



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

**CAUSE NUMBER 931 OF 2017**

**BETWEEN**

**HAMISI JUMANNE.....CLAIMANT**

**VERSUS**

**SHIVA CARRIERS LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Nyandwat Odundo & Company, Advocates for the Claimant*

*Respondent in Person*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 29<sup>th</sup> December 2017. He states, he was employed by the Respondent in the year 2005, as a Driver. He was issued a letter dated 30<sup>th</sup> April 2015 by the Respondent, under the reference ‘ ‘ *Termination of current contract.*’ ’ He was advised that the Respondent was restructuring, and his position would be rendered redundant, effective 31<sup>st</sup> May 2015. ‘ ‘ *You shall be paid all terminal dues on the expiry of the notice period,*’ ’ the Claimant was further advised.

2. The Claimant states, he was always on duty for 24 hours a day, and 7 days a week, as the Claimant was involved in retrieval of cargo from the Port of Mombasa, where trucks were compelled to queue, hours on end. He was not compensated for the excess hours. There was no notice of intended redundancy. The Claimant was not counseled. He was placed on a one year contract after 31<sup>st</sup> May 2015. He resigned in December 2015. He prays for Judgment against the Respondent for: -

a. Redundancy dues at the rate of 20 days’ salary for 10 complete years of service at Kshs. 173,626.

b. Overtime of 14 hours daily, for 10 years at Kshs. 7,018,858.

Total...Kshs. 7,192,484.

c. Declaration that termination was unfair.

d. Costs.

e. Interest.

3. The Respondent filed its Statement of Response on 1<sup>st</sup> February 2016. The Statement is a general denial, conceding only, that the Respondent is a registered Company, and the Claimant a male adult of sound mind.

4. The Claimant gave evidence and closed his case on 2<sup>nd</sup> July 2019. Respondent's Advocate indicated upon closure of the Claimant's case, that the Respondent did not intend to call any Witness, and closed Respondent's case. Parties were directed to file their Closing Submissions on or before 19<sup>th</sup> September 2019. On this date the Advocates for the Respondent informed the Court they intended to file an Application to be discharged from the proceedings. The Application was filed and subsequently allowed on 24<sup>th</sup> October 2019. The Cause was last mentioned on 22<sup>nd</sup> November 2019 in the absence of the Respondent, when the Claimant confirmed filing of his Submissions.

5. The Claimant in his oral evidence, restated his employment history, particulars, terms and conditions of employment with the Respondent, for the period 2005 - 2015, as captured in the Statement of Claim. His position was declared redundant. He was not paid any redundancy dues. He was then placed on 1 year contract. He had worked for 10 years. He drove goods from the Port to Warehouses around Mombasa. He worked for 24 hours a day. He was not paid overtime, just a subsistence allowance. He worked for 6 months after redundancy, and resigned voluntarily. Cross-examined, the Claimant told the Court that the Respondent notified him, about change in terms and conditions of his employment. He had initially worked for the Respondent on contract, from 2002 to 2005. He was a regular Employee from 2005 to 2015. He was placed under contract of 1 year from 31<sup>st</sup> May 2015. He resigned in December 2015 after serving 6 months under contract.

**The Court Finds:-**

6. The Claimant was employed by the Respondent in 2005 as a Driver. He had initially worked irregularly between 2002 and 2005.

7. By a letter dated 30<sup>th</sup> April 2015, the Respondent informed the Claimant that the Respondent was undertaking a process of restructuring and realignment of its functions, necessitated by the "prevailing hard economic times." His position would be rendered redundant, with effect from 31<sup>st</sup> May 2015. He would be paid all terminal dues.

8. The Respondent offered the Claimant a 1 year contract, effective from the date redundancy notice became effective- 31<sup>st</sup> May 2015. The Claimant went on working until the end of this year- 31<sup>st</sup> May 2015, when he voluntarily resigned. He worked for 6 months under contract, after termination on account of redundancy.

9. The Respondent did not communicate in clear terms to the Claimant, if the Claimant was being laid off, or being retrenched. Lay-off is said to be volatile in nature, which is to say termination is provisional, with the Employee subject to recall, upon change in the economic circumstance of the Respondent. Lay-off is for a period, which enables the Employer to put its house together. Retrenchment is non-volatile, involving full and final termination of employment. The Claimant's employment was not fully and finally terminated on 31<sup>st</sup> May 2015; he was offered a 1 year contract immediately, and continued doing what he had always done, from the year 2005. The driving position cannot have become redundant as alleged in the letter from the Respondent to the Claimant dated 30<sup>th</sup> April 2015. The position was available after 31<sup>st</sup> May 2015, enabling the Respondent to issue the Claimant 1 year contract. Termination was provisional, which would suggest the Respondent merely laid-off rather than retrenched the Claimant, while subsequently the Respondent weighed its business performance. Had the Claimant served his 1 year contract in full, it is possible the period of lay-off would come to pass, and the Claimant reverted to regular employment.

10. Either way, it cannot be denied that the Respondent undertook a redundancy process, and promised to pay the Claimant his redundancy benefits for the period 2005 to 31<sup>st</sup> May 2015. None was paid. There is absolutely no justification for non-payment. The Claimant states he earned a monthly salary of Kshs. 26,044 as of 31<sup>st</sup> May 2015.

**11. He is granted severance pay under Section 40 of the Employment Act, at the rate of 15 days salary, based on a 26 day working month, over a period of 10 years, at Kshs. 150,258.**

12. Having accepted to work on contract after redundancy, the Claimant resigned voluntarily on 31<sup>st</sup> December 2015. He accepted the contract extended to him after redundancy. He opted to terminate the contract, before serving the full period. He accepted to cross over from regular employment to determinate contract. For his own reasons, he opted to end the relationship fully and finally, on 31<sup>st</sup> December 2015. The Court does not have reason to declare termination unfair and unlawful. If the Respondent acted unfairly by terminating Claimant's contract on 31<sup>st</sup> May 2015, the immediate offer to the Claimant, which offer the Claimant accepted, to work on contract, was adequate remedial measure taken by the Respondent. The Court would be wrong to declare termination unfair and unlawful. It is noted indeed that the Claimant does not seek compensation or any other remedy due, upon a finding that termination was unfair. What the Claimant seeks is a bare declaration that termination was unfair. It was not unfair, having been instigated by the Claimant himself.

13. Did he work 24 hours a day and 7 days a week as pleaded and testified?

14. Obviously, it is not scientifically possible for an Employee, or any other being, to remain awake 24 hours a day, and 7 days a week. It is quite impossible for one to remain physically active, and drive a vehicle after prolonged sleep deprivation. Such a feat would belong to the realm of the paranormal. The prayer for overtime pay is based on completely unbelievable evidence and is rejected.

15. No order of the costs.

**16. Interest allowed at 16% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

**a. The Respondent shall pay to the Claimant severance, at Kshs. 150,258.**

*b. No order on the costs.*

*c. Interest allowed at 16% per annum from the date of Judgment till payment is made in full.*

**Dated and delivered at Mombasa this 31<sup>st</sup> day of January 2020.**

**James Rika**

**Judge**