



**REPUBLIC OF KENYA**

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

**CAUSE NO. 941 OF 2015**

**SAMMY KITUYI MUSIYA.....CLAIMANT**

**- VERSUS -**

**CONSOLBASE LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 01<sup>st</sup> April, 2022)

**JUDGMENT**

The claimant filed the memorandum of claim on 18.12.2015 through A.I. Hayanga & Associates Advocates. The claimant filed amended memorandum of claim on 10.07.2013 through Otieno Otwere & Company Advocates. The claimant's case is as follows. He was employed by the respondent as a clerk by the letter dated 15.09.2004. He was promoted to supervisor by the letter dated 29.01.2009. By the letter dated 20.01.2009 his salary was increased to Kshs. 37, 700.00 per month. The claimant was summoned to the human resources office on 20.12.2012 and given a letter of summary dismissal. The letter stated that further to management and departmental meeting held on 30.11.2012 on ongoing restructuring process in the company, it was regretfully confirmed that the claimant's employment with the respondent was terminated effective 20.12.2012. the letter stated further, **"This is due to your position Supervisor having to be made redundant as reflected by the current adverse economic conditions experienced by the company. However, we would like to thank you for your hard work during this difficult period, and wish you well in your future endeavours."** The letter further required the claimant to hand over the respondent's property in his possession by close of 20.12.2012 and his final dues would be paid per the employment letter and the Employment Act, 2007. The letter concluded thus, **"Please acknowledge receipt and acceptance of the aforementioned by signing a duplicate of this letter in the space provided below."**

The claimant signed the letter accordingly.

The claimant claimed that the termination was unfair because it violated the contract of service and the Employment Act, 2007. In particular, the claimant stated that he was not given a reasonable notice and no due pay in lieu of notice had been effected. Further no good reason for termination had been given. Further, the restructuring was directed only to the claimant's redundancy as other employees continued in respondent's service. The claimant claimed as follows:

- a) Salary in lieu of notice Kshs. 37, 700.00.
- b) Wages not exceeding 12 months for unfair termination Kshs. 452, 400.00.
- c) Accrued annual leave Kshs. 37, 700.00.
- d) Severance pay Kshs. 37, 700 x 9 years thus Kshs. 330, 000.00.
- e) 15% house allowance x Kshs. 37, 700.00 x12 x 8years and 3 months Kshs. 559, 845.00.
- f) Overtime on Saturdays & Sundays reporting 7am up to 6pm being 11 hours – 8 hours thus 3 hours of overtime per day worked for all period worked Kshs. 417, 600.00.
- g) Total claim Kshs. 1, 800, 545.00.

The claimant prayed for judgment against the respondent for:

- a) Payment of Kshs. 1, 800, 545.00 as claimed.

b) Costs of the suit.

c) Any other relief deemed incumbent upon the respondent by the Honourable Court.

The respondent filed the memorandum of defence on 17.06.2016 through Akanga Alera & Associates Advocates. The respondent's case was as follows. The respondent employed the claimant effective 17.09.2005 per letter of appointment dated 17.09.2005 with a variation of appointment per letter dated 29.01.2011. Further the claimant had poor work relationship with other employees characterised with several complaints of intimidation, high handedness and harassment by the claimant. The claimant was therefore terminated due to his poor relationship with other team players, high handedness while dealing with subordinates and general attitude that was unbecoming and unacceptable for the claimant's position and further due to the restructuring process within the respondent company. The respondent admitted that the termination was by the letter dated 20.12.2012.

The respondent's further case was that the respondent's management and the claimant held a meeting on 20.12.2012 and the claimant's poor relationship with other team players, high handedness while dealing with subordinates and general attitude that was unbecoming and unacceptable were discussed. The claimant therefore agreed that his continued service with the respondent had become untenable. Thus the parties separated by mutual consent, the claimant having understood the respondent's position and consented to be terminated during the meeting that took place on 20.12.2012. The claimant signed in acceptance of the termination and allegations of unfair termination were untruthful. After termination a certificate of service was issued as exhibited for the claimant. The respondent prayed that the Court finds that the claimant was lawfully and fairly terminated from employment.

The claimant testified to support his case and the respondent's witness (RW) was the Administrator and Human Resource Manager of the respondent one Sauda Said. Final submissions were filed for parties through their respective counsel. The Court has considered all the material on record and finds as follows.

To answer the **1<sup>st</sup> issue**, the Court returns that the parties were in a contract of service and as per the undisputed certificate of service the claimant worked for the respondent from 15.09.2004 to 20.12.2012 as a supervisor. The claimant's last monthly gross salary was Kshs. 37, 700.00 effective 01.01.2012 per the letter of salary increment dated the same 01.01.2012.

To answer the **2<sup>nd</sup> issue** for determination the Court returns that the contract of service was terminated by the letter of termination of services dated 20.12.2012. The reason for the termination was redundancy following the meeting of 30.11.2012 between the parties.

The **3<sup>rd</sup> issue** for determination is whether the termination was unfair. The letter of termination alleged the reason as redundancy as reflected by the current adverse economic conditions experienced by the respondent. The letter then stated, "**.... However, we would like to thank you for your hard work during this difficult period, and wish you well in your future endeavors.**" The claimant's case is that section 40 on redundancy was not complied with. The Court finds that indeed the termination was abrupt without due one-month notice under the section to the claimant and the area labour officer on the reasons for and the extent of intended redundancy. While it is true as urged for the respondent that the claimant signed the termination letter in acceptance of the contents, the Court's opinion is that such acceptance did not waive the respondent's obligation to comply with the mandatory substantive and procedural requirements of section 40 of the Act.

The respondent has pleaded and urged that the reason for termination was mutual consent and flowing from the meeting of 20.12.2012 between the respondent's management and the claimant which considered the claimant's poor relationship with other team players, high handedness while dealing with subordinates and general attitude that was unbecoming and unacceptable. The Court finds that the proceedings of that meeting cannot be verified as the minutes were not filed or exhibited and the respondent's witness who may have attended the meeting was not called to testify. The Court finds that if the respondent desired to terminate the claimant's employment on account of the alleged misconduct or poor performance, the proper way to proceed was by a notice and a hearing as provided for in section 41 of the Act. Further by that line of pleading, the respondent is found to have confirmed that redundancy as the reason for termination as per the letter of termination was not a genuine reason and, the claimant's lamentation that he was unfairly targeted in the alleged redundancy is found justified. While making that finding, the Court has considered the definition of redundancy in section 2 of the Act 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. The Court therefore returns that the respondent's pleaded case of alleged misconduct or poor performance against the claimant was inconsistent with the termination on account of redundancy as was stated in the letter of termination.

The Court returns that the claimant has therefore established that an unfair termination of employment occurred as required in section 47(5) of the Act and the respondent has failed to discharge the burden of justifying the grounds for termination of the claimant's employment as required under the same section as well as section 43 of the Act – so that the Court finds that the respondent has failed to show that the reason in the termination letter existed as at the time of the termination and it was valid and genuine. Thus, to answer the **3<sup>rd</sup> issue** for determination the Court finds that the termination was unfair.

The **4<sup>th</sup> issue** is whether the claimant is entitled to remedies as prayed for. The Court finds as follows.

The termination was unfair. The Court has considered the factors to be considered in section 49 of the Act. The claimant appears to have signed the termination letter in acceptance of its contents suggesting that he was agreeing to the proceedings of the meeting of 20.12.2012 but whose agenda and resolutions remain unknown but by which acceptance, the Court finds that as urged for the respondent but for the unfairness established, the claimant was concurring to the termination. The Court finds that such apparent concurrence may have significantly contributed to the unfair termination because had the claimant not signed in acceptance as was done, then it appears the termination would not have taken effect. That contribution is put at 50%. Otherwise the Court considers that the respondent breached section 40 of the Act on redundancy or section 41 of the Act on termination on account of poor performance or misconduct. The claimant appears to have had a clean record of service and he desired to continue in employment. Taking all the factors into consideration, the Court returns that the respondent will pay the claimant 6 months' gross salaries for unfair termination making Kshs.37, 700.00 x 6 thus **Kshs. 226, 200.00**. He testified that a month's salary in lieu of the notice of termination as claimed and prayed for, Kshs.37, 700.00, had already been paid and the

prayer is declined.

The claimant worked for 8 complete years and the respondent assigned redundancy as the reason for termination and under section 40 of the Act the claimant is entitled to half monthly salary for each completed year of service thus  $8 \times 37,700/2$  making **Kshs. 150,800.00**.

The claimant prayed for accrued leave Kshs. 37,700.00 but also testified that 173 leave days from 2005 to the date of termination had been computed and paid for. The claim for leave pay is found unjustified and one due leave day had been paid per final dues' computation on record. In any event the claimant did not plead the period with respect to which he was claiming leave payment. The claim and prayer is declined.

The evidence is that parties agreed upon a consolidated monthly salary inclusive of an element of reasonable monthly rent as envisaged in section 31(2) (a) of the Act and the respondent's submission is upheld in that regard. Further under clause 9 of the contract of employment the parties agreed on 45 hours of work spread over not more than 6 days a week excluding meal breaks and parties further agreed that any extra hours of work were covered in the agreed emoluments and there would be no payment of overtime. The parties are bound accordingly and the prayer for overtime is declined as per the submissions made for the respondent. While making those findings, the Court observes that there was no established grievance about overtime and house allowance throughout the service and further, the termination was on 20.12.2012 and the suit filed on 18.12.2015, long after lapsing of the 12 months from the cessation thereof of the continuing injuries so that the claims were time barred under section 90 of the Act.

The Court has considered the parties' margins of success and all circumstances of the case and the respondent will pay the claimant's 50% 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. 377,000.00** (less due PAYE) by 02.06.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to pay 50% of the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01ST APRIL, 2022.**

**BYRAM ONGAYA**

**JUDGE**