



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

CAUSE NO 234 OF 2016

CARL AKONGO AYIEKO.....CLAIMANT

VERSUS

EMRAY ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. On 29th March 2016, the Claimant filed this claim against the Respondent seeking compensation for unlawful and unfair termination of employment.
2. The Respondent was duly served but did not file any response. The matter therefore proceeded by way of formal proof.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 5th May 2008, in the position of Safety Marshall. He worked until 14th November 2015 when his employment was terminated. At this time, he earned a monthly salary of Kshs. 14,500.
4. The Claimant avers that the termination of his employment on account of the stated reason of reduction in the volume of business was unlawful and unfair. He states that the reason was not valid and he was not given prior opportunity to be heard.
5. The Claimant further states that he was not registered under any pension or provident fund scheme nor was he a member of the National Social Security Fund (NSSF). He therefore claims service pay.
6. The Claimant’s cumulative claim is as follows:
 - a) One month’s salary in lieu of notice.....Kshs. 14,500.00
 - b) Leave pay for 7 years and 6 months.....165,527.25
 - c) 12 months’ salary in compensation.....174,000.00
 - d) Service pay

- e) Certificate of service
- f) Costs plus interest

Findings and Determination

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

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

The Termination

8. On 31st October 2015, the Respondent wrote to the Claimant as follows:

“NOTICE OF CESSATION OF EMPLOYMENT

*We hereby notify you that **Bamburi Cement LTD** who has outsourced our services for provision of labour in their plant have undertaken restructuring at their work place leading to the reduction of manpower required to perform some of the duties within the plant.*

As a result of the above stated changes, Bamburi has demanded that we reduce the manpower in the services related to: -

- (a) Marshalling services at the packing plant*
- (b) The cement weighbridge marshalling services*
- (c) The clinker loading marshalling services*

*The company has directed that we reduce the number on each of the above stated services by 3 personnel hence a total of 9 with effect from **14th November 2015**. The company has also directed that with effect from **1st December 2015** inspectors shall be reduced by 5 whilst the role played by safety coordinator and Head of marshals shall be undertaken by one person hence reduction of personnel by one.*

You are one of the personnel affected by the above stated changes and thus your services shall be brought to an end on 14th November 2015.

We appreciate the services rendered in the period you have been engaged and should any other opening arise, the company shall not hesitate to seek your services.

Regards,

Michael Mutua

(signed)

Managing Director

Emray Enterprises Limited”

9. Reading from this letter, the Claimant's employment was terminated on account of redundancy. 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.”

10. The law allows termination of employment for the reason of redundancy subject to the safeguards contained in Section 40 of the Employment Act. In a nutshell, this provision requires an employer to give redundancy and termination notices of at least 30 days each, demonstrate an objective selection criteria and pay all statutory dues.

11. There was no evidence that the Respondent complied with any of these conditions and I therefore find that a case of unlawful termination of employment has been proved.

Remedies

12. In the result, I award the Claimant eight (8) months' salary in compensation. In making this award, I have considered 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.

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

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

15. The Claimant states that he was not registered under any pension or provident fund scheme nor was he a member of NSSF. In the absence of opposing evidence, he is entitled to service pay.

16. Ultimately, I enter judgment in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation.....Kshs. 116,000
- b) 1 month's salary in lieu of notice.....14,500
- c) Leave pay for 7 years (14,500/30x21x7).....71,050
- d) Prorata leave for 6 months (14,500/30x1.75x6).....5,075
- e) Service pay for 7 years (14,500/30x15x7).....50,750
- Total.....257,375**

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

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

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY MARCH 2020

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JUDGE

Appearance:

Mr. Ganzala for the Claimant

No appearance for the Respondent