



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

**AT MOMBASA**

**CAUSE NO 51 OF 2017**

**CHRISTOPHER MULI MBITI.....CLAIMANT**

**VS**

**READY CONSULTANCY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed his Memorandum of Claim on 18<sup>th</sup> January 2017, seeking compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Response on 9<sup>th</sup> March 2017.
2. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Manager, Ibrahim Bocha. The parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a security guard, from September 2009. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 20,020
4. On 10<sup>th</sup> October 2016, the Respondent issued the Claimant with a letter terminating his employment, on account of redundancy.
5. The Claimant's case is that the termination of his employment on account of redundancy did not accord with the conditions set out in Section 40 of the Employment Act.
6. The Claimant now claims the following from the Respondent:

- a) Salary in lieu of notice.....Kshs. 20,020
- b) Pay in lieu of leave 2015-2016.....20,020
- c) Severance pay.....60,060
- d) 12 months' salary in compensation.....240,240
- e) Certificate of service
- f) Costs plus interest

**The Respondent's Case**

7. In its Response to Claim dated 6<sup>th</sup> March 2017 and filed in court on 9<sup>th</sup> March 2017, the Respondent denies that the Claimant was in gainful employment with it from September 2009.

8. The Respondent further denies terminating the Claimant's employment and states that the Claimant was erroneously issued with a redundancy letter, which was later recalled and the Claimant offered another job on similar terms and conditions, which he declined.

9. The Respondent denies the Claimant's entire claim and puts him to strict proof.

### **Findings and Determination**

10. 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?**

11. On 10<sup>th</sup> October 2016, the Respondent wrote to the Claimant as follows:

*"Dear Muli,*

#### **Termination of employment on account of redundancy**

*The purpose of this letter is confirm the outcome of recent review by our clients **Mombasa Maize Millers Ltd** of its operational requirements, and what this means for you.*

*As a result of the security department having been earlier outsourced to **Texas Alarms Security**, this regrettably means your employment will terminate. Therefore your employment will end on the 11/10/2016.*

*Due to your employment ending on account of redundancy, you will be paid as per the employment ACT 2007 as per the law of Kenya and any outstanding pay.*

*We thank you for your valuable contribution during your employment with us. Please contact the office incase of any queries.*

*Sincerely,*

*(signed)*

**Director.**"

12. The Respondent produced a subsequent letter addressed to the Claimant four days later. The second letter is dated 14<sup>th</sup> October 2016 and states:

*"Dear Sir,*

#### **Re: Transfer Letter.**

*Refer to the above.*

*Following our letter dated the 10/10/2016 in respect to redundancy after further consultations with the directors, they have decided to cancel the redundancy and have decided to transfer and deploy you as follows.*

*You shall be transferred to Mombasa Maize Millers Ltd (Kisumu) as from the 14/10/16 and shall report to Kisumu-Mombasa maize millers ltd on the 30<sup>th</sup> OCT, 2016 and report to Mr. Festus Omollo the manager on the ground, to allocate you duties on that particular day.*

*We shall Endeavour to cater for your transport to Kisumu.*

*This is with immediate effect.*

*We ask that you cooperate.*

*Please note that all your salaries and benefits remain unchanged.*

*Please note the redundancy stands revoked.*

Yours faithfully

(signed)

**Director”**

13. The Claimant denied receipt of the letter dated 14<sup>th</sup> October 2016. On the face of this letter, there is a hand written note indicating that the Claimant refused to sign and accept the transfer letter. The Respondent did not however present any person in whose presence the Claimant declined to accept the letter.

14. The Respondent maintains that after refusing to take up a transfer to Kisumu, the Claimant was issued with a show cause letter dated 15<sup>th</sup> November 2016. The face of this letter indicates that the Claimant was called and texted but he refused to collect the letter. Again, no testimony was called to back this averment.

15. In this case the Respondent makes serious allegations against the Claimant without calling any supportive evidence. The said allegations were therefore unverified and unproved.

16. This leaves the redundancy letter issued to the Claimant on 10<sup>th</sup> October 2016, as the only solid evidence before the Court. According to this letter, the Claimant’s employment came to an end on account of redundancy.

17. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define 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 services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”**

18. By definition, redundancy bears two significant factors; first, it is undertaken at the instance of the employer and second, the conduct of the employee is not in question (see *Jane I Khalechi v Oxford University Press E.A. Ltd [2013] eKLR*).

19. While allowing employers to invoke redundancy as a legitimate mode of ending employment, the Employment Act at Section 40 sets out stringent conditions to be met. These conditions are 7 in number but may be placed in 3 broad categories namely; redundancy and termination notices, an objective selection criteria and payment of statutory dues.

20. The Respondent made no attempt to observe any of the aforesaid conditions and as held by this Court in *Fatma Ali Dabaso v First Community Bank Limited [2018] eKLR* such failure amounts to unfair termination of employment. The Court therefore finds and holds that the Claimant has established a case of unlawful termination of employment and he is entitled to compensation.

**Remedies**

21. I therefore award the Claimant eight (8) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service as well as the Respondent’s failure to observe the law in bringing the employment relationship to an end.

22. I further award the Claimant one (1) month’s salary in lieu of notice.

23. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

24. Having been declared redundant, the Claimant is entitled to severance pay.

25. In the end, I enter judgment in favour of the Claimant as follows:

a) 8 months’ salary in compensation.....	Kshs. 160,160
b) 1 month’s salary in lieu of notice.....	20,020
c) Leave pay for 1 year (20,020/30*21).....	14,014
d) Severance pay for 6 years (20,020/30*15*6).....	<u>60,060</u>
<b>Total.....</b>	<b>254,254</b>

26. This amount will attract interest at court rates from the date of judgment until payment in full.

27. The Claimant is also entitled to a certificate of service plus costs of the case.

28. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY MAY 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:

Mrs. Kariuki for the Claimant

Miss Omido h/b for Mr. Birir for the Respondent