



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 249 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS.....CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED.....RESPONDENT

JUDGMENT

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.

The Respondent is a public limited company registered under the companies Act and engages in supermarket business within the Republic of Kenya.

The parties in this dispute do have a valid Recognition Agreement signed and dated 19th October, 2012, setting out the terms of engagement between the parties on behalf of unionisable employees.

The parties, in pursuance of the said Recognition Agreement, do have a Collective Bargaining Agreement which came into effect on 1st March 2017 for a two year duration and is registered.

On 22nd May 2020 the Respondent notified the Ministry of Labour, the claimant and individual employees of their intention to declare about eighty (80) Unionisable employees redundant. The claimant was aggrieved by the redundancy notices hence this claim.

By a Memorandum of Claim dated 18th June, 2020 the Claimant seeks the following Orders:

1. A declaration that Covid-19 is not a reason to terminate the services of employees.
2. An Order for directing the Respondent to deploy the Unionisable employees at Digo, Mtwapa I, Tom Mboya and Kitale Mega City Branches to other existing Branches for the continuation of their services.
3. An order that the Respondent must declare redundancies all categories of staff including outsourced Labour be affected and that the principle of First In Last Out be applied in accordance with the law.
4. Costs of the Suit be granted to the Claimant.

The Claimant contends that the decision to terminate the employment of its members had already been arrived at prior to the Respondent's decision to declare the positions redundant.

It further contends that the Respondent's intention was to work with outsourced labour as opposed to its substantive employees. It further contends that the Respondent's actions are unfair, discriminatory and therefore unlawful.

It urges this Court to find merit in its Claim and allow it in terms of the reliefs sought therein.

The Respondent filed its Statement of Response dated 1st July, 2020 in which it maintains that due process was followed in the manner in which it declared its members of staff redundant.

It further maintains that the Claimant is not entitled to the reliefs sought in its Claim as the process was procedural, fair and non-discriminatory.

It maintains that the principle of Last In First Out (LIFO) relied upon by the Claimant is not applicable in this case as all the employees working in the affected branches were affected by the redundancy and that it was not feasible to transfer their services to other branches considering the overall poor performance of its operations countrywide.

The Respondent argues that the Claim as filed is devoid of merit and urged this Court to dismiss it with costs.

Parties agreed to dispose of the Claim by way of written submissions.

Submissions by the Parties

The Claimant in its submissions maintained that the Respondent failed to follow due process in the manner in which it declared redundant 80 of its unionisable staff, in particular the provisions of Section 40(1)(c) of the Employment Act, 2007, thus rendering the process unlawful and procedurally unfair.

It further submitted that the Respondent despite having served the claimant and the Ministry of Labour with the requisite notice dated 22nd May 2020, unlawfully and unfairly proceeded to terminate the affected members of staff on the same day.

The Claimant contended that the Respondent failed to ensure strict adherence to the principle of Last In First Out (LIFO) so as to safeguard long serving employees as it seemed to favour its large outsourced work force who were not affected by the redundancies.

The Claimant further submitted that the developing principle in Kenya is that where an employer is greatly affected by Covid-19 pandemic and is unable to pay wages it shall not terminate such contracts of service and/or dismiss the affected staff or coerce any employee to take a salary cut. It is on this basis that it insisted that the reason for the redundancy is therefore not justified and/or supported in law.

It submitted that the Respondent's actions violated the provisions of Section 40(i)(a) and (c) and 41 of the Employment Act, 2007 and that it discriminated against its permanent unionisable staff in favour of interns and outsourced labour.

In conclusion the Claimant urged this Court to find merit in its Claim and allow it in terms of the reliefs sought therein.

Respondent's Submissions

The Respondent on the other hand submitted that the Claim as filed is precipitated (sic), premature, unprocedural and bad in law as it was filed contrary to the mandatory provisions of Section 73 of the Labour Relations Act.

It further submitted that it did follow due process in the manner in which it declared its work force redundant as provided under Section 40 of the Employment Act, 2007 and that it met all the procedural requirements as provided therein.

It submitted that the process was not discriminatory as contended by the Claimant insisting that out of the total of 174 employees declared redundant 94 of them were non-unionized and further that the principle of LIFO was not applicable in this case as all employees working in the affected branches were affected by the redundancy.

The Respondent urged this Court to take judicial notice of its widely reported financial crisis that has culminated in numerous executions by landlords, suppliers and other creditors leaving it on the brink of insolvency and liquidation.

It submitted that it was as a result of these financial difficulties that it was forced to shut down the affected branches and subsequently declare its staff at those branches redundant.

In conclusion the Respondent urged this Court to find the Claim against it unmeritorious and proceed to dismiss it with costs.

Analysis and Determination

I have carefully considered the pleadings filed by the parties, the evidence adduced in court and submissions. The following are the

issues for determination before this Court–

- a) Whether the termination of the Grievants on account of redundancy amounts to unfair termination.
- b) Whether the Claimant is entitled to the prayers sought.

Redundancy is defined under Section 2 of the Employment Act as

“Redundancy” means the 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 an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

Termination

Section 40(1) of the Employment Act provides for redundancy as follows –

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account 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 to 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 the intended date of termination on account 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 time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**
- (d) Where there is in existence 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 is due to an employee who is declared redundant, paid off the leave in cash;**
- (f) The employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and**
- (g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service.**

In the instant case, the Respondent sent notices to the County Labour Officer and the claimant on 22nd May 2020. The notices communicated its intention to close its branches at Digo Road in Mombasa, Mtwapu in Kilifi, Tom Mboya Branch in Nairobi CBD and Megacity in Kitale. The notices attached the names of the affected staff. The redundancies were to be effected on 20th June 2020. The notices thus complied with Section 40(1)(a) in terms of notification to the union and local labour officer, giving reasons and extent of the redundancy.

The letters addressed to the individual employees were also copied to the local labour officer and the union and therefore were in compliance with the law.

In view of the fact that the entire branches were to be closed, the provision at Section 40(1)(c) on selection criteria was not applicable as all the employees in the branches were affected.

The claim herein was filed on 18th June 2020, just a couple of days before the notices took effect and no stay was granted pursuant to the prayers sought in the application filed by the claimant under Certificate of Urgency together with the claim. Directions were given that the application and claim be disposed of together in the interest of expediency.

I have considered all the prayers in both the application and the claim. The prayer to restrain the Respondent from declaring the unionisable employees redundant due to COVID-19 pandemic does not lie as the redundancy was not due to the pandemic but rather the poor performance of the Respondent which had been exacerbated by the pandemic as clearly explained in the notification of redundancy letters.

The prayer to observe Last In First Out (LIFO) principle was not applicable as the redundancy affected all the staff in the branches without exception.

The claimant did not adduce any evidence to support its prayer on victimisation and intimidation during the pendency of this suit.

The prayer to redeploy the staff of the branches affected by the closures to other branches is a matter that could only have been considered in a meeting where the possibility of such redeployment would be discussed. By the time the claimant came to court it was too late to do so.

The prayer that the Respondent declares all employees redundant, including outsourced staff cannot be granted as the claimant did not prove the existence of any outsourced staff and also because the branches affected were closed, meaning that all categories of staff working in the branches were affected, including outsourced staff, if there were any.

From the foregoing, I find that the claimant has not proved its case against the Respondent with the result that the same fails. The claim is accordingly dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE