



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 557 OF 2018

CLEOPHAS OMUGA.....CLAIMANT

VS

HABO GROUP OF COMPANIES.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 10th July 2017 and filed in court on 12th July 2017, the Claimant seeks relief for unlawful and unfair termination of employment and payment of terminal dues. The Respondent filed a Memorandum of Response on 2nd November 2017.
2. By consent of the parties, the matter was dispensed with by way of written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a driver from 1st October 2012 until 18th April 2017, when his employment was unlawfully and unfairly terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 25,000.
4. The Claimant avers that he was not paid house allowance as well as salary for the months of March and April 2017. He adds that he never took annual leave.
5. The Claimant’s claim is as follows:

- a) Salary for March and April 2017.....Kshs. 50,000
- b) One month’s salary in lieu of notice.....25,000
- c) Leave pay for 4 years.....100,000
- d) SACCO deductions.....16,538
- e) In house savings.....16,538
- f) Service pay @ ½ month’s salary per year.....50,000
- g) House allowance @ 15% of basic pay.....206,250
- h) Severance pay.....50,000
- i) Compensation for unlawful termination.....300,000
- j) Certificate of service

k) Costs

The Respondent's Case

6. In its Memorandum of Response dated 1st November 2017 and filed in court on 2nd November 2017, the Respondent denies ever employing the Claimant. The Respondent further denies terminating the Claimant's employment but adds that any termination was effected properly and lawfully.

7. The Respondent further states that the documents relied on by the Claimant confirm that that he held a meeting with his employer who notified him of the termination of employment which was to take effect on 1st March 2017. The Respondent adds that due process was followed, with the Claimant being given a proper hearing and a decision arrived at between the Claimant and his employer.

8. The Respondent avers that the Claimant's own documents confirm that he was paid his terminal dues and was issued with a certificate of service.

Findings and Determination

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

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

Unlawful Termination?

10. In its Memorandum of Response dated 1st November 2017, the Respondent denies terminating the Claimant's employment. However, in a letter dated 10th January 2017, filed by the Claimant, the Respondent wrote as follows:

"Dear Cleophas,

RE: REDUNDANCY DUE TO CURRENT COMPANY FINANCIAL CONSTRAINTS

The subject matter above refers.

This is to bring to your attention that the country is facing serious economic challenges which in turn has immediately affected Habo Group of Companies. Due to these economic forces beyond our control, HGC has been forced to make some difficult decisions. To survive in this industry, the company will undergo a very rigorous and extensive restructuring process to re-align its strategies for sustainable growth and development.

*Due to low business, Habo Group of Companies cannot accommodate the current workforce and therefore declared your position redundant **w.e.f 1st March 2017**. Your file shall be retained and you may be recalled back depending on how fast the company business will regain and stabilize financially.*

The company will work out your terminal benefits based on the number of years served so as to comply with the Employment Act, 2007, cited in your employment letter and Labour Standards. You are advised to proceed and clear with the relevant departments to facilitate payment of your final dues.

Yours faithfully,

For & on behalf of

Habo Group of Companies Ltd.

(Signed)

AUTHORISED SIGNATORY"

11. The Respondent did not contest this letter and from it, it is evident that the Claimant's employment with the Respondent came to an end on account of redundancy. 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."

12. The law therefore recognises redundancy as a legitimate mode of termination of employment. However, the same law sets stringent

mandatory conditions to be observed by an employer terminating employment on account of redundancy. These conditions are codified under Section 40 of the Employment Act and may be categorised under three heads namely; redundancy and termination notices, objective selection criteria and prior payment of statutory dues.

13. The conditions under Section 40 are mandatory and any termination that circumvents any of them is *ipso facto* unfair within the meaning of Section 45 of the Act. The Respondent did not lead any evidence to demonstrate compliance with the foregoing conditions and the Court does not need to say more. The inescapable conclusion is that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

14. 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 accentuated by the Respondent's failure to observe the law in effecting the termination.

15. From the evidence on record, the Claimant was issued with a termination notice on 10th January 2017 and his last day of work was 31st March 2017. He was therefore issued with adequate notice and the claim for notice pay is misplaced.

16. In the absence of any leave records to the contrary, the claim for leave pay succeeds and is allowed. On similar grounds, I award the Claimant salary for the month of March 2017. Having been declared redundant, the Claimant is entitled to severance pay.

17. Clause 4 of the Claimant's employment contract expressly provides that the parties had agreed on a consolidated salary, inclusive of house allowance. The claim for house allowance is therefore without basis and is disallowed. According to the Claimant's payslip, which he himself produced, he was a contributing member of the National Social Security Fund (NSSF). He is therefore not entitled to service pay.

18. The claims for SACCO deductions and in-house savings, which are in the nature of special damages, were not proved and are dismissed.

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

a) 10 months' salary in compensation.....	Kshs. 250,000
b) Leave pay for 4 years (25,000/30x21x4).....	70,000
c) Prorata leave for 6 months (25,000/30x1.75x6).....	8,750
d) Salary for March 2017.....	25,000
e) Severance pay for 4 years (25,000/30x15x4).....	<u>50,000</u>
Total.....	403,750

20. This amount will attract interest at court rates from the date of judgment until payment in full. The Claimant will have the costs of the case.

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF MARCH 2019

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JUDGE

Appearance:

Mr. Nyange for the Claimant

Mr. Bosire for the Respondent