REPUBLIC OF KENYA

IN THE EMPLOYMENT AND ABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1996 OF 2016

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

ZENA ROSES KENYA (SOSIANI, ASIA & THIKA FARM).....RESPONDENT

RULING

1. On 28th September, 2016 the claimant filed a Memorandum of Claim and the issue in dispute was the wrongful termination of 214 employees on account of redundancy. On **14th March, 2017 the claimant filed an Amended Memorandum of Claim**. On **4th April, 2017 the respondent filed their Response to the Amended Claim**. On 30th May, 2017 both parties agreed to address the main claim by way of written submissions and court allocated timelines and mention on 17th July, 2017 to confirm the same. On the due date the respondent was absent and only the claimant had filed written submissions.

Claim

2. The claimant has a Recognition Agreement with the respondent and has concluded a Collective Bargaining Agreement with the Agricultural Employer

Association with the respondent in their membership and effective from 1st August, 2013.

3. On 15th September, 2016 the respondent informed the Uasin Gishu County Labour Officer that they will be laying off by way of redundancy a total of 214 employees. The reasons given were that the respondent was experiencing difficulties as a result of low production, low sales, high costs in the farm input and reduced area under production. That the respondent had an excess staff notwithstanding reduction of the area by 30% to sustain the business.

4. The respondent did not substantiate the purported reasons of declaring the 214 employees redundant and ignored requests to consult over the same with the claimant. Section 43(1) and (2) of the Employment Act, 2007 makes it mandatory for an employer to prove the reasons for the termination of employment and where the employer fails to do so the same is deemed unfair.

5. On 28th September, 2016 the court granted an interim order restraining the respondent from declaring any employee redundant pending herein on 13th October, 2016. The order was extended to 5th December, 2016. On the same day the respondent proceeded to declare over 150 employees redundant through a fresh notice dated 6th December, 2016 and requiring that their last day of work to be 6th December, 2016.

6. The respondent failed to follow the mandatory provisions of section 43 of the Employment Act, 2007.

Further the procedures set out under section 40 of the Act were not followed. The notices to declare employee redundant did not establish he criteria used to select the laid off employee across the respondent farms in Sosiani, Asai and Thika and looking at skills, ability, reliability of order of seniority. This was in violation of ILO Convection No.158 as the respondent failed to take measures to avert or minimise the terminations of mitigate the adverse effects of any termination of employment.

7. The terminations occurred contrary to clear court orders restraining the respondent from taking such action.

The claimant is seeking for orders that;

> *a) The notice by the respondent dated 15th September, 2016 and 5th December, 2016 to declare the employees redundant is invalid and fails to meet the threshold set out in section 40(1) and (c) of the Employment Act, 2007. ILO Convection No.158 and ILO Convection No 166*
>
> *b) The redundancies effected vide notices dated 15th December [September], 2016 and 5th December, 2016 is wrongful and unfair, unprocedural and an act of unfair labour practice.*
>
> *c) The respondent pay each of the employees declared redundant twelve months gross salary as compensation for wrongful loss of employment within fourteen days from the date of judgement in default the principal sum to attract interest at court rates and execution to issue.*
>
> *d) The respondent does forthwith issue a certificate of service upon each of the employees declared redundant with seven days from the date of judgement.*
>
> *e) Costs of this suit be provided for.*

Defence

8. In response the respondent admit they issued notice declaring employees redundant but the claimant did not invite them to any consultations meeting as alleged in the memorandum of claim. In a notice to the Labour Officer dated 15th September, 2016 the respondent gave notice and also communicated the same to the employee in letters dated 5th December, 2016.

9. On 28th September, 2016 the court issued interim orders which were to subsist to 13th October, 2016 when the claimant's application was to be heard *inter parties.* The interim orders were not extended on the 13th October, 2016 as the matter was not listed. From 13th October to 5th December, 2016 there were no orders restraining the respondent from declaring its employees redundant or proceeding with the redundancy process.

10. The letters issued to the employees on 5th December, 2016 was a continuation of the process commenced by the notices issued on 15th September, 2016 and thus the notices of 5th December, 2016 were not fresh notices as alleged in the claim. The respondent has since purged any contempt by recalling the redundancy notices of 5th December, 2016 and calling all workers who had been declared redundant to resume their duties.

11. The defence is also that the respondent was following the of section 40 of the Employment Act, 2007 are also to be found under clause 25 of the CBA when the claimant rushed to court and arrested the process. Had the climate not rushed to court they would have engaged in consultations with the concerned employees as required by law but this could not happen upon the claimant failing to give consultations a chance.

12. The notice of intention to declare a redundancy dated 15th September, 2016 was issued to the County Labour Officer and to the claimant as required by law. The notices put into account the legal requirements

by giving reasons for the intended redundancy as low production, low sales, high costs in farm input. The claimant stalled the process when they rushed to court before consultations could be held.

13. The orders sought cannot issue as the notices issued by the respondent meant all the legal requirements. The notices have since been recalled when the respondent purged the contempt by its officers. Certificates of service are only issued to employees who have ceased to work for the employer and cannot issue to employees who are still in employment. In this regard the respondent does rely on the affidavit sworn on 26th January, 2017.

Submissions

14. The claimant submit that interim orders herein were issued on 28th September, 2016 restraining the respondent from declaring employees redundant.

The respondent replied on 11th October, 2016 and on the hearing date on 13th October, 2016 the claimant asked for more time to respond. A hearing date was fixed for 5th December, 2016.

15. Despite the interim orders, the respondent on 6th December, 2016 declared employees redundant.

16. On 6th March, 2017 the court directed parties to have application dated 27th September, 2016 be heard. The court directed parties to hear the applications and main claim. The claimant was also allowed to amend the claim.

17. On 20th Mach, 2017 the respondent issued notices declaring employees redundant. This has been done contrary to interim orders subsisting. The notices issued by the respondent declaring redundancy on 5th December, 2016 and 20th March, 2017 in clear contravention of court orders of 28th September, 2016 and should be punished in accordance with the applicable law. The claimant has relied on the case of **Hadkinson versus Hadkinson [1952] 2 All ER.** In the case of **Sahihi Housing Limited versus Ferdinand Ndungu Waititu** where the court held that a court order is binding and must be obeyed unless and until the order is varied or set aside.

18. The claimant also submit that the redundancy effected on 6th December, 2016 and 28th March, 2017 are unlawful and procedurally unfair. The respondent failed to abide the mandatory provisions of section 40 of the Employment Act, 2007. The notices of 6th December, 2016 and the notice of 20th March, 2017 are directed to individual employees and not to the claimant or the Labour Officers. These are fresh notices and the respondent cannot rely on any previous notices issued in view of orders of the court barring the redundancy. The employees being unionised are protected under section 40(1) (b) of the Act.

19. The letter of the respondent to the claimant dated 15th September, 2016 does not demonstrate how 214 employees were selected to declaration for redundancy.

The notice of 5th December, 2016 does not demonstrate how the employees declared redundant were selected.

20. Section 43 of the Employment Act, 2007 requires an employer to give reasons for termination of employment. Where no valid reasons ware given, the termination of employment is unfair in accordance with section 45(2) of the Employment Act, 2007.

21. The claimant submits the remedies sought are due. Compensation for unfair termination of employment; issuance of Certificates of Service; and costs of the suit. That the respondent officer, Dr. Sally Koskei should pay a fine of Kshs.100,000.00 or be imprisoned for 6 months for disobedience of court orders.

22. As noted above, the respondent did not file any written submissions.

Determination

Whether the respondent is in contempt of court orders

Whether there is unfair termination of employment

Whether the remedies sought are due

23. Before delving into the analysis of the issues set out above, I note the respondent failed to file any written submissions with regard to the suit herein. I note the respondent filed Replying affidavit on 27th January, 2017 and avers that on 25th January, 2017 there was purge of the contempt when Dr Sally Koskei attended court and made an undertaking with reinstate the employees which was done vide notice to the employees.

24. In this reply, Dr Koskei also avers that upon issuance of the notice to resume work, some employees reported back to work while some have not. All the employees who resumed work signed discharge voucher releasing the respondent company from any claim. Payments were then made to the employees through their advocate Songok Akena & Company Advocates. The employees singed the discharge vouchers in the presence of their shop floor representatives of the claimant. The respondent cannot enforce the court orders against employees who opted not to return to work.

25. In the reply, Dr. Koskei also avers that the respondent declared redundant due to the reason that the respondent company can no longer sustain their employment as the respondent is facing massive losses.

26. It is common ground that the parties herein have a Recognition Agreement and a CBA.

27. The sanctity of the CBA is to be kept. Each CBA is registered with the Court to give it the legal force and where party find any clause is impossible to comply, recourse is the court.

28. Once parties are bound by a CBA, the rights therein particularly should be protected. The unionisable employee enjoy the benefits of the CBA by virtue of their union membership. As such, where the employer is faced with any matter addressed under the CBA, the first point of call is the trade union.

29. As set out above, the respondent through the Affidavit of Dr Sally Koskei avers that various employees have since left the respondent employment after payments were effected through their advocates, Songok Akena & Company Advocates. By their unionisation, the employees have the right to legal representation, but where the terms of the CBA and Recognition requires that the represented union be informed of any matters with regard to terms and conditions of work, sections 48(6), (7) and (8) of the Labour Relations Act, 2007 should apply. The employee seeking to leave the trade union and thus be represented by their advocate or other union of choice should issue notice and such notice should be served upon the affected trade union. Otherwise, the binding CBA and Recognition agreement apply.

30. In this case, the respondent cannot justify the non-issuance of communication or notices to the claimant union on the basis of its employees who were unionised giving instructions to an advocate. To allow such on the face of the CBA and Recognition Agreement would be to allow the respondent to circumvent the sanctity of the same. Such would negate the very essence of negotiating a CBA and having it registered with the court to give it the legal force for enforcement.

31. Equally, the discharge vouchers attached to the response by various employees, such without service upon the claimant union are unprocedural. The legal effect is negated. To circumvent the legal procedures of section 48 of the Labour Relations Act, 2007 and then apply the rationale of section 40 of the Employment Act, 2007 such only opens the respondent to incur most costs. To engage outside the CBA with third parties is an unfair labour practice. Such is meant to avoid the legal obligations set out between the parties in the CBA.

32. Where the respondent has gone out and allowed unfair labour practices and outside the recognition

with the claimant, any costs due should be from the respondents own accounts.

33. Noting the above, it is unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee's conduct, capacity, and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure. **Section 43** specifically places the burden to prove that the termination was fair on the employer. It provides;

> **43(1) in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**
>
> **(2) 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.**

34. The burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer. In addressing the question of what constitute unfair termination of employment, the Court of Appeal in **International Planned Parenthood Federation versus Pamela Ebot Arrey Effiom [2016] eKLR** held that;

35. **Section 43** of the Employment Act deals with proof of reason for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of **section 45**. The reason for termination of contract is the matter 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.

36. In a previous case, the Court of Appeal in **Kenfreight (E.A.) Limited versus Benson K.Nguti [2016] eKLR** held as follows;

> *Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken. Looking at the pleadings, the correspondence between the parties and the evidence on record, no reason at all was given to the respondent why his services were terminated. He was not informed of his transgressions. Neither was he given an opportunity to explain himself*

37. With regard to termination of employment arising out of a redundancy, the elements applicable have also been addressed by the Court of Appeal and restated the law and I find the same to be relevant to refer herein **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** In the case of

> *It is convenient to begin by setting out the provisions of the Employment Act (EA), the Labour Relations Act (LRA) and the Collective Bargaining Agreement (CBA) relating to redundancy. Both section 2 of EA and LRA define redundancy thus:*
>
> **…**
>
> *Section 40 of the EA deals with termination of employment on account of redundancy and provides:*
>
> …

Section 43(1) of the EA provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

43. (2) 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.

Section 45(1) of EA prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

...

Section 40(1) of the EA 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 … [*emphasis added].*

38. In this regard therefore, even where the employer has a valid reason leading to possible termination of some employees or the entire workforce, the employer must nevertheless demonstrate that the termination of employment is attributable to the redundancy. The employment of the affected employees is rendered superfluous due to the redundancy as positions become redundant and not the skills or abilities of the employees. Where the redundancy therefore results in the need to downsize the workforce, the employer must issue individual letters or notices of termination of employment.

39. In this case, the claimant moved the court with a Notice of Motion and Memorandum of claim and interim orders granted on 28th September, 2016. For good reason and to allow the respondent make a response, the orders were extended on 13th October, 2016 for hearing on 5th December, 2016. On the due date the orders were extended to allow the parties consult with the County Labour Officer and to attend hearing on 16th January, 2017.

40. On 16th January, 2017 the claimant was in court but the respondent remained absent. A mention date was given for 25th January, 2017 and the respondent issued with a Notice to Show Cause why they had disobeyed court orders following application by the claimant dated 9th January, 2017.

41. On 25th January, 2017 both parties were in court and the respondent officer, Issa Wafula stated that several employees had collected their dues and others could not be traced. The order issued orders and directions that the County Labour Officers in Ruiru and Eldoret to ascertain the status of respondent employees in terms of orders issue don 28th September, 2016 and noting a memo issued by the respondent on 17th January, 2017 recalling the employees back to work. The director of the respondent was also required to attend court on 2nd February, 2017.

42. On 2nd February, 2017 the respondent director, Dr Sally Koskei attended court and noting her explanation and circumstances and reasons for not attending court before was cautioned and further mention on 21st February, 2017 for hearing directions. On the due date, the claimant was absent and noting the matters arising on 2nd February, 2017 the court dispensed with the application for contempt and directed parties to address application dated 17th September, 2016 on 6th March, 2017. On 6th March, 2017 parties agreed to address the applications and the main claim by way of written submissions.

43. The above thus set out, on 21st February, 2017 the court absolved the respondent of the contempt.

Parties were to address the substantive issues set out in the applications of 27th September, 2016 and the main claim now amended.

44. The County Labour Officer has since filed a report with the court. It is signed on 31st January, 2017 by Boaz Musandu, Uasin-Gishu County. No work records are attached to this report. The officer notes that he received the court orders and proceeded to the respondent premises and found a memo dated 17th January, 2017 addressed to all listed employees displayed in public notices reinstating the listed employees. There was a list of 7 employees and their attendance register who had returned to work. That there were discharge forms indicating full payment of terminal dues.

45. The County Labour Officer further makes observations to the effect that the respondent had disobeyed court orders and declared 159 employees redundant; contempt proceedings were filed and directions issue don 16th January, 2017 recalling the affected employees; 7 employees reported back and others declined; and terminal dues have been paid witnessed by union officials.

46. As noted above, the County Labour Officer, Uansin-Gishu County does not attach any records. It is not clarified as to whether the County Labour officer, Ruiruwas consulted in analysing the affected employees or whether there was a visit to the sites and various farms of the respondent.

47. The initial Memorandum of Claim noted 214 employees had been after by the notices of the respondent. This has since been amended and no numbers are stated in the Amended Memorandum of Claim. The County Labour Officer notes that 159 employees were declared redundant. The claimant in submissions does not address this aspect at all. It is not clear at the end of my analysis at to how many employees were issued with notice; how many resumed work; and how many have since signed vouchers with the assistance of union official and discharging the respondent. What is filed by the respondent in the Affidavit of Dr Sally Koskei is not challenged.

On the above finding that the respondent has acted outside the clear terms of the CBA as agreed between the parties; on the finding that there is no list to verify the employees who resumed duty vies-a-vies those who failed to do so following the unlawful notice of redundancy; the claimant having Amended the Memorandum of Claim and not listed the number of affected employees whose terminal dues should now be assessed; the orders sought shall not issue. Save that, in the next thirty (30) days both parties shall hold a meeting and address the number of affected employees with regard to notice of 15th September, 2016 and notice of 6th December, 2016 respectively;

(1) list the last position held;

(2) the gross wage earned; and

(3) date of employment setting out the number of years in the service of the respondent.

Present at the meeting shall be the Court Deputy Registrar to verify the records. On this basis the court shall make an assessment of terminal dues.

Delivered in open court at Nairobi this 7th day of November, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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