



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 77 OF 2014**

**KENYA PLANTATION AND AGRICULTURAL WORKERS' UNION.....CLAIMANT**

**- VERSUS -**

**HARVEST LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 27<sup>th</sup> June, 2014)**

**JUDGMENT**

The respondent desired to undertake a redundancy exercise which would culminate into about 350 employees being members of the claimant terminated from employment. By the letter dated 1.04.2012, the respondent wrote to the labour officer at Machakos and copied to the respondent conveying that the respondent wished to terminate the services of some of its employees due to poor performance of floriculture industry, weak Kenyan currency and harsh climatic conditions. The letter stated that the employees to be affected were from all the respondent's departments and the criteria to be used were as follows:

- a. **Voluntary resignation in which the respondent was to appeal to employees to voluntarily leave the respondent and that being the most preferred method of undertaking the redundancy.**
- b. **Last in first out under which the casual employees would not be converted to engagement on permanent terms.**
- c. **Ranking appraisals where employees will be appraised and ranked.**
- d. **Transfer under which employees willing to be transferred to any of the respondent's other farms will be considered instead of employing new staff.**

The letter concluded that the intended commencement date of the redundancy process was to be on 1.05.2012.

In view of the redundancy, the parties to the suit held a consultative meeting on 21.05.2012 at which the respondent explained that the redundancy was due to the sale of 12 hectares of the farm on the Kinani side and the employees would be selected on the last in first out basis.

The parties further agreed as follows:

- a. **The communication on the redundancy issue be directed to the claimant's head office and not the branch office.**

- b. The employees declared redundant be paid as per the collective agreement including notice pay, prorated leave, redundancy benefits, days worked, certificate of service, and any other payment like overtime and bonus, if any.
- c. The respondent to communicate to all employees officially in batches according to phases as they left.
- d. The terminal dues to be computed and communicated to individual employees and the claimant for confirmation.
- e. The employees be accessed the respondent's premises for clearance and to receive the terminal pay.
- f. The employees who opt to voluntarily go on termination to be paid as per (b) above.
- g. The employees shall be paid all their dues through their accounts within the month following the last day of working.

Under the arrangements, 58 employees were transferred to the respondent's Kinangop farm, 30 employees opted to resign and were paid as agreed, 19 employees on casual and seasonal contract were discharged upon expiry of their respective contracts, and 77 employees were discharged based on poor performance and disciplinary issues. Thus, the respondent's case is that 200 employees have left employment and 150 employees are yet to be discharged under the redundancy scheme. According to the respondent, the 150 employees are still in employment until the uprooting of the flower crop or demolition of the green houses on the remaining operational 4.5 hectares but targeted for closing down.

By the letter dated 14.01.2014 addressed to the Labour officer at Machakos and copied to the claimant, the respondent notified that it wished to terminate the services of some of the employees due to the continued poor performance of the floriculture industry and escalating operational costs. The affected employees would be from all departments as the respondent had been unable to redeploy them elsewhere in the farm. The criteria to be applied were as per the earlier letter of 1.4.2012. The letter stated that the starting date of the process was to be 20.02.2014 so as to comply with the CBA requirements on redundancy. The parties do not dispute that the notice would lead to redundancy of 35 or 37 employees.

The respondent also issued redundancy notification letters to individual employees with different grounds of termination from those conveyed to the labour officer. The individual letters stated the reason as being the **"high wage bill and escalating operational costs"** as opposed to the one to the labour officer namely **"continued poor performance of the floriculture industry and escalating operational costs."** The further claimant's case is that those subsequent reasons were different from the earlier reasons in the letter of 1.04.2012 namely, **"poor performance of floriculture industry, weak Kenyan currency and harsh climatic conditions."** The meeting held on 21.05.2012 had given a different reason namely **".....redundancy was due to the sale of 12 hectares of the farm on the Kinani side."**

The respondent has admitted to the claimant's claim that the respondent has employed new workers despite the redundancy in issue. To explain the new engagements, the respondent has pleaded that it employed new staff during the peak period in the month of February, 2014 during the Valentine and women's week seasons. The respondent has stated that all the new employees were absorbed on short term contracts of one month and had since been discharged.

The claimant, being dissatisfied by the redundancy proceedings, filed the memorandum of claim on 28.03.2014 and prayed for:

- a. **A declaration that the redundancies are wrongful, unfair and un-procedural.**
- b. **An order staying the redundancy notices dated 14.01.2014, 30.01.2014 and 4.03.2014 intended to be effective from 31.03.2014.**

**c. In alternative, the court to allow the redundancies to proceed but order the respondent to pay 12 months wages as compensation to each employee declared redundant for wrongful loss of employment.**

**d. The respondent to pay costs of the suit.**

The memorandum of response was filed on 24.04.2014 and the respondent prayed for a declaration that the redundancy process was exercised within the law fairly and procedurally; and the suit is dismissed with costs.

The claimant relied on the pleadings and the documents on record. The respondent's witness was Sylvester Wabwire (**RW**), then respondent's Human Resource Officer.

The parties agreed that the main issue for determination is whether the respondent had applied the lawful selection criteria during the redundancy proceedings.

The Employment Act 2007 in section 2 defines redundancy to mean the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. Section 40(1) (c) of the Act provides that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. That is the law that serves as the benchmark against which the respondent's actions must be measured against.

There is no dispute that in undertaking the redundancy, the respondent invoked criteria that included voluntary resignation, last in first out with respect to casual or seasonal employees, ranking appraisals and transfer. It is obvious that the criteria were inconsistent with the idea of redundancy, namely, a termination at the instance of the employer. The court holds that voluntary resignation is at the instance of the employee and is therefore outside the definition of redundancy. Secondly, failure to renew contracts of seasonal or casual employees or failure to convert service of such employees to permanent service would amount to termination by lapsing of their respective term of service or legitimate failure to employ and the court holds that such measures were misconceived as constituting a selection criterion for redundancy. Similarly, in the opinion of the court, transfer as invoked by the respondent was a retention measure and not a selection criterion for redundancy purposes.

As for ranking appraisal, it was submitted for the respondent that the appraisal system had been used by the respondent on annual basis without any disputes. Further, it was submitted that for the 35 employees to be affected by the 2<sup>nd</sup> phase of the redundancy, the management used the appraisal system which is done annually and applied to every employee. It was submitted that the appraisal system provided for grievance management in event of the employee's dissatisfaction. The court has considered the submission and finds that the respondent invoked performance levels as a reason for terminating some of the employees on the purported account of redundancy. The court finds that the respondent acted on account of a reason attributable to the employee's performance yet in redundancy, the reason is free from the employee's fault. Where the employee is to be terminated on account of poor performance, it is the opinion of the court that the employer must apply section 41 of the Act which provides for the purpose and applicable procedure of a notice and hearing. The court therefore finds that it was irregular and misconceived for the respondent to invoke and apply the annual appraisal results in selecting workers for redundancy.

Section 40(1) (c) of the Act clearly provides that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. The court holds that the idea of last in first out satisfies the seniority criterion. As far as skill, ability and reliability are concerned, it is the opinion of the court that the employer must have, prior to the redundancy exercise, instituted objective qualifications for skill, ability and reliability attached to the office held by the workers against which the skills, ability and

reliability possessed by the individual workers targeted in the redundancy will be scored or measured against. The employer, in the court's opinion, must demonstrate the objective score sheet and the ranking of the targeted employees against that score sheet with respect to the selection factors set out in section 40(1) (c) of the Act failing which, it is difficult to establish compliance with the section. The court also holds that the selection parameters in section 40(1) (c) are not in alternative so that in a redundancy process, the employer must establish that all the parameters have been taken into account and in an objective manner. It is the opinion of the court that the employer enjoys the discretion to place given weights on each of the parameters but none can be applied in exclusion of the others.

To answer the issue for determination, the court finds that the respondent has failed to establish compliance with the provisions of section 40(1) (c) in selecting the workers for redundancy.

In conclusion, judgment is entered for the claimant against the respondent for:

1. **The declaration that the intended redundancies were procedurally unfair.**
2. **The respondent shall not proceed with the redundancy except in strict compliance with the provisions of section 40 and the selection process prescribed in section 40 (1) (c) of the Employment Act, 2007.**
3. **A declaration that the notices leading to the intended redundancies are set aside as far as they affect the employees still in the respondent's service as at the date of this judgment.**
4. **The respondent to pay costs of the suit.**

**Signed, dated and delivered in court at Nakuru this Friday 27<sup>th</sup> June, 2014.**

**BYRAM ONGAYA**

**JUDGE**