



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 272 OF 2017**

**THOMAS OTIENO ONYANGO.....CLAIMANT**

**VS**

**T.S.S TRANSPORTERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Statement of Claim dated 11<sup>th</sup> April 2017 and filed in court on 12<sup>th</sup> April 2017, the Claimant has sued the Respondent for unlawful termination of employment.

2. The Respondent entered appearance on 21<sup>st</sup> July 2017 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 as a panel beater from the year 2005 until 10<sup>th</sup> October 2016 when his employment was terminated. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 18,244.

4. The Claimant pleads that on 10<sup>th</sup> October 2016 he was issued with a backdated letter of 30<sup>th</sup> September 2016 terminating his employment on account of redundancy. On 10<sup>th</sup> November 2016, he was issued with a tabulation of his terminal dues which he did not agree with. The Respondent declined to correct the tabulation.

5. The Claimant now claims the following from the Respondent:

- a) Notice pay.....Kshs. 18,244
- b) Salary for 10 days in October 2016.....6,800
- c) Leave pay for 11 years.....200,684
- d) 12 months' salary in compensation.....218,928
- e) Unremitted NSSF dues.....26,080
- f) Unremitted NHIF dues.....13,920
- g) Underpayment .....414,480
- h) Gratuity for 11 years.....117,612
- i) Certificate of service
- j) Costs

## Findings and Determination

6. 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

7. The termination of the Claimant's employment was communicated by letter dated 30<sup>th</sup> September 2016, stating the following:

*"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 the termination letter it is evident that the Claimant's employment came to an end by reason 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 the 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 mandatory conditions to be met. To this extent, Section 40(1) 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 of which the employee is a member and the labour officer in charge of the area where the employee is employed of the 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 the 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 to 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

10. Apart from issuing a backdated termination letter to the Claimant, the Respondent made no effort to comply with the provisions of Section 40(1) of the Employment Act and the resultant termination was therefore unfair within the meaning of Section 45 of the Act.

#### **Remedies**

11. Flowing from the foregoing findings, I award the Claimant twelve (12) 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 process.

12. Additionally, I award the following claims as admitted by the Respondent in its letter dated 10<sup>th</sup> November 2016:

- a) One month's salary in lieu of notice;
- b) Gratuity for 10 years;
- c) Leave pay for 2016;
- d) Salary for September 2016;
- e) Salary for 10 days in November 2016.

13. 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 and not to the Claimant. These claims are therefore unsustainable. The claim for underpayment was not proved and is dismissed.

14. Finally, I enter judgment in favour of the Claimant as follows:

- a) 12 months' salary in compensation.....Kshs. 218,928
  - b) 1 month's salary in lieu of notice.....18,244
  - c) Gratuity for 10 years.....97,301
  - d) Leave pay for 2016.....18,244
  - e) Salary for September 2016.....18,244
  - f) Salary for 10 days in November 2016.....6,081
- Total.....377,042**

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

16. The Claimant is also entitled to a certificate of service and costs of the case.

17. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF FEBRUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Otwere for the Claimant

No appearance for the Respondent