



**REPUBLIC OF KENYA**

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

**CAUSE. NO. 1587 OF 2018**

**ABEDNEGO NGWABE WERE.....CLAIMANT**

**VERSUS**

**EAST AFRICAN SAFARIS AIR EXPRESS LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claim herein is for terminal benefits plus compensation for unfair termination of contract of service on account of redundancy. The claim is contained in the amended Memorandum of Claim and seeks the following reliefs:

- 1) One month’s salary in lieu of notice – Ksh.420,560.00.
- 2) Severance pay  $420,560 \times 15 \times 9 =$  Kshs.1,892,520.00.

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2a. Severance pay  $420,560 \times 15 \times 4 \frac{7}{12} =$  2,183,676.92

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- 3) Accrued leave days of 131 days = Ksh.1,836,445.00.

3b. accrued leave days of 131 days

=  $131 = 6\text{yrs} \times 420,560 =$  Kshs.2,523,360.00

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- 4) Withheld 1/3 of the claimants salary for 9 months

=  $\frac{1}{3} \times 420,560 = 140,186 \times 9 =$  Kshs.1,261,680.00

- 5) 12 months salary for unlawful termination = Kshs.5,046,720.00

- 6) Interest on 1,2,3,4 and 5 above at court rates

- 7) Costs of the suit.

2. The respondent did not file defence despite being served with summons to enter appearance. Consequently, the suit proceeded as undefended and on the day of the pre trial directions, the claimant requested to proceed by written submissions.

**Claimant’s Case**

3. In his written statement, the claimant stated that he was employed by the respondent as an Engineer and progressively rose through the ranks to become Production Control Manager. He filed a payslip for November 2012 to prove that his gross pay per month was Kshs.420,560.

4. He further stated that in the year 2018, while conducting routine pre-flight inspection on an aircraft in Mogadishu, one of the respondent's employees entered the cockpit and switched on the hydraulic pumps, which caused Skydro fluid to hit both of his eyes at PSI 3000 thus permanently damaging his eyesight. That instead of the employer compensating him under WIBA, she decided to terminate his services on 13.8.2018 on the guise that she was restructuring her operations.

5. The claimant further stated that the termination was done the same day he received the termination letter dated 13.8.2018 which offered to pay him one month salary in lieu of notice, and outstanding leave. However, the claimant contended that from January 2018, a third of his salary was withheld by the employer and he prayed for the same.

6. He further contended that statutory deductions made by the employer in favour of NSSF, NHIF and PAYE was not remitted and KRA was demanding from PAYE tax arrears plus penalties running into millions of shillings. He therefore prayed for reliefs set out in his guarded Memorandum of Claim plus costs and interest.

7. The issues for determination arising from the pleadings and evidence are:-

(a) Whether the termination was unlawful and unfair;

(b) Whether the reliefs sought should be granted.

### **Analysis and determination**

8. As regards the first issue for determination the claimant submitted his services were terminated on account of redundancy without prior notice as required by section 40 of the Employment Act.

9. He relied on *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013]eKLR* and *Angela Shikuru Kondonga v Airtel Kenya Ltd [2016]eKLR* to contend that redundancy must be preceded by a statutory notice under section 40(b) of the Act and the employer must prove that all the parameters of redundancy under Section 40(a) & (c) have been taken into account and in an objective manner.

10. I have carefully considered the uncontroverted pleading, evidence and the law cited by the claimant and made a finding of fact that the claimant has proved on a balance of probability that his employment contract was unfairly terminated on account of redundancy. Section 40(1)(b) of the Employment Act provides that before terminating employees contract of service on account of redundancy, the employer must first serve at least one month notice in writing to the employee and Area Labour Officer. In this the claimant and the area Labour Officer were not served with any prior notice even though the employer offered to pay him salary in lieu of notice.

11. The foregoing view is fortified by the Court of Appeal decisions in *Thomas De La Rue v David Opondo Omutelema[2013]eKLR and Africa Nazarene University vs David Mutevu & 103 others [2017]eKLR* where the court held that under section 40(1) a redundancy notice must be served in writing to the employee or his union and the area Labour Officer at least one month before the termination of employment on account of redundancy.

12. The termination letter dated 13.8.2018 stated partly as follows:-

***“Your employment will end on 13th August 2018. Your notice period is one month which will be paid in lieu.”***

13. In view of the following and the cited precedents, the court returns that the termination of the claimant's employment contract procedurally unfair and therefore unlawful within the meaning of section 45 of the Employment Act.

### **Reliefs sought**

14. He prayed for the reliefs set out in the Memorandum of Claim citing several provisions of the Employment Act. He contended that under Section 35(1) (c) and 36 of the Act, he is entitled to one month salary in lieu of notice. He further contended that he is entitled to the 1/3 of his salary which was withheld from January 2018 to August 2018 when he was discharged. He further contended that he is entitled to his salary for the 13 days worked in August 2013.

15. He also contended that he is entitled to severance pay under section 40 of the Act from May 2013 to August 2018. He further contended that during the said period of service, he was subjected to NSSF deduction but the employer failed to remit the same to the fund. He produced as exhibit, copy of NSSF statement to support the said claim.

16. Finally, he submitted that he is entitled to 12 months gross pay as compensation for unfair termination. He contended that fair procedure was not followed before his layoff as provided under section 40(1) of the Act.

17. In view of the finding that the termination of the claimant's services was unfair and unlawful, I award him one month salary in lieu of notice plus 12 months' salary compensation for the unfair termination under Section 49(1) of the Act. In awarding the said compensation, I have considered the fact that the claimant served for over 9 years and did not contribute to the termination through misconduct. I have further considered the fact that his chances of securing another job was compromised by injuries occasioned on his eyes while on duty in the

same year he was discharged. In the termination letter dated 13.8.2018 the employer observed as follows:

***“There is also a concern as well in regard to your eye sight which you admitted is a problem and it’s been deemed unsafe for you to be working in the hangar with all sorts of equipment around you which may hurt you.”***

18. The claim for 131 leave days has not been controverted by leave records. Under Section 28 of Employment Act, an employee is entitled to a minimum of 21 days annual leave.

19. The claim for severance pay is also awarded as prayed for the period between May 2013 to August 2018 when NSSF contributions were not remitted by the employer albeit deducted from the salary. He prayed for 15 days’ pay per completed year of service, which I allow. The NSSF statement produced as exhibit confirms that no remittances were made by the employer for that period between May 2013 and August 2018.

20. The claim for 1/3 salary withheld from January 2018 to August 2018 is allowed as prayed. The employer has no legal right to withhold employee’s salary or to effect any pay cut without prior consultation with the employee.

**Conclusion and disposition**

21. I have found that the termination of the claimant’s employment on account of redundancy was procedurally unfair by breaching the mandatory provisions of Section 40(1)(b) of the Employment Act and it was therefore unlawful. I have therefore found that the claimant is entitled to the reliefs sought in is Amended claim. Consequently I enter judgment for him against the respondent in the following terms.

One month Notice.....	Kshs. 420,560
12 months’ compensation.....	Kshs.5,046,720
Severance pay.....	Kshs.2,183,676
Leave of 131 days.....	Kshs.2,523.360
Withheld 1/3 salary (8 months’)	<u>Kshs.1,121,493</u>
	Kshs.11,295,809
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22. The above award is subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof.

**Dated, Signed and Delivered in Open Court at Nairobi this 11th day of October, 2019**

**ONESMUS N. MAKAU**

**JUDGE**