



Kenya Chemical Workers Union v Kenya Flexogravure Limited (Cause E021 of 2022) [2023] KEELRC 287 (KLR) (7 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 287 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E021 OF 2022
HS WASILWA, J
FEBRUARY 7, 2023**

BETWEEN
KENYA CHEMICAL WORKERS UNION CLAIMANT
AND
KENYA FLEXOGRAVURE LIMITED RESPONDENT

JUDGMENT

1. The Claimant union, filed the claim dated June 20, 2022 on the June 22, 2022, alleging that 12 of its members had been unfairly declared redundant. The claimant sought for the following orders;
 - a. A declaration that the Respondent’s action of terminating it’s 12 employees was unfair and compensation be awarded as provided for under section 49 of the Employment Act.
 - b. A declaration that the Respondent is in violation of the valid collective bargaining agreement between themselves and the Claimant and the compensation for the same at the Courts discretion.
 - c. Interest at Court rates.

Claimant’s case.

2. The Claimant is a trade Union representing workers engaged in the chemical and allied industries within the Republic of Kenya. The Claimant entered into a Collective Bargaining Agreement (CBA) on July 17, 2013 with the Respondent, which is alleged to be active and/or valid to date.
3. That on June 2, 2022, the Claimant’s officials received information from its members, who work for the Respondent, that the Respondent had issued an internal memo in the evening of May 30, 2022 that the company intends to render some of its employees redundant owing to purported financial crisis that it was facing. The redundancy was to take effect from May 31, 2022.



4. On June 2, 2022, a cheque was issued to the Claimant's members, alongside the list of 12 employees who were declared redundant. The Claimant took issue with the fact that the said redundancy notice was not served on them and their members. That they immediately sought the Respondent's audience on the turn of events but they were not given any explanation.
5. It is averred that the Respondent did not give any criteria for the choice of employees to be declared redundant, therefore that the redundancy fell short of the dictates of section 40 of the [Employment Act](#) and Article 41 of the [Constitution of Kenya](#).
6. The Claimant thus prayed for the claim to be allowed in line with clause 16-19 of the Collective Bargaining Agreement.

Respondent's case.

7. The Respondent entered appearance on July 18, 2022 through the firm of Maiyo, Mbugua and Cheruiyot advocates and filed a response to claim on the October 5, 2022. The Respondent denied all the contents of the claim and in particular the validity of the Collective Bargaining Agreement.
8. The Respondent stated that, upon going into financial crisis, it informed its employees of the need to cut down its work force and some employees offered to be paid and leave the Respondent's employee, therefore that the employees who were declared redundant entered into the redundancy process voluntarily.
9. It is averred that the Collective Bargaining Agreement(CBA) which was entered into between the parties on July 17, 2013, commenced on May 1, 2013 and run for two years lapsing on April 30, 2015, a fact which was conclusively decided by consent judgment entered between the parties herein on July 29, 2013 in Nakuru ELRC Cause Number 181 of 2013; *Kenya Chemical Workers Union v Kenya Flexogravure Limited*, thus the CBA is no longer valid and or active and therefore the Claimant lack locus to bring this suit on behalf of the Respondent's employees.
10. The Respondent avers that the issue of standing of the CBA was addressed with the Claimant who failed to take any action to negotiate for another CBA. Thus the Claimant cannot claim any remedy from the said CBA.
11. Regardless of the expired CBA, the Respondent stated that it paid the employees who were declared redundant as follows; May salary, one-month salary in lieu of notices, traveling allowance, severance pay at 30 days for every year worked. Therefore, that the payment done were in accordance with the law and the CBA even though it expired.
12. On January 18, 2023, the advocates representing the parties agreed to rely on the affidavits and evidence filed in advancing their respective cases and proceeded to file submissions.

Claimant's Submissions.

13. The gist of the Claimant submission is that the redundancy was not preceded by notice contemplated under section 40 of the [Employment Act](#), neither did the Respondent give the criteria used in selecting the 12 employees declared redundant. It was submitted that the failure by the Respondent to follow the procedure provided under Section 40 of the [Employment Act](#), made the entire procedure unfair and violated section 41, 43 and 45 of the [Employment Act](#) as read with Articles 2 & 3(2) of the [ILO Convention](#) No 87.
14. On the reliefs sought, the Claimant submitted that the Respondent infringed on the rights of the 12 grievants who should be compensated for the injustice cause. Also that even though the grievants were



paid severance pay, the same was way below the one provided for under clause 16 of the CBA as such the Respondent should pay the difference.

Respondent's Submissions.

15. The Respondent submitted on three issues; whether the Claimant has locus to sustain the instant claim; whether the Claimant has proved its claim to the required standard and whether the Claimant is deserving of the reliefs sought.
16. On the first issue, it was submitted that the Claimant does not have locus standi to sustain this claim because the Collective Bargaining Agreement entered into between the Claimant and the Respondent on the July 29, 2013 run for two years commencing 1st May, 2013 and lapsed on April 30, 2015. It was argued that the validity of the said CBA was subject of ELRC cause number 181 of 2013; Kenya Chemical Workers Union v Kenya Flexogravure Limited, which parties consented vide an Order of July 29, 2013 and capped the duration of the CBA to two years. On that basis the Respondent urged this Court to dismiss this claim.
17. On whether the Claimant has proved its case to the required standard, it was submitted that the Claimant has failed to tender any evidence in form witness statement of affidavit of the affected employees in proving its case. It was argued that since no employee has filed any witness statement, the veracity of the allegation in the claim remain unsubstantiated contrary to the express provision of sections 107-109 of the *Evidence Act*. Also that the Claimant has failed to discharge its mandate given to it under section 47(5) of the *Employment Act*.
18. It was submitted that, the Claimant has failed to indicate the particular employees (their members) whom they are instituting this suit for, contrary to the express provisions of Rule 9(3) of the *Employment and Labour Court Relation(Procedure) Rules 2016*. It was argued that failure to list the said members makes the claim fatally defective. He added that since this is an industrial dispute pursuant to *Labour Relations Act*, the Claimant ought to have reported the same to the Ministry of labour before filling this suit, which was not done in this case.
19. It was the Respondent's submissions that even though the CBA lapsed and was no longer binding, they paid the employees declared redundant in accordance with clause 16 of the CBA on payment of employees upon redundancy, therefore that even if the claim was to be sustained there were no dues owing to the Claimant as its members were fully compensated before exiting the Respondent's employ. In this they relied on the case of *Amalgamated Union of Kenya Metal Workers V Associated Motors Limited* [2021] eKLR where the Court dismissed the Claimant's suit for failing to prove it to the required standard.
20. On whether the orders sought should issue, it was submitted that the Claimant has failed to prove its claim to the required standard and also that it lacks locus to sustain this case as against the Respondent because the CBA expired in 2015. He urged this Court to dismiss the claim with costs.
21. I have examined the evidence and submissions of the parties herein.
22. It is true that the Claimants and Respondents entered into negotiations and signed a CBA on 17/7/2013.
23. Clause 29 of the CBA indicated that the agreement was effective 1/5/2013 and would run for 2 years and thereafter until it is amended by mutual agreement between the company and the union.



24. The Respondents aver that the agreement came to an end by mutual agreement of the parties in Nakuru ELRC Cause No. 181 of 2013 Kenya Chemical Workers Union v Kenya Flexogravure Limited.
25. The Court agreement referred to was presented to Court and it shows that indeed the CBA was to run from 1st May, 2013 to run for 2 years.
26. This however was in reference to a CBA signed by parties on 17/7/2013. The agreement was adopted as an order of this Court and CBA registered on 29/10/2013. The registered CBA is the one before Court which contains an extension clause unless agreed by the parties.
27. There is no agreement after the registration of this CBA on 29/10/2013 indicating that the CBA lapsed.
28. In view of this position, it is my finding that the CBA stands valid unless reviewed or unless dismissed by consent of the parties.
29. The Respondent by conduct seems to agree with this position and that is why they sent the cash payments and list of members declared redundant to the Claimant and cannot therefore deny the existence of the CBA.
30. Having stated as above, it is also true that the Respondent acted against the express provision of law in declaring the Claimants members redundant in contravention of Section 40 of the *Employment Act* which provides as follows;

“40. Termination on account of redundancy

- (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 a 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 extent 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 a 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 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 an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - (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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.
 - (2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.
 - (3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary".
31. It is true that no notice was issued the Claimants or its members as contemplated. It is also clear that there was no consultation between the Claimant and the Respondent.
32. The process envisaged under Article 13 & 14 [ILO Convention](#) C158 which states as follows was not also followed;

“Division A. Consultation Of Workers’ Representatives

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
 - a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
 - b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.
2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
3. For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Division B. Notification To The Competent Authority

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with



national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations”.

33. I therefore find the redundancy unfair and unjustified and the Claimants members are entitled to compensation accordingly being ten months salary for each grievant.

34. The Respondents will pay costs of this claim.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF FEBRUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutonguro for Claimant – present

Maiyo for Respondent – present

Court Assistant - Fred

