



Kenya Union of Commercial Food & Allied Workers v Kobole Supermarket Limited & another (Cause 88 of 2021) [2022] KEELRC 13241 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13241 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 88 OF 2021
JW KELI, J
NOVEMBER 17, 2022**

BETWEEN

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

AND

KOBOLE SUPERMARKET LIMITED 1ST RESPONDENT

KOBOLE KENYA LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant a registered union within the Republic of Kenya *vide* an amended claim dated May 10, 2020 sought the following orders against the respondents:-
 - a. A declaration that the respondent's refusal to sign recognition agreement is unlawful. Order the respondent to recognize the claimant union.
 - b. Engage the claimant in collective bargaining within thirty (30) days upon signing recognition agreement.
 - c. Do declare that the respondents action to stop deducting and remitting union dues is unlawful.
 - d. Do order the respondents to pay from their own funds Kshs.2,800 from January to date of judgement together with the accrued rate.
 - e. Do order the respondents to commence deductions of union dues from the date of judgement and to continue doing so without interruption.
 - f. Order payment of costs of this claim to the claimant
 - g. That this honourable court do grant any other relief found appropriate to meet the ends of justice.



2. In addition to the statement of claim dated July 2, 2021 the claimant filed list of witnesses, witness statements of Vackson Khalumi, verifying affidavit by Boniface Kakuvi, list of documents dated July 2, 2021 and the bundle of documents.
3. The Managing Director of the 1st respondent John King'ori Ngirimu filed notice of preliminary objection and grounds of opposition dated August 5, 2021 stating that no prove to verify what was alleged in the check off and payment of dues to be related to Kombole Supermarkets Limited, that the documents before court were not sworn exhibits and the claim was defective.
4. The 1st respondent further filed replying affidavit of Maxwell George Murungaro Mbugua sworn on the March 23, 2022 in support of its preliminary objection.

Preliminary

5. On the March 8, 2022 when this matter was scheduled for hearing the claimant was absent and the 1st respondent present through its representative Maxwell George Murungaro Mbugua. The court ordered the suit dismissed for want of prosecution.
6. The claimant filed application dated March 9, 2022 seeking to reinstate the suit and the same was listed for hearing on April 20, 2022 which date fell on April recess. The parties appeared before the Deputy Registrar Hon. Getenga. In the presence of both parties the claimant sought to amend the said claim and no objection that the suit had been dismissed was made by the respondent's representative.
7. On the April 28, 2022 when the parties appeared before court, the claimant told the court they wished to amend the claim to bring in Kobole Ltd. The respondent's representative told the court he had no objection to the request. Leave was granted to the claimant to amend their claim. The court then found that in view of the developments in the matter the application dated March 9, 2022 was compromised and or allowed by conduct of the parties. In the interest of justice, the suit was deemed to be validly on record.
8. On the June 23, 2022 the claimant filed in court amended memorandum of claim dated May 10, 2022 joining Kobole Kenya Limited as the 2nd respondent.
9. On June 28, 2022 the respondent filed its statement of defence dated May 25, 2022.
10. On the July 27, 2022 the court directed that the suit be canvassed by way of written submissions and the court would then rely on filed pleadings and documents on record. There was no dispute on the documents which were relied on by both parties. The parties complied. The claimant's written submissions drawn by Bonface M Kakuvi are dated September 6, 2022 and filed in court on the September 12, 2022. The respondent's submissions drawn by Maxwell George Murungaro Mbugua were filed on July 28, 2022.

Claimant's case

11. The claimant's case per amended memorandum of claim was that sometimes in September 2020 it recruited 8 employees of the respondents out of a total workforce of 14 employees the equivalent of 57% membership way above the 50%+1 befitting the signing of a recognition agreement. On the September 24, 2020 the respondent confirmed names appearing on the checkoff list as their employees (document 2). The claimants sent the check off sheets to the respondents for the purposes of deduction of union dues(documents 3). On the December 10, 2020 the respondents deducted and remitted Kshs 2800/- to the claimant (document 4). On the December 16, 2020 the claimant acknowledged receipt of the union dues for the employees on the checklist and attached a draft



recognition agreement (document 5). That the respondent deducted and remitted union dues for one month and stopped. That the respondent did not sign the recognition agreement. The employees of the respondents are undergoing dehumanising labour conditions and efforts to settle the issue was unsuccessful.

12. The parties went through conciliation process and the conciliator issued a report dated June 4, 2021 (document 12). The findings of the conciliator were to the effect that the 8 members recruited by the claimant represent the legal mandate 50+1 percent of the total employees of Kobole Kenya Ltd, Vihiga. The management of Kobole Kenya Ltd made first remittance of Kshs 2800/- for the month of October 2020 an indication that it recognised the employees as claimant's members. No other remittance of dues since then. The respondents rejected to attend the conciliation meetings. The conciliator then recommended that the management should remit the withheld union dues in arrears since November 2020 to date and that the management should sign a recognition agreement with the claimant which will lead the way to signing of a collective bargaining agreement with the union. That there was no compliance with the conciliators recommendations hence the instant dispute.

Respondents' case

13. The respondents in statement of defence dated May 25, 2022 was that Kobole Kenya Limited entered into an agreement with the union to resolve the matter and employer requested until July 31, 2021(MGM-1). That Kobole Kenya Ltd honoured that agreement and remitted first union dues for all the 8 employees who had joined the union for Kshs 2800(MGM-2), that on the July 23, 2021 the parties met at Kakamega office to settle the instant dispute and agreed for the respondent to present the union dues due for 6 months (MG3 being cheque for Kshs 16,800/-). That the Kakamega office Secretary Vackson Khalumi refused to accept the cheque insisting that the respondents first pay money for those terminated from work in Cause No 015 of 2021 before the court. They thought that the intention of the union was to defraud them that day being a Saturday. That Kobole Kenya Limited had employed more than 30 employees and only 8 were recruited by the union and later used to file all the cases by claimant before court. That out of the 8 only 3 accepted to be used and the rest are still in employment. That so far all employees of Kobole Kenya limited are working under contract and no other recognition they may sign due to the malpractices of siphoning the company.

Issues not in dispute

14. That a checkoff for deduction of union dues for 8 employees was presented. That the 2nd respondent only remitted dues for one month for Kshs 2800 for the 8 employees. That the claimant is a valid union. That the respondent has failed to deduct and remit union dues for staff who are members of the union. That some of the members of the claimant have had their employment terminated.

Determination

15. The claimant listed the following issues for determination under its written submissions:-
 - a. Whether the claimant has attained a simple majority membership.
 - b. Whether the respondent should deduct and remit union dues from the employees who have already acknowledged their union membership.
16. The respondents in their submissions addressed the merits of the case and stated they have contracts with the employees hence no other agreements should be signed.
17. The legal underpinning of the claim is section 48 of the *Labour Relations Act* and various provisions of the *Constitution* of Kenya and *ILO Conventions No 87 on the Freedom of Association and Protection of*



the Rights to Organise on failure to deduct and remit union dues and section 54 of the Labour Relations Act on failure to sign recognition agreement and other laws. The court then taking into consideration the law and issues addressed by the parties is of the considered opinion that the issues for determination in the suit are as follows: -

- a. Whether the claimant has met the requirement of section 54 (1) of the Labour Relations Act for recognition by the claimant
 - b. Whether the claimant has complied with the requirement for deduction and remittance of union dues
 - c. Whether the claimant is entitled to reliefs sought
- Whether the claimant has met the requirement of section 54 (1) of the Labour Relations Act for recognition by the claimant.
18. Section 54(1) of the Labour Relations Act reads, ‘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 the unionisable employees’
 19. The claimant relies on list of documents dated July 2, 2021 and states that following the submission of check off list (document 1) and confirmation by the 2nd respondent that the 8 employees listed under the checkoff list were their employees(document 2) and upon remittance of union dues for the 8 employees for month of November 2020 forwarded a draft recognition agreement to the respondents vide letter dated December 16, 2020(document 5). That the respondents have refused to sign the recognition agreement. The claimant submits that they recruited 8 out of the 14 employees of the Kobole Kenya Limited working at the Kobole supermarket limited hence one and the same and that is more than the 50+1 percent hence qualified for recognition agreement.
 20. The respondents submit that Kobole Kenya Ltd has more than 30 employees and hence the criteria not met and that three of those who signed the check off has been terminated. That the rest are still working. That all employees of Kobole Kenya Limited are working under contract and no other recognition they may sign due to the malpractices of siphoning the company.
 21. The Court of Appeal in Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union (2016)eKLR held; ‘to be recognised as the representative trade union of the workers of a person or entity, section 54 of the Labour Relations Act stipulates that the minimum number of workers willing to join the Union must be a simple majority or 51% of the workforce.’ The 2nd respondent submits that it has over 30 employees in their defence to the claim dated May 25, 2022. The claimant did not file reply to the defence or offer prove there were 14 employees.
 22. The court finds that the claimant failed to prove the number of employees was 14 taking into consideration the defence statement of May 25, 2022 paragraph 8 that Kobole Kenya Limited had 30 employees. Only 8 employees were recruited as members of the claimant. The defence stated they had over 30 employees. The claimant did not discharge its burden to prove the employees were 14 and not 30. The burden shifted to the claimant once the defence stated it had 30 employees to prove otherwise.
 23. The court determines that the claimant did not discharge its burden of demonstrating it met the threshold under section 54(1) of the Labour Relations Act on recognition.

Whether the claimant has complied with the requirement for deduction and remittance of union dues.
 24. It was undisputed fact that the 2nd respondent only remitted union dues for the 8 recruited employees for one month.



25. The respondent's defence was that it had signed contracts with all the employees of Kobole Kenya Ltd hence no other agreement. The court finds and determines that deduction of union dues is not conditional to a provision in employment contract. The claimant filed its constitution to demonstrate they operate in the sector of supermarkets (document 1) and filed in court letter forwarding the check off for the 8 members which referred to Kenya Gazette No 11153 of August 8, 2012 and No 6912 dated September 2, 2016 allowing the deductions in the sector. The court finds that there was no dispute on the validity of the union deductions.
26. The court finds and determines that the claimant complied with the requirements of section 48 of the *Labour Relations Act* on deductions of dues.
27. Section 48(3) of the *Labour Relations Act* requires an employer in respect of whom the minister has issued an order under for deduction of wages to commence deducting the trade union dues 30 days of the trade union servicing notice in Form S (check off) signed by the employees in respect of which the employer is required to make deductions.
28. The court finds and determines that the claimant complied with the law on deduction of union dues.

Whether the Claimant is entitled to reliefs sought

29. The claimant seeks for an order that the respondents pay from their own funds Kshs, 2800/ monthly from January 2021 to date of judgment in arrears together with the accrued interest at court rate.
30. The claimant has not cited authority to support the prayer. It was the recommendation of the conciliator that the management should remit the withheld union dues in arrears from November 2020 upto date.
31. The court in *Bakery, Confectionery, Food Manufacturing and Allied Workers' Union (K) v Milly Fruit Processors Limited* [2014] eKLR found as follows:-

‘the claimant did not address the court on the legal basis of requiring the respondent to take over the liability of payment of union dues that had not been deducted. The *Labour Relations Act* which provides for the deduction of union dues is silent on what the claimant should in such an event.

Section 19 of the *Employment Act* which provides for deductions from wages of employees, which would include union due does not provide for the employer to be penalized to make such deductions from its own funds.

Sub section 19(5) provides for the penalizing of an employer to pay only if the employer has deducted but failed to remit the amounts for deductions to the beneficiary thereof.

The prayer for review under this head is granted and I owned the court award adding thereto as follows;

”The claimant’s prayer that the court directs the respondent to pay from its kitty all the money it would have, except for its refusal/failure/negligence, deducted from its employees’ wages and remitted to the trade union dues since the month the employees first joined the claimant is hereby dismissed for the following reasons;

The claimant has not given justification for the prayers.”

32. The court upholds the decision of the court in *Bakery, Confectionery, Food Manufacturing and Allied Workers' Union (K) v Milly Fruit Processors Limited* [2014] eKLR and finds that there is no legal basis to order the respondent remit undeducted union dues from its funds.



33. The respondents were willing and had a cheque for 6 months dues for Kshs 16,800/-. The court orders the respondents to remit the admitted sum of Kshs 16800/- dues. The court did not find prove of deductions outside the admitted amount.

Prayer for order for signing of recognition agreement and collective bargaining agreement.

34. The court found that the respondents pleaded to have more than 30 employees and only 8 members of the claimant. The claimant did not file response to the defence. This shifted the burden of proof to the claimant. The court looking at the defence holistically found the respondents candid in their response on the dispute and believed that the number of employees was over 30. A notice by the claimant to produce the payroll would have been helpful. The 8 members do not amount to 50+1 percent of the 2nd respondent's employees threshold under section 54(1) of the *Labour Relations Act*. The prayer is disallowed. The parties are encouraged to enter into a recognition agreement once the threshold is met.

Conclusion and disposal

35. The claim has succeeded partially and judgment is entered for the claimant against the Kobole Kenya Limited as follows:-

- a. Declaration is hereby issued that the respondents' action to stop deducting and remitting union dues was unlawful.
- b. The respondents are ordered to deduct and remit the union dues for members of the claimant who were in their employment as at date of judgment and whose names appear under the submitted membership check off to the claimant effective end of November 2022.
- c. The respondents to remit payment of admitted union dues of Kshs 16,800/- to the claimant.
- d. Interest is awarded at court rates from the date of judgment until payment in full.
- d. The respondents failed to submit themselves to the conciliation process. The courts orders that they pay costs to the claimant for the claim.

32. Stay of 30 days granted.

33. It is so ordered

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 17TH NOVEMBER 2022 .

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:-

Court Assistant : Brenda

For Claimant : Absent

For Respondent: Maxwell George Murungaro Mbugua.

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