



Kenya Engineering Workers Union v Alpha Logitics (Epz) Limited (Cause 14 of 2020) [2022] KEELRC 1659 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1659 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 14 OF 2020
B ONGAYA, J
MAY 27, 2022**

**BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
ALPHA LOGITICS (EPZ) LIMITED RESPONDENT**

JUDGMENT

1. The claimant filed a memorandum of claim on 03.03.2020 through its Secretary General Wycliffee A. Nyamwata. The claimant prayed for judgment against the respondent for:
 - a) An order that the respondent complies with section 48 of the *Labour Relations Act*, 2007 by way of deducting and remitting union dues on monthly basis with immediate effect.
 - b) The respondent be ordered to pay 2% of the claimant's members' gross salaries from the month of December 2018 from their own pockets.
 - c) The respondent be restrained from victimizing the claimant's members on ground of trade union activities or affiliation by way of lock-out, redundancy, termination, dismissal, or, change of their terms of contracts unless agreed by both parties.
 - d) Parties be ordered to sign recognition agreement within specified shortest timeframe possible.
 - e) Respondent to pay costs of the suit.
 - f) Any other relief the Honourable Court may deem fit to grant.
2. The claimant has pleaded as follows:
 - a) It is a duly registered trade union and the respondent's business falls within the union's sector or jurisdiction of representation per the union's registered constitution.



- b) The claimant has recruited 29 out of 40 being 73% of total unionisable employees of the respondent as at November 2018 but the respondent has declined to deduct and remit union dues after having forwarded the original check-off forms duly signed.
 - c) In May 2019 the claimant forwarded the Model Recognition Agreement to the respondent for perusal before having a joint meeting for signing the same but the respondent declined to cooperate.
 - d) By letter dated 07.05.2019 the claimant forwarded the relevant duly signed check-off forms but the respondent declined to deduct and remit union dues as required in law.
 - e) The conciliator issued a certificate of disagreement and thereafter the respondent threatened its employees being claimant's members that if they did not withdraw membership they risked termination especially if the dispute moved to Court.
 - f) There is no rival union involved.
3. The respondent filed the memorandum of response on 14.07.2021 through Lilian Waweru Advocate. The respondent pleaded as follows:
- a) The respondent undertakes mainly marine logistics, ship management on behalf of local and foreign ship owners, and chartering of marine assets such as tugs and barges in support of offshore projects.
 - b) As at filing of the suit the respondent had employed a total of 105 unionisable employees serving in various capacities within the company with 74 out of 105 being seafarers working as crew on board various vessels managed by the respondent and per exhibited list of employees.
 - c) On 27.11.2018 the respondent received a letter by the claimant for deduction of union dues. The respondent declined to deduct union dues as the respondent operates in a sector different from the respondent's enterprise. In particular, the respondent's enterprise is logistics and shipping sector whereas the claimant is registered to represent workers in the general mechanical engineering and metal allied manufacturing industries as per exhibited claimant's constitution. Thus y section 14(1) (e) of the *Labour Relations Act*, 2007 the respondent's employees do not qualify to join and be represented by the claimant trade union.
 - d) The analysis of the list of recruited members as served disclosed that contracts of service for some of the recruited employees had lapsed and deductions could not be effected. The respondent conveyed to the claimant that it would not be available to discuss the proposed recognition agreement. The respondent reported two disputes on failure to deduct union dues per section 48 of the Act and failure to sign recognition agreement per section 54(1) of the Act. The conciliator by letter dated 24.03.2020 duly exhibited recommended thus, the union to recruit simple majority of the unionisable employees for a recognition agreement to be enforced; and the union should ensure that the company falls under its jurisdiction of representation. Any party dissatisfied with the recommendation could refer the dispute to Court.
 - e) On 18.11.2019 parties signed a certificate of disagreement before the conciliator and the suit was filed.
 - f) The claimant operates outside the respondent's sector of business and the claimant has not recruited simple majority and the two preconditions under section 54 for conclusion of a recognition agreement has not been met.



4. The respondent prayed for orders:
 - a) That the respondent does not operate within the respondent's sector and is therefore not proper union for the respondent's employees and is not eligible to recruit the respondent's employees as its members.
 - b) The claimant has not met the threshold for recognition by the respondent.
 - c) A declaration that the claimant is not entitled to recruit respondent's employees and demand deduction and remitting of union dues thereof by the respondent.
 - d) The union dues as prayed for are not due or payable as claimed and prayed for by the claimant.
 - e) The claim is frivolous, vexatious, an abuse of court process and be dismissed with costs.
5. The claimant filed on 26.07.2021 a reply to memorandum of response. The claimant stated that it was not sure of the unionisable employees engaged by the respondent at all material time as no relevant document had been exhibited such as tax returns or NSSF or NHIF returns. Further the respondent's sister company Southern Engineering Company Limited (SECL) operating on same premises as the respondent had no problem with its employees joining a trade union as per exhibited CBA concluded between SECL and Kenya National Union of Fishermen Workers. Further the country had moved out of Industrial Trade Unionism and one employer could recognise more than one union based on employer's diverse undertaking. The claimant wishes to represent respondent employees No. 1 to 40 in the exhibited list of 105 unionisable employees of the respondent and of which more than 51% have been recruited. Those to be recruited and represented are Technicians (Engineers) by profession.
6. The claimant relies on the holding in *malgamated Union of Kenya Metal Workers v Dockworkers Union & Another* [2019] eKLR where Rika J held that Courts have recently downplayed the concept of industrial trade unionism and they have emphasized the primacy of freedom of association and the freedom to contract and further, "12. It is therefore not a substantive point of law, for the 2nd respondent to posit that the 1st Respondent is not the relevant Trade Union to represent Employees in the motor trade group. Recent decisions from the Courts have tended to overlook industrial trade unionism, in favour of freedom of association. Realities on the ground have shown that the principle of 'one industry, one trade union' is no longer workable. As Dock Workers Union has recruited a sizable number of willing Employees from the motor industry, it cannot be barred from enjoying recognition from this industry, on the mere ground that its constitution restricts its area of representation to port and marine sector. Demarcation in areas of activity has become blurred, under the constitution and recent judgments of our Courts."
7. The claimant further pleaded that in *Kenya Union of Entertainment and Music Industry Employees – Versus- Multi Media University* [2019] eKLR this court held thus, "On the issue of recognition, the claimant has exhibited the signed lists and affidavits of recruited members. While the respondent says it has recognised other three trade unions it has not denied and demonstrated that the claimant is equally the sector trade union for the category of employees it seeks to recruit and has recruited over simple majority at the Multimedia University and Conference Centre. As urged for the claimant the court returns that it is the sector union for the employees it seeks to represent. Section 54 of the *Labour Relations Act* provides that a trade union shall be recognised for purposes of collective bargaining if the trade union represents simple majority of unionisable employees. Of the targeted category of unionisable employees, the claimant has established that it has met the threshold as submitted and it is entitled to the recognition."



8. The parties agreed and the court ordered the suit be determined on the basis of the pleadings and documents filed for parties. The court has considered all material on record as well as final submissions filed for parties. The court finds as follows.

First, the claimant urges that it seeks to recruit and represent the respondent's employees being from Nos. C001 to C040 who fall within its registered sector of general mechanical engineering and metal allied manufacturing industries as per exhibited claimant's constitution. The respondent does not deny that much only that it says it is predominantly in the enterprise of logistics and shipping sector. The court finds that the evidence is that as found by the conciliator, a report relied upon by the respondent, there is no rival union on the scene. In the circumstances there would be no reason to bar the claimant union from recruiting and representing those of the respondent's employees whose actual duties are consistent with the sector the claimant is registered to represent. As per the claimant's cited authorities, the court will overlook industrial trade unionism in favour of freedom of association. The court finds therefore that the claimant has established that it has recruited 29 employees out of 40 employees of the respondent's employees serving in the sector the claimant is registered to represent. That recruitment is found to be over simple majority as envisaged in section 54 of *Labour Relations Act* for recognition purposes. In the circumstances, the claimant has established a case for recognition under section 54 of the Act and for deduction and remission of union dues under section 48 of the Act.

9. While making that finding the court has guided itself that under section 48(2) of the Act the threshold for ministerial order for deduction of union dues is where an employer of more than five employees belong to the union. In the instant case the respondent employs more than five employees belonging to the category the claimant is registered to represent and the Court considers that to be a sufficient threshold to permit the claimant to proceed as claimed in the instant case to pursue and obtain recognition. The Court has considered the list of employees as exhibited for the respondent and indeed C001 to C041 are the category the claimant is targeting to represent and C042 TO C105 are mariners and apparently not targeted. Further, there being no rival union seeking the respondent's recognition or to represent the respondent's employees, it cannot be found in the instant case that there exists another union that would otherwise sufficiently represent the category of respondent's employees that the claimant trade union now seeks to represent and to collectively bargain for as flowing from the recognition as prayed for and per section 54 of the Act and as otherwise contemplated in section 14 (1) (d) of the Act on sufficiency of representation.
10. The court has also considered that the respondent while alleging that some contracts of service of the recruited employees had lapsed, no evidence was provided to show the numbers affected and when the contracts may have so lapsed. In any event, such lapsing of the contracts long after the dispute was reported to the Cabinet Secretary for appointment of the conciliator would not in any manner diminish the claimant's attainment of the simple majority threshold in section 54 of the Act.
11. The Court therefore finds that in the circumstances of the case and on a balance of probability, the claimant has established that it has attained simple majority of the category of the respondent's employees that fall in the claimant's registered sector of representation. The claimant has established a case for deduction and remission of union dues under section 48 of the Act as well as recognition under section 54 of the Act and for subsequent collective bargaining for the targeted category of employees.

Second, the court returns that the claimant did not compute and plead particulars of the 2% gross salaries to be paid out of the respondent's own funds commencing December 2018 and in that regard the prayer will fail as not strictly pleaded and proved as required of special or liquidated claims. That prayer will collapse, but, for the recruited members and still in service, deduction and remission of union dues shall commence and continue beginning with monthly payment for end of June, 2022.



Third, the claimant has not provided evidence of alleged harassment or victimisation or punishment or termination on account of respondent's employees joining the union or participating in the union's lawful activities – and there is no established prima facie case to justify an order in the nature of a restraining injunction as prayed for. The court reckons that section 46 of the *Employment Act, 2007* provides that it is not a fair reason to punish, dismiss, terminate or otherwise impose a penalty against an employee on account of membership or proposed membership in a trade union, or participating in union activities or seeking an office in that regard. The court will issue a declaration in that respect.

Fourth, the claimant has substantially succeeded in its claims but to foster the germinating industrial relationship between the parties, the respondent will pay the claimant's 50% of costs of the suit to be agreed upon in 30 days failing to be taxed in the usual manner.

12. In conclusion judgment is hereby entered for the claimant against the respondent for orders:
- 1) The respondent to comply with section 48 of the *Labour Relations Act* on deduction of union dues and for respondent's employees recruited as claimant's members and still in respondent's service, deduction and remission of union dues by the respondent to the claimant shall commence and continue beginning with monthly payment for end of June, 2022.
 - 2) The declaration that as per section 46 of the *Employment Act, 2007*, the respondent by itself or by its agents, directors, managers or servants shall not punish, dismiss, terminate or otherwise impose a penalty against its unionisable employee on account of membership or proposed membership in the claimant trade union, or participating in the union activities or seeking or holding an office in the union in that regard.
 - 3) The parties to negotiate terms of the recognition agreement towards concluding and signing the same not later than 15.08.2022 so as to pave way for collective bargaining agreement per section 54 of the *Labour Relations Act, 2007* and with respect to the targeted category of staff.
 - 4) The respondent to pay the claimant's 50% of costs of the suit to be agreed upon in 30 days from the date of this judgment and failing to be taxed in the usual manner.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 27TH MAY, 2022.

BYRAM ONGAYA

JUDGE

