



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 60 OF 2019**

**BETWEEN**

**SAMUEL NJOROGE KIMANI.....CLAIMANT**

**VERSUS**

**BASH HAULIERS LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Andrew Mwabanga*

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*Chamwada & Company Advocates for the Claimant*

*Khalid Salim & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim, on 12<sup>th</sup> September 2013. He states, he was employed by the Respondent as a Forklift Driver, on 26<sup>th</sup> January 2011. His contract was terminated by the Respondent on 10<sup>th</sup> June 2019, on the ground of redundancy. His last gross monthly salary was Kshs. 82,765. He states, redundancy was a colourable exercise. The Respondent's real intention was to terminate the Claimant's employment unfairly. He was singled out for redundancy. His juniors were untouched. The process was shrouded in mystery. **His prays of compensation for unfair termination equivalent of his 12 months' gross salary, at Kshs. 993,180; costs; and interest.**

2. The Respondent filed its Statement of Response on 4<sup>th</sup> October 2019. It is admitted that the Claimant was employed by the Respondent, as a Forklift Driver, on a monthly salary of Kshs. 82,765. It is true that the Respondent terminated Claimant's contract, on redundancy. The process was fair and in accordance with the law. The Claimant received a notice dated 10<sup>th</sup> June 2019, advising the Claimant that he had been discontinued, on redundancy. The Respondent states that the Claim is brought in bad faith. It urges the Court to dismiss the Claim with costs.

3. Parties recorded a consent order in Court, on 12<sup>th</sup> September 2020, to have the Claim considered and determined of the strength of the Pleadings, Documents, Witness Statements and Submissions. They confirmed to the Court, filing and exchange of Submissions, on 26<sup>th</sup> October 2020. This accelerated, minimal-contact procedure, is based on Rule 21, E&LRC [Procedure] Rules 2016, and is a very useful tool for dispensation of industrial justice, in this difficult period of a global health crisis.

**The Court Finds: -**

4. The Claimant was employed by the Respondent as a Forklift Driver, on 26<sup>th</sup> January 2011. His letter of appointment of even date, is exhibited. His first salary was Kshs. 18,000. He worked until 10<sup>th</sup> June 2019, when the Respondent terminated his contract. He was informed that termination would become effective from 18<sup>th</sup> June 2019. His last salary was Kshs. 82,765.

5. He was advised further that, ' we are in the process of downsizing the number of staff to strengthen our operations...it is unfortunate to

*notify you that the operations department has been affected, and you are one of those to be laid off.’’*

6. He was paid a net amount of Kshs. 321,188, which included notice; leave; and severance. He does not claim any terminal benefits. He signed acknowledgement and discharge on receiving terminal benefits. His Claim is for compensation, costs, and interest.

7. The single issue in dispute is whether termination was fair and lawful, under Section 40 and 45 of the Employment Act 2007, warranting a compensatory award.

8. On validity of reason, the Respondent merely states it was downsizing. There is no evidence to support the assertion. There is no evidence that a downsizing exercise took place, or that there was justification for such an exercise. There are no documents exhibited before the Court, showing the reason and extent of redundancy. No number of affected Employees is shown anywhere. The Claimant states, and was not seriously contradicted by the Respondent, that he was the only Employee affected. How does a business downsize by singling out one Employee for termination? All the Respondent has done, is exhibit a letter to the Claimant, advising him that there was a downsizing exercise going on, and that the Claimant would be adversely affected by that exercise.

9. There was no notice issued under Section 40 [a] or 40 [b] of the Employment Act, heralding any form of consultation between the Parties. The Labour Office was not involved. There was no room for consultation, notice of termination having issued on 10<sup>th</sup> June 2019, to take effect 8 days later, on 18<sup>th</sup> June 2019. The Claimant was not advised on selection criteria. His juniors were retained. He states that new Employees were recruited to discharge his roles. What took place was not a redundancy process as prescribed under Section 40 of the Act; it was termination at the will of the Respondent. It was a colourable exercise.

10. There is clearly no valid reason shown, by the Respondent, to justify termination. It was not shown, that there was a genuine redundancy situation. Procedure went against Sections 40 and 45 of the Employment Act 2007. Termination was unfair.

11. The Claimant had worked for 8 years. There is nothing on record to suggest that his performance was wanting, or that he had disciplinary problems. He was paid terminal benefits, which mitigated the effect of losing his job. His contract was open-ended. ***He is allowed the prayer for compensation, equivalent of his 8 months' gross salary, at Kshs. 662,120.***

12. ***Costs to the Claimant.***

13. ***Stay of execution of the Judgment allowed for 30 days.***

14. ***Interest granted at the rate of 16% per annum, from the end of the stay period, till payment is made in full.***

IN SUM, IT IS ORDERED: -

***a. The Respondent shall pay to the Claimant, compensation equivalent of his 8 months' gross salary at Kshs. 662,120.***

***b. Costs to the Claimant.***

***c. Stay of execution of Judgment is allowed for a period of 30 days.***

***d. Interest granted at the rate of 16% per annum, from the end of the stay period, till payment is made in full.***

**Dated, signed and released to the Parties electronically, under Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 15<sup>th</sup> day of December 2020.**

**James Rika**

**Judge**