REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.35 OF 2019

STEPHEN MUNENE WAITITU.....CLAIMANT

VERSUS

KENYA TEA PACKERS LIMITED.....1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY

HOLDING LIMITED.....2ND RESPONDENT

JUDGEMENT

The claimant is a male adult. The 1st respondent is a company dealing with the processing and packaging to tea for local and export market. The 2nd respondent is a company dealing with management of tea companies and is currently managing agent of the 1st respondent.

The claim is on the facts that on 1st respondent employed the claimant first as a driver on 28th October, 1996 and later as a sales representative in sale and distribution from 1st July, 2007.

The claimant was last earning ksh.61, 016 per month.

The claim is that the claimant worked diligently with outstanding performance and was awarded with Long Service Award and Certificate of Appreciation for work of 17 years and 21 years respectively.

By letter dated 16th July, 2018 the 1st respondent issued the claimant with letter declaring his position redundant without considering his work performance and long-standing with the company. Such letter and notice was in violation of article 41 of the constitution and section 40 of the Employment Act. The claimant was not issued with the required notice before his employment was terminated; there was no consideration of seniority, skill, ability of reliability before effecting the redundancy.

The claim is that there was wrongful, unfair and unlawful termination of employment. The respondent failed to act in accordance with justice and equity, no sufficient reason was given and the claimant was not taken through the rules of natural justice or due process of the law.

The claimant is seeking that the termination of employment be declared null and void and an order of reinstatement or re-engagement with back pay and without loss of seniority or benefits be issued and in the alternative the payment of compensation, severance pay for 22 years; and costs of the suit.

The claimant testified that upon employment by the respondent he worked diligently and was of excellent work performance and was issued with awards. He was promoted from driver to a sales representative and was appointed to head different territories/regions.

The respondent then alleged that he was of poor work performance which was an afterthought meant to justify unfair termination of employment. His last work station was in Kitui from the February, 2011 which area was doing poorly at 25% and he left at 81%. He had been placed in such region to lift it and ensure improvement. Other regions like Nyahururu and Nyeri were merged and there was no lay off of the employee. The respondent had the duty to merge his region with another to avoid termination of employment.

The claimant also testified that the defence is that the claimant had a warning letter for gross negligence with regard to fuel consumption but the letter was issued to 10 employees to explain and not specific to him. For the 22 years he worked for the respondent he had no negative work record.

The respondent also alleged that it issued the claimant with two notices before termination of employment which was not the case. There was no notice which came to the attention of the claimant. He was not unionised and he was due to retire in 4 years and termination of employment was biased and the claims made should issue.

The claimant also testified he singed for his terminal dues but was not satisfied. He left a question mark [?] to indicate he was not satisfied with the tabulation of his dues and Sammy Ruto did witness the same. He was not made aware of the other employees declared redundant. What was paid had no breakdown to indicate what was covered.

The defence is that the performance analysis conducted and the claimant achieved a lower score and his position was declared redundant after the 1st respondent conducted an organisational review and restructuring which led to the mergence and abolition of various offices and position redundant. The select criteria used by the company to retain one of the two employees then were based on performance and the claimant was found to be an underperformer. Upon the declaration of redundancy, the claimant's employment was terminated in accordance with the law.

The defence is also that the claimant had been issued with warning letters in the year 2015 for negligence of duties due to fuel consumption variances and the explanation as to the variance was not satisfactory. The redundancy procedures were followed. There was a general notice to employees on the intended redundancy and the employee were invited to discuss the same; the notice was issued to the labour officer, Kericho; there was a notice to the union; there was a selection criteria based on performance per a performance analysis.

The claimant was paid his terminal dues and the claims made should be dismissed with costs.

The respondent filed work records.

Judy Kinyanjui the human resource and administration with the 1st respondent testified that the 1st respondent was the sole employer of the claimant and not the 2nd respondent. His employment was upgraded from a driver to sales assistant in the year 2005 and which he held until notice to terminate employment dated 16th July, 2018.

In July, 2018 the respondent conducted an organisational review restructuring which led to merging and abolition of various offices and positions. In this process Kitui and Machakos territories were merged to form one regional office to be represented by one sale assistant. The merger rendered one sales assistant position redundant.

The criteria used by the company to retain one of the two employees of the offices merged were based on performance. A performance analysis was conducted between the two employees and the claimant had a lower score of 81.61% while the second employee had scored 101.88% and on these scores the claimant's position was declared redundant and his employment terminated.

Ms Kinyanjui also testified that the claimant was paid his terminal dues and he cleared and was paid on 2nd October, 2018.

The claimant had been issued with two warning letters with regard to fuel usage and variances on 9th September and 1st October, 2015.

The respondent followed redundancy procedures in accordance with the Employment Act, the labour officer was notified, the union was issued with notice and the employees were issued with two notices vide memo dated 6th July, 2018 and the employees were invited for tea hour meeting to discuss the same and the second notice was issued to individual employees. The claim for reinstatement is not available as the position held by the claimant does not exist.

It is common cause that the claimant last worked for the 1st respondent. He was the sales person at Kitui territory.

The defence is that there was a restructuring of the respondent and the Kitui and Machakos territories were merged. The two salesperson in the two region were assessed based on performance and the claimant scored lower hence upon the merger of the territories, his position was declared redundant and he was issued with letter terminating his employment in accordance with section 40 of the Employment Act, 2007 (the Act).

A declaration of redundancy leads to the process of employer reorganising itself and part of the reorganisation led to restructuring of its functions and this may lead to termination of employment of some employees. This is a position appreciated as a lawful means of terminating employment.

Where a redundancy is declared, Section 40 of the Act thus allows the employer to apply the procedures therefrom.

In the Court of Appeal Case of **Kenya Airways Ltd and Aviation & Allied Workers Union of Kenya & 3** Others **Civil Appeal No. 46 of 2013** it was held that;

Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy - that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment— [underline added]

There must be a valid and fair reason based on operational requirements of the employer as otherwise to terminate employment without such reason(s) it is unjustified.

Where there is a valid and fair reason that is genuinely justified, the employer is also required to ensure the due process of section 40(1) of the Act. Issue the employees with a general notice and then an individual notice on account of the redundancy and to the individual for termination of employment respectively. See **Kenya Power & Lighting Company Limited versus Agree Lukorito Wasike [2017] eKLR.**

In this case, the respondent has filed work records and notice dated 6th July, 2018 on the restructuring referenced to *all staff* and therein states that;

> *RESTRUCTURING*
>
> *… As shared with staff during out town hall meetings of 4th and 5th July, out cost to income ratio is above industry average.*
>
> *Given the above background, it is necessary that we have to look at our costs structure in order to remain competitive. …*

There is also notice dated 2nd July, 2018 to the labour officer and another notice of equal date to the union.

The respondent has also filed notice to *all staff* dated 4th July, 2018 inviting the staff for *Tea Hour for the Month of July 2018.*

It is common cause that the claimant was the salesperson in Kutui Territory. The notices dated 4th and 6th July, 2018 to *all staff* though sent from the head office and the managing director and the human resource office for the *tea hours* is not evidence that these notices issued to the claimant whose work performance was assessed and found to have scored lower than that of his Machakos counterpart and hence he his position was found justified for termination.

Section 40 of the Act is mandatory that the notices due to the employee where there is a redundancy must issue and particularly where the employee is not unionised, the notice(s) must be issued to the subject employee.

In **Margaret Mumbi Mwago versus Intrahealth International [2017] eKLR** the court held that;

> *… in declaring redundancy, an employer is required to issue two separate notices of at least one month each. The first is a general communication to employees generally notifying them of the impending redundancy. The second is a specific notice to the affected employees. The employer is further required to issue a one month notice to the local Labour Officer (see* ***Thomas De La Rue v David Omutelema [2013] eKLR***).

In the case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR** the court relied on the case of **Thomas De La Rue (K) Limited versus David Opondo Umutelema eKLR** and held that;

> *It is quite clear to us that section 40(a) and 40(b)provide for two*
>
> *different kinds of redundancy notificationsdepending 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 to the employee and the local labour officer…*

The claimant testified he was not unionised. There is no evidence that he was invited to the *tea hour* at town hall at the head office vide the general notices referenced above. Even where these notice issued, which have no evidence, the time span and period from 4th July, 2018 and 6th July, 2018 and leading to the termination notice of 16th July, 2018 do not meet the statutory threshold set out under section 40 of the Act on the basis that;

> *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; [*underline added]

Without evidence that the respondent adhered to the mandatory provisions of section 40 of the Act, termination of employment failed the threshold set out under section 43 of the Act. the same lacked a valid and fair reason and it amounted to unfair termination of employment.

On the remedies sought the primary claim is that of reinstatement or re-engagement.

Immediately upon the declaration of redundancy and termination of employment, the claimant was paid his terminal dues which he accepted. These dues comprised of;

a) Salary earned to the last day;

b) One (1) pay in lieu of notice;

c) Severance pay at the rate of one month for each year worked;

d) Pay in lieu of taking leave;

e) Leave travelling allowance;

f) Pay of provident fund;

The redundancy present, the payment of terminal dues pays, to order a reinstatement or re-engagement would be to negate the very presence of the redundancy. There is the alternative prayer for compensation for the unfairness visited upon the claimant. To pay compensation will meet the ends of justice.

The claimant had worked for the respondent for over 22 years, he had 4 years to his retirement and had it not been for the unfair termination of employment he would have served such term successfully. The alleged notice and caution related to matters collective on alleged fuel consumption variance and hence cautioned *to be vigilant in fuel management of the company motor vehicle that is assigned to you* and there is no evidence there was noncompliance as directed resulting in a warning or disciplinary action against the claimant. His record was therefore untainted for the 22 years of service.

Compensation is hereby found appropriate at six (6) months gross pay of Ksh.61, 016 x 6 all at Ksh.366, 366.

On the claim for notice pay, the claimant has since received one month pay in lieu of notice and he also received his individual notice and pay for 16 days worked until the 16th July, 2018. This appropriately compensated him in this regard.

Severance pay is paid and acknowledged.

On the claim for payment of general damages, as analysed above, there is a finding the respondent failed the provisions of section 43 and 40 of the Employment Act now redressed with compensation under the provisions of section 40, 45 and 49 of the Act. the court finds no violation of the constitution so as to apply the remedies under section 12 of the Employment and Labour Relations Court Act, 2011.

Accordingly, the termination of employment is found unfair and judgement entered for the claimant against the respondent for compensation at Ksh.366, 366 together with costs.

Dated and delivered electronically this 2nd June, 2020.

M. MBARU

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 the Order herein shall be delivered to the parties via emails.

this 2nd June, 2020.

M. MBARU

JUDGE