REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE NO. 18 OF 2020

RONALD KIPNGENO BII.....CLAIMANT

VERSUS

UNLIVER TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant was employed by the Respondent on 10/9/20185 as an Assistant Field Manager and the appointment was confirmed on 11/5/2019 after a diligent service during his probation period. Thereafter he worked until 29/7/2019 when he was served with a letter terminating his services on account of redundancy. He was aggrieved by the termination and brought this suit on 26/6/2020 seeking the following reliefs: -

a) A declaration that his dismissal from employment was unfair and wrongful.

b) Payment of Kshs.2,081,397.14 for unfair termination of employment.

c) General damages for discrimination.

d) Costs of the suit.

2. The Respondent filed defence on 27/8/2020 admitting that it employed the claimant on 31/8/2018 as an Assistant Field Manager and terminated his employment on account of redundancy by the letter dated 26.7.2019. It denied that the termination was unlawful and contended that it was justified by a valid reason and it was done in compliance with the applicable law after notifying the claimant about an intended organizational restructuring. It further averred that the claimant was paid all his terminal dues and voluntarily signed a settlement agreement discharging the employer from any further claims in relation to his employment contract. Therefore the respondent prayed for the suit to be dismissed with costs.

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

Claimant's case

4. The claimant testified as CW 1 and adopted her written statement dated 20.2.2020. In brief he reiterated the facts pleaded in the defence and added that termination of his employment on account of redundancy was malicious and unfair since there was no valid reason and no prior notice was served on him. He contended that there was no genuine redundancy because the position of Assistant Field Manager was not scrapped. He testified that another person by the name Mr. Too from another Estate took over the position.

5. He testified that his Estate had four division including Chebaswa, Lemon, Tapain and Sambret. His division was Lemon. He contended that he was the only Assistant Field Manager laid off and left two other colleagues appointed with him on the same day were never laid off. He was shocked by the dismissal coming just two months after confirmation of his appointment. In his view, the redundancy was discriminatory.

6. He contended that there was no fair selection of the persons for the lay off and there was no prior meeting with the management before the termination. He testified that he was just ambushed with a termination letter. Therefore he prayed for the reliefs set out in his Claim.

7. On cross-examination, he reiterated that he was employed on 10.9.2018 as an Assistant Field Manager. He reiterated that he was not aware of any redundancy process being undertaken and maintained that his position was not scrapped. He further stated that on 29.7.2019, he was called to a meeting alone where he was given a termination letter.

8. He admitted that he received communication dated 5.7.2019 as part of the management informing the employees about a restructuring

process but clarified that it was about management of senior cadre. It also clarified that the management level 1 would follow in due course but nothing of that was done.

9. He contended that he was the only Assistant Field Manager laid off though he was not last Assistant Field Manager to join the company. However, he did not produce any documents to prove that he was employed the time with the other three colleagues in the Estate. He also did not produce documents to prove that another person took his position. Finally, he stated that he heard that some other employees were also laid off.

10. On re-examination, he contended that the communication date 5.7.2019 only targeted the Management Level II only and he never received any other communication targeting Management Level I where he belonged. He maintained that on 29.7.2019, he met his line manager who just gave him the termination letter.

Respondent's case

11. Ms. Beatrice Bett, Respondents HR and Business Partner testified as RW1 and also adopted her written statement dated 30.9.2021 and 4documents annexed thereto as her evidence.

12. In brief she stated that the claimant received communication dated 5.7.2019 which was sent to all managers. She testified that there was change of strategy which affected the structure in operations leading to merger of roles. As a result there was redundancy not only of the claimant but other employees.

13. She further testified that there were consultations between the claimant and his Line Manager before the termination. She also testified that the claimant was paid his terminal dues and signed separation documents to confirm the said payment.

14. On cross examination RW1 admitted that the memo dated 5/7/2019 concerned senior managers in Level II and clarified that level 1 managers were to discuss with their Line Managers at personal level. She also admitted that there was no other communication after the memo dated 5/7/2019 and further that, the only meeting held between the claimant and his Line Manager was on the day he was served with the termination letter. She further admitted that the Labour Office was not served with notice of the intended redundancy as required by the law.

15. She contended that the claimant was the last to join the company compared to the other three Assistant Field Managers in their Estate. However she did not produce any records to prove the foregoing allegation. She admitted that there was no selection based on skill but the only person impacted by the merger. She further admitted that the claimant was not given any alternative job because most of the roles had been merged and there was no opportunity. She maintained that the redundancy was done in accordance with the respondent's Separation Policy.

16. On re-examination she contended that the claimant was was served with the first notice on 5.7.2019 and the second one dated 26.7.2019 which gave the effective date as 31.8.2019. She maintained that the claimant was selected because he was the last in and there was no alternative job due to mergers and mechanization. She also clarified that the redundancy was not performance based.

Submissions

17. The Claimant submitted that his redundancy was not done in compliance with the procedure set out in section 40 of the Employment Act and the company's Separation Policy. He contended that service of a notice of the intended redundancy was not done on him and the labour officer. Consequently, he submitted that redundancy was unlawful for beaching section 40 of the employment Act and as such he is entitled to compensation under section 49 of the act.

18. For emphasis she relied on several cases including **Fatma Ali Dabaso v First Community Bank Limited [2018] eKLR, Hesbon NgaruiyaWaigi v Equitorial Commercial Bank Limited {2013] eKLR,** and **Agnes Ongadi v Kenya Electricity Transmission Company Limited [2016] eKLR** where the courts discussed the process of a lawful redundancy.

19. The claimant submitted that he was the only Assistant Field Manager laid off leaving three others in the Estate some of whom were employed by the respondent on the same day. Therefore he urged that his redundancy was discriminatory.

20. 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 Lemeon Division, held by claimant fell off after merging of roles in the four divisions of the Estate. Further, the employer sought alternative position for the claimant but none was found for him in the new structure. It contended that the claimant has failed to prove that another person was appointed to replace him in same position he was holding before the layoff. Therefore it contended that the redundancy was not justified within the meaning of section 2 of the Employment Act.

21. As regards the procedure followed, the respondent 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. It maintained that between 5.7.2019 and 31.8.2019, there were consultative meetings between the claimant and his Line Manager. Consequently it submitted that the claimant was made aware of the intended restructuring and thereafter he was served with a notice of the intention to declare redundancy dated 26.7.2019 stating the reasons.

22. In view of the above matters the respondent submitted that the redundancy was justified and the claimant was given ample notice before the termination. Therefore it urged that the claimant has failed to discharge his burden of proving unfair termination under section 47(5) of

the Employment Act and as such he is not entitled to the reliefs sought.

23. For emphasis, it relied on the case of **Kenya Airways v Aviation Workers Union Kenya [2014] eKLR** where the Court of Appeal held that redundancy was justified so long as the employer genuinely believes that there exists a redundancy situation.

24. In the alternative, the respondent submitted that in the event the court finds that the claimant is entitled to relief, an award of one month salary in lieu of notice would be sufficient compensation. For emphasis, it cited the case of **Charles Nyamoanga v Action Aid International [2015] eKLR, Patrick Ombati v Credit Bank Limited [2016] eKLR**and **CMC Aviation Limited v Mohamed Noor [2015] eKLR**where the Court of Appeal set aside an award of 12 months' salary compensation and only awarded one month salary in lieu of notice.

Issues for determination

25. 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 18/8/2018 to 29/7/2019 when it was terminated by the respondent on account of redundancy vide the letter dated 26/7/2019. 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

26. The burden of justifying the reason for termination of employees employment lies with the employer under section 47 (5) of the 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.

27. It further contends that one of the roles affected by the merger was the claimant's position of Assistant Field Manager in the Lemion Estate. The Estate had 4 Assistant Field Managers but the claimant's division and his position were scrapped reducing the positions of Assistant Field Managers to 3. According to the respondent, efforts were made to secure an alternative position for the claimant in the new structure but it was all in vain. Consequently, according to the respondent, terminating the claimant's services on account of redundancy was justified.

28. The claimant maintains that his former positionof Assistant Field Manager still exist in the company and another person has been appointed. However, he did not substantiate that allegation by evidence. In fact I would say that Rw1 rebutted that allegation when she clarified that the restructuring of the Estate led to abolition of the Claimant's position in the Estate he was working. Consequently, I am satisfied that respondent has proved by evidence that the position of Assistant Field Manager, held by the claimant was abolished from the new organizational structure.

29. I have held before, and repeat here that, an employer is entitled to make independent decision as to whether or not 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.

30. I seek support from case of **Kenya Airways Ltd v Aviation Workers Union Kenya [2014]eKLR** where the Court of Appeal held that:

> ***"As long as the employer genuinely believed that there was existence of a redundancy situation, any termination was justified and it is not for the court to substitute its decision of what was reasonable. The court has no supervisory role."***

Procedure followed

31. 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 managers of Level 1 on the new structure.

32. Rw1 admitted that no communication was done to the claimant on his redundancy until 29.7.2019 when he was served with a termination notice dated 26.7.2019. 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.

33. I gather support from the **Addah Adhiambo Obiero 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 extentof 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

34. 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.

35. The claimant prays for compensation for unfair termination under section 49(I) (c) of the Employment Act but the respondents averred in that the claimant was paid all his terminal dues after the termination and he signed a settlement agreement in which he discharged the employer from any further claims related to his employment contract.

36. I seek guidance from the Court of Appeal decision in the case of **Thomas De La Rue v David Opondo Omutelema [2013] e KLR**,where it the Court held that:

"We would agree with the trial 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".

37. I am further guided by the Court of Appeal decision in **Costal Bothers Limited –V – KimathiMithika [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"

38. 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 denied 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"

39. In this case, the respondent pleaded in its defence that the claimant signed a discharge voucher voluntarily waiving any further claims against it. The claimant admitted in his testimony that he was paid his dues as set out in the termination letter. He never protested either in his pleadings or evidence that he did so through mistake, coercion, misrepresentation or undue influence from the employer.

40. 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 he signed the discharge voucher dated 29/7/2019 and as such it constituted a binding contract between the claimant and the respondent. He waived the right to any further claim from the employer and as such he is estopped from filing this suit against the employer to press for more reliefs under the terminated employment contract.

41. In conclusion,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 10TH DAY OF FEBRUARY, 2022.

ONESMUS N MAKAU

JUDGE

<u>Order</u>

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