



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

**AT MOMBASA**

**CAUSE NO. 203 OF 2017**

**DOMINIC MUTISYA SAMMY.....CLAIMANT**

**VERSUS**

**TAHIR SHEIKH SAID TRANSPORTERS.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 9<sup>th</sup> April, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 14.03.2017 through Oyugi Kiptoo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that his termination by the respondent was unfair.
- b) Terminal dues as herein below tabulated:
  - i. One-month salary in lieu of notice Kshs. 50,000.00.
  - ii. Remaining salary for the month of September 2016 Kshs. 15,000.00
  - iii. Salary for 7 days worked in October 2016 Kshs.11, 666.00.
  - iv. Severance pay for 8 years Kshs. 200,000.00.
  - v. Compensation for unlawful termination Kshs. 600,000.00.
- c) Costs of the claim and interest thereon at court rates.
- d) Any other relief that the Honourable Court may deem fit to grant.

The claimant's case is as follows:

- 1) He was employed by the respondent as an accountant in June 2008. He was given a letter of appointment and as at termination his monthly salary was Kshs. 50, 0000.00.
- 2) The claimant diligently performed as employed by the respondent until 08.10.2016 when the respondent served him with a letter declaring him redundant. The letter was dated 07.10.2016.

3) The letter dated 08.11.2016 tabulated the claimant's final dues as follows:

- a) Gratuity for 7 years Kshs. 175, 000.00.
- b) September 2016 net salary 39, 112.00.
- c) November, 2016 salary (8 days' pay) Kshs. 16, 667.00.
- d) Total final dues payable Kshs. 230, 779.00.
- e) Less 14 days taken between 02.09.2016 to 04.10.2016 Kshs. 23, 333.00.
- f) Net total dues payable Kshs.240, 779.00.

4) The claimant followed up with the respondent but the final dues were not paid to him.

5) The termination was unlawful because the prescribed procedure on redundancy was not followed. The termination was therefore unfair. Further, there was no fair or justifiable reason for termination.

The respondent filed the response to the memorandum of claim on 04.04.2018 through M/S Muturi Gakuo & Kibara Advocates. The respondent admitted that it had employed the claimant as pleaded and the claimant's employment was terminated on account of redundancy as per the letters referred to in the claimant's memorandum of claim. In particular, the respondent pleaded that the redundancy was occasioned by the fact that the respondent was unable to sustain him in employment since it was experiencing low volume in terms of business following which dues were tabulated as per the letter dated 08.11.2016. Further the respondent pleaded that it had not paid the final dues because of the prevailing economic hardships and therefore it had not refused to pay the final dues, as was alleged for the claimant. The redundancy procedure had been followed and the termination was therefore not unfair.

The respondent prayed that the suit be dismissed with costs.

Despite service the respondent did not attend at the hearing of the suit. The claimant opted to rely on the documents on record, the pleadings and the final submissions that were filed for the claimant. The Court has considered all the material on record. The Court makes findings as follows:

1) There is no dispute that parties were in a contract of service. The claimant was employed by the respondent as an accountant and the last monthly pay was Kshs. 50, 000.00.

2) The employment came to an end by reason of redundancy per the letter dated 07.10.2016 on account that the respondent was unable to maintain its workforce due to reduced volume of business. As per subsections 43 (1) and 47(5) of the Employment Act, 2007 it was the respondent's burden to prove that indeed it had suffered the alleged reduced volume of business. That was not established at all and the Court returns that the claimant has established that the termination was unfair for want of justifiable or valid reason, and, for want of due procedure.

3) The termination was by letter dated 07.10.2016 notifying that in a month's time from 07.10.2016 the contract of service would end. While giving the claimant one-month notice, the respondent failed to notify the area labour officer as per section 40 of the Employment Act, 2007. Despite the notice issued, section 40 of the Act also prescribed that the claimant be paid in lieu of notice but which was not done. As submitted for the claimant the respondent failed to state and explain the extent of the intended redundancy as envisaged in section 40 of the Act – and it is difficult to tell that the respondent complied with the selection criteria in section 40 of the Act. The terminal dues were not paid promptly (in view of the redundancy decision) as prescribed in section 40 of the Act. In the circumstances the Court returns that, upon the material on record, the respondent failed to comply with the redundancy procedure prescribed in section 40 of the Act.

4) The Court has considered that the termination was unfair both in procedure and in substance. The Court has considered the factors in section 49 of the Employment Act, 2007 on award of compensation. The claimant had served for 8 complete years and appears to have been a good employee with a clean record of service. He did not contribute to the unlawful and unfair termination. He desired to continue in employment and the aggravating factor is that consequential to the termination on account of redundancy, the respondent failed to promptly pay the final dues as envisaged in section 40 of the Act. Accordingly, the Court returns that the claimant has established a case for the award of maximum compensation at 12 months' salaries making **Kshs. 600, 000.00** as prayed for. The Court has also found that the claimant has established that he was not paid a month's salary in lieu of notice as prescribed in section 40 of the Act and is awarded **Kshs. 50, 000.00** in that regard and as prayed for.

5) As for the other headings of claims for salary in September and October 2016 as well as severance pay the Court finds that the claimant appears to have established the claims and he was entitled to 8 completed years of service on account of severance pay at 15 days' pay per year per section 40 of the Act.

6) The Court therefore awards the claimant a sum of **Kshs. 876, 666.00** as claimed and prayed for (less PAYE) and costs of the suit.

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

1) Payment of **Kshs. 876, 666.00** (less PAYE) to be paid by 01.06.2021 failing interest to be payable thereon at Court rates from the date of filing the suit (13.03.2017) till the date of full and final 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 9<sup>th</sup> April, 2021.**

**BYRAM ONGAYA**

**JUDGE**