IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 116 OF 2016

BETWEEN

ASSOCIATION FOR THE PHYSICALLY

DISABLED OF KENYA.....APPELLANT

VERSUS

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL

HOSPITAL AND ALLIED WORKERS UNION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from part of the Judgment and Decree of the Employment and Labour Relations Court at Mombasa, (Rika, J.) made on 23rd March, 2015

in

E.L.R.C Cause No. 348 of 2013)

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JUDGMENT OF THE COURT

[1] This is an appeal against part of the award given in favour of the Kenya Union of Domestic Hotels Educational Hospital and Allied Workers KUDHEIHA (1st respondent herein after referred to as the Union). In the said claim filed by the Union against the Association for the Physically Disabled (appellants), the Union was seeking reinstatement of 24 employees who had been declared redundant. The matter fell for hearing before Rika J. and by an award made on 23rd March, 2015, the subject matter of this appeal, the twenty four of the Union members were ordered to be reinstated back in the appellant's employment. A brief synopsis of the matter is that the 1st respondent, a registered trade union whose members were engaged by the appellant in various capacities filed the claim on account that the appellant, by letters dated 27th September, 2012, served redundancy notices upon 24 employees and shortly thereafter, declared them redundant and terminated their employment, citing persistent losses which it claimed had rendered it incapable of retaining employees services.

[2] The affected 24 employees (hereinafter referred to as claimants) were members of the Union, being dissatisfied with the said redundancy notices lodged a claim before the Employment and Labour Relations Court (ELRC). They alleged that they were unfairly terminated as the redundancy was unwarranted and sought an order compelling the appellant to withdraw all the letters of termination and they be ordered to continue with their employment. The Union contended that the termination of employment of the claimants went against the provisions of **section 15** of the **Persons with Disabilities Act 2003** and clause 8 and 22 of their Collective Bargaining Agreement (CBA) with regards to retirement of disabled employees. Further to this, they contended that, the appellant's claim that the termination was on account of diminished finances was misleading for reasons that the appellant had promptly replaced them with able bodied workers, who continue to work there to date.

[3] The claim was resisted vide a memorandum of defence dated 13th February, 2014; wherein, the appellant claimed that the dismissal was fair and in accordance with the law. In particular, that the redundancy was necessitated by the fact that the appellant's finances had dwindled down from Kshs.19.7 million to Kshs.10.4 million between the years 2007- 2011 and as a result, it had been rendered incapable of sustaining the services of the 24 affected claimants who were members of the Union. The appellant contended that all the procedural requirements with

regard to the declaration of redundancy were met; that the Union was duly notified as was the labour office; that the affected employees received the requisite notices and that the entire process was carried out in accordance with the Constitution, the Persons with Disabilities Act and the CBA. Consequently, the appellant contended that the termination was fair, and was based on its operational policy and fiscal guidelines which demanded the downsizing of its workforce in order to survive the harsh economic situation the appellant was going through failure to which the entire body would be forced to shut down. In conclusion, the appellant contended that the Union's claim failed to address those pertinent issues which if considered would clearly show that not only was the termination fair, but that the same was overtaken by events, since the Union's 24 members had already been declared redundant and paid their dues.

[4] In an award delivered on 23rd March, 2015, the learned Judge Rika J., delivered a somewhat perplexing award that on one hand found the appellant's decision to terminate the 1st respondents' employment was within the law as well as the CBA and hence was legally fair. On the other hand, however, the Judge declared that the Union members who were declared redundant were a special class of employees requiring the protection by the court and consequently ordered their immediate reinstatement to their former workstations and to report back on duty on 1st June, 2015 at 8.00.a.m for assignment of duty. With regard to their back pay, it was ordered that they be paid their dues from the time of termination and that any terminal dues as may have been received by the employees be offset against that back pay.

[5] Aggrieved with the latter part of the award, the appellant lodged the instant appeal, which is premised on grounds that;

> **i. "The learned Judge erred in law and in fact in finding that the appellant's decision of terminating the 1st respondents' contracts on account of redundancy was made within the law and the collective bargain** (sic) **agreement between the parties and was legally fair but went ahead to order the reinstatement of all the 24 1st respondents without loss of benefits on the grounds that they are a special class of employees requiring the court's protection.**
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> **ii. The learned Judge erred in law and in fact by finding that the 1st respondents report to their work stations on 1st June 2015 for assignment of duties without taking into account the practical difficulties of such reinstatement on the appellant yet the judge had acknowledged the financial handicap of the appellant."**

[6] It is also necessary to mention that contemporaneously with the issuance of the aforesaid orders, the learned Judge directed the Government to avail an annual subsidy of Kshs. 5 million to the National Development Fund. This is how the Judge put it in his own words;

> ***"The court is aware that the Government is not a party to the proceedings. The court shall therefore recommend the Government of Kenya releases to the respondent a subsidy of Ksh.5 Million annually, from the National Development Fund for persons with disability."***

In view of aforesaid directive, the Hon. Attorney General came on board in this appeal as the 2nd respondent. With leave of Court, the appeal was ventilated through written submissions, with oral highlights at the hearing. In her submissions, learned counsel for the appellant Ms. Opolo argued that the trial Judge, having found the termination to be fair and based on the appellant's financial incapacity to retain the workers, he erred by ordering their reinstatement. With regard to the Kshs.5 million government subsidy, the Judge ordered to be paid to the Association annually, counsel contended that the Judge once again fell in error when he made the directive because in so doing, he failed to appreciate that the government was not a party to the proceedings and its views were not sought; that the directive was thus not binding on the government. As a matter of fact, the appellant did not receive any funds to date, an indication that the government has no intention of complying with the said directive. Consequently, the appellant is left with a group of workers it can no longer sustain given its financial circumstances that even the Judge appreciated. In view of the foregoing, counsel urged this court to allow the appeal.

[7] Mr. Hezron Onwong'a, appearing for the Union, submitted that the claimants were indeed a special class of people who worked for an association specifically designed to cater for their welfare. As such, the Judge was alive to the special needs of this category of workers and consequently, was right and justified in granting the orders he made.

[8] Appearing for the 2nd respondent was learned counsel Mr. Wachira, who submitted that in the memorandum of claim, no orders were sought against the government and consequently, the directive that the government should pay an annual subsidy to sustain the appellant's program was misguided. Citing the decision in **Andy Forwarders Service Ltd & Another v. Price Waterhouse Coopers Ltd & Another** (**2012) eKLR**, counsel added that in making those orders, the court failed to appreciate that the 2nd respondent was never accorded an opportunity to be heard. In addition, given that the Judge had found the redundancy was valid, counsel wondered what legal justification was there to order reinstatement of the claimants; it was obviously a misdirection for the Judge to order reinstatement which order contradicted his own findings that the appellant was financially incapable of sustaining them. Counsel was emphatic that once declared, executed and found to have been valid, redundancy cannot be substituted with any other remedy.

[9] With regard to the directive issued against the government, it was submitted that the same was based on a recommendation and was not justiciable, it just remained that, an *obiter dictum*. To elaborate further, counsel stated that in making that directive, the learned Judge relied on a proposal letter dated 22nd August, 2011 made to the then Minister for Gender, Children and Social Development, Hon. Naomi Shabaan by the then National Chairman of the Association of People with Disabilities Kenya (APDK), Dr. Moody Awori. The proposals in letter, counsel contended, never came to fruition as the subsidy never crystallized into government policy. As such, no judgment can be based on such a proposal. In any event, the issue under trial was not about government subsidy to the appellant but redundancy of employees. In view of the foregoing, counsel argued that the appeal be allowed, the judgment of the trial court be set aside and the 1st respondent's claim dismissed.

[10] This is a first appeal, it is therefore the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial court in order for it to reach its own independent conclusion. (See **Selle v. Associated Motor Boat Co. Ltd (1968) EA 123) Selle and Another v. Associated Motor Boat Company Ltd And Others**, **[1968] 1 EA 123 (CAZ):**

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan*, (1955), 22 E.A.C.A. 270)."

[11] Being guided by the above principles and from the grounds of appeal, the record and the submissions made by all the parties, we discern a single issue for determination by this Court, that is, whether the Judge erred in ordering the reinstatement of the claimants to their jobs without loss of salaries, seniority, privileges and other benefits. It is common ground that the 24 claimants in this case were lawfully declared redundant and that finding has not been challenged by the respondent even by way of a cross appeal. The question is whether, having declared that the claimants were legally and fairly declared redundant, could the court by the same stroke of the same pen, order a reinstatement merely because the claimants fell into a special category of employees, without any pleading or joinder of the government. It is significant also to point out that the issue of redundancy and orders of reinstatement are somewhat legal as both concern the interpretation and the import of **Section 40** of the Employment Act, various sections of The Persons with Disability Act, and in particular **clause 8 and 22** of the CBA.

[12] We find the learned Judge fastidiously went through all the motions and considered the provisions of the Employment Act, and the Collective Bargaining Agreement which principally governed the parties herein. **Section 40** of the Employment Act, which deals with termination of employment on account of redundancy provides;-

"(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;-

(a) Where the employee is a member of the trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extend of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of the trade union, the employer notifies the employee personally in writing and the labour officer;

(c) The employer has in the selection of employees to be declared redundant had due regard to seniority in time in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between the employer and a trade union setting our terminal benefits payable upon redundancy.

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) The employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

[13] Under **section 2** of the Employment Act, redundancy is defined as:

"The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;"

As aforestated, the Judge found no fault at all on the part of the appellant who followed the whole procedure as provided for in the Employment Act and in the CBA and indeed lauded the appellant for carrying out consultation with the affected parties, and for offering them training on how to start and run a business. The Judge, indeed found as it was held in the case of; **Kenya Plantation & Agriculture Workers Union v. James Finlay (K) Ltd** eKLR as follows;-

"An employer would be entitled to undertake redundancy just like an employer would be entitled to undertake the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle was that the court would not interfere in the employer's entitlement to undertake these functions and interference by the court, with respect to such functions would be exercised sparingly…"

[14] That notwithstanding, the Judge considered the provisions of the Persons with Disability Act Cap 133 and went on to make orders or directives that the government do make an annual subsidy of Ksh.5 million from the National Fund for Persons with Disabilities. Based on this, the order reinstating the claimants was made obviously because the money to sustain their employment was to come from the government. With tremendous respect to the Judge, we agree with the appellant that the Judge erred because the issue of annual government subsidy of Ksh.5 million was not pleaded and secondly, the Attorney General as the legal representative of the Government was not party to

the proceedings. This was an employment contract between the appellant, the claimants and the Union which negotiated the CBA; the government was not a party to it; how does the government then become bound in such a contract. As a general rule of the thumb, a contract binds only the parties to it. See the case of; **Agricultural Finance Corporation v. Lengetia, 1982-88 I KAR 772** which stated:

> ***"As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."***

[15] In ordering the reinstatement of the 24 claimants in this case, the learned Judge was of the view that the government is obligated under **section 32** of the Persons with Disabilities Act to contribute to the expenses of organizations catering to persons with disabilities. In addition, that under the United Convention on the rights of persons with disabilities, which was ratified on 19th May, 2008, the state parties are required to recognize and safeguard the right of persons with disabilities to work. We appreciate, whereas, all this may be morally right in principle, the appellant and the 2nd respondent have raised a crucial issue that the learned judge failed to address; that is whether, the directive binding the government to this judgment could be issued given the fact that the government was never a party to the proceedings. It was submitted and rightly so that this was a blatant violation of natural justice rule and in particular, the *audi alteram partem* principle, which demands that no person should be condemned unheard.

[16] It was the appellant's contention that natural justice lies at the heart of a fair trial, whether criminal or civil, and that the Industrial Court is obliged by the Constitution of Kenya to respect and uphold the principles of natural justice, which it failed to do in this case.

In ***Onyango v. Attorney General (1986-1989) EA 456***, ***Nyarangi, JA*** asserted at *page 459:*

> ***"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."***
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> ***At page 460 the learned judge added:***
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> ***'A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.'***

And in ***Mbaki & Others v. Macharia & Another*** ***(2005) 2 EA 206***, at page 210, this Court stated as follows:-

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

[17] From the foregoing findings, it is obvious that the reinstatement of the claimants cannot stand, given that it was founded on unsustainable orders of payment of subsidies by the government in a matter where the government was never made a party. The enforcement of such orders would thus fly in the face of the rules of natural justice as the government was never accorded an opportunity to be heard. In view of the foregoing, we find this appeal has merit and it is hereby allowed with the result that the orders made on the 23rd March, 2015 and all consequential orders are hereby set aside and the 1st respondent's claim stands dismissed. Due to the nature of these proceedings that largely involve claimants who are persons with disabilities, we order that each party do bear their own costs in this appeal and the court below.

Dated and delivered at Mombasa this 17th Day of May, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR