



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO. 17 OF 2020

JARED ODHIAMBO ADANGA.....CLAIMANT

VERSUS

UNLIVER TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant was employed by the Respondent on 23/2/2015 as an Assistant Field Manager and worked as such until 26/7/2019 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 the dismissal of the claimant from employment was unfair and wrongful.
- b) Payment of Kshs.2,151,622 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 23/2/2015 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. 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 19.2.2020 and list of documents filed with the claim. In brief she reiterated that he joined the respondent on 23/2/2015 as an Assistant Field Manager. On 5.7.2019, the company sent out a communication informing employees of a restructuring that had been done in its plantations resulting into scrapping of Operational Manager roles, introduction of Estate Manager and factory Manager roles, and reduction of General Manager roles from three to two in Kericho.

5. He further stated that on 18.7.2019, there was the Managing Director's cascade (a gathering of management staff) where the MD said that the company was in the process of instituting structural changes that was likely to involve movement (transfer) of management staff. The Line Managers were therefore going to discuss with the Leadership team to see how the management staff were going to fit in the new management structure. However, there was an assurance that nobody was going to lose his job.

6. The claimant further stated that on the same his line Manager scheduled his mid- year performance appraisal on 20.7.2019 which was done and followed by a discussion about his mid-term and long-term career development plan in the company.

7. The claimant testified that on 27.7.2019, his Line Manager informed him via a phone call to go to the General Manager's office on Monday 29.7.2019 at 9.00 am to be informed about the restructuring that was on-going. He went to the said office and found the General Manager, his line Manager and the Operations manager. However, he was surprised to be served with a termination letter instead of a transfer letter or promotion letter like some other employees. The letter was to take effect on 31.8.2019. He felt intimidated because he was told to work well during the remaining one month because he would still go back for references.

8. He contended that his role was never removed from the structure as another person called Robert Twala was appointed to replace him and he handed over to him. Consequently, he contended further that he was a victim of discrimination. He also deemed that although, some roles were merged and others abolished during the restructuring process the managers concerned were never laid off but they were given new roles. He maintained that the respondent's separation policy was not followed in terminating his services.

9. He admitted that he was paid the terminal dues set out in the termination letter but he contended that he is entitled to the reliefs sought in his suit.

10. On cross-examination, he stated that he was an Assistant Manager in Charge of Tagabi Division. He reiterated that on 26.7.2019, he was told of a meeting scheduled on 29.7.2019 which was with respect to the restructuring communicated earlier. He admitted that he was given a letter terminating his services from 31.8.2019 on ground that his role had been abolished. However he denied that his position was abolished and maintained that the position of Assistant Division Manager was never abolished. He confirmed that other employees were also laid off after they were scrapped during the restructuring process.

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 list of documents filed on 4/10/2021 as her evidence.

12. In brief she stated that there was a cascade in March and June 2019 where the agenda was to update the employees on business performance and highlight structural changes.

13. She testified that the claimant's role was impacted after a merger of roles. She explained that the claimant's position of Assistant Division Manager in Chebanon Estate was merged with another division and his role fell off.

14. On cross examination RW1 admitted that the memo dated 5/7/2019 concerned senior managers in Level 2 and promised that level 1 managers would 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 as required by the law. She also admitted that the claimant was not given any other notice before the letter dated 26.7.2019.

15. He maintained that the Estate where the claimant was working had 4 divisions but they were merged into 3 and the claimant's division fell off. She admitted that the law requires that there be a fair selection if there are more than one officer involved in the redundancy but she contended that only the claimant was involved in the process after his role fell off. Finally, she contended that the termination letter dated 26.7.2019 was the second communication of the redundancy after the communication to all employees dated 5.7.2019.

Submissions

16. The Claimant submitted that his redundancy was just a mockery as the process set out in section 40 of the Employment Act was not followed before terminating his employment on account of redundancy. 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 breaching section 40 of the employment Act and as such he is entitled to compensation under section 49 of the act.

17. For emphasis she relied on several cases including **Fatma Ali Dabaso v First Community Bank Limited [2018] eKLR**, **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR**, **Francis Maina Kamau v Lee Construction [2014] eKLR**, **Communication Workers Union of Kenya (COWU) v Telkom (K) Limited [2016] eKLR** and **Agnes Ongadi v Kenya Electricity Transmission Company Limited [2016] eKLR** where the courts discussed the process of a lawful redundancy.

18. 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 Chebaom Division, held by claimant was abolished after merging the four divisions in the Estate to 3. Further, the employer sought alternative position for the claimant but none was found for him in the new structure. Therefore it contended that the redundancy was not justified within the meaning of section 2 of the Employment Act.

19. 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 further submitted that the claimant, on his own admission, confirmed that there was a cascade on 18.7.2019 where possible restructuring was discussed. 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.

20. 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.

21. 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.

22. 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

23. 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 23.2.2015 to 31/8/2019 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

24. 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 contended 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.

25. It further contends that one of the roles affected by the merger was the claimant's position of Assistant Division Manager Chebaom Estate. The Estate had 4 Assistant Division Managers but the claimant's division and his position were scrapped reducing the positions of Assistant Division 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.

26. The claimant maintains that her former position of Assistant Division 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 Claimants Division and also his position. Consequently, I am satisfied that respondent has proved by evidence that the position of Assistant Division Manager, held by the claimant was been abolished from the new organizational structure.

27. 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.

28. 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

29. 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. On 18.7.2019 there was a cascade where the intended restructuring was discussed but the restructuring concerned senior managers only. 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.

30. I gather support from the **Addah Adhiambo Obiero v ArdInc [2014] eKLR** 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

31. 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.

32. 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.

33. I seek guidance from the Court of Appeal decision in the case of **Thomas De La Rue case**, 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 Industrial 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”.

34. 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”

35. The court went on to state that:-

“In our minds, it is clear in our mind 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”

36. 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 all his dues as set out in the termination letter. He never protested that she did so through mistake, coercion, misrepresentation or undue influence from the employer.

37. 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. 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.

38. 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 3RD DAY OF FEBRUARY, 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 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.

ONESMUS N. MAKAU

JUDGE