



**Amalgamated Union of Kenya Metal Workers v Kenya Coach Industries
Limited (Employment and Labour Relations Cause E506 of 2021)
[2023] KEELRC 2915 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2915 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E506 OF 2021
BOM MANANI, J
NOVEMBER 16, 2023

BETWEEN
AMALGAMATED UNION OF KENYA METAL WORKERS CLAIMANT
AND
KENYA COACH INDUSTRIES LIMITED RESPONDENT

JUDGMENT

Background

1. This action challenges the validity of a redundancy declaration at the workplace. The Claimant, a Trade Union representing employees of the Respondent, has challenged the Respondent's decision to declare one hundred and twenty (120) of its employees redundant.
2. According to the Claimant, there was no valid reason to justify the Respondent's move. Consequently, the Claimant prays that the aforesaid decision be declared unfair and therefore unlawful.
3. On the other hand, the Respondent contends that the redundancy decision was justified. Further, the Respondent contends that it followed the procedure that is prescribed in law in making the impugned decision. As a result, the Respondent prays that the Claimant's case be dismissed with costs.

Claimant's Case

4. The Claimant asserts that it has in place with the Respondent both a Recognition Agreement and a Collective Bargaining Agreement. It is the Claimant's case that these instruments entitle it to represent the Respondent's unionized employees in the collective bargaining process and generally.
5. The Claimant accuses the Respondent of perennially using the redundancy tool to suppress the process of collective bargaining at the workplace. For instance, it accuses the Respondent of having declared redundancies in 2017/2018 and 2018/2019 just before the parties commenced the collective



bargaining process. The Claimant also asserts that the Respondent attempted to deploy the same tool in the year 2020 but was stopped through court action. In the Claimant's view, these perennial redundancy declarations are intended to stifle the right of employees to engage in the process of collective bargaining.

6. The Claimant avers that after the court stopped the Respondent's attempts to declare redundancies in the year 2020, the Respondent renewed the illegitimate redundancy process sometime in the year 2021 by issuing fresh redundancy notices to one hundred and twenty (120) employees. According to the Claimant, the Respondent proposed to shut down its motor vehicle body building department under the guise of low business. It is the Claimant's case that the Respondent invoked the spurious excuse of its business having been negatively affected by the Covid 19 pandemic to attempt to lay off workers. The Claimant has questioned the legitimacy of the decision.
7. According to the Claimant, all indicators at the time pointed to the Respondent enjoying vibrant business in the vehicle body building department. The Claimant contends that data in its possession pointed to increased business volumes in favour of the Respondent at the time. The Claimant asserts that as a matter of fact, the Respondent had received recognition for being the leading motor vehicle body building firm for Isuzu in Africa.
8. The Claimant asserts that when it demanded for the Respondent's audited accounts for the two years that preceded the onset of the Covid 19 pandemic in order to evaluate the impact of the pandemic on its business, the Respondent declined to share this information. Yet, the Respondent continued to harp on the effects of Covid 19 to justify its decision to shut down the plant.
9. In the Claimant's view, this conduct by the Respondent is proof that its actions were suspect. It is the Claimant's contention that the Respondent had no justification for its decision to close down the body building department.
10. The Claimant asserts that the Respondent's intention was to ride on the excuse of the Covid 19 pandemic to close the plant for a short duration before reopening it and hiring the same individuals on less favourable terms. To justify its contention that the Respondent was operating optimally, the Claimant asserts that the Respondent employed nine (9) new members of staff in senior positions around the time that it sought to declare the impugned redundancy.
11. The Claimant further avers that the Respondent had in the period preceding the redundancy declaration hired a large number of "contractees" and casual employees. The Claimant asserts that this lot of employees usually works under less favourable terms than their permanent and unionized counterparts. It is the Claimant's belief that the purported redundancy declaration was part of the Respondent's wider scheme to get rid of permanent unionized members of staff and replace them with "contractees" and casual labourers.
12. The Claimant further asserts that the Respondent's decision to declare redundancies was an attempt to victimize employees who are its members. It is the Claimant's case that these employees have been unfairly targeted because of their involvement in collective bargaining activities.

Respondent's Case

13. In response, the Respondent confirms that the parties had subsisting Recognition and Collective Bargaining Agreements. However, it contends that the statutory threshold for recognition of the Claimant has since been obliterated following a drop in its membership. Thus, the Respondent has initiated the process of revocation of the recognition.



14. The Respondent further avers that the Collective Bargaining Agreement between the parties has since lapsed. In the Respondent's view, since it has invoked the procedure for revocation of the Recognition Agreement, the obligation to conclude a fresh Collective Bargaining Agreement has been obliterated.
15. The Respondent contends that although it had declared redundancies earlier on, the circumstances informing those decisions were not similar to the reason for the impugned redundancy. It is the Respondent's case that the current redundancy process was triggered by the unprecedented economic meltdown that resulted from the effects of the Covid 19 pandemic. The Respondent asserts that this development occasioned a severe decline in its vehicle body building business thus necessitating the release of some of its employees.
16. The Respondent also asserts that it experienced a high wave of cancellation of business orders. Business from the Respondent's main clients who include Passenger Service Vehicle Operators (PSV) and schools had suffered a decline.
17. The Respondent avers that after a series of consultations with the Claimant and its members directly, the entire complement of one hundred and ten (110) employees in the vehicle body building department elected to exit employment subject to their terminal dues being paid. It is the Respondent's case that the employees signed documents giving their consent to the exit plan. Besides the aforesaid complement, the Respondent states that other employees from other departments applied for voluntary retirement bringing the entire number of those who wished to exit to one hundred and twenty five (125) individuals.
18. It is the Respondent's case that after the lapse of the period in the redundancy notice, it issued the employees who had agreed to the exit plan notices terminating their contracts of service. The Respondent states that it paid the said employees their terminal dues in terms of what the law and the Collective Bargaining Agreement provide.
19. The Respondent states that contrary to the assertions by the Claimant, it wrote to the Claimant on 18th June 2021 sharing data on its declining business fortunes in the year 2021. The letter suggests that the Respondent's vehicle building department was operating below 40% of its optimal capacity. The letter was received by the Claimant on the same date. The Respondent also asserts that it shared with the Claimant other data from other stakeholders evidencing the challenges that it faced.
20. The Respondent contends that it held consultations with the Claimant over its challenges even before it issued redundancy notices at the tail end of June 2021. These meetings were followed with the issuance of the requisite redundancy notices under section 40 (1) of the *Employment Act*. It is the Respondent's case that the redundancy notices complied with the timelines that are set under the law. At the same time, the notices indicated the reason and extent of the proposed redundancy.
21. The Respondent argues that the current suit by the Claimant which had sought to stop declaration redundancy has been overtaken by events since the redundancy decision was eventually implemented and the affected employees paid their dues and released before the case was heard. In the Respondent's view, the suit is therefore an abuse of the court process.

Issues for Determination

22. After analyzing the pleadings and the evidence on record, it is my view that the following are the issues for determination in the action:-
 - a. Whether the redundancy declaration by the Respondent was unlawful.
 - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.



Analysis

23. I have considered the evidence on record on the contested issues. The Respondent's case is that the decision to declare the impugned redundancy was triggered by the decision to close its motor vehicle body building department. The Respondent avers that the decision to close the vehicle body building section was occasioned by the near collapse of business in the department following the emergence of the Covid 19 pandemic and the recall of orders by many of its customers.
24. It is a matter of public notoriety that the novel corona virus was first detected in China towards the close of December 2019. On 12th January 2020, the World Health Organization confirmed the presence of the virus in the People's Republic of China. Thereafter, the disease spread rapidly across the world with adverse health, social and economic consequences. These are matters which the court takes judicial notice of.
25. The Respondent's attempts at declaring redundancies at the workplace on account of the pandemic begun on 27th August 2020 when the Respondent issued the first redundancy notice. This development triggered the filing of ELRC Cause No. E450 of 2020 between the parties.
26. In the action, the Claimant contended that the Respondent had commenced the redundancy process notwithstanding that the parties had entered into an agreement to step down employee salaries by a margin of 20% as a mitigating measure against the effects of the pandemic.
27. The record shows that after hearing the parties, the court issued an order stalling the redundancy process and referred the matter to the Ministry of Labour for conciliation. In its interim ruling, the court observed that the Respondent had not consulted the Claimant prior to commencing the process. At the time, the proposed redundancy was to have affected thirty five (35) of the Claimant's members.
28. The record shows that after hearing the parties, the Conciliator recommended that the Respondent be permitted to undertake the redundancy exercise as long as it adhered to the law and the Collective Bargaining Agreement between the parties. The Conciliator further recommended that the Respondent gives the affected employees first priority for re-absorption once job opportunities became available in future.
29. The record shows that the Claimant rejected the above recommendations. As a result, the court heard the dispute and delivered its judgment on 22nd April 2021.
30. In the decision, the court found that the Respondent had failed to issue the Claimant and the affected employees the requisite notices for declaration of redundancy. In the court's view, what the Respondent had issued were notices for termination of employment under section 40 (1) (f) of the *Employment Act*.
31. The court also observed that the Respondent had embarked on the redundancy process without consulting the Claimant. The court found that the Respondent had not given the Claimant an opportunity to challenge the validity of the reasons for the proposed redundancy. Further, the court observed that the Respondent had not provided evidence of the selection criteria that it had used to identify the thirty five (35) employees that were to be released from employment.
32. Having regard to the foregoing, the court declared the redundancy exercise a nullity. However, the court gave the Respondent the leeway to re-institute the process as long as it observed the law.
33. The record shows that shortly after the aforesaid decision, the Respondent wrote to the Claimant on 11th May 2021 asking for a meeting to discuss the scaling down of its business. In the letter, the



Respondent averred that the decision to scale down had been necessitated by the global effects of the Covid 19 pandemic which had adversely affected its operations.

34. In addition, the Respondent cited cancellation of business orders by some of its customers for various other reasons and the spike in the prices of raw materials as the other reasons for its decision to scale down its business. Although these latter reasons are not mentioned in the Respondent's letter of 11th May 2021, they are contained in a couple of correspondence that the Respondent has placed on record.
35. The record shows that the parties held a meeting on 3rd June 2021. Thereafter, they held two other meetings on 30th June 2021 and 6th July 2021. In all these meetings, the Respondent's management and the Claimant's General Secretary, Rose Omamo, were in attendance. The attendees are shown to have signed the attendance registers.
36. In the meeting of 3rd June 2021, the issue of the impact of Covid 19 on the Respondent's business was flagged. It was indicated that the lockdown that was informed by the spread of the disease had impacted negatively on the Respondent's activities. The lockdown was said to have disrupted the Respondent's the supply chain. The record also shows that the Respondent indicated that it had lost business from the PSV sector and schools due to the low uptake of vehicles following the pandemic.
37. In the meeting of 3rd June 2021, the Respondent also cited stiff competition in the market as the other reason for its decision. It indicated that cheaper body builders in the market had negatively impacted its business.
38. To verify the assertion that some of its customers had cancelled their orders and there had been a sharp increase in raw materials, the Respondent referred to letters from Trans Trum Travellers Ltd, Lopho Multipurpose Co-operative Society, Zuri Genesis Company Ltd and KABM Services Ltd. In addition the Respondent wrote to the Claimant a letter dated 18th June 2021 showing that its body building department was operating below average. All these letters have been produced in evidence and are shown to have been shared with the Claimant who acknowledged their receipt by stamping on them. The letters speak to: cancellation of orders; below average performance of the Respondent's plant; and the spike in the prices of steel that is used in building of vehicle bodies.
39. The fact that the Covid 19 pandemic impacted negatively on the Respondent's business is in my view not in question. This fact is confirmed by the Claimant's decision to enter into an agreement with the Respondent through which the Respondent was allowed to reduce staff salaries by 20% in mitigation of the effects of the virus on its business. This arrangement is confirmed in the case between the parties in ELRC Cause No. E450 of 2020.
40. In the meeting of 6th July 2021, the Claimant's General Secretary demanded for proof that the Respondent was experiencing challenges in its vehicle body building department. The record shows that the Respondent's management reacted by indicating that details of this had already been shared with the Claimant. As indicated earlier in this decision, there is evidence that the Respondent shared with the Claimant various correspondences detailing: cancellation of its vehicle body building business with a number of its customers; increased raw material prices; and below optimum performance for the year 2021.
41. The record shows that the Claimant's representatives demanded for the Respondent's pre-Covid 19 audited accounts to authenticate its claim that it had suffered a fall in business. In reaction, the Respondent's management stated that the audited accounts for the period before the Covid 19 pandemic were of no value to the exercise since the challenges that afflicted its business fell in the post Covid 19 period which was yet to be audited. Further, the Respondent stated that even if the accounts had been available, they would not have provided an accurate image of the challenges it was facing in



- the vehicle body building department. According to the Respondent, its audited accounts cover the entire of its business. Yet, it is only its vehicle body building department that had faced the challenges that informed the decision to close it.
42. I have looked at the documents by the Respondent's business partners cancelling the business orders that they had placed with the Respondent. Most of them relate to the year 2021. This is also the case with the documents speaking to the hike in the prices of steel.
43. In my view, pre Covid 19 accounts which probably showed that the Respondent's body building department was operating profitably would not have been of value in determining whether the Respondent could still sustain the members of staff that it proposed to release as a result of the effects of Covid 19 pandemic and the business cancellations and price hikes that happened in 2021. The pre-Covid 19 audited accounts would not have been of value in assessing the meltdown effect of the foresaid post-Covid 19 events.
44. Importantly, it cannot be gainsaid that the Covid 19 pandemic affected businesses. This occurrence was in all respects a Force Majeure which had adverse ramifications on the business community world over. The fact that the Respondent's business was not spared the effects of the pandemic is confirmed by the Claimant's decision to conclude an agreement with the Respondent through which the Respondent was allowed to temporarily step down staff salaries by 20%. Therefore, the court accepts the Respondent's plea that the pandemic slowed down its business.
45. In view of the foregoing, I am satisfied that the Respondent has demonstrated that it had valid reason to declare the impugned redundancy. There is sufficient evidence, on a balance of probabilities, to demonstrate that the decision by the Respondent to close down its motor vehicle body building department was informed by the Respondent's operational requirements in terms of section 45 of the [*Employment Act*](#).
46. It has been emphasized times without number that the court must exercise caution not to unduly upstage the employer's prerogative to manage the workplace. The court must avoid upstaging decisions made by the employer at the workplace merely because it would have handled the matter differently had it been in the employer's shoes.
47. All that the court is required to consider whilst evaluating the exercise of managerial prerogative by the employer is whether the employer acted within the law and whether the impugned decision is, in the circumstances of the case, a reasonable one. In determining whether the employer's decision is reasonable, the court must restrict its assessment to the standard of a reasonable employer. In effect, the question that the court must grapple with is whether impugned decision falls in the band of decisions that another reasonable employer, faced with the same set of facts, would have made. If the answer to the question is in the affirmative, the court must refrain from interfering with the decision notwithstanding that the trial judge thinks that he would have handled the matter differently.
48. I note that the Claimant's case does not overtly challenge the process by which the Respondent declared the impugned redundancy. However, it is important to point out that the Respondent produced a notice of intended redundancy addressed to the Claimant dated 29th June 2021. The notice is said to have been issued pursuant to section 40 (1) (a) of the [*Employment Act*](#).
49. In the notice, the Respondent cited two reasons for the decision to declare redundancy. These were: the adverse effects of the Covid 19 pandemic on its business; and the Respondent's inability to sustain and continue operating the body building department. The notice further indicated that the redundancy was to affect all the 110 employees in the Respondent's vehicle body building department as it was being closed down.



50. The notice also indicated that the redundancy would crystallize upon the lapse of the thirtieth day should it not have been obviated in the intervening period. The notice set out the terminal benefits that were to be paid to the affected employees in the event that they were to leave employment. The notice was copied to the Labour Commissioner.
51. This notice meets the threshold of section 40 (1) (a) of the *Employment Act*. It spoke to the reason and extent of the proposed redundancy. It was addressed to the affected employees' Trade Union and copied to the labour officer. Finally, it was expressed to be for a period of one month.
52. The Respondent indicated that the entire complement of employees in the vehicle body building department was to be released since the department was to close down. Therefore, the issue of selection of the employees to be released from employment became irrelevant.
53. The Respondent has provided evidence to demonstrate that all the affected employees gave their concurrence to the redundancy terminal dues as worked out by the Respondent. They signed a schedule expressing their consent which was produced in evidence.
54. Further, there is evidence that an additional lot of employees signed requests asking that they be allowed to exit employment under the aforesaid redundancy program. This lot of employees, which brought the total number of employees that were released to one hundred and twenty five (125), comprises of individuals who elected to exit on a voluntary retirement scheme which is not subject to the application of the strict redundancy rules as envisaged under section 40 of the *Employment Act*.
55. The Respondent produced evidence showing that all the affected employees were subsequently issued with letters of termination of employment dated 30th July 2021. In addition, they signed confirmations of receipt of their terminal dues on the same date. The employees confirmed that the terminal dues that were paid to them were in full and final settlement of their redundancy pay packages. These documents were produced in evidence.
56. The above evidence shows that the Respondent complied with the procedural requirements in declaring redundancy at the workplace. Consequently, the court arrives at the conclusion that the redundancy process was processed in accordance with fair procedure.
57. But even if I was wrong in my analysis regarding the propriety of the impugned redundancy, the question that the court must grapple with is whether the affected employees would in any event have been entitled to re-open this matter for litigation with a view to seeking further compensation. At paragraph 46 (b) of its defense to the claim, the Respondent stated as follows:-

“All the redundancy benefits and dues were paid to the affected employees as per clause 17 of the CBA and section 40 of the *Employment Act*. As such, the claim that the employees be paid terminal dues is spent.”

58. The record shows that sometime on 30th July 2021, a total of one hundred and twenty-five (125) employees signed vouchers confirming receipt of their redundancy terminal dues. In the vouchers, every of the several employees stated as follows:-

“I ID No..... hereby confirm receiving an amount of Kenya Shillings.....via cheque No.....being my full dues payable to me against Kenya Coach Industries Limited or any of their concerns upon termination of my employment on account of redundancy.

I hereby confirm that I have received the above amount as full and final settlement of my terminal dues upon termination from employment having nothing outstanding whatsoever against KCI or any of their concerns.



Received by:

Name.....Sign.....Date.....

Dated this 30th Day of July 2021

James Omondi

(HR/Admin Officer)

(Witness)

Accounts Department

Name.....

Sign.....

Date.....”

59. For all intents and purposes, the affected employees, by these instruments confirmed that their claims against the Respondent in respect of the impugned redundancy had been fully settled. By declaring that what they had received constituted full and final settlement of their terminal dues, the employees renounced their right to pursue further claims against the Respondent.
60. The question that this presents is whether it is appropriate for the court to re-open the issue of compensation for wrongful termination of the employees’ contracts of service in the face of these vouchers. The general position is that it is undesirable for the court to do so
61. The court must accept and give meaning to the wishes of the parties as per the executed instruments by refusing to re-open the question of compensation (see [Ronald Kipngeno Bii v Unliver Tea Kenya Limited](#) [2022] eKLR). It is for this reason that I would still have been hesitant to accept the invite to re-open the issue of compensation for the employees who were released from employment.
62. Before I pen off, it is perhaps necessary to make some comments on some issues that the Claimant raised in support of its claim and why the court did not buy into them. First, the Claimant filed a bundle of documents dated 23rd December 2022 containing pictures of what appears to be newly built vehicles. Some of the units bear the logo of the Respondent whilst others have logos of different players in the motor industry. The Claimant asked the court to accept this as evidence that the Respondent was still in production.
63. The court was reluctant to accept this suggestion for three reasons. First, it is clear that some of the units bear logos that belong to other players in the motor industry. It is therefore not possible to use them as evidence that the Respondent remains in the production business.
64. Second, the pictures do not provide information on when the units were built. Therefore, the court cannot rely on them to accept the view that the Respondent reopened and continued to run the body building section after June 2021.
65. Finally, the Respondent stated that in addition to body building, it does general sales on behalf of Isuzu Motors. Therefore, the possibility that the units may be bearing its brand on account of the sales as opposed to the body building aspect cannot, in the absence of cogent evidence, be ruled out.
66. The Claimant also filed a bundle of documents dated 26th August 2022. The bundle contains data on units that have been produced and or serviced, their registration details and their owners. Some of the records have information regarding the dates of production and or servicing of the units while others



do not. Again, the Claimant produced this data as evidence of the fact that the Respondent continues in business particularly in the motor vehicle body building section.

67. The court was unable to accept this as evidence of production for a number of reasons. First, the data that bears details of production of the units shows that they were all produced before the redundancy process in 2021. Second, it is difficult to determine when the units without production dates were produced. Thus, it cannot be said that they were produced after the Respondent had declared the impugned redundancy. Fourth, the Respondent's witness stated that some of the information that was supplied related to servicing of vehicles as opposed to body building, activities that are handled by different departments of the Respondent.
68. Finally, the Respondent's witness stated that the units that are shown to have been produced in 2021 related to the period before the redundancy declaration and in any event fell far below the Respondent's optimum production capacity. According to the Respondent's witness, the data showed a fall in its production percentage for buses and minibuses to approximately 22% and 10% respectively.
69. The Claimant has also stated that the Respondent failed to provide it with relevant data to authenticate its claim that it was experiencing a downturn in business due to the effects of the Covid 19 pandemic. In its Statement of Claim, the Claimant first zeroed in on the Respondent's failure to supply it with the pre Covid 19 audited accounts. Later on during the trial, the Claimant expanded this complaint to cover data generally. This is despite the fact that at paragraph 13 of the Statement of Claim, the Claimant indicates that it had in its possession data that showed that the Respondent's business was operating profitably.
70. The court has declined to accept the Claimant's contention that it was not supplied with data because from the record, there is evidence that the Respondent wrote to the Claimant on 18th June 2021 sharing various correspondence from other business partners. These correspondences showed cancellation of business orders and spikes in material prices.
71. The Claimant has castigated the Respondent for supplying it with graphs and tables instead of raw data. Yet, the correspondence aforesaid constitutes raw data. The court cannot wish away the information in the correspondence that the Respondent shared with the Claimant on the basis that the Respondent ought to have provided additional data to further authenticate its claim. The law only obligates the Respondent to establish its claim on a balance of probabilities as opposed to beyond reasonable doubt. In my view, the data that the Respondent supplied the Claimant established on a balance of probabilities its claims of business cancellations and spikes in the prices of raw materials.

Determination

72. The upshot is that the court finds no merit in the Claimant's claim against the Respondent.
73. The court finds that the redundancy process was legitimately undertaken.
74. Consequently, the Claimant's case is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF NOVEMBER, 2023.

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent



ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

