Kenya Union of Commercial Food and Allied WorkersKenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited (Cause 49 of 2020) [2022] KEELRC 13477 (KLR) (21 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13477 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE 49 OF 2020

NJ ABUODHA, J

NOVEMBER 21, 2022

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... CLAIMANT

AND

TUSKER MATTRESSES LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant is a trade union registered as such under the laws of Kenya with the objective of advocating for the rights of commercial sector employees, within the Republic of Kenya.

2. The respondent is a limited company registered under the Companies Act and engages in supermarket business within the Republic of Kenya.

3. The parties in this dispute do have a valid recognition agreement signed and dated April 26, 2017 setting out the terms of engagement between the parties on behalf of unionisable employees.

4. The parties, in pursuance of the said recognition agreement, do have a collective bargaining agreement which came into effect on May 1, 2017 for a two year duration and is registered.

5. It is the claimant's case that on October 15, 2020, the respondent notified the Ministry of Labour and the claimant of their intention to declare about thirteen (13) unionisable employees redundant for the reasons that they plan to close their bakery department and transfer it to a third party on the grounds that the business was no longer economical to run due to the reduction in profit margin, Covid 19 factors and market competition level.

6. According to the claimant, the parties met on November 12, 2020 where the union made proposals to resolve the issue which the respondent did not consider and that the claimant pleaded with the

respondent to transfer the targeted employees to other departments within the shop or to other branches all in vain.

7. Vide a memorandum of claim dated November 13, 2020, the claimant sought the following orders;

   i. A declaration that the respondent did not serve the claimant with the requisite notice under clause 24 of the collective bargaining agreement and under section 40 of the *Employment Act*, 2007

   ii. An order directing the respondent to redeploy the targeted unionisable employees to serve at other existing branches or transfer them to other departments within the shops

   iii. An order that the respondents action is unlawful, wrongful and unfair to the targeted employees

   iv. A declaration that it is unlawful to discriminate on permanent employees by sacking them to create room for outsourced labour

   v. An order for compensation in the circumstances

   vi. Any other relief the court deems fit to grant in the circumstances to meet the ends of justice

   vii. Costs of the suit to be granted to the claimant

8. The respondent filed its reply to memorandum of claim on November 19, 2020 and maintained that sometimes in October 2020, the respondent made a decision to close down the bakery department since it had become uneconomical to run.

9. It was the respondent's contention that soon thereafter, the respondent was approached by an interested party by the name of Pemawa Services Limited (new employer) who agreed to run the bakery department and take over the labour force at the bakery department.

10. It was the respondent's contention that it agreed with the new employer that for the good order and to ensure smooth transition and running of the bakery department, the respondent would inform its employees of the changes ahead and pay them all their final dues to enable the new employer to commence on a clean slate in all aspects.

11. According to the respondent, on October 15, 2020, it issued a notice of intention to carry out redundancy to the County Labour Officer, Kitale and the claimant herein.

12. That on November 5, 2020, the respondent received a letter from the claimant whereby it proposed for a meeting to be held on November 12, 2020. It was stated that the meeting was held on the said date where it was agreed that the respondent should proceed to compute the final dues of the affected employees and ensure that all employees are handed over to the new employer.

13. The respondent maintained that it paid the final dues to the affected employees on November 14, 2020 and they duly signed an acknowledgement of receipt of final dues form and as agreed in the meeting on November 12, 2020 , the respondent proceeded to hand over the bakery department to the new employer together with the affected employees save for 6 employees who declined to work for the new employer.

14. According to the respondent, the redundancy process was concluded amicably and the claimant fully participated in the process.

15. The respondents averred that the actions and the redundancy process was properly guided by clause 24 of the collective bargaining agreement and it adhered to the computation of the final dues as stipulated under the said clause.

16. It was thus averred that the claimant is not entitled to the reliefs sought.

17. On June 6, 2022, the court directed parties to file written submissions. The claimant filed its submissions on June 28, 2022 whereas the respondent filed its submissions on July 13, 2022.

18. The claimant in its submissions has maintained that the notice dated October 15, 2020 was served upon the claimant on November 4, 2020, only 11 days to the lapse of the redundancy notice.

19. According to the claimant, this went against clause 24(a) of the parties collective bargaining agreement and section 40(1)(a) of the *Employment Act*.

20. The claimant further submitted that the redundancy notice stated clearly that the employee's services would be transferred to an outsourced company who is described as a partner and that it is the said outsourced company which provide labour to the respondent in all other departments and what the respondent did was to terminate the services of its regular employees hiding behind redundancies to create room for outsourced labour. This according to the claimant amounted to discrimination in its worst form.

21. It was the claimant's submission that the respondent did not observe procedural fairness under section 41 of the *Employment Act*, 2007 as there is no evidence that they ever approached the grievants and discussed their intention to declare redundancies before issuing them with the redundancy notices.

22. In conclusion the claimant urged this court to find merit in its claim and allow it in terms of the reliefs sought therein.

23. The respondent on the other hand submitted that due process was followed in the manner and that the claimant fully participated from the onset upon being issued with the redundancy notice.

24. It was further submitted that there was no loss of employment for the affected employees since all of them were given a chance to work with the new employer and those who opted to comply, were still working. According to the respondent, it acted in good faith to protect loss of employment.

25. In conclusion the respondent argued that the interest of justice tilted in its favour as it acted in good faith throughout the redundancy process. This court was thus urged to dismiss the claim with costs.

Determination

26. The court has carefully considered the pleadings filed by the parties, the evidence on record and the submissions of the parties an finds that the two main issues for determination to be;

    i. Whether the termination of the 13 employees on account of redundancy amounts to unfair termination.

    ii. Whether the claimant is entitled to the prayers sought.

27. Section 2 of the *Employment Act* define redundancy as;

> " Loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer, where the

services of the employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

28. Section 40 of the *Employment Act 2007* provides for the procedure to be complied with in event termination of employee on account of redundancy as follows: -

> "40 (1) An employer shall not terminate a contract of service on amount of redundancy unless the employer complies with the following conditions:-
>
> (a) Where the employee is a member of a trade union, the employer notifies the Union which the employee is a member and the Labour Officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of intended date of termination on amount of redundancy .
>
> (b) Where an employee is not a member of a trade union the employer notifies the employee personally in writing and the labour officer.
>
> (c) The employer has in the selection of employees to be declared redundant had due regard to seniority in him and to the still, ability and reliability of each employee of the particular class of employees affected by the redundancy,
>
> (d) Where there is an existence of a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union .
>
> (e) The employer has where leave dis due to an employee who is declared redundant paid off the leave in cash.

29. The respondent and the claimant (Union) entered into CBA (exhibit 2) which came into force on May 1, 2017 . The terms of the said CBA as per clause 24 provided as follows;

a. The company shall give notice one month prior to taking action, inform the union of the intended redundancy, giving reasons for and the extent of such redundancy;

b. The company shall adopt the principles of “last in first out” provided that due regard is given to seniority, time, ability and reliability

c. Any leave due to an employee shall be paid in cash,

d. The redundant employee(s) shall be entitled to notice of pay in lieu of such notice as provided for in the *Labour Relations Act,2007*

e. An employee declared redundant shall be entitled to severance pay at the rate of 17 days’ pay for each completed year of service as provided for in clause 21 of the agreement.

30. In this case, on the October 15, 2020, the respondent issued a notice of intention to declare thirteen (13) unionisable employees redundant to the County Labour Officer, Kitale and the claimant herein, on the grounds that that they planned to close their bakery department and transfer it to a new company, known as Pemawa Services Limited who had said would run the bakery department and take over the labour force at the bakery department.

31. It was submitted that a meeting was held on November 12, 2020 between the respondent and the claimant where the parties herein agreed that the respondent should proceed to compute the final dues of the affected employees and ensure that all employees are handed over to the new employer.

32. Consequently, on November 14, 2020, the respondent from the evidence on record, paid the final dues to the affected employees.

33. The claimant on the other hand has maintained that in the November 12, 2020 meeting the union made proposals to resolve the issue by having the affected employees transferred to other departments within the shop or to other branches but the respondent failed to consider this proposal. According to the claimant, the respondent unlawfully discriminated on permanent employees by sacking them to create room for outsourced labour. However, no evidence was tabled before court to prove this allegation.

34. It is worth noting that an employer cannot be denied its right to declare an employee redundant. What section 40(1) of the *Employment Act ,2007* envisages is that the law must be followed.

35. The court has analysed the redundancy notices issued to the claimant and the Ministry of Labour. The respondent in the said notice explained the reasons for the redundancy and I find that the procedure followed was in accordance with the mandatory procedure set out in section 40 (1) (a) and (b) of the *Employment Act*.

36. In *Aviation & Allied Worker Union vs Kenya Airways Limited and 3 others* (2012) eKLR, Justice Maraga (as he then was) observed as follows with regard to redundancy;

> " There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequences of which will be inevitable loss of employment.
>
> The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises "where the services of an employee are superfluous" through "the practices commonly known as abolition of office, job or occupation and loss of employment. " In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary".

37. In the instant case, the respondent has explained that the reason for declaring the grievants redundant was because they intended to close the bakery department and transfer it to a third party who would run the same as the business was no longer economical to run due to the reduction in profit margin, Covid 19 factors and market competition level.

38. In my view, this was a situation that was beyond the respondent's control and as such, even going out of its way to secure the grievants with employment from the third party taking over the business was by large an act of good faith by the respondent.

39. In the end, I find the claim not meritorious and thus dismiss it with no orders as to costs.

40. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC