



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 73 OF 2018

HASSAN KIBWANA SAID.....CLAIMANT

VERSUS

A TO Z TRANSPORTERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Before me is a claim by Hassan Kibwana Said against his former employer A To Z Transporters Limited. The claim is condensed in a Memorandum of Claim dated and filed in court on 13th February 2018. The Respondent filed a Response on 23rd March 2018, to which the Claimant responded on 29th October 2018.
2. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Managing Director, Kavel Ramesh Patel. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a Diesel Service Worker from 1st February 2012 until 17th December 2016. He earned a monthly salary of Kshs. 21,372.
4. The Claimant further states that he worked for the Respondent until 17th December 2016, when his employment was unlawfully terminated. He claims that there was no valid reason for the termination and he was not allowed an opportunity to defend himself.
5. The Claimant’s claim against the Respondent is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 21,372
- b) Service pay.....21,372
- c) 12 months’ salary in compensation.....256,464
- Less amount paid.....(17,337)

6. The Claimant also asks for a Certificate of Service as well as costs and interest.

The Respondent’s Case

7. In its Response dated 22nd March 2018 and filed in court on 23rd March 2018, the Respondent admits having employed the Claimant in the position of Diesel Service Worker. The Respondent however states that the Claimant’s monthly salary was Kshs. 16,372.
8. The Respondent avers that the Claimant’s employment was terminated on account of redundancy after the Respondent had complied with the terms, conditions and procedures laid down in law.
9. The Respondent submits that the provisions of Section 40 of the Employment Act, 2007 on termination on account of redundancy were strictly adhered to in that:

- a) The Claimant's Union (Kenya Long Distance Truck Drivers & Allied Workers Union) and the Mombasa County Labour Office were duly notified of the intended redundancy more than a month prior to the date of termination;
- b) The Claimant was also notified of the intended termination on account of redundancy;
- c) The reasons for and extent of the termination on account of redundancy were sufficiently given;
- d) Dues outlined in Section 40 of the Employment Act, that is leave pay, salary in lieu of notice and severance pay, all totalling Kshs. 17,337 were duly paid to the Claimant, fully compensating him.

10. The Respondent points out that there exists another cause being ***ELRC Cause No 336 of 2017: K.L.D.T.A.W.U v A To Z Transporters Limited (formerly Nairobi Cause No 2615 of 2016)*** filed by the Claimant's Union, pursuant to the same cause of action, which is pending hearing and final determination. The Respondent therefore states that all proceedings in this case ought to be stayed pending determination of ***Mombasa ELRC Cause No. 336 of 2017.***

Findings and Determination

11. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

12. The Respondent filed a letter dated 7th December 2016 addressed to the Claimant as follows:

"Dear Sir,

RE: TERMINATION ON ACCOUNT OF REDUNDANCY

Following our letter of 18th November, 2016, giving notice of intended redundancy, we are extremely sorry and regretful to inform and confirm to you that your employment with us is terminated with effect from 17/12/2016.

This is due to your position having to be made redundant and after a subsequent period of consultation of the Management of A to Z Transporters Ltd following a substantial reduction in our income that is most likely to continue.

Moreover, it is unfortunate that the Management is unable to offer you any suitable alternative employment.

You will receive payment based on the following: -

- Salary for the month of December up to the date of this letter.*
- One month's pay in lieu of redundancy notice.*
- Accrued annual leave days.*
- Severance pay at the rate of 15 days for each completed year of service.*
- Less any statutory deductions.*

On behalf of the Management of A to Z Transporters Ltd, I would like to wish you well in your future endeavors and to thank you for your efforts and the contributions you made for the betterment of this company during your employment.

Yours faithfully,

For: A TO Z TRANSPORTERS LTD

(signed)

LEWIS MWALIMU

HR & ADMINISTRATION OFFICER

13. It is indicated on the face of this letter that the Claimant refused to acknowledge receipt.
14. It was however common cause that the Claimant's employment with the Respondent came to an end on account of redundancy.
15. Section 2 of the Employment Act, 2007 defines redundancy as:

“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.”

16. The law allows employers to terminate employment on account of redundancy but sets out the following mandatory conditions in Section 40 of the Employment Act:

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

17. The foregoing conditions may be condensed into 3 broad categories namely; redundancy and termination notices, objective selection criterion and payment of statutory dues.

18. From the evidence on record, the Respondent issued a redundancy notice to the County Labour Office, Mombasa and to the Claimant's Union on 18th November 2016, setting out the reasons for and extent of the intended redundancy.

19. There is also evidence that the Claimant was paid one month's salary in lieu of notice in addition to other statutory dues.

20. In the circumstances of this case, the Court finds no fault in the declaration and execution of redundancy.

21. No basis was established for the claim for service pay which therefore fails and is disallowed.

22. The Court disregards the unpleaded and unsubstantiated claims for leave pay, public holidays and overtime which the Claimant sought to introduce in final submissions.

23. In the end, the Claimant's entire claim is disallowed.

24. Each party will bear their own costs.

25. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngonze for the Claimant

Mr. Adede h/b for Mr. C.B Gor for the Respondent