Kenya Universities Staff Union v Kisii University (Cause E009 of 2020) [2022] KEELRC 9 (KLR) (4 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 9 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E009 OF 2020

S RADIDO, J

MAY 4, 2022

BETWEEN

KENYA UNIVERSITIES STAFF UNION ..... CLAIMANT

AND

KISII UNIVERSITY ..... RESPONDENT

JUDGMENT

1. The Kenya Universities Staff Union (the Union) and Kisii University (the University) entered into a recognition agreement on or around 19 March 2010.
2. The parties thereafter signed collective bargaining agreements.
3. On or around 30 September 2020, the University sent a 1-month redundancy notice to the Union's Kisii chapter Secretary in respect of some 204 employees.
4. The next day, the University sent redundancy notices to some select employees.
5. The Union considered the redundancy notice(s) unlawful, and on 9 October 2020, it moved to the Court, and it stated the Issues in Dispute as:
   (a) Unlawful, unfair and wrongful declaration of redundancy.
   (b) Violation and breach of fundamental constitutional right to fair labour relations.
6. Filed together with the Cause was a Motion under a certificate of urgency.
7. The Court certified the Motion urgent and directed the Union to serve it and further that responses and submissions be filed and exchanged.
8. However, on 13 October 2020, the Union filed a second application requesting that the initial application be heard on a priority basis.

9. The Court reviewed the earlier directions and directed the Union to serve the application ahead of hearing of the initial application on 21 October 2020.

10. On 21 October 2020, the Court, upon being informed of a pending Petition No. 2 of 2020 also challenging the redundancy ordered that all Causes and Petitions challenging the redundancies at the University be consolidated.

11. The Court also issued an injunctive order stopping the redundancies from being implemented and further that the files be placed before this Court for inter-partes hearing on 3 November 2020.

12. When the parties appeared before this Court on 3 November 2020, it extended the injunctive order(s) and directed that the Cause proceeds to hearing. The Court gave other directions and set mention on 19 November 2020 to confirm compliance.

13. The Union filed a further affidavit on 16 November 2020.

14. When the parties appeared on 19 November 2020, they informed the Court that they had engaged a Conciliator.

15. They also informed the Court that they had not yet agreed on the Issues in contention.

16. The Court directed the parties to file the Agreed Issues before 24 November 2020.

17. On 24 November 2020, the Court granted leave to the parties to file and exchange further documents ahead of the hearing on 9 March 2021.

18. On 16 December 2020, the Union filed a third application. It sought to cite the University for contempt of the injunctive orders.

19. Pursuant to directions by the Court, the University filed an affidavit in reply to the contempt application on 4 February 2021, and the Union filed a further affidavit on 15 February 2021 (the Union had filed further supplementary documents on 8 February 2021).

20. The University filed Supplementary documents on 8 March 2021, and the hearing commenced on 9 March 2021 and was adjourned to 6 May 2021.

21. On 16 March 2021, the Union filed a Notice to Produce directed to the University (the University responded to the Notice on 5 May 2021).

22. On 1 April 2021, the Union filed a fourth application, seeking leave to file further documents and the University responded to the application on 30 April 2021.

23. When the Cause was called for hearing on 6 May 2021, the parties informed the Court that they had agreed by consent that all documents be allowed, and the hearing resumed.

24. The hearing continued on 24 May 2021, 7 December 2021, 9 December 2021 and 14 February 2022 when the Court reserved judgment to today.

25. The Union filed its submissions on 3 March 2022 and the University on 20 April 2022.

26. The Issues as discerned by the Union in its submissions were:

    i. Whether the reasons cited in the Respondent's redundancy notice dated 30th September 2020 were legitimate reasons for the declaration of the redundancy of the members of the Claimant union?

ii. Whether the procedure employed before, during and after the redundancy exercise was in tandem with the collective bargaining agreement, *the Constitution* of Kenya, 2010, the *Employment Act, 2007* and best international practices in labour relations?

iii. Whether the Claimant should be granted the prayers sought?

27. The University set out 3 Issues for adjudication:

i. Whether the redundancy was justified?

ii. Whether due process was adhered to?

iii. Whether the reliefs sought in the Claim before the Court should be granted?

28. The Court has considered the pleadings, evidence, and submissions.

Unfair termination through redundancy

The process of redundancy

29. The Union asserted that the University got the process wrong because it (the Union) was not consulted, the selection criteria set out in section 40(1)(c) of the *Employment Act, 2007* was not considered, the notice period was less than 30-days as envisaged in law, the local Labour officer was not notified, the redundancy notices were signed by a person not authorised to practice as a human resource officer by the *Human Resource Management Professionals Act, 2012* and that the Council had not approved the declaration of redundancies.

30. The University contended that it complied with all the required processes. It asserted that the Council resolved to have the management carry out redundancies through a resolution made on 26 August 2019, a copy of the redundancy notice was served upon the local Labour Officer, the University scheme of service allowed the Registrar to sign the redundancy notice(s) despite not being a licensed human resource practitioner at the material time, the Union frustrated consultations since it rushed to Court instead of giving consultations a chance immediately upon being served with the notice and that consultations could only be triggered upon the notice.

31. The University further asserted that the selection criteria of last in first out was not the only determining criteria in effecting redundancies and that in the instant case, the enterprise resource planning system it had embraced made the need for employees performing clerical duties superfluous.

32. The process of redundancy is regulated by section 40 of the *Employment Act, 2007*.

33. The section has been the subject of determinative interpretations by the Court of Appeal.

34. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, the Court stated:

> It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational

reason why the employee who is not a member of a union should be entitled to a shorter notice.

35. In *Cargill Kenya Ltd v Mwaka & 3 ors* [2021] KECA 115, the Court of Appeal discussed in detail the implication of the notice required by section 40(1)(a) & (b) of the *Employment Act, 2007* and opined:

> While the requirement of consultation was not expressly provided in section 40 of the *Employment Act*, that requirement was implied, as the main reason and rationale for giving the notices in section 40(1)(a) and (b) to the unions and employees of an impending redundancy. Section 40(1) of the Act did not expressly state the purpose of the notice. Although it also did not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy was made, the requirement for consultation was provided for in the Kenyan law and implicit in the *Employment Act* itself.
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> By dint of Article 2(6) of *the Constitution*, the treaties and conventions ratified by Kenya were part of the law of Kenya. Kenya was a State party to the *International Labour Organization* (ILO), which it joined in 1964 and was bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982-required consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy.
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> In interpreting statutes, the courts had the function of filling in the textual detail by implication, which arose either because it was directly suggested by the words expressed, or because they were indirectly suggested by rules or principles of law which were not excluded by the express wording of a statute. Consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees was implied by section 40(1)(a) and (b) of the *Employment Act*.
>
> Consultation was also specifically required by Article 47 of *the Constitution* and section 4(3) of the *Fair Administrative Action Act*. An administrative action was defined under the *Fair Administrative Action Act* to include any act, omission or decision of any person, body or authority that affected the legal rights or interests of any person to whom such action related. Employers fell within the category of persons whose action, omission or decision affected the legal rights or interests of employees, and more so the redundancy by the appellant in the instant appeal was not contested. The appellant was therefore also bound by the provisions on consultation required by article 47 and section 4(3) of the *Fair Administrative Action Act*.
>
> The purpose of the notice under Section 40(1)(a) and (b) of the *Employment Act*, as was 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 were 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 was unavoidable. That meant that if parties put their heads together, chances were that they could avert or at least minimize the terminations resulting from the employers proposed redundancy. If redundancy was inevitable, measures should have been taken to ensure that as little hardship as possible was caused to the affected employees.

36. The University produced an extract of a delivery book to show that the redundancy notice(s) was served upon the Union and the local Labour officer on the same day.

37. The Union's contention that the Labour Officer was not served is not correct.

38. The Union also took the position that the notice period was not adequate since the affected employees were instructed to proceed on accrued leave immediately.

39. In the Court's view, so long as the employees were still considered to be employees until effective date of termination of employment through redundancy, there was nothing unlawful on the leave.

40. The next question is whether the Council as the employer gave its seal of approval, either in advance or afterwards to the redundancies.

41. The Council met on 26 August 2019 and resolved that deliberate steps be taken to reduce the wage bill.

42. Despite being the employer, the *Universities Act* and instruments of the University have placed upon the management the role of implementation of policy guidelines issued by the Council.

43. The Court is satisfied that the redundancy was based upon a policy decision of the Council and was left to the management of the university to implement.

44. On the question of selection criteria, the University's testimony that the implementation of an enterprise resource planning system with a view to reducing expenditure led to nearly all clerical jobs being superfluous was not controverted by the Union and considering this peculiar circumstance, the Court would agree with the University that the last in first out formula was not the most appropriate or dominant consideration.

45. The Court is of the view that the question of the practice status of the Registrar who signed the redundancy notice(s) should not be determinative of the procedural fairness of the redundancies or the validity of the redundancies since position of Registrar is entrenched in the university system.

46. The Court will now consider the question of the elephant in the room, consultations.

47. The redundancy notice sent to the Union named the employees whose positions stood to be terminated on account of redundancy after the lapse of 30-days.

48. The University was informing the Union of a fait accompli (decision).

49. The decision by the University thus did not give an opportunity to the Union to engage with a view to minimising or mitigating the adverse effects of the redundancies.

50. The notice(s) sent out by the University did not allow room for genuine and meaningful consultations since such genuine and meaningful consultations can only be carried out during the formative stages of the redundancy process. The consultations should be in the formative stages of the process because section 40(1)(a) talks of notification of intended redundancy.

51. The notice(s) also fell short of what is envisaged under *International Labour Organisation Convention No. 158*, *Termination of Employment Convention*.

52. The University had the intention or plan to outsource some of its functions. Genuine and meaningful consultations may have included discussions with the potential outsourcing entities about absorbing the employees whose positions were declared redundant.

53. The University should have in the first instance engaged the Union in consultations before making a decision that the contracts of specific employees would stand terminated.

54. The Court is satisfied that the University's decision signalled through the notice of 30 September 2020 did not meet the threshold contemplated by section 40(1) of the *Employment Act, 2007* on genuine consultations and was thus unlawful and unfair.

Substantive justification

55. Termination of employment through redundancy is also subject to the substantive justification envisaged by sections 43 and 45 of the *Employment Act, 2007*.

56. The primary reason given by the University for the declaration of redundancies was the need to reduce the wage will in line with the decline or end of module II programmes in public universities across the country.

57. The University produced reports, including from the Auditor-General. The Court has no reason nor did the Union produce any cogent reason for the Court to dismiss or disregard the reports on the financial status of the University.

58. The Court finds that the University had valid and fair reasons for the declaration of redundancies.

Contempt application

59. On 21 October 2020, Nduma J granted an injunction staying the termination through redundancy of the 204 employees. On the basis of that interdict, the Court sustained the contracts of these employees pending the determination of the Cause and therefore they were entitled to all benefits accruing to them from their respective contracts.

60. The Union alleged contempt mainly on the ground that the University had stopped paying the 204 employees the remuneration they were entitled to.

61. The University admitted that because of the Court order, the 204 persons were still in employment.

62. Consequently, in this Court's view, a declaration and order that the 204 employees are entitled to and be paid the entitlements up to the date of this judgment would address the contempt concerns.

Appropriate remedies

63. One of the primary remedies where a Court finds unfair termination of employment is an award of compensation. The factors the Court should consider are outlined in section 49(4) of the *Employment Act, 2007*.

64. The schedule of the employees whose positions were declared redundant indicate the length of service ranged from 1991 at the earliest to 2018.

65. Further, the circumstances of separation were a fait accompli from the side of the University.

66. In consideration of these factors, the Court is of the view that the equivalent of 7-months gross wages for each of the employees calculated using the gross wages for September 2020 would be appropriate.

Certificate of Service

67. A certificate of service is a statutory entitlement, and the University should issue one to each of the 204 employees within 21-days.

Terminal benefits

68. The University did not compute or indicate the terminal benefits due to each of the 204 employees.

69. Section 40(1)(d)(e)(f) & (g) of the *Employment Act, 2007* has set out the terminal benefits due to an employee whose contract has been terminated on account of redundancy.

70. The University should compute and pay the terminal benefits.

Conclusion and orders

71. From the foregoing, the Court finds and declares:

    a. The Respondents unfairly, wrongfully, and unlawfully declared the positions of the 204 members of the Union redundant.

    b. The 204 employees' contracts were sustained by the injunctive order issued on 21 October 2020 pending determination of the Cause and thus they were entitled to benefits accruing under the respective contracts.

72. The Court orders:

    (a) The Respondent to pay each of the 204 employees whose positions were declared redundant the equivalent of 7-months gross wages as compensation.

    (b) The Respondent to compute and file with the Court within 30-days, a schedule of the terminal benefits due to each of the 204 employees in terms of paragraph 70 above.

    (c) The Respondent to pay the dues in (b) above within 60-days.

    (d) The Respondent to pay the 204 employees declared redundant remuneration up to the date of this judgment if the same were not paid when falling due.

    (e) The Respondent to issue certificates of service to each of 204 employees within 21-days from today.

73. The awards in 72 (a), (b) & (c) to attract interest at court rates from the 7 June 2022 until payment in full.

74. The parties are in an on-going social partnership and each party is ordered to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 4TH DAY OF MAY, 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Onyony & Co. Advocates

For Respondents Nyamurongi & Co. Advocates

Court Assistant Chrispo Aura