



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 959 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 19<sup>th</sup> December, 2019)**

**FELIX M. NYAMAI .....CLAIMANT**

**VERSUS**

**CRESCENT TECH LIMITED ....1<sup>ST</sup> RESPONDENT**

**AASHIFA SALEH.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed a Statement of Claim filed in Court on 10<sup>th</sup> June, 2014, in which he seeks compensation for unfair and unlawful termination of his employment on account of redundancy by the Respondent herein and non- payment of redundancy benefits owed to him.

2. He states that he was employed by the Respondent on or about 18<sup>th</sup> December, 2008 as a Motor bike driver and messenger and that his contract was to commence on 5<sup>th</sup> January, 2009.

3. The Claimant further contended that he performed his duties diligently and to the Respondent's satisfaction until 24<sup>th</sup> April, 2014 when his services were terminated by the Respondent on account of redundancy.

4. He further averred that his last salary without house allowance was Kshs. 21,350 as evidenced by his April, 2014 payslip as well as the Certificate of Service issued to him.

5. The Claimant avers that the Respondent violated the mandatory provisions of Section 40 of the Employment Act, 2007 by failing to inform the area labour office of the intended redundancy prior to declaring the Claimant redundant.

6. The Claimant further avers that during the subsistence of his employment with the Respondents they failed to comply with the provisions of the Employment Act, specifically sections 20 and 31 on itemized payments of his salaries and payment of house allowance.

7. The Claimant contends that the respondents should compensate him for loss of employment as required under Section 15 (c) of the Labour Institutions Act, 2007.

8. Aggrieved by the decision to unfairly terminate his services on account of alleged redundancy the Claimant filed the instant claim seeking the following reliefs:

**1. The Respondents to pay the Claimant his severance pay, house allowance & compensation for loss of employment together with prorate leave.**

**2. The Respondents to pay the Claimant his redundancy benefits amounts to Kshs. 532,327/=.**

**3. The Respondents to pay the costs of this suit.**

9. The Respondents through the firm of Njoroge Regeru filed their Memorandum of Reply dated and filed in Court on 6<sup>th</sup> August, 2014 in which the Respondents admit having engaged the Claimant herein. However, it is averred that the 2<sup>nd</sup> Respondent being the Managing Director of the 1<sup>st</sup> Respondent does not have personal responsibility over the Claimant's employment.

10. The Respondents further aver that the Claimant's employment was for a fixed term period of three years and that upon expiry of the said term, it did not renew the said contract on account of the Claimant's misconduct and insubordination as evidenced by several warning letters issued to him dated 4<sup>th</sup> May, 2010, 17<sup>th</sup> September, 2010, 26<sup>th</sup> January, 2011, 1<sup>st</sup> March, 2011, 22<sup>nd</sup> May, 2013 and 13<sup>th</sup> February, 2014.

11. The Respondents contended that by a letter dated 1<sup>st</sup> April, 2010, the parties herein agreed to a period of one (1) months' notice prior to termination in compliance with the Employment Act, 2007.

12. The Respondents further contended that the Claimant's services were lawfully terminated on 24<sup>th</sup> April, 2014 and that he was paid all his dues at the time of separation and that he has no other Claim against the Respondents herein.

13. In the circumstances, the Respondents urged this Honourable Court to dismiss the instant Claim with costs to the Respondents.

14. The matter was thereafter fixed for hearing on 18<sup>th</sup> June, 2019 with the Claimant testifying on his own behalf and the Respondents calling one witness to testify on their behalf.

### **Evidence**

15. The Claimant (CW1) requested to have his witness statement dated 18<sup>th</sup> September, 2018 and filed in Court on 19<sup>th</sup> September, 2018 adopted as his evidence in chief, a request which was allowed by this Honourable Court.

16. In his statement, CW1 reiterated the averments made in his Memorandum of Claim. In brief, CW1 stated that he was employed by the Respondents on 5<sup>th</sup> January, 2009 as a motor bike driver and messenger, a position he held until 24<sup>th</sup> April, 2014 when his services were terminated on account of redundancy.

17. He further stated that upon receipt of his termination letter he was not paid any terminal benefits prompting him to make several calls to the Respondents for payment but was never done.

18. The Claimant urged this Honourable Court to allow his claim as drawn.

19. On cross-examination, CW1 confirmed that in his appointment letter, his salary was 18,000/- which included house allowance. He further confirmed that he had no case of misconduct with the Respondent prior to his termination.

20. On re-examination, CW1 confirmed that the payslip he was issued with the Respondent has no indication of payment of any house allowance.

### **Respondent's Case**

21. **RW1, Elizabeth Wanjiru Mwangi** the Human Resource Manager of the Respondent herein testified on behalf of the Respondent herein. She adopted her witness statement dated 13/6/2019 and filed in Court on 14/6/2019 as her evidence in chief in which she reiterated the averments made in the Memorandum of response.

22. RW1 further testified that the Claimant was not wrongfully terminated as alleged and that the termination was due to restructuring within the Respondent Company that occurred in the year 2014.

23. She further testified that the Claimant had no outstanding leave and that he was paid one month's salary in lieu of notice at the time of separation. She further confirmed that the Claimant's salary was inclusive of house allowance.

24. RW1 further contended that the 2<sup>nd</sup> Respondent was not the Claimant's employer. She further contended that the 2<sup>nd</sup> Respondent was the Managing Director of the 1<sup>st</sup> Respondent.

25. She urged the Court to dismiss the instant Claim against the Respondents herein having been paid all his dues at the time of separation and therefore has no claim against the Respondents herein.

26. On cross-examination RW1 confirmed that the Respondent Company went through the process of restructure in the year 2014 and the Claimant was among other members of staff whose services were terminated as a result thereof.

27. She further confirmed that she did write to the Claimant notifying him of the intended redundancy.

28. On further cross-examination RW1 stated that the terms of engagement were changed during the subsistence of the Claimant's services a result of which notice period was changed from 3 months to 1 month. She however confirmed that the change was not explained to the Claimant.

29. She further confirmed that the Claimant's salary was consolidated to include house allowance.

30. On re-examination, RW1 stated that the Company could review the terms of its policy from time to time as provided under its letter dated 1/4/2010. She further confirmed that the Claimant signed this review letter.

31. Parties thereafter filed and exchanged written submissions to the Claim herein.

### **Submissions by the Parties**

32. The Claimant submitted that his termination on account of redundancy was unfair as it failed to follow the mandatory provisions of Section 40 of the Employment Act, 2007 as read together with Section 2 of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the case of **Hesbon Ngaruiya Waigi Vs Equitorial Commercial Bank Limited (2013) eKLR**.

33. Further, the Claimant relied on the Authority of **Francis Maina Kamau Vs Lee Construction (2014) eKLR** where it was held:-

**“Where an employer declares a redundancy the conditions set out in Section 40 of the Employment Act must be observed and where the employer fails to do so, the termination becomes unfair termination within the meaning of Section 45 of the Employment Act.”**

34. The Claimant further submitted that he was entitled to the reliefs as sought in his Memorandum of Claim having been unfairly and unlawfully terminated by the Respondent herein.

35. In conclusion, the Claimant urged this Honourable Court to allow his Claim as drawn, the Respondents having failed to adhere the mandatory provisions of redundancy as required by law.

### **Respondents' Submissions**

36. The Respondents on the other hand submitted that the Claimant's services were lawfully and procedurally terminated on account of redundancy as provided under the provisions of Section 40 of the Employment Act, 2007.

37. It is further submitted that the Claimant is only entitled to Kshs. 26,371/= having been paid Kshs. 48,408/= at the time of separation from the Respondents employment.

38. With regards to the claim for loss of employment, the Respondents submitted that the same was not proved by the Claimant as the Claimant stated that he has since been employed by MFI Limited as a credit controller since the year 2014. The Respondents urged this Honourable Court to dismiss the Claim.

39. On the issue of house allowance, the Respondents contended that the Claimant's salary was consolidated and the allegation of non-payment of house allowance therefore lacked merit and urged the Court to dismiss the same. To buttress this argument the Respondents cited and relied on the cases of **Abigail A. Kiarie Vs Aggreko International Company Limited & Another (2018) eKLR** and **Sani Orina Vs Hiprora Business Solutions (EA) Limited (2017) Eklr**.

40. The Respondents further contended that the Claim for unpaid leave days was also not proved and urged this Honourable Court to dismiss the same for want of evidence.

41. It was further submitted that the Claim against the 2<sup>nd</sup> Respondent ought to be dismissed with costs as there is no evidence of an employment relationship between the 2<sup>nd</sup> Respondent and the Claimant herein. It is further submitted that the 2<sup>nd</sup> Respondent has been wrongfully been sued in this matter.

42. In conclusion, the Respondents urged this Honourable Court to dismiss the Claim before this Honourable Court for lack of evidence.

43. I have considered the evidence and submissions of Parties. In the defence filed by the Respondent, they aver that the Claimant had been employed on a 3 year contract which ended and was not renewed.

44. This is far from the truth because the contract between the Claimant and Respondent has no such contract terms.

45. In the evidence in Court however, the RW1 indicated that the Claimant was terminated due to company restructuring which is what the Claimant had indicated only stating that the termination was irregular, as due process was not followed. The Respondent averred that they followed due process.

46. The burden of proving that due process was followed rests upon the Respondent herein. The process envisaged is as set out under Section 40 of the Employment Act 2007 which states as follows:-

**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 to 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 an 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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

47. The Claimant was terminated vide a letter dated 22.4.2014 and the termination was effective on 24/4/2014 and was served on 24.4.2014 which in essence breached the mandatory processes envisaged under Section 40 of employment Act above.

48. There was no indication that there were consultations before this restructuring. The Respondents have also not proved that there was a redundancy situation to warrant the restructuring.

49. No notice was served on the Labour Officer too.

50. This Court finds that the redundancy against Claimant was unlawful and unjustified.

51. I find in favour of the Claimant and I award him as follows:-

1. 10 months' salary as compensation for the unlawful redundancy =  $10 \times 21,350 = 213,500/=$ .

2. Severance pay equivalent to 15 days salary for each year worked =  $21,350 \times \frac{1}{2} \times 5 \text{ years} = 53,375/=$ .

3. Pending 7 leave days (7 days) as pleaded =  $7/21 \times 21,350 = 4,982/=$

**TOTAL = 271,857/=**

4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 19<sup>th</sup> day of December, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Wangare Ndirangu for Claimant – Present

No appearance for Respondent