



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 459 OF 2015

ABEL MUIITHI MAKAU.....CLAIMANT

v

MOTO GARI LIMITED.....RESPONDENT

JUDGMENT

1. Abel Muithi Makau (Claimant) commenced legal proceedings against Moti Gari Ltd (Respondent) on 24 March 2015 and the Issues in Dispute were stated as

- (a) Unlawful and unfair dismissal from employment.
- (b) Non-payment of terminal dues and compensatory damages.

2. Upon service, the Respondent filed a Defence on 16 April 2015.

3. On 8 June 2015, the Court directed the parties to file witness statements within 14 days and on 14 August 2015, the Claimant filed his witness statement. The Respondent did not file any witness statement.

4. On 11 July 2017, the parties representatives appeared in the Registry and had the Cause fixed for hearing on 15 February 2018.

5. Despite the hearing date having been fixed by consent, the Claimant served the Respondent with a hearing notice on 5 October 2017 (was acknowledged).

6. For unknown reasons, the Respondent failed to attend the hearing and because the Court was satisfied that the Respondent was aware of the hearing, it allowed the hearing to proceed.

7. The Claimant gave sworn testimony but did not file written submissions within the agreed timelines.

8. The Court has identified the Issues for Determination as, *whether there was unfair termination of employment, whether the Claimant worked overtime without pay, whether Claimant was paid July 2014 wages and appropriate remedies.*

Unfair termination of employment

9. The Claimant was employed by the Respondent as a driver on 14 October 2013. He was earning a gross salary of Kshs 35,129/- (net was Kshs 30,000/-).

10. In his testimony, he stated that when he reported on duty as usual on 6 August 2014 he was issued with a letter informing him of the termination of his contract.

11. Although the Claimant stated that he was not given reasons for the action, the reason given in the letter is primarily that his services as a *family driver was surplus to Tullow Kenya requirements.*

12. The Claimant also testified that there was no hearing prior to the termination and that no notice was given.

13. From the contents of the letter of termination, it emerges that the Claimant's employment was being terminated on account of operational reasons, hence redundancy.

14. An employer contemplating terminating the contract of an employee on account of redundancy ought to comply with the conditions set out in section 40 of the Employment Act, 2007.

15. In the case at hand, there is no evidence of written notice to the Claimant and Labour Officer one month in advance or payment of the statutory entitlements.

16. The termination therefore did not satisfy the written notice condition prescribed by section 40(1)(b) of the Employment Act, 2007.

17. In terms of sections 43 and 45(2)(a) & (b)(ii) of the Employment Act, 2007, the Respondent was also under an obligation to prove in Court the operational requirements that necessitated the termination on account of redundancy.

18. The Respondent by failing to attend Court failed to discharge that obligation.

19. The Court therefore concludes that the termination of the Claimant's employment was both procedurally and substantively unfair.

Overtime

20. The Claimant's contract provided that he would work for 12 hours per day spread over 6 days in the week.

21. Although testifying that he used to report to work at 6.00am and work sometimes up to 11.00pm, the Claimant did not disclose the particulars of the formula he used to compute the overtime pay or the exact number of days he worked overtime.

22. The Claimant equally did not enumerate the public holidays he worked without appropriate remuneration.

23. In the view of the Court, the Claimant did not lay an evidential basis for this head of claim.

July 2014 wages

24. The Claimant's testimony that he was not paid wages for July 2014 was not traversed in the Defence nor rebutted in any other way.

25. He would be entitled to the wages as of right.

Appropriate remedies

Pay in lieu of notice

26. Pursuant to section 35(1)(c) of the Employment Act, 2007 and the termination clause in the employment agreement, the Court finds that the Claimant is entitled to the equivalent of 1 month pay, in lieu of notice.

Wages for July 2014

27. The Claimant is entitled as of right to the earned wages for July 2014 and which he quantified as Kshs 35,129/-.

Overtime

28. Overtime, both normal and for public holidays was not proved and the relief is declined.

Compensation

29. The Claimant served the Respondent for 1 year and in consideration of the length of service and the circumstances surrounding the termination, the Court is of the view that the equivalent of 3 months gross wages would be appropriate.

Conclusion and Orders

30. The Court finds and holds that the termination of the Claimant's contract was unfair and awards him and orders the Respondent to pay him

(i) Pay in lieu of notice	Kshs 30,000/-
(ii) Wages July 2014	Kshs 35,129/-
(iii) Compensation	Kshs 105,387/-
TOTAL	Kshs 170,516/-

31. Claimant did not file submissions as directed. He is denied costs.

Delivered, dated and signed in Nairobi on this 9th day of March 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mungai instructed by Namada & Co. Advocates

For Respondent K.N. Mburu & Associates (did not attend hearing despite service)

Court Assistant Lindsey