



Kenya Chemical Workers Union v Reliance Plastics Limited (Cause 76 of 2019) [2022] KEELRC 1314 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1314 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 76 OF 2019
HS WASILWA, J
JULY 26, 2022**

BETWEEN
KENYA CHEMICAL WORKERS UNION CLAIMANT
AND
RELIANCE PLASTICS LIMITED RESPONDENT

JUDGMENT

1. This Judgment is in respect to the report by the County Labour Officer made on the May 18, 2022. This report was filed pursuant to directions of this Court issued on the July 28, 2021 for the issues raised in this case to be subjected to conciliation with the assistance of the County Labour Office and for the labour officer to write a report thereafter.
2. The issues that were identified for determination by the Labour Officer were as follows;
 - a) Declaring nineteen (19) employees of the company redundant and refusal to negotiate Collective Bargaining Agreement proposals sent to the company on the February 1, 2019 on terms and conditions of service of employees of the company.
 - b) Changing terms of service of company employees to contract basis.
3. Three meeting were convened at the county Labour offices and a report for the purposes of resolving the issues identified above.
4. The basis upon which this dispute arose, according to the union, is that the union recruited a simple majority of the unionisable employees at the respondent's employ sometimes in March, 2015 and send recognition agreement and check off forms duly signed by the union for the company to sign and implement the deduction of union dues. The Union did not receive any response for about three months from the company forcing it to report a trade dispute to the Ministry of Labour on the June 10, 2015. The issue was further brought before the court that issued an Order on the December 2, 2016



compelling the company to sign the recognition agreement. The company then took about 2 years to sign the said agreement on November 20, 2018, despite being served with the court order.

5. After the recognition agreement was signed, the union send a copy of the CBA to the company on the 1st February, 2019 for their consideration and counter proposal. The said CBA was received by the company on the February 20, 2019 and they even promised to consider the same and sent their proposals. A meeting was proposed for March 19, 2019, which respondent proposed the same be held at their premises, however nothing was discussed in the meeting as the company requested for more time to consult its directors and internal relations experts and come up with counter proposals. The parties however agreed to have FKE follow up on the issue. Efforts by FKE were however frustrated by the company and the conciliation meetings were never conducted.
6. While the CBA was pending for negotiation, the Union noted that the respondent was underpaying its employees and wrote a letter dated 31st May, 2019 raising it concerns and seeking for it to be rectified as they gear towards negotiation of the CBA. Eight months down the line the company refused to negotiate the CBA, citing for the Union's decision to report a trade dispute on the September 25, 2019. A conciliator was appointed on the October 22, 2019. Before the conciliation meeting was held, the company declared its employees redundant and this cause was filed to avert the decision of the Company.
7. It is the Union's averments that the offices that were declared redundant were not abolished, rather that the respondent gave an outsourcing company (Volt management services) work to fill the said vacancies, all in efforts to defeat the CBA negotiation and evade payment of the underpayments concern raised by the Union. The union in conclusion prayed for the reinstatement of the Union dues deductions for all unionisable employees and for the union to commence negotiation on the CBA having signed a recognition agreement.
8. The company on the other hand states that it has not refused to negotiate the CBA rather that they no longer had any employee at its company after they were all declared redundant in accordance with the law. It is stated that the CBA negotiations were overtaken by events after the employees left employment and to order for negotiation would be an exercise in futility as its enforceability is impossible and not practical in light of the fact that they do not have any employees in their payroll.
9. The Labour officer after hearing the parties made the following findings;
 - i. That both parties signed a recognition agreement.
 - ii. That the company outsourced labour services from Volt Management services and declared the employees redundant while the matter was still pending for CBA negotiations and determination by the conciliator.
 - iii. That the same employees who were declared redundant are the same ones who are now working for the company under the Volt management outsourcing company as such no position was abolished defeating the definition of redundancy.
 - iv. The purpose of outsourcing labour was to defeat the CBA negotiations. Also that there was enormous underpayment of the employees and their contract terms had changed.
 - v. The company was not truthful when they alleged they lacked HR expertise leading to the outsourcing when they had been in existence since 2012.
 - vi. In the redundancy process, the employees were not duly compensated as per the law.
10. The Labour officer then made the following recommendations;-



- a) That the affected employees who were declared redundant and their positions not abolished were unfairly terminated and thereafter they should be compensated as per section 49(c) of the Employment Act, 2007 on top of redundancy benefits already paid.
 - b) The resulting arrears of underpayment of wages be effected accordingly for the period each and every one was underpaid contrary to the *Regulations of wages (General) (Amendment) order* for the relevant period worked.
 - c. The respondent be compelled to negotiate a CBA with the claimant
11. This report was filed in court on the May 19, 2022 as directed by this court. The parties were further directed to file submissions on the said report which claimant filed on the June 14, 2022 and the respondent filed on the June 20, 2022.

Claimant's Submissions

12. The claimant submitted in total agreement with the report of the labour officer herein and urged this court to compel the respondent to implement the said recommendation by the labour officer and any other direction that the court will give.

Respondent's Submissions.

13. The respondent on the other hand submitted on several issue being; whether the redundancy was done in accordance with the law and the employees duly paid, whether the grievants were terminated unfairly, whether there is any case of underpayment, whether the CBA negotiation have been overtaken by events and whether the respondent is entitled to costs.
14. The first and second issue were submitted together. It was argued that the respondent declared its employees redundant in accordance with section 40 of the Employment Act and finalized the process in the year 2019. In support of his case, the respondent relied on the case of Kenya Union of Commercial Food and Allied Workers v Agricultural Society of Kenya [2017] eklr and the case of Kenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited [2015] eklr where the court emphasized the need to follow the provisions of section 40 of the Employment Act in declaring employees redundant.
15. Similarly, that the respondent issued the notices dated September 30, 2019 to the Labour officer, the union representatives and the employees at large. It is submitted that the union was aware of the redundancy process and did not stop the same and only filed this suit after the completion of the process. It was argued that there was an order by the court that stopped the respondent from declaring its employees redundant, and in fact that there were no negotiation going on between the respondent and the union to allege frustration.
16. The respondent took issue with the report of the Labour officer, when it claimed that the reason for redundancy was due to lack of HR expertise, and submitted that the actual reason for declaring its employees redundant was due to financial constraints. It is argued that the employees who were affected by the redundancy were paid in accordance with the wage order prevailing at the time in the year 2019.
17. It is the respondent's submissions that redundancy affected all employees across board and not only the claimant's members as alleged. After the redundancy, the respondent company was shut down to enable it restructure and reorganize itself. The company then reopened in January, 2020 and now outsourced labour. He thus argued that the termination of the employees was not unfair as alleged by the labour officer in the report.



18. On the issue of underpayment, it was argued that the employees of the respondent were paid in accordance with the wage order subsisting at the time and the argument by the Labour officer of underpayment is based on 2020 *General wages (Amendment) Order* and not the one for 2019 that was relevant at the time. It was further argued that the claim of underpayment was not particularized to warrant any orders of the court. In this they relied on the case of *Peter Ngunjiri Kariuki v Management Magomano Secondary school* [2022] eKLR where the court insisted on the need to particularize a claim and support the same with evidence.
19. On the CBA Negotiation, it was submitted that the Union have never provided a copy of the draft CBA or requested for the same to be negotiated as alleged. Therefore, that it was impossible to negotiate on a CBA whose draft was never forwarded to them. In any event that the same has now been overtaken by events when the respondent's employees were declared redundant and the ones working at its company have been outsourced and are managed by Volt management services.
20. It is the respondent's contention that, if the said orders are issued it would be impractical to implement them. He added that courts do not issue orders in vain. To support this argument, the respondent relied on the case of *Anita Chelangat & 2 others v Fredrick Kwame Kumah & 2 others* [2015] eKLR and the case of *Republic v Attorney General and another Ex parte Ongata Works Limited* [2016] eKLR.
21. In conclusion the respondent submitted that it followed due process in declaring its employee redundant and that it does not have any employee on its payroll as such the orders sought would not be enforceable. Further that the respondent employees were paid in accordance with the regulation of wages order subsisting at the time as such the underpayment was not proved.
22. The respondent prayed for the claim to be dismissed with costs as per their statement of defence dated January 15, 2020.
23. I have examined the submissions of the parties herein in relation to the Labour officer's report dated 18th May, 2022.
24. The issues identified by the Labour Officer were;
 1. Whether the redundancy was done properly.
 2. Whether the refusal to negotiate the CBA was proper.
 3. Whether the employees were underpaid.
25. In relation to the 1st issue, I note that the Labour officer indicates that the redundancy was unfairly done.
26. I note that the claimants were declared redundant vide letters dated October 15, 2019 which indicated that the redundancy will be effective 15/11/2019.
27. In terms of section 40 of the *Employment Act* 2007, I note the notice period given was adequate and the employees were to be paid all leave due if any, notice pay and severance pay at the rate of 15 days for each year worked.
28. My finding therefore is that the redundancy was properly done if at all.
29. The second issue is that the respondents changed terms of the contract of all the employees when they decided to declare them redundant.
30. It is true that the employees after being given the notice of the redundancy were now employed by Volt Management Services Ltd on contract terms to work for the respondents herein.



31. As noted by the Labour officer the respondent outsourced its services to Volt Management Services who took over the respondents employees as theirs but the said employees continued to work for the respondent.
32. This shows that there was basically no redundancy situation since the respondents continued being served by the same employees but whose “employer” changed in principle.
33. As observed by the Labour officer, the aim of declaring the employees redundant when there was actually no redundancy situation was to evade the CBA negotiations which the respondents succeeded in doing.
34. There is also no evidence that the employees were then paid as per the redundancy notice.
35. That notwithstanding, I have considered the memorandum of claim and i note that the only remedy the claimants sought was to prohibit the respondents from declaring their employees redundant and not change the terms of contract which prayers have been overtaken by events.
36. The other prayer was to have the CBA negotiated to the end which I find is a viable prayer so long as the claimants have the requisite number of employees as their members.
37. It is therefore my finding that the claim as pleaded is now overtaken by events and there are no orders to be granted.
38. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 26TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gwako for Claimant – present

Otieno holding brief for Ondego for respondent – present

Court Assistant - Fred

