



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

**AT NAIROBI**

**ELRC. CAUSE NO. 324 OF 2016**

**BENEDICT MWENDA ..... CLAIMANT**

**-VERSUS-**

**IMARA STEEL MILLS .....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent as a Chemist on 26.7.2017. His salary was Kshs. 13000 per month. He worked continuously without leave except on Christmas and Boxing Day. He worked without any misconduct until 27.7.2015 when he was laid off.

2. As a result he brought this suit on 2.3.2016 seeking the following beliefs:

- (a) Gratuity
- (b) Compensation for wrongful termination
- (c) Certificate of service
- (d) Punitive damages to curb employers from extorting employees.
- (e) Any other relief the court deems fit.

3. The Respondent filed defence on 4.4.2016 denying the alleged wrongful termination and averred that he was lawfully declared redundant. It further averred that it paid his terminal dues which he acknowledged and voluntarily executed a discharge in which it waived all further claims against it in relation to the employment. It therefore prayed for the suit to be dismissed with costs.

4. The suit went to full hearing and only the claimant gave evidence and filed submissions thereafter.

5. The Claimants case was that the termination of his contract of service was done without serving him and the area labour office with a written notice at least one month before the termination. He contended that the reason for the termination was because he joined a Trade Union. Therefore, according to him the termination unlawful and wrongful and prayed compensation.

6. He admitted that he was paid Kshs. 33456 as terminal dues but still prayed for gratuity overtime for 3 years worked, Annual leave, House Allowance, underpayment, NSSF and NHIF for 3 years. He also prayed for paternity leave for 2014 when he got a child but he was denied the same.

7. Having carefully considered the pleadings, evidence and the submissions presented by the partners the following issues arose for determination.

- (a) Whether the redundancy was justified.
- (b) Whether the redundancy was in accordance with the procedure in section 40 of the Employment Act.
- (c) Whether the Claimant is entitled to the reliefs sought.

**Justification**

8. Under Section 43 and 45 of the Employment Act the burden of proving or justifying the reason for termination of an employee's contract of service lies with the employer. In this case the Claimant testified that the reason for his lay off was union membership. That contention was not rebutted by the employer.

9. Under section 46 of the Employment Act, termination on ground of union membership is outrightly unfair and consequently the redundancy herein was not justified by a valid and fair reason related to the employer's operation requirement.

#### **Procedure**

10. Under section 40 of the Employment Act, employer is required to serve the employee or (his trade union if a member) and the Area Labour Officer with at least one month notice in writing. In this case, the Claimants evidence that he and the Area Labour Officer were not served with any prior notice was not rebutted by evidence. I therefore find and hold that the procedure under section 40 of the Act was not complied with even if terminal dues were paid to him.

#### **Reliefs**

11. The claimant produced as evidence, the termination letter bearing a settlement agreement which acknowledged payment of Kshs. 33456 as full and final settlement and discharged the Respondent from any further claims in relation to his employment.

12. The Respondent pleaded in its defence that by dint of the said discharge, the suit is devoid of merits and should be dismissed.

13. In **Thomas De La Rue v David Opondo Omutelema [2013] eKLR** the Court of Appeal held as follows concerning discharge agreements:

***“The court has in each and every case, to make a determination if the issue is raised, whether the discharge was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”***

14. The Claimant did not plead or even demonstrate by evidence that said discharge was vitiated by coercion, mistake, misrepresentation or fraud. Without evidence to show that the discharge was not freely signed, I find and hold that the said discharge constituted a binding contract between the parties herein and therefore the claims made herein are declined.

15. In the end the suit is dismissed with no costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**