Kenya Plantation & Agricultural Workers Union v Vitaplant Kenya Limited (Cause E023 of 2023) [2023] KEELRC 828 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 828 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE E023 OF 2023

HS WASILWA, J

APRIL 13, 2023

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT

AND

VITAPLANT KENYA LIMITED ..... RESPONDENT

RULING

1. Before me for determination is the Claimant/Applicant's Notice of motion dated March 16, 2023, filed under certificate of urgency pursuant to Article 41(1) of the *Constitution*, Section 40(1) (a)&(c) of the *Employment Act*, Section 12 of the *Employment and Labour Relations Court Act*, and all enabling provisions of law seeking for the following Orders;

    1. Spent.

    2. That this Honourable Court be pleased to prohibit and or restrain the Respondent from declaring 30 employees redundant without any justifiable reason pending the hearing and determination of this Application and or cause.

    3. That this Honourable Court be pleased to compel the Respondent to retain the grievants as its employees in absence of any justifiable reason in law warranting termination on the basis of redundancy.

    4. Costs of this Application be borne by the Respondent.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Lawrence Ombiro, the Claimant's National organizing secretary, sworn on the March 16, 2023.

3. In the affidavit, the affiant stated that the claimant is a registered trade Union within the meaning of section 2 of the *Labour Relations Act*, representing employees in the Agricultural sector.

4. That the parties herein entered into a Recognition Agreement and signed a Collective Bargaining Agreement on July 16, 2021, which is still active to date.

5. On March 6, 2023, the claimant received a letter from the Respondent dated February 22, 2023, giving employees and the Union, notice of a looming redundancy that was affecting 30 of its employees and the reasons given for the redundancy was to avert the high cost of production.

6. It is averred that the claimant responded to the redundancy notice, opposing it on the basis that the reason given did not meet the threshold to warrant the termination of its members.

7. It is contended that the Respondent had never raised any financial issue it was facing, if at all and also that in the notice they did not attach analysis report in support of its intended action.

8. The deponent stated that the intended redundancy process was done in bad faith, a clear indication of victimization and intimidation of members of the Applicant, because the reason given for the said redundancy did not have any merit.

9. He stated that unless this court intervenes and stop the looming illegal redundancy process, the grievants and the claimant alike stand to suffer irreparably. He thus urged this Court to allow the Application as prayed.

10. The Application is opposed by the Respondent who filed replying affidavit deposed upon by Wesley Siele, the Chief Executive officer of the Agricultural Employers Association, the representatives of the Respondent's in this case.

11. In the affidavit, the affiant stated that the Respondent is a limited liability company, carrying out business of growing medicinal plants for export and one of the Agricultural Employers association members.

12. He stated that its association has recognition agreement with the Claimant that cover not only the Respondent but also other companies in similar trade. However, that the Respondent has never signed any Collective Bargaining Agreement(CBA) with the claimant.

13. He stated that indeed, the association is the one that send the redundancy notice on behalf of the Respondent because the Respondent needed to restructure its business to profitability.

14. He stated that they received the protest letter from the claimant and offered an opportunity to the claimant to raise any concerns it had and was amenable to even extend the redundancy notice. He added that out of the 30 employees affected, only one employee belongs to the claimant union and thus the notice was done in good faith and out of good internal relations as opposed to legal obligation.

15. He stated that there is no obligation for the Union to be informed of any hardship the Respondent was facing as such the earlier notice, demanded by the claimant is without basis. He reiterated that they followed due process under section 40 of the *Employment Act*, in declaring the said employees redundant, therefore the claim and this Application lacks merit.

16. Direction were taken for the application to be disposed of by written submissions.

Applicant's Submissions.

17. The Claimant/ Applicant submitted that the Respondent did not meet the threshold of declaring its employees redundant. He argued that the allegation by the Respondent that he is facing financial challenges as to necessitate operational restructure and eventual redundancy is not proved and thus the redundancy process is aimed at victimizing the claimant's members.

18. It was submitted that even if the said redundancy was necessary, the Respondent flawed the provisions under section 40(1)(c) of the *Employment Act* , since no consideration was made with regard to seniority, skills ability and reliability of each of the said employees. To support this argument, they relied on the case of *Noor Mohamed V Red Court Hotel Limited t/a Boma Hotel*[2020] eklr where Justice M Onyango referenced Article 15 of the Supplementary provisions of *ILO Recommendation 119-termiantion of employment recommendation 1963* and stated that;

> " The selection of workers to be affected by a reduction of the work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.
>
> She further relied on Article 13 of Recommendation No 166 of ILO Convention No 158 – Termination of Employment Convention, 1982 which provides that –
>
> 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 minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

19. The claimant also relied on the case of *Kenya Union of Domestic, Hotels, Educational institutions, Hospitals and Allied Workers V The Nairobi Hospital* [2021] eklr where the Held that;

> " I am persuaded that the Respondent in this particular case failed in all fronts to comply with the requirements of rendering redundancy as stipulated in Section 40 of the Employment Act by: -
>
> a. Failing to give notices to the Claimants.
>
> b. Failing to hold meaningful consultancy with the Claimants.
>
> c. Failing to demonstrate how its selection criteria of affected employees was based on an objective or open criteria.
>
> Subsequently the court is of the considered view that the decision taken by the Respondent to terminate the employment of the Claimants members was procedurally unfair and was not based on reasonable grounds."

20. Accordingly, the claimant submitted that the redundancy process was not properly done and urged this Court to declare the same unlawful and illegal.

Respondent's Submissions.

21. The Respondent submitted that the current application has been precipitated by respondent's letters dated February 22, 2023 which were basically redundancy notices done in line with the provisions of section 40 of the *Employment Act* notifying the union of an intended redundancy affecting 30 employees.

22. It was submitted that, the Association and the claimant union have a Recognition Agreement that regulate the Industrial relations, dispute resolution and Collective Bargaining Agreement negotiations and the two letters dated February 22, 2023 clearly indicates that the affected employees will be released in batches with the first group of 15 leaving on April 1, 2023 and second group of on April 30, 2023.

23. The Respondent Maintained that the reason for redundancy was clearly stipulated as the high cost of production and the respondent has committed to payment of the affected employees in line with the Act having complied with the mandatory minimum of 30 days' notice to the claimants' union. Further that the Collective Bargaining Agreement clearly stipulate on the mechanism of resolving collective grievances and stated at clause 3(d) that; in the event of failure to reach a settlement either party may refer a dispute to the ministry of Labor in accordance with the *Trade Dispute Act* (Repealed) and now the *Labour Relations Act*.

24. It was submitted that section 74 of the *Labour Relations Act* provides that a trade Union may only refer a dispute to the court as a matter of urgency if the dispute concerns redundancy on two folds where;

    i. The trade union has already referred the dispute for conciliation under section 64(4) or

    ii. the employer has retrenched employees without giving notice.

25. Accordingly, the Respondent submitted that the current application fails on both the account of the Recognition Agreement and the cited provisions of the *Labour Relations Act*. In fact that, the association by it's letter dated March 8, 2023, on behalf of the respondent, offered to convene a meeting between parties to know any difference and or offer clarification/conciliate on any areas of concern and instead of meeting the respondents for a resolution and/or clarification, the claimant opted to come to court. Also that the claimant union requested for a list of affected employees and computation of their dues which information was supplied by the respondent through the Association. Thus, the refusal to dialogue between social partners is against the spirit of good Labour Relations and the offending party should not be allowed by this court to benefit from the same.

26. It was argued that the reasons for the redundancy is of an economic nature as such the same requires evidence in the main hearing of the suit. Furthermore that a redundancy exercise is a termination of employees' contract of employment whose remedies if not executed in line with the law are clearly stipulated under the *Employment Act*. He thus submitted that the current application if dismissed does not leave the claimant members without legal redress, on the converse, allowing the same has serious implication to the respondent as it is condemned to continue paying employees who are not gainfully engaged which money they will not recover.

27. It was submitted that main Court precedent relied by the claimant; *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals versus Nairobi Hospital* (2021) eklr relate to a matter that had gone through full hearing and therefore evidence analyzed and final remedies awarded and thus inapplicable in this case.

28. It is further submitted that allowing the claimant's prayers will push the respondent to financial hardship that may further edge the company out of business and lead to further losses of jobs including

those of other employees currently standing over 70 in numbers that are also members of the claimant union which in itself is counterproductive. He urged the Court to dismiss the application with costs as it is filed in bad faith and contrary to the parties Recognition Agreement and applicable Law. Moreover that the dialogue window is still open within parties recognition Agreement.

29. He concluded that the nature of Court orders sought are final in nature that can only be granted during and after a full hearing, after which Respondent could have an opportunity to justify is position.

30. I have examined all the averments and submissions of the parties herein. The applicants seek stay orders against the respondents notice to declare 30 employees redundant. The respondents aver that the notice given was necessary given that they were having financial difficulties and needed to restructure their operations. The notice of redundancy was issued to the claimant on 6/3/2023 vide a letter dated 22/2/2022.

31. The claimants responded to the redundancy notice opposing it indicating that the reasons given were not valid. They also sought to be notified of the names of the employees to be declared redundant.

32. It is not clear whether the names were supplied as requested. The main purpose of a redundancy notice is to enable the parties consult on redundancy process if at all and reach an agreement on how to either avert it or proceed with it in the best manner possible. This is what was held in the Court of Appeal case of *Kenya Airways Ltd Vs Aviation & Allied Workers Union*, CA No 46 of 2013 where the learned JA Maraga (as he then was) opined as follows;-

> " 52. As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "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." The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr Oraro's criticism of the learned trial Judge's reliance on the UK Employment Appeals Tribunal's decision in Mugford v Midland Bank, UK Employment Appeal Tribunal,10 and the treatise by Rycroft and Jordan, - "A guide to the South Africa Labour Law" both of which dealt with the requirement of consultation, was therefore unfair. Those

were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on".

33. There is no indication that any consultation took place. Infact from the communication of the respondent to the claimant, the employer had already determined redundancy was going out and it was a foregone cause.

34. Whereas the employer has the prerogative to determine whether to restructure their organization or not, this must be done within the law.

35. The notice having been sent out and having lapsed, it is my view that the parties can still discuss the matter and resolve it amicably. I will therefore give consultation a chance and suspend the redundancy situation. The parties will have 2 weeks to try out their consultations.

36. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 13TH DAY OF APRIL, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Awino holding brief Omwaka for claimant

Kinyanjui for respondent – present

Court Assistant - Fred