



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 690 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**NAIROBI GYMKHANA CLUB.....RESPONDENT**

**JUDGMENT**

On 1<sup>st</sup> October 2019, the Respondent served the Claimant with a notice of its intention to declare 18 employees redundant by 31<sup>st</sup> October 2019. Consequently, the Claimant filed this cause on 16<sup>th</sup> October 2019 challenging the impending redundancy declarations and sought the following prayers-

- a. That the Respondent be compelled to maintain the status of all Claimant's members in her employment until parties meet and negotiate.
- b. That the Respondent's decision to declare the Claimant members redundant be declared unfair.
- c. That the cost of this suit be paid by the Respondent.

The Claimant avers that it wrote to the Respondent to have the process suspended to pave way for negotiations. It is the Claimant's position that prior to the notice, the Respondent had never disclosed the intention to declare some of its employees redundant. As such, the action is a charade to disguise the Respondent's ulterior motives.

The Respondent filed its response on 7<sup>th</sup> November 2019. The Respondent avers that it wrote to the Claimant on 19<sup>th</sup> September 2019 to communicate the financial difficulties it was experiencing and the consequences of failing to address those issues. The Respondent avers that in the letter, a meeting with the Claimant was requested at the earliest opportune time, to discuss the proposal and a way forward.

However, when the letter was delivered to the Claimant, the same was rejected and the messenger sent away thus necessitating delivery by registered post. The same was also sent via email. It is the Respondent's case that the Claimant did not respond to the letter, as such, redundancy notices were issued to its employees.

The Respondent avers that the Claimant responded to the redundancy notice vide its letter dated 4<sup>th</sup> October 2019 where they stated that they would meet the Respondent only if the redundancy notice is withdrawn. In response, the Respondent referred the Claimant to the previous letters and reiterated the need to settle the matter amicably.

The Respondent avers that it was not the first time the Claimant had been issued with an invitation to negotiate on the way forward. It is their case that in August 2018, the Respondent was issued with a similar invitation where the Claimant's representatives attended the meeting but stormed out without them agreeing on the possible interventions.

It is the Respondent's case that the Claimant was invited to two subsequent meetings to discuss the issue of redundancy and voluntary early retirement, but the Claimant refused to attend.

On 17<sup>th</sup> December 2018 and 23<sup>rd</sup> February 2019, the Respondent issued the Claimant with a redundancy notice of 15 employees. They were declared redundant and the Claimant filed Cause 188 of 2019 to challenge the same. The matter is still pending before court.

It is their position that the above history demonstrates the Claimant's reluctance to engage them. Further, that its financial constrains and the difficulty in managing its wage bill was communicated to the Claimant.

The cause was disposed of by way of written submissions where the Claimant filed its submissions on 20<sup>th</sup> November 2019 while the Respondent filed theirs on 22<sup>nd</sup> November 2019. Thereafter, parties highlighted their written submissions in open court.

Mr. Simiyu, Counsel for the Claimant, submitted that the Respondent informed them of their intention to restructure and outsource the bar yet they had a pending CBA and were in the process of negotiating monetary clauses. It was his position that the decision was arrived at unilaterally hence a breach of clause 1 and 2 of the Recognition Agreement dated 21<sup>st</sup> May 2007. That the respondent was also in breach of the 2017/2018 CBA where parties mitigated over an imminent redundancy leading the Claimant to suspend service charge pay of her members, in an effort to protect their employment and which saved the Respondent Kshs.4,200,000.

Counsel submitted that the Respondent's action breached Section 10 of the Employment Act, Article 13 of the ILO Convention No. 158 and ILO Recommendation No. 166 where mitigation is advanced as a way of fair termination.

It was the Counsel's submissions that the deficit of Kshs.2,152,203 incurred by the Respondent was far below what was mitigated by the Claimant. As such, the Respondent has no reason to declare the employees redundant. Further, he submitted that there is no justification for the Respondent to declare employees in the Reception and Security departments redundant as it only intends to reduce the staff at the bar.

Mr. Simiyu submitted that the Claimant was never informed of the Respondent's inability to raise the wage bill and further submitted that the impending redundancies are a way of frustrating negotiations and reducing the Claimant's simple majority, a fact that is manifested in the Respondent's declaration of zero increase in the number of unionisable employees.

It was his submissions that in recruiting two management staff, the Respondent demonstrated that it has capacity as this has raised the wage bill by 33%. Further, the Respondent has not carried out an audit for the year 2019.

Ms. Kanyiri, Counsel for the Respondent, submitted that despite declaring employees redundant, the respondent has still been experiencing financial difficulties as evidenced in the losses the bar has been making of over Kshs.17,000,000 as demonstrate in the notice to the members of the club at appendix 3 of the witness statement of Lydia Aquino signed on 6<sup>th</sup> November 2019 and filed on 7<sup>th</sup> November 2019. . As such, the Respondent has no capacity to pay its employees.

In response to Mr. Simiyu's submissions, counsel submitted that the Respondent was outsourcing the management of the bar and not outsourcing staff.

It was her position that the claim has been filed to delay the redundancy as the Claimant ought to have reported the matter to the labour office, if it were aggrieved.

It was Counsel's submissions that the suspension of payment of service charge was only for 2 years. Nevertheless, that did not improve the respondent's financial position. That the respondent has been paying some employees in instalments due to its financial position. She admitted that there was an increase in the fees for services to members but which was dependent on whether the club members would pay despite the price increase.

Counsel further submitted that no audit report had been submitted for the year 2019 as the financial year was not yet over. She also submitted that the Claimant opted not to attend the meeting of 19<sup>th</sup> September 2019, thus, the issue of redundancy was not discussed. It was her position that the Claimant had squandered her opportunity to negotiate.

She submitted that Section 10(5) of the Employment Act did not apply as the Respondent in seeking to declare employees redundant and that redundancy is a lawful process. Counsel further submitted that a proposition was made in line with the provisions of the ILO Convention, but the Claimant opted not to take it. Further, the Claimant has not made any proposal to mitigate the situation.

It was Counsel's submissions that the Respondent's revenues has reduced significantly due to a decline in bar sales. It was her further submissions that the Respondent's deficit keeps increasing each financial year. Additionally, she submitted that the cost of keeping the employees that the said employees were to be declared redundant keeps on increasing and who are being paid from the Respondent's savings.

In Mr. Simiyu's rejoinder, he contended that the Respondent's loss for the year 2018 was Kshs.3,600,000 and not Kshs.17,000,000 and that the deficit was Kshs.2,000,000. He maintained that the Claimant was invited for negotiations after a decision had already been made by the Respondent.

### **Analysis and Determination**

I have considered the pleadings filed by the parties, the evidence they have relied upon and their submissions. The issues for determination are –

- a. Whether the process of declaring the Claimant's members redundant as initiated by the Respondent is lawful.
- b. Whether the Claimant is entitled to the reliefs sought.

Section 40 of the Employment Act provides as follows-

**(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.

Article 20 of the **ILO R166 - Termination of Employment Recommendation, 1982 (No. 166)** provides as follows-

*(1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes.*

*(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.*

It is clear from this provisions and as submitted by the Claimant that an employer ought to consult before making the decision to declare employees redundant. In this present case, the Claimant was informed by the Respondent vide the letter dated 19<sup>th</sup> September 2019 (page 1 of the Respondent's bundle of documents) as follows-

*“Nairobi Gymkhana has over the past few years been experiencing a decline in business incomes and losses are continuing to accumulate. As a result, the management through a series of meetings and deliberations resolved to restructure the operations of the club.*

*It is important to note that every effort to sustain the business has not yielded any success, and the club continues to incur losses, which unless stemmed without further delay, will lead to imminent closure of the Club.*

*In this regard the Club has considered the option to hand over the management of the three Bars in Nairobi Gymkhana so as to cut down on operational costs in an effort to sustain business. The tenders to bid for the said Bars shall be sent out and depending on the outcome of the bids for the Bars, the employment of those who work within these areas may be affected.*

*We therefore need to urgently meet to discuss and implement the way forward, in a bid to stem the current losses which the club cannot continue to sustain any longer.*

*The Employer undertakes to carry out any redundancy processes in accordance with the provisions of the existing collective bargaining agreement, between KHAWU and the Club and in line with the prevailing Labour Laws.*

*We look forward to your urgent response and a confirmation of the earliest date possible to discuss the proposal.”*

The same communication was sent through registered post and via email as evidenced in the copy of the email and the payment receipt at pages 4 and 3, respectively, of the Respondent's bundle of documents. There was no response prompting the Respondent to write to the Claimant, as evidenced in the letter of 1<sup>st</sup> October 2019, as follows-

*“... The Club is therefore left with no option but to declare redundancies in the bar, reception and security departments, which shall affect eighteen (18) employees. The redundancy exercise shall be carried out in accordance with the provisions of the labour laws without any further delay as the club will not be in a position to sustain the affected employees beyond the 31<sup>st</sup> October 2019.*

*We therefore urgently call for a meeting to discuss and formalize the same without further delay. By copy of this letter we have requested the Federation of Kenya Employers to facilitate the said meeting and to propose an appropriate date within this month of October 2019.*

The County Labour Officer was also served with the same letter informing the Labour Office that the Club shall declare 18 employees in the bar, reception and security departments redundant. In their letter of 4<sup>th</sup> October 2014, the Claimant stated that it would only participate in the meeting upon cancellation of the date of redundancy, yet no date had been communicated in the letter.

Consequently, on 11<sup>th</sup> October, 2019 the Respondent wrote to the Claimant inviting them to solve the matter amicably. Another invitation letter of 19<sup>th</sup> September 2019 was also sent to the Claimant.

In view of the foregoing, and in further consideration of the Respondent's financial reports reflecting the deficit incurred by the Respondent in the years 2017 and 2018, I find that the Respondent's decision to declare 18 employees redundant was genuine and not actuated by malice. In the Court of Appeal case in ***Kenya Airways Limited vs. Aviation & Allied Workers Union and 2 Others [2014] eKLR*** the Court opined that-

*“It is not necessary to consider all the reasons that the learned Judge gave for essentially decided was that redundancy was not commercially necessary and that more consultation was necessary. This was a wrong test. As long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision of what was reasonable. The Court has no supervisory role.”*

I also note that the names of the employees to be declared redundant as well as the terminal dues and exit packages that would have been due to them were never discussed. As such, the cause herein was instituted prematurely without there being negotiations or exploration of the available avenues of dispute resolution. Further the claimant refused to discuss the issue with a view to reaching a solution when invited to do so by the respondent, thus the dispute was filed in bad faith.

In the circumstances, I find that the claim lacks merit and dismiss the same.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF DECEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**