



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

**AT MOMBASA**

**CAUSE NO 335 OF 2018**

**FRANCIS KERRY OGUTA.....CLAIMANT**

**VS**

**PORTLINK TRANSPORT LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is an employment dispute between Francis Kerry Oguta and his former employer, Portlink Transport Limited.
2. The Claimant states his claim in a Memorandum of Claim dated 18<sup>th</sup> May 2018 and filed in court on 21<sup>st</sup> May 2018. The Respondent filed a Response on 5<sup>th</sup> April 2019.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Austin Seth Olale. The parties also filed written submissions.

**The Claimant’s Case**

4. The Claimant pleads that he was employed by the Respondent on 6<sup>th</sup> April 2017, as a Workshop Supervisor. He earned a monthly salary of Kshs. 50,000 as at the time of termination.
5. The Claimant states that on 19<sup>th</sup> February 2018, he was informed by the Respondent’s Human Resources Manager, Fahim Kasozi that the company business had gone down and the company would no longer employ him.
6. The Claimant further states that he was issued with a letter setting down his salary arrears and accrued leave pay, which money was to be paid to him upon termination but was not actually paid.
7. The Claimant avers that the termination of his employment was unjustifiable and unfair. He therefore claims the following from the Respondent:

- a. One month’s salary in lieu of notice.....Kshs. 50,000
- b. Salary arrears for:
  - i. September 2017.....19,750
  - ii. October 2017.....50,000
  - iii. January 2018.....50,000
  - iv. February 2018.....50,000
  - v. March 2018.....50,000

- vi. Accrued leave pay
- c. Severance pay (18 days \* Kshs. 1,923 \* 1 year).....34,614
- d. 12 months' salary in compensation.....600,000
- e. Costs plus interest

### **The Respondent's Case**

- 8. In its Response dated and filed in court on 5<sup>th</sup> April 2018, the Respondent denies the Claimant's claim and puts him to strict proof.
- 9. The Respondent states that the Claimant's employment was terminated by virtue of an operational requirement/restructuring since the Company was undergoing financial difficulties.
- 10. The Respondent further states that it honoured its contractual obligations to the fullest extent and that the same was only curtailed due to decline in company business, facts which were well within the Claimant's knowledge.
- 11. The Respondent avers that it followed due process in the termination of the Claimant's services as provided under Section 40 of the Employment Act.

### **Findings and Determination**

- 12. 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**

- 13. The Claimant testified that on 19<sup>th</sup> February 2018, he was called by the Human Resources Manager, Fahmi Kasozi who informed him that due to reduction in business, the Respondent would no longer keep him in employment.
- 14. The Respondent's witness, Austin Seth Olale confirmed that the termination of the Claimant's employment was occasioned by business reduction.
- 15. According to the parties' testimony, the Claimant left the Respondent's employment on account of redundancy.
- 16. Section 2 of the Employment Act 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.”**

- 17. The law allows employers to terminate employment on the ground of redundancy, subject to the following conditions set out under Section 40 of the Employment Act:
  - (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.**

18. The first two conditions under Section 40 require the employer to issue a redundancy notice of not less than one month, to the affected employee, their trade union (where one exists) and the local Labour Officer. As confirmed by the Court of Appeal in *Thomas De La Rue v David Opondo Omutelelma [2013] eKLR* the redundancy notice is separate and distinct from the termination notice required under Section 40 (f).

19. By definition, the redundancy notice should set out the reasons for and the extent of the intended redundancy.

20. The third condition deals with the redundancy selection criteria, including seniority in time, skill, ability and reliability of each employee within the affected establishment.

21. In its decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR* the Court of Appeal stated thus:

**“redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with fair procedure. As section 43(2) [of the Employment Act] provides, the test of what is a fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means.....is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy-that is that the services of the employee have been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”**

22. From the evidence on record in this case, the Respondent did not comply with any of the conditions in Section 40 of the Employment Act and the termination of the Claimant’s employment was consequently unfair within the meaning of Section 45 of the Act.

**Remedies**

23. I therefore award the Claimant two (2) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service with the Respondent as well as his testimony that he had moved on to other employment. I have also considered the Respondent’s unlawful conduct in terminating the Claimant’s employment.

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

25. By virtue of the Respondent’s letter to the Claimant dated 19<sup>th</sup> February 2018, the claims for salary arrears and leave pay are admitted and are therefore payable.

26. Having worked for less than a year, the Claimant is not entitled to severance pay.

27. In the end, I enter judgment in favour of the Claimant as follows:

a. 2 months’ salary in compensation.....	Kshs. 100,000
b. 1 month’s salary in lieu of notice.....	50,000
c. Salary arrears.....	219,750
d. Accrued leave pay.....	<u>43,040</u>
<b>Total.....</b>	<b>412,790</b>

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

29. The Claimant will have the costs of the case.

30. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 1<sup>ST</sup> DAY OCTOBER 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 Mbithe for the Claimant

Mr. Gitonga h/b for Robson Harris & Co Advocates for the Respondent