



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1714 OF 2013

IRENE MWENDE MUTUIRICLAIMANT

VERSUS

SEN-TECH LIMITED RESPONDENT

JUDGEMENT

Issue in dispute – unfair, unlawful and unprocedural redundancy

1. The Claimant was employed by the Respondent as a Store Keeper at a monthly wage of Kshs.48,000.00 but on 11th February, 2013 the Respondent notified the Claimant that they were ceasing operations and therefore declared her redundant. On 11th April, 2013 the Claimant was issued with a letter of service on KHS East Africa and SEN-TECH LTD letter head and on 24th June, 2013 the Respondent operating under the name KHS East Africa informed all its customers that the management team and an extensive service team of the Respondent had joined this company and would remain at the service of customers under such name. On 30th June, 2013 the Respondent informed clients that from 1st July, 2013 they would be operating as KHS East Africa Limited on a letter with a heading of both the Respondent and KHS East Africa.

2. On 23rd July, 2013 the Claimant made demand against the Respondent and in response the respondents replied on 13th August, 2013. The Respondent had declared the Claimant redundant unprocedurally and unfairly. There were no reasons for the redundancy and the process was fraudulent and contrary to section 40 of the Employment Act. The Claimant has suffered loss and damage and is seeking compensation; general damages for unlawful redundancy and costs of the suit.

3. The Claimant testified in support of her claim that she was unfairly terminated over a redundancy that was fraudulent as the Respondent is still operating under a new name. There was no internal assessment to know who should be terminated. The same employees were taken over by the new company. The Claimant was not aware that the Respondent was sold to KHS East Africa as this process was never explained to her before termination of employment. She was paid her terminal dues. The remedies sought are due.

Defence

4. In defence the Respondent admit they employed the Claimant and notified her of a redundancy within the provisions of section 40 of the Employment Act vide letter dated 30th April, 2013. In the notice the Respondent informed the Claimant that she had been affected by the redundancy and issued a written notice to this effect of the reasons and such was within the lawful time periods. By letter dated 30th June,

2013 the Respondent in a letter in joint names of Respondent and KHS East Africa communicated to clients and suppliers of the Respondent that it had been acquired by KHS East Africa; that the Respondent would honour all contractual obligations it had; and for the purpose of informing and communicating on the changes at the respondent. The Respondent in its letter was not sharing the intricate legal nature of the relationship it had with KHS East Africa who had been the primary suppliers and or its clients.

5. The claimant's termination was carried out in a lawful and fair manner and in good faith. There is no evidence of malice as alleged. Termination was due to the fact that the Claimant was a store keeper and her position was required under the Respondent but under KHS East Africa there was reduced volume of work and thus the position was not required. In terminating the claimant, the Respondent put into consideration seniority in time of employees; skills of the claimant; ability and reliability and such assessment was used on the claimant. No other employee has been employed to carry out duties that the Claimant was undertaking while at the respondent.

6. The process used in terminating the Claimant is lawful. On 11th February, 2013 the Respondent issued letter to the County Labour Officer 3 months before the termination. The Claimant was personally notified of the redundancy and termination by letter dated 30th April, 2013; there was one month notice vide letter of 30th May, 2013; and all terminal dues were paid. Such was in compliance with section 40 of the Employment Act.

7. In support of the defence the Respondent called Daniella Pleitz who testified that she worked with the Claimant at the Respondent company which company was purchased through shares by KHS East Africa. The two are separate companies and before the Respondent was acquired by KHS East Africa they used to carry out business together. The acquisition of the Respondent was done in Germany and the company in Kenya is a subsidiary thereof. The Respondent had no previous affiliation and no directors and was independent until the purchase.

8. Upon the acquisition of the Respondent some employees were taken over and engaged on different contracts. The new company did not take over duties done by the Claimant as manufacturing role was not taken over. There was no position in the new company to be offered to the claimant.

9. In June, 2013 the management of the Respondent and KHS East Africa informed clients of the changes and that the new company would take over obligations and that the service team would remain as under the Respondent but the manufacturing team would cease. As a result the claimant's contract was terminated.

10. All the procedures and process contemplated under section 40 of the Employment Act was followed diligently. The Claimant was paid and acknowledged receipt of terminal dues. He termination was in good faith and not malicious.

11. At the close of the hearing, both parties agreed to file written submissions.

12. Only the Claimant filed written submissions. The Claimant in submissions reiterates the pleadings and evidence.

Determination

13. There are few instances the law allow termination of a contract of service/employment. Redundancy is one such case. Redundancy is a matter strictly regulated in law under section 40 of the Employment Act. 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.

14. Section 2 of the Employment Act and Labour Relations Act define what a 'redundancy' is and where there is an operational requirement by the employer that require a restructuring, reorganisation and thus a redundancy, a termination pursuant to due process is allowed as a fair and valid reason for termination of

employment as held by the Court of Appeal in **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**;

Section 40(1) of the EA [Employment Act] is merely procedural by its tenor. It has to be read together with sections 43, 45 and Section 47(5) of EA. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:

- (i) The reasons or reasons for termination.*
- (ii) that reason for termination is valid and that*
- (iii) the reason for termination is fair reason based on the operational requirements of the employer and*
- (iv) That the employment was terminated in accordance with fair procedure.*

However, as section 43(2) of EA provides the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

Further, as section 47(5) of EA provides the burden of proving unfair termination of employment rests with the employee while the burden of justifying the grounds for termination rests with the employer.

15. Therefore, in terms of section 45(2) of the Employment Act termination of employment is unfair if the employer fails to prove that;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) That the reason for the termination is valid;*
- (b) That the reason for the termination is a fair reason—*
 - (i) Related to the employee's conduct, capacity or compatibility; or*
 - (ii) **Based on the operational requirements of the employer; and***
- (c) That the employment was terminated in accordance with fair procedure.*

16. As set out by the Court of Appeal in the above cited case, the employer has to comply with the law by setting out what *operational requirements* they are faced with to justify a termination on the ground of redundancy. The defence is that, the Respondent was acquired by a third party, KHS East Africa, the role held by the Claimant in the Respondent company was not transferable to the new company and hence the notice to the County Labour officer, notice to the Respondent employees and notice to the Claimant on the same and hence the termination of her employment.

17. The Claimant does not contest the facts of the various notices issued to her save that the Respondent fraudulently used the process to deny her employment as majority of its employees moved to the new company and are still trading as previously under the respondent. The Respondent in defence admit that that the Respondent was acquired by a third party, the service department was moved with the company while the manufacturing department where the Claimant was working under was not. The Claimant was not therefore taken over by the new company as her skills were not moved with the Respondent acquisition.

18. In **Elizabeth Washeke & 62 Others versus Airtel Networks (K) Ltd [2013] eKLR** the court held

that where an employer is faced with an operational requirement and wish to outsource labour to a new entity, the options available in law are to declare a redundancy; terminate employment contracts and allow the new company to secure employment on new terms and conditions as should be agreed between the parties. Our law, unlike in some jurisdiction does not provide for outsourcing of employees and as such, to secure employee's rights under the current and on-going contract of employment, where there is a redundancy situation, the employer has the liberty to declare the redundancy and pay the terminal dues set out under section 40 of the Employment Act. Therefore, an employee who is notified of a redundancy due to operational needs of the employer has no right to get new employment with a third party unless such third party is willing to employ the employee on new terms and condition under a new and separate contract of employment aside from what the current employer has.

19. Upon the Claimant admitting that indeed the Respondent was acquired by a third party, there was due notice and terminal dues were paid in accordance with the law, the claim that the same was fraudulent and with malice has no justification in fact or in law. The relationship between the Claimant and Respondent as an employee and employer ceased following the acquisition and new arrangement between the Respondent and the third party, such facts have not been contested and the third party has not engaged the Claimant which is an option that existed upon the Claimant being declared redundant by the respondent.

20. As such, I find the claim by the Claimant that the termination on grounds of redundancy was unfair, unlawful or unprocedural does not arise. The remedy sought of compensation does not arise. The Claimant has since been paid all terminal dues of which there is an acknowledgement.

Suit is hereby dismissed. Each party shall bear own costs.

Dated, signed and read in open court at Nairobi this 15th day of June, 2017.

**M.
JUDGE**

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In the presence of:

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