



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 72 OF 2018

HASSAN ABDALLAH MUHATI.....CLAIMANT

VERSUS

A TO Z TRANSPORTERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 13th February 2018 and amended on 4th April 2018, the Claimant sued the Respondent for unlawful termination of employment and failure to pay terminal dues.
2. The Respondent filed a Response on 23rd March 2018 to which the Claimant responded on 5th November 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Managing Director, Keval Ramesh Patel.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a Mechanic from 1st July 2014 until 17th December 2016, when his employment was terminated. He earned a monthly salary of Kshs. 19,009.
5. The Claimant claims that his employment was terminated verbally, without lawful clause and in contravention of due procedure. He therefore seeks the following:

- a) One month's salary in lieu of notice.....Kshs. 19,009
- b) Service pay.....19,009
- c) Underpayment.....569,240
- d) 12 months' salary in compensation.....228,108
- e) Less amount paid.....(47,408)
- f) Certificate of service
- g) Costs plus interest

The Respondent's Case

6. In its Response dated 22nd March 2018 and filed in court on 23rd March 2018, the Respondent admits having employed the Claimant as a Mechanic at a monthly salary of Kshs. 19,009
7. The Respondent frames the issue in dispute as whether the termination of the Claimant's employment on account of redundancy was

lawful and procedural.

8. The Respondent states that it complied with the laid down conditions and procedures for terminating employment on the ground of redundancy.

9. The Respondent further states that the Claimant was paid Kshs. 47,408 as compensation for termination on account of redundancy.

10. The Respondent submits that the provisions of Section 40 of the Employment Act were strictly adhered to in that:

- 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 one 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 to Kshs. 47,408 were duly paid to the Claimant, fully compensating him.

11. The Respondent further submits that there exists another cause being ***Mombasa 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.

12. The Respondent takes the view that all proceedings in this case ought to be stayed pending the hearing and final determination of ***Mombasa ELRC Cause No 336 of 2017***.

13. 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

14. The Respondent filed a letter dated 17th December 2016, addressed to the Claimant as follows:

"Dear Sir,

RE: TERMINATION ON ACCOUNT OF REDUNDANCY

Following our letter of 18th November, 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 17/12/2016.

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 December up to the date of this letter.*
- 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

15. The Respondent states and the Claimant admits that he declined to acknowledge receipt of the aforesaid letter.

16. It is however evident that the Claimant's employment with the Respondent came to an end on account of redundancy.

17. 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.”

18. The law allows employers to declare redundancies 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.

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

20. From the evidence on record, the Respondent issued a redundancy notice to the County Labour Officer, Mombasa and to the Claimant's Union on 18th November 2016, setting out the reasons for and extent of the intended redundancy.

21. There is also evidence that the Claimant was paid one month's salary in lieu of notice.

22. Further, it is evident that the Claimant was paid his accrued statutory dues in full.

23. The Court therefore finds no fault in the execution of the subject redundancy.

24. No basis was established for the claims for service pay and underpayment.

25. Ultimately, the Claimant's entire claim is disallowed.

26. Each party will bear their own costs.

27. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JULY 2020

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 Oguna h/b for Mr. Ngonze for the Claimant

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