



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 269 OF 2017**

**DERICK MWAMBAJI MUNGA.....CLAIMANT**

**VERSUS**

**T.S.S TRANSPORTERS LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 10<sup>th</sup> April 2017 and filed in court on 12<sup>th</sup> April 2017, the Claimant seeks compensation for unfair termination of employment and payment of terminal dues.
2. The Respondent did not file a response in spite of due service. The matter therefore proceeded by way of formal proof.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a mechanic in December 2007. He worked until 10<sup>th</sup> October 2016 when his employment was terminated on account of redundancy. As at the time of termination, the Claimant earned a monthly salary of Kshs. 18,244.
4. On 10<sup>th</sup> November 2016, the Claimant was issued with a tabulation of his terminal dues but he did not agree with the tabulation. The Respondent declined to revise the tabulation as suggested by the Claimant.
5. The Claimant's claim is as follows:

- a) Notice pay.....Kshs. 18,244
- b) 10 days' pay in October 2016.....6,081
- c) Leave pay for 9 years.....164,196
- d) 12 months' salary in compensation.....218,928
- e) Deducted and unremitted NSSF dues.....26,080
- f) Deducted and unremitted NHIF dues.....13,600
- g) Underpayment for 9 years.....339,120
- h) Gratuity for 9 years.....96,228
- i) Certificate of service
- j) Costs

## Findings and Determination

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

- a) Whether the Claimant has made out a case for unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

## Unlawful Termination?

7. The Claimant's employment was terminated by letter dated 30<sup>th</sup> September 2016 stating as follows:

*"Dear Sir*

**RE: REDUNDANCY**

*The above matter refers.*

*This is to inform you that we are unable to maintain the current workforce due to reduced volume of business.*

*You are therefore given one month notice effective today that at the end of this period you shall be given your final redundancy dues breakdown as stipulated in the redundancy process.*

*Yours faithfully,*

**T.S.S TRANSPORTERS LTD**

*(Signed)*

**MOHAMMED RAJAB WANINI**

**GENERAL MANAGER"**

8. From this letter, it is evident that the Claimant's employment was terminated on account of redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 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."***

9. While the law recognizes redundancy as a legitimate form of termination of employment, there are stringent conditions to be observed. In this regard, Section 40 of the Employment Act provides as follows:

***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.**

15. In its well-known decisions in *Thomas De La Rue v David Opondo Omutelelma [2013] eKLR* and *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR*, the Court of Appeal affirmed that the foregoing conditions are mandatory, not optional.

16. From the evidence on record, apart from issuing a termination letter to the Claimant, the Respondent did not comply with any of the redundancy conditions. The termination of the Claimant's employment was therefore substantively and procedurally unfair and he is entitled to compensation.

### **Remedies**

17. Pursuant to the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

18. According to the termination letter, the Claimant was given a one month termination notice. He is therefore not entitled to notice pay. He is however entitled to salary during the notice period.

19. The Respondent did not produce any leave records to counter the Claimant's claim for leave pay which therefore succeeds and is allowed. By its letter dated 10<sup>th</sup> November 2016, the Respondent admits the claim for gratuity which is consequently due and payable.

20. Regarding the claims for unremitted NSSF and NHIF dues, the only thing to say is that any such dues are payable to the respective statutory bodies not to the Claimant. The claim for underpayment was not proved and is dismissed.

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

a) 10 months' salary in compensation.....	Kshs. 182,440
b) Salary for September 2016.....	18,244
c) Salary for 10 days in October 2016 (18,244/30x10).....	6,081
d) Leave pay for 8 years (18,244/30x21x8).....	102,166
e) Prorata leave for 2016 (18,244/30x1.75x10).....	10,642
f) Gratuity for 8 years (18,244/30x16x8).....	<u>77,841</u>
<b>Total.....</b>	<b>397,414</b>

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

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

24. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF JANUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Otwere for the Claimant

No appearance for the Respondent