REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE NO. 16 OF 2020

SHEILA KIPLANGAT ....CLAIMANT

VERSUS

UNLIVER TEA KENYA LIMITED............RESPONDENT

JUDGEMENT

1. The Claimant was employed by the Respondent on 6/8/2012 as a Supply Planning Assistant and on 4/7/2018 she was promoted to the position of Assistant Field Manager. She worked as such until 26/7/2019 when she was served with a letter terminating her services on account of redundancy. She was aggrieved by the termination and brought this suit on 8/6/2020 seeking the following reliefs: -

a) A declaration that her termination was unprocedural, unfair and discriminatory,a contravention of the basic requirements and good labour practice as guided by the Employment Act Cap 226, the Constitution of Kenya, 2010 and Rules of natural justice more specifically:-

i. The Respondent has no justification for declaring the claimant's position redundant as the position is still in existence and is now occupied by someone else.

ii. That the respondent's letter to the claimant was unprocedural as the same did not copy the labour office as required under section 40(1) (b).

iii. That there were no meetings between the Claimant and the respondent regarding the termination and the claimant had no prior knowledge before receipt of the letter.

b) That this Honourable court be pleased to order the respondent to pay the claimant compensation based on section 49 (I) (c) of the employment act.

c) That this Honourable court finds that the Respondent's actions were discriminatory against the claimant and order the Respondent to pay quantum for discrimination, a sum equivalent to 12 months gross salary.

2. The Respondent filed defence on 27/8/2020 admitting that it employed the claimant on 6/8/2012 as Supply Planning Assistant until 4/7/2018 when she was promoted to the position of Assistant Field Manager. It further admitted that it terminated claimant's employment on account of redundancy following a restructuring and change of strategy. However, it denied that the termination was unlawful and contended that it was done in compliance with law. It further averred that the claimant was paid all her terminal dues and signed a settlement agreement discharging it from any further claims.Therefore it prayed for the suit to be dismissed with costs.

3. The suit went to full hearing where other parties gave evidence and thereafter filed written submissions.

Evidence

4. The claimant testified as CW 1 and adopted her written statement and list of documents filed with the claim. In brief she reiterated that she joined the respondent on 6/8/2012 and worked until 26/7/2019, when she was informed that her position had become redundant and she was given a termination letter indicating the effective date as 31/8/2019.

5. She testified that the redundancy came as a surprise because apart from a memo dated 5/7/2019, which dealt only with the senior Managers (work level 2) no other communication, was served on herabout any intended redundancy.

6. On cross-examination, she admitted that she was paid her terminal dues after the redundancy.

7. Ms. Beatrice Bett, Respondents HR Manager testified as RW1 and also adopted her written statement and list of documents filed on 14/4/2021 as her evidence. In brief she statedthatthe respondent employed a new Chief Executive Officer (CEO) who brought a new a strategy leading to changed management structure and operations. As a result, some roles were changed as well as reporting lines changed.

8. The first change was at Management level 2 and communication was done by memo dated 5/7/2019. The said memo indicated that the rest of the impacted managers would be notified through their line managers at a later date. The claimant was thereafter laid off after her position was abolished in the new structure.

9. RW1 further stated that consultations had started in March 2019 and the termination took effect on 31/7/2019. She contended that the claimant was paid her termination dues and signed off clearance.

10. On cross examination RW1 admitted that the memo dated 5/7/2019 concernedsenior managers in Level 2 and promised that level 1 managerswould be contacted through their Line Managers. She also admitted that there was no other communication except the memo dated 5/7/2019. She further admitted that the Labour Office was not served with notice of the intended redundancy. However, she contended that the email dated 5.7.2019 covered Managers Level 1 as well, and it communicated the change of roles.

11. She also admitted that the position of Assistant Field Manager still exists in the company but it was no longer required in Kericho factory where the claimant was stationed under the new structure.

Submissions

12. The Claimant submitted that the process set out in section 40 of the Employment Act was not followed before terminating her employment on account of redundancy. She contended that service of a notice of the intended redundancy was not done on her and the arealabour officer. Consequently, she submitted that redundancy was unlawful for beaching section 40 of the employment Act and as such she is entitled to compensation under section 49 of the act.

13. For emphasis she relied on several cases including **Fredrick MulwaMutiso – V – Kenya Commercial Bank Ltd [2017] e KLR, Thomas De La Rue (K) Ltd –Vs David Opondo Omutelema [2013] and Margaret MumbiMwangi –V- Intra Health International [2017] e KLR**where the court discussed the procedure of a lawful redundancy under section 40 of the Act and especially service of notice on the employee and the labour office.

14. The Respondent, on the other hand, submitted that the redundancy was lawful both substantively and procedurally. It maintained that after undertaking organizational structure, the position of Assistant Field Manager Kericho, held by claimant was abolished and no alternative position was found for her in the new structure. It further contended that the memo dated 5/7/2019 was emailed to all the staff including

the claimant informing them of potential changes to its organizational structure with the aim of realizing optimal operations and improved financial results.

15. In view of the above matters the respondent submitted that the redundancy was justified. For emphasis, it relied on the case of **Carol AtienoOsweta –Vs- Kenya yungheng Plate Making Ltd [2013]e KLR** where the court held that the right of the employer to declare redundancyis well secured in law.

16. As regards the procedure followed, the respondent submitted that it complied with section 40 of the Employment Act byfirst, serving the claimant with the memo dated 5/7/2019 notifying him of intended restructuring and changes in the organizations structure. Thereafter it served her with letter dated 26/7/2019 notifying her of her redundancy effective 31/8/2019. Finally it paid all her terminal dues which she acknowledged by signing and discharging it from any further claims.

17. It further submitted that, selection process contemplated under section 40 (i) (c) of the Act did not apply in his case because the position of Assistant Field ManagerKericho Central Division no longer exists in the new structure.

Issues for determination

18. I have carefully considered the pleadings, evidence and submissions by both parties.There is no dispute that the parties were engaged in an employment relationship from 6/8/2012 to 26/7/2019 when it was terminated by the respondent on account of redundancy. The issues for determination are:-

a) Whether the redundancy was justified

b) Whether the procedure followed was in accordance with section 40 of the Employment Act.

c) Whether the reliefs sought are merited

Justification

19. The burden of justifying the reason for termination of employee's employment lies with the employer under section 47 (5) of the Employment Act. In this case the respondent contends that in 2019 it saw the need for changing its old strategy and organizational structure in order to realize optimal operation and financial improvement. As a result, some roles were merged and other abolished.

20. It further contends that one of the roles affected by the merger was the claimant's position of Assistant Filed ManagerKericho and it was abolished. According to the respondent, efforts were made to secure an alternative position for the claimant in the new structure but it was in vain. Consequently, according to the respondent, terminating the claimant's services on account of redundancy was justified.

21. The claimant maintains that her former position of Assistant Field Manager still exist in the respondent and another person has been appointed. However, no evidence to support that allegation was tendered. Consequently, I am satisfied that respondent has proved by evidence that the position of Assistant Field Manager in Kericho, held by the claimant has been abolished from the new organizational structure.

22. In my view an employer is entitled to make independent decision as to whether a position is necessary in his enterprise. Such decision is discretionary and amounts to a managerial prerogative which ought not to be interfered with unless the employee shows that the procedure followed was wrong or unfair. Consequently,I find and hold that the respondent has proved that the termination of the claimant's employment on account of redundancy was justified.

Procedure followed

23. RW1 admitted in evidence that the employer did not serve the mandatory notice of the intended redundancy on the labour officer. The said notice was also not served on the claimant, but a circular (Memo) dated 5/7/2019 to all staff members on the new organizational structure which affected the senior managers Level 2 only. The circular promised that line managers would contact the other employees on the new structure.

24. Evidently, no such communication was done until 26.7.2019 when the claimant was served with a termination notice after her goose had already been cooked. In the circumstances, I find that the procedure followed was not in accordance with the mandatory procedure set out in section 40 (1) (a) and (b) of the employment Act. The foregoing procedural mess denied the parties a chance to hold consultations which would possibly have prevented the redundancy or mitigated the consequences of the redundancy on the claimant.

25. I gather support from the **AddahAdhiamboObiero v ArdInc [2014] e KLR** that:

> ***"The Respondent has however failed to prove that the claimant and the Labour officer were notified of the reasons for and extent of the redundancy at least one month prior to the redundancy. The claimant and the Labour officer were notified on 20th January 2012 the very day the redundancy took effect.***
>
> ***To the extent that the claimant was not notified of the redundancy at least one month prior to the date of redundancy, I find that the claimant's redundancy was not in accordance with the procedure in the law and therefore amounted to unfair termination of her employment contract.***
>
> ***This however does not make the redundancy null and void. It only makes the claimant entitled to the remedies provided for in section 49 of the Employment Act. "***

Reliefs sought

26. Having found that the respondent has not proved that termination of the claimant's employment was done in accordance with the mandatory procedure under section 40 (1) (a) & (b) of the Employment Act, I make declaration that the termination was unfair discriminatory and unlawful.

27. The claimant prays for compensation for unfair termination under section 49(1) (c) of the Employment Act but the respondents contends that the claimant signed a settlement agreement in the form of a Discharge Voucher and as such she is disentitled to any further relief.

28. I seek guidance from the Court of Appeal decision in the case of **Thomas De La Rue,** *Supra,* that:

> ***"We would agree with the trail court that a discharge voucher per se does not absolve an employer from statutory obligation and that it cannot preclude the Industrials Court from enquiring into the fairness of a termination. That is however, as far we are prepared to go. The court has in each and every case to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge".***

29. I am further guided by the Court of Appeal decision in **Costal Bothers Limited –V – Kimathi Mithika [2018] e KLR** that:-

> ***"Whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim depends on the circumstances of each case.***
>
> ***A court faced with such an issue, in our view, should address its mind firstly upon the import of such a discharge/agreement; and secondly whether the same was voluntarily executed by the concerned parties"***

30. The court went on to state that:-

> ***"In our minds, it is clear that the parties had agreed that Payment of the amount stated in the settlement Agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondents' termination. It is instructive to note that the respondent never denial signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as adequate. As it stood, the agreement was a binding contract between the parties….***
>
> ***All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. ...Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant"***

31. In this case, the respondent pleaded in is defence that the claimant had signed a discharge voucher waiving any further claims against it after receiving the terminal dues paid. The claimant admitted in her testimony that she signed the said discharge voucher.She never protested that she did so through mistake, coercion, misrepresentation or undue influence from the employer.

32. In the circumstances of this case therefore, I am satisfied that the discharge voucher was signed voluntarily with full knowledge of all the material information and the import of the document. There was no vitiating factors when she signed the discharge voucher dated 29/7/2019 and as such it constituted a binding contract between the claimant and the respondent. She waived the right to any further claim from the employer and as such she is estopped from filing this suit against the employer to press for more reliefs under the terminated employment contract.

33. In the end I dismiss the suit as prayed by the respondent. However, I will not award costs to the employer because it violated the law while terminating the claimant's services.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF JANUARY, 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE