



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1717 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH MUSEMBI.....CLAIMANT

VERSUS

SEN-TECH LIMITED.....RESPONDENT

JUDGMENT

The Claimant, John Musembi, instituted this claim by a Memorandum of Claim dated 1st October 2013 and filed on 25th October 2013 through the firm of Mang'ere, Bosire and Associates Advocates seeking maximum compensation, general damages for unlawful redundancy, costs for the suit and any other remedy the Court deems fit against the Respondent, Sen-Tech Limited.

The Claimant avers that he was an employee of the Respondent having diligently worked as its Miller Machinist from 8th October 2004 with his last salary being computed at Kshs.101,844/= and that he received a letter from the Respondent on 13th May 2013 dated 30th April 2013 upon arrival from Cameroon notifying him that they were purportedly ceasing operations and were prompted to declare him redundant. That on 30th May 2013, he received a letter of termination on account of redundancy.

He avers that on 24th June 2013, the Respondent operating under the name of KHS East Africa informed its customers that it had joined KHS East Africa Limited and that it would remain at the service of its customers as such. That it then unequivocally informed its clients on a letter dated 30th June 2013 vide a letterhead that contained the names of both companies- KHS East Africa and Sen-Tech Ltd, that from 1st June 2013, they would be operating as KHS East Africa Limited.

The Claimant avers that he issued a demand letter to the Respondent through his lawyer on 23rd July 2013 and states that he was not given any reason for redundancy. That the Respondent's actions of declaring him redundant were unlawful, wrong, unfair, inhuman and tainted with malice and as a result, he has suffered loss of income, trauma and inability to meet his obligations.

The Respondent in its Memorandum of Defence dated 17th January 2014 and filed on 4th February 2014 admits that the Claimant was its employee but qualifies that what he states as his last salary was not his regular monthly salary which was Kshs.58,000/= as it included terminal benefits due to him. It also admits notifying the Claimant in writing of an intended redundancy, reasons for the intended redundancy and issuing the notice within the correct time period. Further, it admits giving the Claimant a letter of termination on account of redundancy.

The Respondent avers that the letters to its customers/recipients were not intended to convey intricate legal nature of the relationship between Sen-Tech and KHS East Africa and if that happened, the purpose and scope of the said letters were taken out of the correct context.

It avers that the termination of the Claimant's employment was carried out in a fair, lawful and procedurally sound manner and with good faith. That as a result of corporate restructuring, a number of employees including the Claimant's position was terminated on account of redundancy. The Respondent further states that it subsequently paid the Claimant all his dues, receipt of which the claimant admits to and agrees in writing and that it also issued him with a Certificate of Service dated 1st July 2013.

The respondent heavily relied on the evidence adduced in its memorandum of defence together with the verifying affidavit of Daniella Pleitz, its then General Manager attesting to the veracity of the information therein.

The parties applied and were granted leave to dispel off the case by way of pleadings, documents and written submissions.

Claimant's Submissions

The Claimant submits that the reason advanced by the Respondent to declare him redundant was misleading and not genuine, that it only purported to comply with Section 40 of the Employment Act in order to hoodwink the Claimant. That after the termination of the claimant from employment, the respondent continued to carry out business as usual and did not cease operations and thus the alleged restructuring process could not have rendered his position redundant. Further, that the respondent retained the same staff, clients and business and only changed its name from Sen-Tech Limited to KHS East Africa Limited so as to circumvent justice from being done to the Claimant. He submits that after the merger of the two companies, other employees and him in particular were not privy to the nature of business the new company was going to carry out and whether his services were required in regard to Section 40(1)(c) of the Employment Act 2007.

He also submits that the reasons and the process of terminating his employment were unfair, unlawful and cannot by any means whatsoever meet the threshold set out in **Sections 40, 41 and 45 of the Employment Act 2007** and that the Respondent used redundancy as an excuse to terminate his employment unfairly. He cites the following sections of the Employment Act 2007, which he avers, were not complied with by the respondent:

Section 45(1) - "no employer shall terminate the employment of an employee unfairly."

Section 45(2)(c) - "termination of employment by an employer is unfair if the employer fails to prove that employment was terminated in accordance with fair procedure."

Section 45(4)(b) – "termination of an employment shall be unfair where it is found out that in all circumstances of the case the employer did not act in accordance with justice and equity in terminating the employment of the employee."

The Claimant states that in his submissions, he is guided by the authorities of Caroline Wanjiru Luzze -Vs- Nestle Equatorial African Region Limited (2012) eKLR and Kenya Airways Limited -v- Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR.

He finally submits that he has proved his case on a balance of probability as required by the law and prays that judgment be entered in his favour as prayed in the memorandum of claim.

Respondent's Submissions

The Respondent submits that by way of a tripartite sale agreement dated 14th June 2013, it discontinued its business operations upon transferring its interest in its tangible and intangible assets, including its inventory and other material assets, software programs, licenses and other property rights relating to its business operations to a different company called KHS East Africa Limited (KHS EA).

It also submits that it terminated the Claimant's employment with one-month notice through the letter dated 30th May 2013, which also set out that the Claimant would be paid all his final dues as provided by law. That prior to his termination, it endeavoured to conduct an employee assessment and consultation process to consider if the Claimant's position of machinist would be carried over to KHS EA, and the result indicated that since KHS EA would no longer be a manufacturing plant and the Claimant's position would not survive the redundancy. Further, that the Claimant was told that should his skills be required, he would be called upon on short-term contractual basis only.

That pending payment of terminal dues to the Claimant, it wrote to the labour office to confirm the scope of its obligation to legally offset the Claimant's pay and the Ministry of Labour replied with a clarification of payments due to him and other employees declared redundant. That subsequently, the Claimant appended his signature in the presence of a witness on a letter dated 01st July 2013, confirming that his terminal dues had been fully compensated and that he also undertook therein not to initiate any claim against the Respondent. That he however proceeded to demand through its counsel vide a letter dated 23rd July 2013 that the Respondent unconditionally reinstates him and/or pays him compensation on allegations that the redundancy was incapable of standing the test of legality but it opposed the allegations on the basis that they were unmerited.

The Respondent submits that redundancy is indeed a legitimate ground for terminating a contract of employment, provided it is substantively justifiable and procedurally fair. It cites the Appellate Court's reasoning in Civil Appeal No. 46 of 2013 Kenya Airways Limited -vs- Aviation Allied Workers Union Kenya & 3 Others [2014] eKLR that it is necessary to attribute the cause of a redundancy to services of an employee being rendered superfluous.

That upon the acquisition of its business by KHS East Africa Ltd, it ceased operations including the business of processing small mechanical parts for beverage filling equipment, a function which the Claimant had been employed to perform and so in the absence of that department, the Claimant's services were simply rendered superfluous. It submits that cognisance should be taken of the following provisions of the **Sale Agreement between KHS East Africa & Sen-Tech Ltd:**

Clause 2(a) – "Sen-tech will discontinue its business operations, namely those that concern the sale, service, assembly and replacement part business for beverage filling equipment at the end of 30th June 2013 for new business."

Clause 3 - "Sen-tech was not selling and KHS was not buying or taking over the divisions of Sen-tech that produce and process the small mechanical parts that do not form part of the KHS Group's operating activities....in particular, this division's employees and assets are not taken over."

It is their submission that the Respondent found the Claimant's position to be superfluous after a rational and reasonable assessment and thus declared his position redundant in conformity with Section 43 of the Employment Act and informed by the terms of the Sale Agreement and the Global policy of KHS Group.

Further, that this Honourable Court should not readily interfere with the Respondent's decision in respect of its operational requirements, but

rather proceed with its primary role of interrogating the facts of the case and determine if indeed the Respondent's decision was reasonable and made in good faith. The Respondent urges the Court to exercise its mind judiciously and find that the decision to render the Claimant's position redundant was well-thought, reasonable in the circumstances and thus fair.

The Respondent submits that Section 40(1) of the Employment Act addresses the procedure of terminating the employment of an employee which can be summarised into three facets: *issuing of a redundancy notice; conducting a fair selection criterion; and properly computing the terminal package due to the employee.* That as regards issuance of a notice, it relies in the determination in **Civil Appeal No. 65 of 2012, Thomas De La Rue (K) Limited -vs- David Opondo Omutelema [2013] eKLR** that an employer is required to personally write to the employee and the labour office, issuing one month's notice before the date of the intended redundancy.

That following the advice issued by the labour officer, it issued a notification of intended redundancy to the Claimant personally vide a letter with reasons for the intended redundancy and copied the said letter to the local labour office. After completion of the one-month notification period, it proceeded to issue notice of termination on the grounds of redundancy.

It is the Respondent's submission that as regards payment of a redundancy package, such payment is not usually intended to compensate for loss of employment but is a reward for long services rendered as held by Justice Ongaya in **Fredrick Ngari Muchira & 99 Others -vs- Pyrethrum Board of Kenya [2013]**. That the Honourable Judge rendered in the above case that computation of a redundancy package is based on basic salary as opposed to gross monthly pay. It avers that it abided by Section 40(e), (f) and (g) of the Employment Act when determining the Claimant's terminal dues. Further, that the Claimant has not raised in his memorandum of claim nor his submissions that the dues paid to him were improperly computed.

The Respondent finally prays that the court finds that the Claimant's suit is devoid of any formidable cause of action and dismisses it with costs and also to consider a similar unreported case arising from similar facts being **Cause No. 1714 of 2013, Irene Mwende Muturi -vs- Sentech Limited** where this Honourable court dismissed the claim of unlawful termination.

Determination

The first issue for determination herein is whether the claimant's redundancy was unfair, unlawful and unprocedural and if there was malice. The second issue is whether the claimant is entitled to the remedies sought.

Section 40 of the Employment Act sets out the procedure for redundancy in mandatory terms, that the employer shall not terminate a contract of service on account of redundancy unless the employer complies with the provisions set out under Section (1)(a) to (g). These provisions include notification of intention to carry out redundancy, the period of notification not to be shorter than one month, the selection criteria which encompass non-discrimination on account of union membership, non-membership and the terminal benefits which include termination notice or pay in lieu thereof, payment of any leave due and severance pay.

In this case the claimant has not raised any issues over payment of redundancy package, his contention is that the reasons advanced for the redundancy are not genuine as the respondent continues to operate albeit, under another name. That after the merger the employees and the claimant in particular were not privy to the nature of business the new company is going to carry out and if his services would no longer be required.

The respondent on the other had submitted at appendix DP5 the EMPLOYEE ASSESSMENT FORM FOR NEW KHS EAST AFRICA LIMITED in which comments are endorsed that –

“Since KHS East Africa Limited will no longer have a manufacturing facility, the portion of machinist will not be carried over to the new company. Due to the level of skill Joseph Musembi had to offer, he was verbally informed that should a need arise for his skills on a short contract basis he would be called as and when needed.”

The claimant did not contest the fact that there was a merger of the respondent and KHS East Africa Limited. In the preamble to the merger agreement at paragraph (a) it is stated –

“SANTECH will discontinue its business operations, namely those that concern the sales, service, assembly and replacement part business for beverage filling equipment (herein referred to as “business operations”) at the end of 30 June 2013 for new business.”

The claimant does not deny that this clause of the agreement would phase out his job as a machinist.

Having not faulted the procedure and benefits relating to the redundancy, I do not find any evidence of unfairness, unlawfulness want of procedure or malice in the claimant's redundancy.

The law through Section 40 permits an employer to carry out redundancy. Section 45 (2)(b)(ii) further recognises that an employer may lawfully terminate employment “based on the operational requirements of the employer” provided such termination is carried out in accordance with fair procedure [45(2)(c)].

This court had the occasion to determine the case of a colleague of the claimant whose employment was terminated at the same time as the claimant or similar grounds in **Cause No. 1714 of 2013: IRENE MWENDE MUTURI -V- SEN-TECH LIMITED** where the court found no evidence that the termination was unfair, unlawful or unprocedural.

The court further found that the remedy sought of compensation does not arise since the claimant therein, as in the instant claim, was paid all

terminal dues, which the claimant acknowledged. The case was consequently dismissed.

I have perused the judgment and I am of a similar opinion in this case.

For these reasons, I find no merit in the claim herein with the result that it is dismissed.

Each party will bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE