

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. E427 OF 2020

(Before D.K.N. Marete)

ALFRED OKOTH SEWE.....CLAIMANT

VERSUS

LENANA FOREST FURNISED APARTMENTS LIMITED.....1st RESPONDENT

ACCESS CONSTRUCTION COMPANY LIMITED2ND RESPONDENT

JUDGMENT

This matter came to court by way of an Amended Statement of Claim amended 28th December 2022. It does not disclose any issue in dispute on its face.

The Respondent in an Amended Reply to Claim amended on 12th February, 2023 denies the claim and prays that its be dismissed with costs as against the 1st Respondent.

The claimant's case is that he was employed by the Respondent as a Messenger on 28th October, 1996. He rose through the rank to the position of a driver, office assistant, store keeper and all this time received a salary for his work. He earned Kshs.25,000.00 as his last salary in the assignment as a driver. His stint of service was also blemish free.

The claimant further case is that his services were terminated by the Respondent on 18th November, 2019 for reasons that the company was unable to sustain its financial obligations and it was downsizing. He avers that the Respondents disregarded and or violated the rules and procedure of redundancy as by law stipulated. The termination was therefore without due process. This was actuated by malice and bad blood.

It is the Claimant's case that during the computation of his service pay on expiry of termination notice, the Respondent only considered service pay for four (4) years instead of the twenty-three (23) years worked thereby failing to compute the pay for the balance of nineteen (19) years he had served. This is because his stint of duty dates back to 2009 and indeed he was included in the staff pay roll for October, 2009 in which he was paid a salary.

The claimant's penultimate case is that during this stint of service, and particularly from 1997, the Respondent continued to deduct NSSF dues but these were not remitted to the institution for ninety-three (93) months. Besides, he has never been paid for leave days and neither has he gone on leave ever since employment.

The claimant further avers that he has suffered injustice through administrative unfairness by the Respondent. The following is a tabulation of the particulars of their breach of contract;

- a) *Terminating the Claimant's employment without giving him valid reasons.*
- b) *Refusing to accord the Claimant a hearing based on redundancy procedures.*
- c) *Refusing to pay the Claimant his severance dues.*
- d) *Exposing the claimant to ridicule and rendering him destitute.*

He prays as follows; -

1. *An order for reinstatement.*
2. *A declaration that the termination of the Claimant by the Respondents was unfair, unprocedural and unlawful.*
3. *An order that the Respondent does forthwith-*
 - i. *Issue the Claimant with a certificate of service as required by the law.*
 - ii. *Pay the Claimant*
 - a. *Unpaid leave days at Kshs.1,000 x 21 days' x 23 years Kshs.483,000/*

- b. Unremitted National Social Security Fund (NSSF) contributions at Kshs,200 x 93 months Kshs.18,600/-*
- c. Severance pay calculated at 25,000 x 15 days' x 19 years divide by 30 Kshs.237,500/-*
- d. Compensation for wrongful and unfair termination being 12 x 25,000 = Kshs.300,000/-.*
- e. Exemplary damages.*
- g. Interests on "a" "b" "c" and "d" above at court rates.*
- h. Costs of the suit.*
- i. Any other relief the Honourable court may deem fit to grant.*

The Respondent's case is a denial of the claim.

The Respondent avers that it is a stranger to the averment that the claimant was an employee from 28th October, 1996 and state that the claimant was in its employment when his services were lawful terminated with a payment and release of his full and final terminal dues amounting to Kshs.42,667.00. His NSSF dues were remitted in full as his expected of law up to and including December, 2019. It therefore prays that the claimant's case be dismissed with costs to the 1st Respondent.

The matter came to court variously until the 29th April, 2024 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of employment of the claimant by the Respondent was wrongful, unfair and unlawful.
2. Whether the claimant is entitled to the relief sought.

3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of employment of the claimant by the Respondent was wrongful, unfair and unlawful. The claimant in their written submission dated 6th July, 2024 reiterates the case for unfair and unlawful termination of employment on grounds of redundancy.

The claimant seeks to rely on the authority of section 45 of Employment Act, 2007 which stipulate that a termination of employment shall be deemed unfair if the employer fails to prove that it was based valid and fair reason and also that fair procedure was applied in such termination. Further, the claimant relies on authority of **Walter Anuro v Teachers Service Commission (2013) Ekir** where the Court observed that,

"...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination"

The claimant submits that the termination on grounds of redundancy would have incorporated the provisions of section 43, 45, 47 and 49 of Employment Act, 2007 for it to stand the ground of a fair termination of employment. This comes out thus;

Under section 45, a termination on grounds of redundancy shall be considered unfair if the employer cannot demonstrate that it was based on the operational requirements of his business and that the employment was terminated in accordance with fair procedure.

Before an employer terminates a contract of service on account of redundancy, they must have a justifiable ground for doing so. This must be an event that has rendered the position of the affected employee obsolete or superfluous.

The employer should include the factors set out in section 40(1) (c) of the Employment Act in the criteria for evaluating and selecting the employees to be declared redundant. Additionally, the employer is required to prove that the criteria was objectively, uniformly and fairly applied.

The Claimant submits that the Respondent failed to give a reason why his position qualified for redundancy and what evaluation criteria was used in selecting his position for redundancy. The decision was not objective and was biased.

Further, the claimant submits that the Respondent has failed to bear the evidential burden by demonstrating financial difficulties in evidence and defence to the claim. There is no financial statement in support of this claim and therefore the inference that the termination was malicious and did not amount to a valid redundancy. It was not objective but immensely biased.

The claimant further a violation of section 40 of the Employment Act, 2007 by failing to adopt the procedure for redundancy. This is as follows;

- a) To issue notice of the anticipated redundancy to his employees. This is a general notice issued at least 30 days before the actual termination on account of redundancy. It is addressed to the employees and local labour office where the employees are not members of a Trade Union.*

- b) *The notice should indicate the grounds for the proposed redundancy. It must also indicate the extent of the redundancy in the context of how many employees will be affected and from which departments.*
- c) *The employer must then embark on a selection process of the employees to be terminated while having regard for the seniority in time of the employees, their reliability, ability and skills.*
- d) *The employer must then pay the employees identified for release: severance pay; leave dues; and a month's salary in lieu of notice.*

The Respondent did not file any written submission in support of their case.

I agree with claimant. The process of the termination of his employment was flawed from day one. I therefore find a case of a botched-up redundancy which amounted to wrongful, unfair and unlawful termination of the employment of the claimant by the Respondent and find as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having established and won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to award the claim and order relief as follows;

- (i) The Respondent is ordered to issue the claimant with a certificate of service within thirty (30) days of this judgment of court.
- (ii) Service pay computed at Kshs.25,000x15/30x19yearsKshs237,500.00
- (iii) Four (4) months salary as compensation for unlawful termination of employmentKshs25,000.00 x4monthsKshs.100,000.00

Total of claimKshs337,500.00

- (iv) Interest at court rates from the date of this judgment of court till payment in full.
- (v) The costs of the claim shall be borne by the Respondent.

Delivered, dated and signed this **22nd** day of **October** 2025.

D. K. Njagi Marete
JUDGE

Appearances:

1. Miss Annete holding brief for Owino Bukachi & Company Advocate for the claimant.
2. Mr. Kinuthia instructed by A. W. Kinuthia & Company Advocates for the 1st Respondent
3. No appearance for the 2nd Respondent.

