



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 742 OF 2015

BETWEEN

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

KENYA MARINE CONTRACTORS EPZ.....RESPONDENT

JUDGMENT

1. The Claimant initiated this Claim on 1st October 2015. The Claim arises out of a decision made by the Respondent to declare certain positions held by the Claimant's Members at the Respondent's Business, redundant. The Claimant prays the Court to restrain the Respondent from terminating the concerned Employees' contracts.
2. The Respondent states redundancy was necessitated by adverse changes in the market, which affected its project based business in marine and plant workshop department. The Respondent acknowledges it issued notices of redundancy irregularly to the Employees on the 1st October 2015. These were recalled on 9th October 2015. The Respondent prays it is allowed to go on with the process. Non-unionisable Employees left employment on redundancy. The Respondent should be allowed to go on with the process with regard to Claimant's Members. The wage bill in the particular department is not sustainable.
3. The Claimant obtained orders of temporary injunction indicting the process until the main dispute is determined. On 5th October 2016, Parties agreed to have the dispute disposed of based on their Representatives' oral submissions made before the Court on the same day.
4. Mr. Omolo submits that the Respondent went ahead with the process the injunction notwithstanding. Employees should be reinstated unconditionally, without loss of benefits
5. The Employer is not honest in alleging there is no more work to be performed by Claimant's Members. Supervisors were assigning Employees excess hours. There would be no justification in working excess hours, if there was no work. The Union did not receive notice of redundancy. The Respondent purported to issue notice, after the Court granted the orders of injunction. The order was in favour of all Employees; it did not discriminate against non-Members.
6. The Respondent continues to engage Casual Employees. Managers and Foremen have been engaged, even as the Respondent says there is no work for Claimant's Members. Redundancy was not based on a genuine economic problem and was not carried out fairly.

7. The Respondent argues it has the right to terminate the contracts of its Employees, under Section 40 of the Employment Act 2007. It has encountered financial constraints in running its business, and cannot sustain the wages of Employees in the workshop department.

8. It is conceded by the Respondent that the notice issued on 1st October 2015 was faulty. It had been served to Employees only. It was recalled and fresh notices served on the Union, Labour Office and the Employees.

9. The Respondent submits it is not able to continue employing Claimant's Members in the workshop department. It should be allowed to go on with the process. It is ready to pay the Employees their redundancy benefits. Members of the Claimant Union are still in employment. The Respondent submits it does not have a valid CBA and Recognition Agreement with the Claimant Union. It should be allowed to go on with the process under Section 40 of the Employment Act.

The Court Finds:-

10. The Claimant Union obtained an order barring the Respondent from terminating Claimant's Members' contracts until the dispute is heard and determined. It appears the Claimant's Members are still working with the Respondent. Mr. Omolo alluded to some of his Union's Members being reinstated, once they were identified as Members.

11. The dispute as understood by the Court is brought on behalf of identifiable Members of the Claimant Union. It relates to the alleged non-observance by the Respondent of Section 40 of the Employment Act, and of the CBA between the Parties. The dispute is not about non-Members whose contracts have already been terminated and benefits paid. If it was, such non Members-should have stepped forward and stated their grievance in Court. Instead, the Claimant seems to have taken up their cause, arguing they should not be discriminated against, and should be reinstated. The details of Members and non- Members in any case, were not given to the Court.

12. The Respondent indicated in the notices that it was compelled to declare redundancy in its workshop department due to reduction in business involving that department. Already some Employees have left on this ground. There was no material availed by the Claimant Union contradicting the existence of a genuine economic problem at the Respondent. Employment of casual Employees and the putting in of excess hours by affected Employees is not disproof of a redundancy situation. The Union ought to have supplied the Court with economic data to support its position that the Respondent is in a healthy financial position, and the workshop still in a position to keep the Claimant's Members in viable employment. Alleging there are casual Employees, Supervisors and Foremen engaged by the Respondent, without providing the Court with hard economic data, does not assist the Claimant in establishing its claim on the validity of redundancy, on a balance of probability.

13. The process however appears to the Court faulty. The first misstep on the part of the Respondent lies in its interpretation of the Recognition Agreement and CBA concluded between the Parties. Both Agreements, even though indicated to cover a certain period, do not cease to have force, until there is a subsequent agreement revoking or modifying the existing ones. It is not correct therefore for the Respondent to move from the position that it has no obligations under the existing Labour Contracts.

14. It is conceded also, that the Respondent initially issued Employees notices of redundancy, without involving the Union and the Labour Office. Notices initially issued on the 1st October 2015. These were recalled, and fresh notices issued on 8th October 2015. This was after the Claimant filed this Claim, and obtained the order for injunction.

15. The Respondent ought to have issued notices in the form required under Section 40 of the Employment Act. Recalling and re-issuing notices while the matter was already in Court, and order of injunction issued at the very least in protection of Claimant's Members, was a procedural misstep. The resolution to declare redundancy was arrived at by the Respondent's Board of Directors on 9th September 2015. There was time to engage the Union, the Labour Office and the Employees, issue proper notices,

and have consultations. There was time to consult and agree on the modalities of redundancy. There must be genuine consultations at every turn, in a redundancy process; it is not just a matter of issuing notice.

16. The procedure adopted by the Respondent was flawed. The reasons given in justifying termination, as captured in the Board of Directors' resolution dated 9th September 2015, are valid. The resolution of the Board, was clear evidence that the decision by the Respondent was based on the operational requirements of the Employer. The entire workshop operation was to be closed down. Termination would be fair, under Section 45(2) (ii) of the Employment Act. As termination based on the flawed procedure did not take effect, there is no ground to consider grant of compensation. Redundancy was based on valid ground, and it would not be proper to give an order for reinstatement of Employees who have already left, or bar the Respondent from separating with current Employees whose positions have fallen redundant. IT IS ORDERED:-

- a) Declaration of redundancy was based on valid reasons, but flawed on fairness of procedure.*
- b) The Respondent is at liberty to go on with the process, while avoiding such missteps as pointed out above, and shall pay to the Claimant's Members all their redundancy benefits under Section 40 of the Employment Act and the prevailing CBA.*
- c) No order on the costs.*

Dated and delivered at Mombasa this 2nd day of December 2016

James Rika

Judge