



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 209 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**CHRISTOPHER GOVEDI DANIEL.....CLAIMANT**

**VERSUS**

**IMPRESA COSTRUZIONI GIUSEPPE**

**MALTAURO SPA.....RESPONDENT**

**JUDGMENT**

The Claimant filed suit through the firm of Nyamwega Osoro and Company Advocates seeking for:

a. A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the Respondent he was not remunerated as required by law.

b. Payment of the sums of money as claimed below –

(i) One month pay in lieu of notice-----Kshs.18,954

(ii) Severance pay

17 days x 2 years x 18,954 /26 days----- Kshs.24,786

(iii) Compensation for unfair termination

Gross pay x 12 years

18954 x 12----- Kshs.227,448

Total Kshs.271,188

Less Amount paid Kshs.43,740

**Total balance due Kshs.227,448**

c. Costs and interest

d. Any other relief that this honourable court may deem fit to grant.

This suit was selected as a test suit by an order of Lady Justice MONICA MBARU by an application dated 12<sup>th</sup> August, 2015, and the instant suit was consolidated with the following cases:-

**1. KERICHO ELRC CAUSE NO. 200 OF 2015 - BASHIR ISMAIL NYONGE VS IMPRESA COSTRUZIONI GIUSEPPE MALTAURO S.P.A**

**2. KERICHO ELRC CAUSE NO. 201 OF 2015 - JOHN KURIA NJOROGE VS IMPRESA COSTRUZIONI GIUSEPPE MALTAURO S.P.A**

**3. KERICHO ELRC CAUSE NO.202 OF 2015 - ABUBAKARI MUGAZIA SHABANI VS IMPRESA COSTRUZIONI GIUSEPPE MALTAURO S.P.A**

**4. KERICHO ELRC CAUSE NO. 205 OF 2015 - CHARLES MWANGI NJOROGE VS IMPRESA COSTRUZIONI GIUSEPPE MALTAURO S.P.A**

**5. KERICHO ELRC CAUSE NO. 206 OF 2015-PAUL SAKWA ISAH I VS IMPRESA COSTRUZIONI GIUSEPPE MALTAURO S.P.A**

**6. KISUMU ELRC CAUSE NO. 210 OF 2015-BENSON AMBITA OTOLO VS IMPRESA COSTRUZIONI GIUSEPPE MALTAURO S.P.A**

## **Pleadings**

The Claimant in the instant suit avers that he was employed by the Respondent as a casual worker from 2000 to November 2012 when his employment was terminated without any justifiable reason. He avers that the termination was unlawful for the reasons that his trade union was not informed of the intention to declare him redundant, he was not paid for leave not taken, he was not paid his salary for the month of February 2012, he was not paid one month's salary in lieu of notice and he was not paid overtime dues.

The claimant further avers that during his employment with the respondent he was grossly underpaid having regard to the Regulations of Wages (General) (Amendment) Order in force payment, summarily dismissed without February Salary, Worked on public holidays without due pay. He prays for his claim to be allowed as drawn.

The Respondent filed a memorandum of response to the memorandum of claim admitting the employment relationship but denying having unfairly terminated the Claimant. It states that it employed the Claimant as a driver from about 10<sup>th</sup> March 2011 until on or about 18<sup>th</sup> October 2013 when he was declared redundant upon which the Claimant was paid his monthly dues covering the period from the time of his employment until the time he was declared redundant.

The Respondent contends that it declared several of its employees redundant with the Claimant being one of them. The redundancy was on account of scaling down of the Respondent's operations. That the Respondent fully complied with all the requirements of the Employment Act and the Collective Bargaining Agreement applicable in declaring the said employees redundant. That the Claimant is not entitled to the prayers sought and the Claim should be dismissed with costs.

## **Submissions**

The parties elected to dispense with the taking of evidence and to canvass the suit by way of written submissions.

### **The Claimant's submissions**

In addition to what is contained in the memorandum of claim it was submitted on behalf of the Claimant that as at the time of termination the Claimant was earning a monthly salary of Kenya Shillings Eighteen Thousand, Nine Hundred and Fifty Four (Kshs.18,954/=).

The Claimant admits in his submissions that he was notified of the redundancy but states that he was unfairly terminated by being told to sign for the money that he received, that he was informed after signing that the money paid was on account of redundancy and that if the company finds more work the Claimant would be among the first people to be considered.

That the respondent continued to employ new workers after terminating his services. That in the year 2011 his status changed from that of a casual and the Respondent employed him as a Company driver.

It is submitted that Section 40 1(a) of the Employment Act provides:

***“a). Where the employee is a member of 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 the reason for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination.”***

It is the claimant's contention that the respondent failed to explain to the claimant the extent of redundancy but rather promised him to be re-employed if such opportunity arises.

Further that Section 40(1) provides.

***“Where there is an existence a collective agreement between an employer and trade union setting out terminal benefits payable upon redundancy the employer has not placed the employee at a disadvantage for being a member of trade union.”***

It is submitted that payments provided under Section 40(1) (e) and (f) were not paid and the Claim herein should be allowed with costs.

## Respondent's submissions

It is submitted for the respondent that the Claimant was employed by the Respondent as a driver on or about 10<sup>th</sup> March 2011 at the time when the Respondent was undertaking works on the Eldoret-Webuye road under contract number KENHA/ICB/51/2010 having been contracted by the Government of Kenya through the Kenya National Highways Authority. The works were scheduled to be completed on or about September 2013 and as the scope of works reduced towards the end of the contract it became necessary to lay off staff on account of redundancy.

That the Respondent wrote to the Claimant's union, Kenya Building, Construction, Timber and Furniture Industries Employees Union vide a letter dated 2<sup>nd</sup> October 2013 and to the County Labour officer. The Respondent thereafter proceeded to lay off the employees declared redundant in keeping with the collective bargaining agreement and the provisions of the Employment Act. That the Claimant's position as a driver was redundant as the Respondent was shutting down operations. The Claimant was indeed paid final dues in cash of Kshs.93,830/- a fact he does not dispute. That the instant suit is an attempt by the Claimant to unjustly enrich himself as he has already been paid his terminal dues and due procedure was followed.

Counsel for the Respondent further submitted that there existed a CBA that governed the relationship between the Claimant and the Respondent whose contents and applicability have not been challenged. The CBA provided as follows on redundancy:-

“17. REDUNDANCY.

*It shall be a condition in every contract that where the employment of an employee is to be terminated on account of redundancy the following principle shall apply:*

- i. The Union shall be informed of the reasons for and the extent of the intended redundancy seven (7) days prior to the issuance of the notice.*
- ii. The employer shall have due regard to the seniority in time, skills, ability and reliability for each employee belonging to that particular category of employees affected by the redundancy.*
- iii. Any leave due to any employee who is declared redundant shall be paid for in cash.*
- iv. Any redundant employee with less than four years continuous service with an employer shall be entitled to one month's notice or one month's wages in lieu of notice. An employee with four or more years continuous service shall be entitled to two months notice or two months wages in lieu of notice.*
- v. An employee declared redundant shall be entitled to severance pay at the rate of 17 days pay for each completed year of service.*
- vi. On being declared redundant the employee shall be paid one way actual cost of transport to his home area.”*

It is submitted that the employer cannot be prevented from declaring employees redundant if their employment is no longer viable. The respondent cites the case of **Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the Court of Appeal cited with approval the New Zealand case of **G.N. Hale & Sons Limited Vs Wellington Caterers IUW f19901 2 NZILR 1079 (CA)** taking the view that a worker does not have the right to continue employment if it is no longer viable. As long as the employer genuinely believed that there was a redundancy situation, any dismissal was justified, and it was not for the court or the union to substitute their business judgment.

It is further submitted that termination of the Claimant's employment was lawful as evident from the letters to the Union and the County Labour Officer dated 2<sup>nd</sup> October 2013 in which the Respondent clearly explained that the project was coming to completion and there was therefore a need to lay off workers. That the Respondent has since wound up its operations and left the area where the Claimant was working on the Eldoret-Webuye road.

That it is not only the Claimant who was terminated on account of redundancy. There were various other employees whose employment was terminated on account of redundancy including the Respondent's former human resource manager Mr. David Ndolo whose statement appears at page 27 of the Respondent's supplementary list of documents.

That the allegation by the Claimant that the Respondent employed people after declaring the claimant redundant is baseless and meant to mislead the court as there is no evidence of such. That the Claimant is not a truthful person as he had even lied that he was not paid his final dues yet the documents that he adduced paint a different picture.

It is also submitted on behalf of the Respondent that the money to pay the employees came from the proceeds of the contract hence once the contract works were complete, there was no justifiable reason to keep employees as there would be no work for them and similarly there would be no money to pay them.

On whether the redundancy was carried out lawfully it is submitted that the hallmarks of a lawful redundancy is one that follows the CBA and the Employment Act's which the Respondent observed to the letter.

On notice, the respondent submits that the Claimant contradicts himself when he alleges that there was no notice issued yet he has confirmed that he had notice of the redundancy. That in his submissions under the heading “*Brief Statement of Facts*” he has clearly stated that he was

notified of the redundancy. Indeed even at paragraph 5 of his statement to be found at page 6 of his memorandum of claim he confirms that he was informed of the redundancy.

Further that the Employment Act requires that a month's notice be given to the Union and the labour officer in charge of the area where the employee is employed giving the reasons for and the extent of the redundancy. This was done verbally in early September 2013 and followed up in writing with a letter dated 2<sup>nd</sup> October 2013. That there is no requirement for the one months notice to be in writing under Section 40(1)(a), 40(1)(b) and if the drafters intended that a notice under section 40(1)(a) be in writing they would have specified so.

That the CBA provided for a notice period of seven days. As such the verbal notice issued in early September as followed up with the written notice issued on 2<sup>nd</sup> October 2013 for redundancy that was effected at the end of October 2013 was sufficient as per the law and the CBA.

On payments due to the Claimant, it is submitted that the Respondent has proved that the Claimant was paid a gross sum of Kenya Shillings Ninety Three Thousand, Eight Hundred and Thirty (Kshs.93,830/-) which payment can be further confirmed by the Claimant's own documents which includes a KRA form P9A annexed to his memorandum of claim at page 17 which confirms that in October 2013 he was paid a gross sum of Kshs.93,825.75.

That the Claimant's payments are broken down in conformity with the requirements of the Act and the CBA. These payments are reflected in the Claimant's pay slip which is at page 3 of the respondent's supplementary list of documents. It is therefore submitted that the Claimant was fully paid his dues as required under the Employment Act and that the redundancy was carried out lawfully. Counsel urges the Court to dismiss the suit with costs.

### **Determination**

I have considered the pleadings and the submissions filed by the parties. I have further considered the documents filed with the pleadings and the authorities cited. The issues for determination are whether the claimant was unfairly terminated and if he is entitled to the remedies sought.

It is not in dispute that the claimant was declared redundant. His contention is that the respondent did not comply with Section 40 of the Employment Act, as he was not informed of the intention to declare him redundant, was not paid for leave earned, salary for February 2012, notice and overtime.

In the respondent's supplementary list of documents it has annexed the notice to the union as well as the notice to the Labour Officer, Uasin Gishu, both dated 2<sup>nd</sup> October 2013. At page 3 of the respondent's supplementary list of documents is the claimant's last payslip which itemises the payments therein to include basic pay, leave pay, overtime, severance pay, notice pay, house allowance and payment of arrears. The payslip is for the month of October 2013. The averments by the claimant are therefore evidently not valid as all his averments are contrary to the evidence on record.

I find that the redundancy was in compliance with both Section 40 of the Employment Act and the CBA that governed the terms of employment of the claimant.

Pursuant to the foregoing, it is my finding that the claim has no merit. The same is accordingly dismissed.

Each party shall bear its costs.

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF APRIL 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 20<sup>TH</sup> DAY OF MAY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**