



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

**AT NAIROBI**

**CAUSE NO. 1275 OF 2017**

***(Before Hon. Justice Dr. Jacob Gakeri)***

**YOHANA LUMBASI.....CLAIMANT**

**VERSUS**

**HEAVY VEHICLES AND**

**PLANT SUPPLIERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent by letter dated 2<sup>nd</sup> June 2015 as an Automotive technician at a monthly salary of Kshs.50,000/- until 1<sup>st</sup> December 2015 when he was terminated for on an account of redundancy.
2. The Claimant contends that the termination was unlawful and unfair on the ground that the Respondent did not notify the Claimant of the intended redundancy one month before it was effected, pay for leave days nor give one month's notice contrary to the Employment Act, 2007.
3. The Claimant contends that the despite being terminated on an account of redundancy the Respondent recruited a new employee to take up the role the Claimant was undertaking.
4. The Claimant avers that the Respondent unjustifiably refused to pay house allowance and terminal dues.
5. The Claimant prays for judgment against the Respondent as follows-
  - a) *A declaration that the redundancy was unlawful*
  - b) *An order for the Respondent to pay the Claimant Kshs.825,003.50*
  - c) *Interest on (b) above and cost of this claim*
  - d) *A certificate of service*
6. The Respondent filed its response to the memorandum of claim dated 12<sup>th</sup> October 2017. It admits that the Claimant was employed as a workshop technician vide a letter dated 2<sup>nd</sup> June 2015.
7. It also avers that the Claimant failed to disclose that he was suffering from seizures which posed a danger to his life given the nature of his work.
8. The Respondent contends that despite its efforts to assist the Claimant with his condition including ensuring that he received medical attention, the Claimant was not keen on addressing the issue, dismissing it as witchcraft.
9. The Respondent avers that the Claimant was lawfully terminated vide a letter dated 1<sup>st</sup> December 2015. That the reason was misdescribed as redundancy while its intention was to terminate the Claimant under Section 36 of the Employment Act 2007.

10. The Respondent avers that it paid the Claimant his final dues comprising one month's salary in lieu of notice.

11. The Respondent further avers that the Claimant is not entitled to house allowance as the salary paid included house allowance. That he had utilized all leave days and one month's salary in lieu of notice had already been paid.

12. Finally, the Respondent contends that the Claimants cause is misconceived, frivolous, and an abuse of the court's process and prays that the same ought to be dismissed with costs to the Respondent.

### **Evidence**

13. The Claimant had filed witness statement dated 5<sup>th</sup> July 2017. He states that he was employed by the Respondent on 2<sup>nd</sup> June 2015 and his employment was terminated unlawfully on 1<sup>st</sup> December 2015 on an account of redundancy.

14. The Claimant states that he was earning a basic salary of Kshs.50,000/- which did not include a house allowance.

15. On cross examination, the witness confirmed that he worked for only six months and had a leave entitlement of 24 days per year and had not proceeded on leave.

16. It was the Claimant's testimony that he had been paid for all the months he had worked including November 2015 and was suspended on 1<sup>st</sup> December 2015. The witness also confirmed that he received Kshs.50,000/- as one month's notice pay.

17. He also admitted that he had not disclosed to the employer that he was epileptic and appreciated the dangers of the disease in light of his work. The witness told the Court that he discussed the issue with the employer and refused to go to hospital because he had been bewitched. The witness further conceded that it was dangerous for him to continue working for the Respondent and the Respondent acted reasonably by terminating him.

18. On re-examination, the witness contradicted himself testifying that he was not paid the one month's notice and the payslip on record was for November 2015.

19. The Respondent had two witnesses. **RW1, Gabriel Kipkoeh Rotich**, the Chief Executive Officer of the Respondent filed a witness statement dated 2<sup>nd</sup> April 2019. In the statement, he states that the Claimant was employed as a workshop technician on 2<sup>nd</sup> June 2015. He further testified that the Claimant suffered for seizures, a fact he did not disclose to the Respondent.

20. It was the Respondent's evidence that the Claimant was lawfully terminated vide letter dated 1<sup>st</sup> December 2015 and was paid his dues comprising one month's salary in lieu of notice.

21. Further, the witness testified that the Claimant had utilised all his leave days accrued during his six months employment period and that his salary of Kshs.50,000/- per month included house allowance as consolidated pay.

22. On cross examination, the witness confirmed that the Claimant was terminated on account of his illness though the letter made reference to redundancy due to low activity levels at the Respondent's workshop. The witness further confirmed that the Claimant was paid final dues after he had been paid the November salary and had a leave entitlement of 12 days for the six months worked and the salary included house allowance.

23. **RW2, Alloys Kibet Korir** testified that the word redundancy was used in the Claimant's termination letter in error. It was his testimony that the Respondent had held meetings with the Claimant about his illness. Finally, the witness told the Court that the pay slip dated 1<sup>st</sup> December 2015 comprised his terminal dues.

24. On cross examination, the witness confirmed that the letter of termination made no reference to the Claimant's illness. The witness further confirmed that the level of activity at the Respondent's workshop was low.

### **Claimant's Submissions**

25. The Claimant relies on Section 43 of the Employment Act which provides that any claim arising out of a termination of contract, the employer shall be required to prove the reasons for termination and if he fails to do so the termination shall be deemed to have been unfair.

26. The Claimant submits that the termination letter dated 1<sup>st</sup> December 2015 stated that the reason for termination was the low level of activity in its workshop and that the termination was consistent with the redundancy policy.

27. The Claimant further submits that an employer has the right to declare an employee redundant provided the redundancy is justified and conducted in accordance with the provisions of Section 40 of the Employment Act.

28. Reliance is made on Section 2 and 40 of the Employment Act for the definition of the term redundancy and the conditions to be complied with.

29. It is further submitted that for termination on the ground of redundancy to be lawful, it must be substantially justified and procedurally fair. The Claimant submits that an employer contemplating redundancy must give a general notice to the employee which should be

followed by consultations between the parties in accordance with **Article 13 of Recommendation No. 166 of the International Labour Organization Convention No. 158 – Termination of Employment Convention 1982.**

30. The decision in **Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019) (2021) KECA 115 (KLR) (22 October 2021) (Judgment) Neutral Citation Number (2021) KECA 115 (KLR)** is relied upon to buttress the submission.

31. The Claimant contends that he was never issued with a notice informing him of termination on an account of redundancy as required under Section 40(1)(b) of the Employment Act. That this provision is couched in mandatory terms and failure to observe the same renders the termination unfair.

32. It is submitted that the Claimant is entitled to 12 months' salary compensation for unlawful termination.

33. The Claimant further submits that he was never paid one month's salary in lieu of notice and the Respondent had tendered no evidence of payment.

34. The Claimant further submits that the Respondent denied him lawful leave days contrary to Section 28(1) of the Employment Act, 2007. That the Claimant disowned the leave forms relied upon by the Respondent.

35. It is submitted that the Claimant was never paid house allowance contrary to Section 31 of the Employment Act. Reliance is made on the holding in **Grain Pro Kenya INC LTD v Andrew Waithaka Kiragu (2019) eKLR** where the Court held that:

*“From the above terms was the judge right to interpret this contract as having a component of house allowance under the provisions of Section 31 of the Employment Act? No doubt the answer to the above lies in the interpretation of the contract of employment especially because the employment contract is silent on whether the sum USD 600 salary per month was a gross one or consolidated. What is more persuasive on our part is the need to re-evaluate the material that was before the trial court especially the term of the contract that referred to “Other benefits as required by law” in clause 6 of the letter of appointment.”*

36. Reliance is made on Section 31 of the Employment Act.

#### **Respondent's Submissions**

37. The Respondent submits that the Claimant's employment did not last for more than six months. It is the Respondent's submission that Claimant's employment was terminated for a valid reason in the best interest of the company and safety of the Claimant who was suffering from seizures from time to time and his work involved the use of heavy machinery.

38. The Respondent submits that the letter of termination was an innocent mischaracterization and the true reason for the termination was to protect the Claimant from serious harm or loss of life.

39. It is submitted that the Respondent paid the one month's salary in lieu of notice as the payslip for December 2015 shows.

40. The Respondent further submits that an award of 12 months' salary would be grossly excessive and would be rewarding an employee for unreasonable conduct which would be a bad precedent.

41. The Respondent submits that compensation is discretionary and must be based on sound principles. The decision in **Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR** is relied upon to reinforce the submission.

42. It is the Respondent's submission that the circumstances do not warrant the exercise of discretion in favour of the Claimant. On the contrary, it is submitted that discretion should be exercised in favour of the Respondent who took steps to have the Claimant treated and terminated employment to save him from possible grievous harm or loss

of life, the tardiness in the process notwithstanding.

43. The Respondent urges the court to dismiss the claim with costs.

#### **Analysis and determination**

44. From the pleadings, evidence on record, submissions and the law, the issues for determination are whether: -

- i) The Claimant was declared redundant or unlawfully terminated from employment;
- ii) The Claimant is entitled to the reliefs sought.

45. In determining whether the Claimant was declared redundant or unlawfully terminated, regard must be had to the provisions of the Employment Act, 2007.

46. First, Section 2 of the Act provides that

**“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of the 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;**

47. This definition is explicit that in a redundancy, the employee is free from blame and the entire separation process is attributable to the employer.

48. As observed by the Court of Appeal in **Freight in Time Limited v Rosebell Wambui Munene [2018] eKLR** –

*“In addition, Section 40(1) of the Employment Act prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely:*

*i) if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;*

*ii) if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;*

*iii) in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;*

*iv) where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;*

*v) the employer must pay the employee any leave due in cash;*

*vi) the employer must pay the employee at least one month’s notice or one month’s wages in lieu of notice; and*

*vii) the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.”*

49. Relatedly, in **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR**, the Court of Appeal underscored the heavy burden of proof imposed upon the employer in justifying any termination as follows:

*“There is a heavy burden of proof placed upon the employer to justify any termination of employment.”*

50. In sum, a termination of employment on the ground of redundancy is unfair if it is not conducted in compliance with the procedural and other requirements provided by the Section 40 of the Employment Act.

51. As regards pre-redundancy consultations, in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, the Court of Appeal expressed itself as follows:

*“But on the requirement to hold consultations, the Act is silent. When the International Labour Organisation Termination of Employment Convention 1982 (“ILO Convention”), as ratified by Kenya in 1985 is taken into consideration, it is apparent that the Convention requires employers to notify the trade unions, and the competent authorities of the impending redundancies, and to provide the trade unions with an opportunity for consultations, where retrenchment is contemplated. So that, where Section 40(1)(a) of the Act only contemplates notification, it is clear from the ILO Convention, which is applicable to Kenyan law by virtue of Article 2(6) of the Constitution, that in addition to the requirement to notify the union, in this case, the 1<sup>st</sup> Respondent and the competent authorities, that being the Ministry of Labour, there is also the requirement for the employer to hold consultations with trade union representatives.”*

52. The Court is bound by these sentiments.

53. Applying the foregoing principles to the instant case, it is clear that the provisions of Section 40(1) of the Employment Act were not complied with.

54. The letter of termination dated 1<sup>st</sup> December 2015 states as follows:

*“It is with regret that we inform you that the company has made a decision to terminate your services today. This decision has been necessitated by low activity levels in our workshop department ...*

*In line with the redundancy policy, you will be paid your final dues entitlement which in your case is one month’s pay in lieu of notice ...”*

55. While the letter of termination is explicit that the Claimant was declared redundant, on account of low activity levels in the Respondent’s workshop and RW2, Mr. Alloys Kibet Korir confirmed as much on cross examination, RW1, Mr. Gabriel Rotich testified that the Claimant was terminated on account of illness yet the letter had a different reason.

56. In its oral testimony, the Respondent struggled to distance itself from the contents of the letter of termination in an attempt to convince the Court that the Claimant's employment was terminated on account of ill health.
57. Puzzlingly, other than copies of hospital receipts, the Respondent led no documentary evidence of the Claimant's ill health.
58. Finally, although the Claimant admitted that he suffered from seizures, the Respondent led no evidence that the termination of employment was on the ground of ill health.
59. The Respondent urges the Court to disregard the term "redundancy" notwithstanding the fact that the letter of termination is clear that the decision was necessitated by low activity levels at the workshop which was not demonstrated by evidence to justify the redundancy.
60. The Court is satisfied that the Respondent has on balance of probabilities failed to demonstrate that the Claimant's termination of employment was on account of ill health.
61. It is the finding of the Court that the Claimant's employment was terminated on account of redundancy. This finding is consistent with the finding of the Court of Appeal in **Freight in Time Limited v Rosebell Wambui Munene (supra)** as follows –

*"... there is no evidence on record led by the appellant to justify the grounds of termination cited in the notice of termination ... no evidence was led to prove that the appellant followed the procedure for redundancy as stipulated in Section 40(1)(b), (c) and (g) and Section 45 of the Employment Act. Further, the appellant led no evidence to justify and prove the alleged redundancy. The requirement to issue a separate notice to the Labour Officer, simultaneously with the termination notice, is mandatory. Failure to issue renders the redundancy unlawful. On record, there is no evidence to prove that a separate notice was issued to the Labour Officer. A relevant dictum is discernible in **Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited [2013] eKLR** where the trial court while finding that a contract of employment was unfairly terminated held that the respondent had not demonstrated that there was redundancy despite relying on it as a ground for dismissal. Persuaded by the foregoing, we find that the appellant's termination of the respondent's contract of employment on account of redundancy was unfair due to non-compliance with procedural requirements and failure to justify and prove the redundancy."*

62. The Court is in agreement with these sentiments which apply to the instant case on all fours.
63. For the foregoing reasons, it is the finding and holding of the Court that the termination of the Claimant's employment contract on account of redundancy was unfair for noncompliance with the provisions of Section 40 of the Employment Act.

## **Reliefs**

64. Having found that the termination of the Claimant's contract of employment was unfair, I will now proceed to address the reliefs sought –

### **(a) A declaration that the redundancy was unlawful**

65. Having found that the Claimant's termination of employment on account of redundancy was unfair, a declaration that the redundancy was unlawful is hereby **issued**.

### **(b) Unpaid leave 1.75 days each month Kshs.1,666 x 175 x 6 months = Kshs.17,500/-**

66. Under the contract of employment dated 2<sup>nd</sup> June 2015, the Claimant had a leave entitlement of 24 days per year on a prorated basis in the case of termination. Since the Claimant was in employment for six months, his leave entitlement was 12 days.

67. The Respondent furnished nine (9) leave application forms signed by the Claimant on diverse dates from 12<sup>th</sup> June 2015 to 25<sup>th</sup> November 2015, all signed by the Claimant and counter signed by an officer of the Respondent. The total number of leave days taken by the Claimant is 12. RW1 confirmed on cross examination.

68. Although the Claimant denied having seen the documents, he did not contest their authenticity. These are documents typically completed in the ordinary course of employment and the Claimant led no evidence to puncture their genuineness.

69. Accordingly, it is the finding of the Court that the Claimant had no unpaid leave days. The claim is **declined**.

### **(c) House allowance being 15% of the salary (Kshs.7,500 x 6 months = Kshs.45,000/-)**

70. Paragraph 6.1 of the Claimant's contract to of employment dated 2<sup>nd</sup> June 2015 states that –

*"Your retainer is Kshs.50,000/- (fifty thousand shillings) gross per month payable by bank transfer on or around the 24<sup>th</sup> day of each month"*

71. Section 31 of the Employment Act provides as follows:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

72. As stated by Radido J. in **Kenya Union of Sugar Plantation & Allied Workers v Butali Sugar Mills Limited [2021] eKLR** –

*“The requirement to provide housing or an allowance to cover rent, in the view of the Court, is a general entitlement to all employees without distinction on type and nature of the contract, save for the exceptions on consolidation and agreement in a collective bargaining agreement as contemplated by section 31(2) of the Employment Act, 2007, or in any other law.”*

73. In the instant case, the Claimant was entitled to housing allowance. The Claimant urged the Court to award house allowance as the Respondent did not furnish evidence of payment of the allowance.

74. In making the determination as to whether the Claimant is entitled to house allowance, the Court is guided by the sentiments of the Court of Appeal in **Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu (supra)** as follows –

*“We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause “other benefits as required by law” in the contract to award house allowance. We would have applied Section 31 (2) (a) of the Employment Act to exclude it.”*

75. In this case, paragraph 6.1 of the contract of employment uses the phrase “*gross per month*”.

76. While the Claimant submits that the Respondent did not pay house allowance as evidenced by the payslip which had no entry for house allowance. The Respondent on the other hand relies on the phrase “*Total Pay*” on the pay slip dated 1<sup>st</sup> December 2015 to urge that the phrase meant that the Claimant’s pay comprised house allowance under Section 31(2)(a) of the Employment Act, 2007.

77. Regrettably, paragraph 6.1 of the contract of employment is silent on whether the Claimant’s monthly salary had a component of house allowance.

78. For the above reasons, the Court finds that the Respondent has on a balance of probability failed to demonstrate that the monthly salary of Kshs.50,000/- paid to the Claimant included house allowance.

79. The Claimant is awarded house allowance at the rate of 15% of the monthly salary, **Kshs.45,000/-**.

**(d) Twelve months wages for loss of employment (12 months x 50,000) = Kshs.712,503.50**

80. Having found that the termination of the Claimant’s contract of employment was unfair for noncompliance with the provisions of the Employment Act, the Claimant is eligible for the discretionary reliefs provided by Section 49(1) of the Employment Act subject to the provisions of Section 49(4) of the Act.

81. In determining the quantum of compensation to be awarded under Section 49(1)(c) of the Act, the Court has taken into consideration the following factors:

- i) The Claimant was an employee of the Respondent for six months only.
- ii) The Claimant admitted on cross examination that he had not informed the employer that he suffered from seizures from time to time and appreciated the fact that the disease predisposed him to danger at the work place and he refused to seek medical attention. The Claimant further admitted that it was dangerous for him to continue working at the garage.
- iii) The Claimant was paid final dues soon after termination.
- iv) The Respondent did not involve the Claimant in the redundancy process.

82. In light of the foregoing, the equivalent of two months’ salary is fair **Kshs.100,000/-**.

**(e) One month's salary in lieu of notice**

83. The Respondent submits that the Claimant was paid one month's salary in lieu of notice as the payslip entitled final dues dated 1<sup>st</sup> December 2015 attests and had no salary arrears by the date of termination.

84. The Claimant's oral evidence on this point was contradictory. On cross examination, the Claimant confirmed that he had been paid for all the other months till the end of November 2015 and had attached a pay slip on terminal dues. He further confirmed that he was actually paid Kshs.50,000/- in lieu of notice.

85. Puzzlingly, on re-examination, the Claimant stated that the pay slip dated 1<sup>st</sup> December 2015 was for the month of November 2015 and that he was not paid the one month's notice.

86. Instructively, paragraph 6.1 of the employment contract stated that salary was "*payable by bank transfer on or around 24<sup>th</sup> day of each month*".

87. Granted that the Claimant did not testify that the salary for November had not been paid by 1<sup>st</sup> December 2015 and having confirmed payment on cross examination, the Court is satisfied that the Respondent had paid the one month's salary in lieu of notice. The claim is **declined**.

88. In the upshot, judgment is entered for the Claimant against the Respondent as follows: -

- a) **House allowance Kshs.45,000/-.**
- b) **Equivalent of two months' salary as compensation Kshs.100,000/-.**
- c) **Costs of this suit.**
- d) **Interest at Court rates from the date of judgment.**

89. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF MARCH 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**