



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 71 OF 2018**

**WOODSOME OCHWO MWANIKA.....CLAIMANT**

**VERSUS**

**A TO Z TRANSPORTERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim against the Respondent is for compensation for unfair termination of employment plus terminal dues. The claim is contained in a Memorandum of Claim dated and filed in court on 13<sup>th</sup> February 2018.
2. The Respondent filed a Response on 23<sup>rd</sup> March 2018, to which the Claimant responded on 5<sup>th</sup> November 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called Kavel Ramesh Purshotam Patel. The parties also filed written submissions.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent as a Clerk from 1<sup>st</sup> April 2012 until 17<sup>th</sup> November 2016, when his employment was terminated. He earned a monthly salary of Kshs. 23,811.
5. The Claimant’s case is that the termination of his employment was unlawful and unfair, in that there was no valid reason for it and due procedure was not observed.

6. The Claimant therefore seeks the following reliefs:

- a) 1 month’s salary in lieu of notice.....Kshs. 23,811
- b) Service pay.....23,811
- c) 12 months’ salary in compensation.....285,732
- d) Less amount paid.....(10,275)

7. The Claimant also asks for a certificate of service, costs and interest.

**The Respondent’s Case**

8. In its Response dated 22<sup>nd</sup> March 2018 and filed in court on 23<sup>rd</sup> March 2018, the Respondent admits that the Claimant was its employee, working in the position of Clerk and earning a gross salary of Kshs. 18,811.
9. The Respondent states that the issue in dispute in this case is whether the termination of the Claimant’s employment, on account of redundancy, was lawful and procedural.

10. The Respondent avers that the Claimant's employment was terminated on account of redundancy after the Respondent complying with the terms, conditions and procedure laid down by law.

11. The Respondent states that the Claimant is not entitled to any of the reliefs sought and points out that the Claimant was paid a total of Kshs. 50,275 as compensation less Kshs. 40,000 Sacco loan.

12. The Respondent maintains that the Claimant is not entitled to compensation for unlawful termination as the termination was lawful, fair and procedural.

13. The Respondent submits that the provisions of Section 40 of the Employment Act, on termination on account of redundancy, were strictly adhered to as:

- a) The Claimant's Union (Kenya Long Distance Truck Drivers & Allied Workers Union) and the Mombasa County Labour Officer 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 at Section 40 of the Employment Act that is leave pay, salary in lieu of notice and severance pay all totalling Kshs. 50,275 less Kshs. 40,000 Sacco loan were duly paid to the Claimant, fully compensating him.

14. Regarding the Claimant's certificate of service, the Respondent states that it has always been available for collection from its offices.

15. The Respondent further states that there exists another Cause being *ELRC Cause No 336 of 2017: KLDTAWU v A to Z Transporters Limited (formerly Nairobi ELRC Cause No 2615 of 2016)* filed by the Claimant's Union pursuant to the same cause of action, which is pending hearing and determination.

#### **Findings and Determination**

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

#### **The Termination**

17. The Respondent filed a letter dated 17<sup>th</sup> December 2016, addressed to the Claimant as follows:

*"Dear Sir,*

**RE: TERMINATION ON ACCOUNT OF REDUNDANCY**

*Following our letter of 28<sup>th</sup> October, 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 27/11/2016.*

*This is due to your position having to be made redundant 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 November 2016.*
- 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**

18. The Claimant denies receiving the termination letter. In his final submissions however, he pursued a case of unlawful redundancy.

19. It is therefore safe to conclude that the Claimant's employment with the Respondent came to an end on account of redundancy.

20. 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.”***

21. The law allows employers to declare redundancy subject to the following conditions set out under Section 40 of the Employment Act:

***40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –***

***(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.***

22. The conditions under Section 40 of the Employment Act may be placed in three broad categories namely; redundancy and termination notices, objective selection criterion and payment of statutory dues.

23. From the evidence on record, the Respondent issued a redundancy notice to the County Labour Officer, Mombasa and to the Claimant's Union on 28<sup>th</sup> October 2016, setting out the reasons for and extent of the intended redundancy.

24. When he appeared before the Court, the Respondent's witness, Kavel Ramesh Purshotam Patel testified that the Respondent had ceased operations with all employees, including himself, being declared redundant progressively.

25. The Court did not find any evidence that the Claimant had been specifically targeted for redundancy.

26. Moreover, there is evidence that the Claimant was paid one month's salary in lieu of notice in addition to other statutory dues.

27. In the result, the Court is satisfied that the termination of the Claimant's employment on account of redundancy was lawfully executed and the claim for compensation is without basis.

28. In his final submissions, the Claimant made claims for overtime and public holidays. These claims were however neither pleaded nor

proved.

29. Ultimately, the Claimant's entire claim fails and is disallowed.

30. Each party will bear their own costs.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF JULY 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:

Miss Kiboss h/b for Mr. Ngonze for the Claimant

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