



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT MOMBASA**

**CAUSE NO. 692 OF 2016**

**SAID BAKARI MWAFUJO.....CLAIMANT**

**- VERSUS -**

**NDOLO INVESTMENTS LTD..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 25<sup>th</sup> February, 2022)

**JUDGMENT**

The claimant filed the memorandum of claim on 21.09.2016 through Okanga & Company Advocate. The claimant was employed by the respondent as a driver from 27.05.2015 to 07.04.2016. He initially served three months' contract ending on or about 27.08.2015. By the letter dated 05.12.2015 the contract was extended for one year to end. The contract of service ended when the respondent wrote to the claimant the letter dated 07.04.2016 thus,

**“RE: RELIEVE FROM DUTY**

**Owing to the recent accident on one of our vehicles, it is pretty clear that the department is now overstaffed and it is in this regard that we regret to relieve you off your duties as we take time to acquire a new vehicle after which we may recall your services.**

**You are advised to hand over any company property under your possession to the manager as you proceed to accounts office for your dues.**

**We regret all inconveniences and hope for your understanding.**

**Yours faithfully,**

**NDOLO INVESTMENTS**

**Signed**

**S. NDOLO**

**MANAGING DIRECTOR”**

The claimant handed over on 12.11.2016. The respondent had computed the claimant's dues at Kshs. 14, 000.00 as at 04.05.2016 but the claimant declined to take the dues and filed the present suit.

The claimant's case is that the termination was without a valid excuse or reason and it was in breach of the contract of service. He pleads that sections 35, 41 and 43 of the Employment Act, 2007 were violated. He claimed:

- a. Notice pay Kshs. 14, 000.00.
- b. Eight months' salary for the unexpired term of service Kshs. 112, 000.00.

c. 12 months' salary compensation for unfair termination Kshs.168, 000.00.

The claimant prayed for judgment against the respondent for Kshs. 294, 000.00; costs of the suit plus interest; and any other relief that the Court may deem fit to grant.

The respondent filed the statement of response on 10.11.2016. The respondent admitted the employment relationship as pleaded for the claimant. The respondent denied the unfair and unlawful termination as pleaded for the claimant and stated that the claimant was rendered redundant after the motor vehicle he was deployed to drive was involved in an accident and the respondent had no option but to terminate the employment by the letter dated 07.04.2016.

The claimant testified to support his case and the respondent's witness (RW) was Bernard Mmbaha, the respondent's Hotel Manager. Parties filed their respective submissions. The Court has considered the pleadings, evidence and submissions. The Court makes findings as follows:

1. The Court finds that the claimant and the respondent were in employment relationship. The claimant worked as a driver at Kshs. 14,000.00 per month.

2. The Court finds that the termination was unfair both in procedure and substance. RW testified that the motor vehicle involved in the road accident was one assigned to and driven by the claimant but provided no documents to verify that assertion. There is no reason to doubt the claimant's position that there was an accident involving the respondent's motor vehicle but it was not driven by and allocated to the claimant so that the one assigned to the claimant was still available. The reason for termination is found not genuine because the respondent has failed to show that the motor involved was the one assigned to the claimant and as envisaged in section 43 of the Employment Act, 2007. Further, RW testified that the respondent had 4 drivers each assigned a vehicle and it was not clear how the claimant was identified for redundancy in view of the selection criteria in section 40 of the Act. Further, the relevant notices to the claimant and the area labour officer as envisaged in section 41 of the Act were not shown to have been issued and served. The redundancy was contrary to the necessary preparation as required and as was held in **Kenya Airways Limited – Versus- Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** (Githinji, Maraga, and Murgor JJA), cited for the respondent. Thus the termination was unfair.

3. The Court has considered the provisions of section 40 of the Act. Under the section the claimant was entitled to a mandatory one-month notification (for preparation) and thereafter to one month pay in lieu of notice. He is entitled to the one-month notice as undisputed and offered at **Kshs. 14, 000.00**. He had 8 months to expiry of his annual contract and had a clean record of service. He was not paid the statutory one-month salary in lieu of notice in section 40 of the Act. Taking all the factors into account as envisaged in section 49 of the Act, an award of 6 months' salaries making **Kshs. 84,000.00** will balance justice for the parties. While making that finding the Court has considered the termination clause in the contract which did not provide for a minimum statutory notice envisaged in section 35 of the Act and which instead provided, "**The management shall reserve a right to terminate the contract for any reason it may view to warrant such step without prior notice.**" It appears the respondent invoked that otherwise unlawful clause in terminating the claimant's contract of service and it acts as an aggravating factor in awarding the 6 months' salaries.

4. In the circumstances of this case the Court considers that the award of the compensation serves as sufficient remedy and the claimant being a skilled driver, after the termination, he has not established a disabling factor attributable to the respondent that may have barred him from engaging in alternative gainful activities thereafter. The prayer for pay for the unexpired term will fail.

5. The claimant has succeeded in his claim and he is awarded costs of the suit.

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

1. The respondent to pay the claimant a sum of **Kshs. 98, 000.00** by 01.04.2022 failing interest to be payable thereon at Court rates till full payment.

2. The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25<sup>TH</sup> FEBRUARY, 2022**

**BYRAM ONGAYA**

**JUDGE**