the role of an employer once it is served with the check off form. The section provides:

Deduction of trade union dues.

48.



- (1) In this Part, “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.
- (2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to—
 - (a) deduct trade union dues from the wages of its members; and
 - (b) pay monies so deducted –
 - (i) into a specified account of the trade union; or
 - (ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.
- (3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee’s wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.
- (4) The Minister may vary an order issued under this section on application by the trade union.
- (5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.
- (6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.
- (7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.
- (8) An employer shall forward a copy of any notice of resignation he receives to the trade union.

31. In the instant case, the Respondent was served with the check off forms between March 2018 and July 2020 way before the Outsourcing Agreement came into force.
32. The Respondent replied informing the Claimant that all its employees were outsourced to Saruja. Copies of outsourcing agreements were submitted by the Respondent as proof.
33. From the evidence on record it is clear that the Claimant recruited a majority of the employees but the Claimant has not adduced any evidence to prove that the Respondent herein is the employer of the said employees. Even after the Respondent directed the Claimant to the outsourcing company the



Claimant did not make any effort to disprove the same or to redirect the check off forms to the named outsourcing company.

34. It is for this reason that I find that the Claimant has not proved its case against the Respondent as sued. The Claim accordingly fails and is dismissed with no orders for costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 7TH DAY OF DECEMBER, 2023.

M. ONYANGO

JUDGE

