REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E450 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

KENYA COACH INDUSTRIES.....RESPONDENT

JUDGMENT

The claimant herein is a trade union registered under the Labour Relations Act while the Respondent operates in the Motor Industry Sector under which the Claimant union is empowered by its Constitution to recruit and represent employees.

The Claimant and Respondent have a valid recognition agreement and CBA, setting out the terms of engagement between the parties and terms of employment for the Respondent's unionisable employees.

On 5th August 2020, the parties had a consultative meeting where it was mutually agreed that the unionisable employees' salaries would be reduced by 20% for a period of 2 months as they observe the situation brought about by the COVID-19 pandemic and that in the event of termination, the terminal dues will be computed in accordance with the provisions of the CBA. Despite this agreement, the Claimant was served with a notice on 27th August 2020 intimating the Respondent's intention to declare redundant the 35 employees whose names were set out in the list.

In the Memorandum of Claim dated 28th August 2020, the claimant prays for the following –

(i) That the Court do order the respondent to pay redundancy benefits based on employees' wages/salaries before pay cut.

(ii) That the Court do set aside the parties agreement dated 1st August 2020 and reinstate the salaries to their principle status prior to pay cut.

(iii) That the Respondents be ordered to pay redundancy benefits to the affected employees within the provisions of collective bargaining agreement and law.

(iv) The affected employees be paid compensation of 12 months for unfair loss of employment

(v) Costs the suit be paid to the Claimant.

The claim was filed together with an application in which the Claimant sought the prayers:-

a. Spent.

b. That pending the hearing and determination of this suit the Court do issue an order restraining the Respondent from declaring 35 unionisable employees who are the grievants in the dispute redundant.

c. That pending hearing and determination of this application, the Court be pleased to restrain the Respondent from any acts of victimization, coercion or intimidation of the Claimant members during the pendency of this suit.

d. That the Court be pleased to set down this Application for inter partes hearing on priority basis and further order the Respondent to negotiate with the Claimant in good faith.

e. That the Court be pleased to grant costs of this Application in favour of the Applicant.

The court heard the application and made the following orders –

1. That the Respondent be and is hereby restrained from declaring redundant the 35 grievants named in the claim pending final determination of this suit.

2. That the parties are referred to the Labour Commissioner to appoint a Conciliator to reconcile the parties.

3. That the Conciliator so appointed is directed to file a report to court within 30 days.

4. That the matter will be mentioned on 27th January 2021 with a view to either adopting the report of the Conciliator or making further orders with respect to disposal of this dispute.

5. That the Deputy Registrar sends a copy of this ruling to the Labour Commissioner forthwith.

The parties presented themselves for conciliation as directed and after hearing the parties, the Conciliator prepared a report of his findings and recommendations as follows: -

"FINDINGS

- *This is a matter that had been taken to Court under certificate of urgency where the parties were heard and made their submissions to Court and a ruling made on 4th December 2020, therefore the findings/facts of the case are as contained in the said ruling.*

- *The Judge in the ruling ordered that the respondent be restrained from declaring the 35 employees redundant and the parties were referred to Labour Commissioner to appoint a conciliator to reconcile them.*

- *A meeting took place on 21st January 2021 where both parties were represented and the union requested to be allowed to interview the employees.*

- *The employer obeyed the Court order and still has the 35 employees on payroll, despite the difficult business environment*

- *The union maintained that the redundancy is not warranted as the business has picked up. Management on the other hand insists that they are not in a position to retain the current staffing levels and that they should be allowed to proceed with the redundancy.*

As a conciliator I submit that the law recognizes termination on account of redundancy as a lawful way to relieve an employer of the burden of operational costs as long as due procedure is followed as provided under section 40 of the Employment Act 2007.

Section 45 (2) (b) of Employment Act provides further that the reason for terminating services of an employee is fair if it relates to operational requirements of the employer.

The COVID-19 pandemic has seen many businesses both locally and globally forced to make difficult decisions especially in relation to whether to retain all, some or none of the employees. It would be asking too much to force the employer to retain the workers if their continued employment is not sustainable. It is also important to take note of the fact that the employer had intended to declare the employees redundant in September 2020 but because of the injunction they arc still earning salaries.

The union in their submissions alleged that they had received information from the employees that the employer has sufficient work and that there are casual and contracted employees. This is neither here or there as the union did not produce any evidence to support the assertion that the business can still sustain the services of all the employees in the organization.

RECOMMENDATION

In cognizance of the Court's finding that the management failed

to effectively discuss with the union to agree on the terms of the redundancy thereby not following the due procedure and coupled with the fact that the employees have been earning salaries from the time when the redundancy was to be effected, I recommend that;-

1. The employer be allowed to proceed with the redundancy and pay all the dues as provided in the parties' CBA and in accordance with the Agreement the parties signed on 11th August 2020.

2. On top of the above dues, each of the employees declared redundant be paid one month's gross salary.

3. That the employer gives first consideration to the employees declared redundant when a vacancy occurs for employment in future. "

The Respondent accepted the recommendations of the Conciliator as a basis of settling the dispute while the Claimant did not.

The Court directed that the parties file submissions in respect of the findings and recommendations of the Conciliator. Parties were also allowed to file further evidence.

The Respondent filed a supplementary affidavit of NARAIN SOKHI, its Managing Director sworn on 15th March 2020 together with submissions dated 16th March 2021.

The claimant filed submissions dated 10th March 2021. In the submissions the Claimant included evidence, which the Respondent has responded to in both the affidavit and supplementary submissions.

Determination

I have considered the pleadings, the further evidence and affidavits adduced by the parties and the submissions. The issues for determination are the following: -

1. Whether the Respondent complied with the law and the CBA in the issuance of notice of redundancy.

2. Whether the Claimant is entitled to the orders sought.

Redundancy

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.

The parties CBA also provides for redundancy as follows: -

"7. REDUNDANCY

(a) In the event of redundancy the employer concerned shall inform the Union the reasons for and the extent of the intended redundancy.

(b) The principle of "LAST IN, FIRST OUT" shall be followed in the particular category of employees affected subject to all other factors such as skill, merit, ability and reliability being equal.

(c) The redundant employee shall be entitled to appropriate pay in lieu of notice as provided for under Clause 16 herein above.

(d) An employee shall qualify for severance pay after the completion of one year's continuous service with the employer.

(e) Subject to sub-paragraph (d) of this Clause and in the case where the service of an employee is terminated on grounds of redundancy, the employer shall pay the employee severance pay at the rate of 17 days basic pay for each completed year of service and a service gratuity of 17 days basic pay for each completed year of service."

Redundancy Procedure

It is the Claimant's averment that the Respondent did not comply with the procedure in the CBA. It submits that the Respondent ought to have informed the Claimant of the intended redundancy in advance as mandatorily required by the CBA, which mirrors Section 40(1) of the Employment Act. It states that the Act is clear that the union should be informed of the intended redundancy. That the reasons must be brought to the attention of the Union as the Union has liberty to challenge the reasons and extent of the intended redundancy. That the Union must be served with the proof of the reasons for the redundancy, which the Respondent has to date not done. That the redundancy should be participatory.

The Claimant submits that what the Respondent did was to serve it with a decision that had already been reached unilaterally. The Claimant further submits it was denied an opportunity to challenge the reasons and extent of the redundancy when the Respondent declined to meet the Claimant.

It is further the Claimant's submission that the Respondent has selected permanent employees to declare redundant when it has contracted employees. The Claimant further disputes the reason given by the Respondent being low business. It is the Claimant's contention that its members have not been idle as alleged by the Respondent. That during conciliation the Claimant requested to be allowed to visit the Respondent's premises to ascertain the situation on the ground. That the Claimant found that the Respondent had so much work that some of its employees had been reporting for duty at Isuzu East Africa (formerly General Motors) being three employees in framing department, 3 in panel beating department, 3 in sheeting department and 4 in finishing department.

That at the Respondent's premises there were a total of 22 vehicles, 14 of model FRR and 8 of NQR/NKR model which were being worked on.

Further, that due to high market demand in Kenya and neighbouring countries, 26 vehicles were still untouched, pending work. The claimant listed the job cards for the 26 vehicles, 15 of which are of model FRR/MV and 11 of NQR/NKR Model.

It is the Claimant's submission that with 22 vehicles being assembled/manufactured and another 26 vehicles in the waiting list to be assembled/manufactured, the Respondent's reason for redundancy being low work volumes or that the 35 employees selected to be declared redundant were idle beats logic.

The Claimant further submitted that the Respondent did not demonstrate that it complied with the LAST IN-FIRST OUT criteria as those selected for redundancy were the longer serving employees. The Claimant gave a list of 8 employees on contract in service department, and another 30 together with 2 supervisors in truck fabrication line making a total of 42 employees on contract who were not in the list of redundancy.

The Claimant further submits that it represents the motor industry in Kenya and all the other companies in the industry have not declared employees redundant on grounds of COVID. The Claimant citied Toyota, Subaru, Ryce, D. T. Dobie, CMC, Scania, Simba Colt, Isuzu, KVM, AVA, Nissan, Banbros, Jeet and Peugeot among others whose workforce is still intact despite COVID pandemic.

For the Respondent it is submitted that it did not declare any redundancy but only gave notice of the intended redundancy. That it complied with the procedure both under Section 40 of the Employment Act and Clause 17 of the CBA. That the reasons for redundancy were clearly set out in the letter to the claimant in the first two paragraphs being that: -

"The motor industry has experienced very low sales statistics over the last couple of years. The global Covid-19 pandemic has aggravated the situation in the past few months. We have endeavoured through all means possible to cushion our employees by ensuring no job losses are effected.

At this moment, we still continue to experience even worse economic times and have no choice but to let some of our employees go."

That the last paragraph thereof reads: -

"The purpose of this letter therefore is to serve one month written notice effective immediately to your office of the said intended redundancies."

On the lack of consultations, the Respondent submits that this was as a result of miscommunication.

Section 40(1) sets out factors that must all be met by an employer for redundancy to be regular and lawful. The Claimant has contested the

reasons given by the Respondent being low business. It has backed this by giving specific evidence of work that was underway and work that was pending. It has further referred to other companies in the same business who have not declared redundancies due to COVID.

The Claimant has further raised issues about selection criteria whether the Respondent complied with the LAST IN-FIRST OUT criteria.

The Claimant has further raised issues about permanent employees being selected while there were employees on contract, who are more than the permanent employees targeted for redundancy.

It has proved that it sought a meeting with the Respondent which was rebuffed. Indeed, it is on record that as soon as the Claimant received the letter dated 24th August 2020 on redundancy, on 25th August 2020 it wrote to the Respondent seeking a meeting on 27th August 2020. The letter reads: -

> *"Your Ref: THE MANAGING DIRECTOR,*
>
> *KENYA COACH INDUSTRIES LTD,*
>
> *P.O. BOX 18354-00500,*
>
> *NAIROBI.*
>
> *25th August 2020*
>
> *Dear Sir*
>
> ***RE: REDUNDANCY***
>
> *Reference is made to your letter dated 24th August 2020 on the above subject matter. We write to propose an urgent Parties Joint meeting to deliberate on the extent of Redundancy on 27th August 2020 at 2:00 pm in your premises before the implementation of the 20% pay cut.*
>
> *Yours Faithfully*
>
> *SIGNED*
>
> *ROSE OMAMO*
>
> *GENERAL SECRETARY"*

The letter was received by the Respondent on the same date, according to the receipt stamp. The Respondent's response of 27th August 2020 was non-committal. It stated -

> *"RE: REDUNDANCY*
>
> *From: Human Resources (human_resources@kci.co.ke)*
>
> *To: amalgamated.union@yahoo.com*
>
> *Date: Thursday, August 27, 2020, 11:21 AM GMT+3*
>
> *Good Morning,*
>
> *We confirm receipt of your letter dated 25/08/2020 proposing a meeting today from 2 pm.*
>
> *We regret to advise that we will be unable to have the meeting today as we already had prior business meetings aimed at generating revenues to keep our business operations going.*
>
> *We regret any inconvenience caused.*
>
> *Kind Regards.*
>
> *Ruth Gitau | HR/Administration*
>
> *Kenya Coach Industries Ltd"*

The letter does not propose an alternative date. The Respondent's reason that it considered that there was sufficient time to discuss the issue is not stated or implied in its response. If it was important for the Respondent to offload 35 employees on redundancy, it should have been able to create time to justify the redundancy to the union. It had already set the redundancy process in motion and it should have been in its interest to ensure the notice of one month did not run out before the consultations with the Union were held. As submitted by the Claimant, the parties had just discussed and agreed on a pay cut of 20% in recognition of the disruption of business by COVID 19, which was intended to avoid declaring employees redundant.

Further, the letter from the Respondent was not a notification of intention to carry out redundancy as the Respondent has submitted but a notice of redundancy. The last two paragraphs thereof reads:-

> *"The purpose of this letter therefore is to serve a one month written notice effective immediately to your office of the said intended redundancies.*
>
> *This redundancy will take effect at the expiry of the notice upon which the affected staff will be required to see the undersigned for collection of their dues."*

It is evident that there was no intention by the Respondent to hold consultations with the Claimant over the redundancy. This was confirmed by the Respondent's response of 27th August 2020.

As was stated by the Court of Appeal in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** –

> *51. Kenya is a State party to the **International Labour Organization (ILO),** which it joined in 1964 and is bound by the ILO conventions. **Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982** requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:*
>
> *"1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:*
>
> *(a) provide the workers' representatives concerned*
>
> *in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;*
>
> *(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on 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 Court further observed

> *54. Section 40(1) of the Employment Act requires employers contemplating redundancy to give the employees or their trade union notice of at least one month. In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations, the other objective of a reasonable notice, as was stated in the English case of **Williams v. Compare Maxam Ltd 11** is:*
>
> *"to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere."*
>
> *55. Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful negotiations, consultation has to be real and not cosmetic. The New Zealand Chief Judge succinctly expressed this point in the case of **Cammish v. Parliamentary Service 12**:*
>
> *"Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done."*

In this case it is clear that there was no notification of intended redundancy as required under Section 40(1)(a) and (b) of the Act. What the Respondent gave was termination notice under Section 40(1)(f).

It is further clear that the Respondent did not give the Claimant an opportunity to question the validity of the reasons given for redundancy or the criteria for selection that are set out in Section 40(1)(c) and (d). The Claimant has also raised pertinent issues that ought to be cleared before the Respondent can declares the employees redundant.

Redundancy is a right of an employer. However, the law recognises that it is done by the employer at no fault of an employee and has set safeguards to ensure it is not used as an excuse to relieve employees of their employment for reasons other than those stated by the employer. As was stated by the Court of Appeal in the **Kenya Airways case** when it stated: -

> *46. … the notice envisaged by Section 40(1)(a) of the Employment Act ... My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees ... It does not have to be a calendar month's notice ... The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant."*

It is for these reasons that I must declare the notice issued by the Respondent irregular for not being in compliance with the law.

Should the Respondent still wish to go ahead with the redundancy it must comply with the provisions of Section 40 of the Employment Act by first issuing a general notice as per Section 40(1)(a), then discuss the reasons and criteria for selection with the Claimant before issuing redundancy notice.

Having found the process of redundancy by the Respondent to have been irregular, I do not have to make a determination on the specific prayers by the Claimant. These are issues to be discussed during consultations prior to the redundancy, should the Respondent still desire to proceed with the same.

There shall be no orders for costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 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