



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 729 OF 2017

BETWEEN

CHARLES DZOMBO..... CLAIMANT

VERSUS

MOMBASA RETREADS LTD.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

E.W. Munyari & Company Advocates for the Claimant

Ngonze & Ngonze Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 7th September 2017. He avers, he was employed by the Respondent on 10th October 2011, as a Tyre Repair Man. His salary was Kshs. 14,000 monthly. He was issued by the Respondent, a notice of termination on or around 23rd December 2016. Termination was to take effect from 22nd January, 2017. The reason cited by the Respondent to justify termination, was that the Respondent was going through economic constraints. This was not a genuine reason. The Claimant was not given an opportunity to defend himself. He prays the Court to find that termination was unfair, and grant the following Orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 14,000.
- b) Annual leave pay at Kshs. 56,538.
- c) Service pay at Kshs. 40,385.
- d) 12 months' salary in compensation for unfair termination at Kshs. 168,000.
- e) Certificate of Service to issue.
- f) Overtime pay at Kshs. 545,400.
- g) Costs.
- h) Interest
- i) Any other suitable relief.

2. The Respondent filed its Memorandum of Response on 13th February 2018, conceding to have employed the Claimant as a Repair Man on

10th October 2011, until 22nd January 2017, when his contract was terminated, on the ground of redundancy. He earned a monthly salary of Kshs. 14,000. He was issued notice dated 23rd December 2016, to take effect on 22nd January 2017. He was paid all his annual leave days. His Claim does not disclose reasonable cause of action against the Respondent, and should be dismissed with costs.

3. The Claimant testified on 24th October 2018. Chief Security Officer Rashid Said, testified for the Respondent on 19th February 2019, bringing the hearing to an end. The Claim was last mentioned on 19th June 2019, when Parties confirmed filing of their Submissions.

4. The Claimant adopted his Pleadings, Documents and Witness Statement in his testimony. The Respondent told him he had not done anything wrong but its business was low. He was not paid terminal dues. Cross-examined the Claimant confirmed that he was issued 1 month notice, which was indicated to have been copied to the Labour Office. He did not know if other Employees were affected. He was paid Kshs. 8,496 being half – salary for December 2016. He had taken advance salary for December 2016. He was paid the whole salary for December 2016. Salary Vouchers exhibited by the Respondent show that the Claimant received overtime pay. He went on annual leave, but was not paid during such leave. Twice, he was paid in lieu of annual leave. Redirected, the Claimant told the Court that he was in employment until 22nd January 2017. He was not paid salary for January 2017. He did not know if the Respondent Company has closed down.

5. Rashid Said Abdallah told the Court that the Respondent closed business in 2017. The Respondent was doing poorly. It issued notices of redundancy to its Employees. The notices were shared with the Labour Office. The Claimant was paid his leave dues. He was paid for overtime worked, with his monthly salary. The Respondent is ready to release Claimant's Certificate of Service, and pay service at Kshs. 35,000.

6. On cross-examination, the Witness told the Court that the Respondent did not have evidence to show notice was received by the Labour Office. Notice was not shown to have been received by Claimant's Union. The business has closed down. Abdallah did not have documents to support closure. There is no document, showing Parties consulted, before termination decision was made. Redirected, the Witness told the Court that the Claimant was paid a sum of Kshs. 35,000.

The Court Finds:-

7. The Claimant was employed by the Respondent Company as a Tyre Repair Man on 10th October 2011. He earned a monthly salary of Kshs. 14,000. He left employment on 22nd January 2017.

8. The Court accepts the evidence of the Respondent that its business was experiencing a downturn, necessitating laying off of staff. The notice issued to the Claimant and the County Labour Office on 23rd December 2016, as well as the testimony of Abdallah, shows there was a genuine redundancy situation. As of the date Abdallah gave evidence, the business was no longer open. Other Employees were similarly released by the Respondent.

9. The Respondent did not however, adhere to Section 40 of the Employment Act, in execution of redundancy. There was nothing paid to the Claimant under this law, other than the balance of his salary for the month of December 2016, at Kshs. 8,496.

10. The Claimant did not acknowledge that he was paid Kshs. 35,000 as severance. In his evidence-in-chief, Abdallah told the Court that the Respondent is ready to pay severance at Kshs. 35,000. On redirection, he contradicted this, saying that the Claimant was paid a sum of Kshs. 35,000 in severance. Paragraph 10 of the Statement of Response un-clearly states that the 'Claimant had been paid all leave, days worked for apart from severance which is Kshs. 35,000'. The Respondent appears to plead that severance was not paid. There is no evidence of payment.

11. Termination was notified to the Claimant through the letter dated 23rd December 2016. His prayer for notice pay has no merit.

12. There are Annual Leave Application Forms exhibited by the Respondent, together with Petty Cash Voucher showing payment of Leave to the Claimant. He signed several Leave Encashment Forms. He is shown to have gone on annual leave, or sold his annual leave days to the Respondent. His prayer for annual leave pay, over the entire period of employment cannot therefore be correct, and is declined.

13. Similarly, there are pay slips exhibited by the Respondent, showing that the Claimant received overtime pay, with his monthly salary. The prayer for overtime pay of Kshs. 545,400 has no foundation.

14. It was conceded by Abdallah that the Claimant belonged to a Trade Union. Notice issued to the Claimant and the Labour Office, was not shared with Claimant's Union. The notice of 23rd December 2016 appears to have been a notice of termination solely. There was no notice of intended redundancy, issued under Section 40(1)(a). The notice on record seems to have issued under Section 40(1)(f), read together with Section 35(1)(c) of the Employment Act. Without notice of intended redundancy to the Trade Union, it follows no tripartite consultation took place, before termination.

15. While the Respondent had substantive ground in terminating Claimant's contract, the Respondent disregarded the procedure laid down in Section 40 of the Employment Act. To this extent, termination was unfair, and the Claimant merits compensation for unfair termination.

16. The Court has taken note that Abdallah was transferred to another business outlet of the Respondent, after the Respondent experienced a downturn in the outlet where the Claimant and Abdallah worked. Abdallah's evidence is that some of the Employees whose positions were declared redundant, did not want to join other outlets.

17. The Claimant is granted the prayer for compensation for unfair termination, equivalent to 5 months' salary at Kshs. 70,000.

18. He worked 5 complete years between 10th October 2011 to 22nd February 2017.
19. ***He is granted severance pay computed at 15 days' salary for each of the 5 years, at Kshs. 40,384.***
20. ***Certificate of Service to issue.***
21. ***Costs to the Claimant.***
22. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IT IS ORDERED:-

- a) The Respondent shall pay to the Claimant: equivalent of 5 months' salary in compensation for unfair termination at Kshs. 70,000; and, severance at Kshs. 40,384 – total Kshs. 110,384.***
- b) Certificate of Service to issue.***
- c) Costs to the Claimant.***
- d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

Dated and delivered at Mombasa this 29th day of July 2019.

James Rika

Judge