



**REPUBLIC OF KENYA**

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

**CAUSE NO 847 OF 2015**

**HASSAN MWALIMU MPASUA.....1<sup>ST</sup> CLAIMANT**

**COMFORT MUGOYWA LUVAI.....2<sup>ND</sup> CLAIMANT**

**ZACHARIA ANANDA.....3<sup>RD</sup> CLAIMANT**

**VS**

**LOCHAB BROTHERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 9<sup>th</sup> November 2015 and filed in court on 10<sup>th</sup> November 2015, the Claimants have sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Reply on 29<sup>th</sup> August 2016.

2. When the parties appeared before me on 5<sup>th</sup> March 2018, they agreed to dispense with the claim by way of written submissions.

**The Claimants' Case**

3. The Claimants state that they were employed by the Respondent on diverse dates and in different capacities as follows:

a) 1<sup>st</sup> Claimant: Hassan Mwalimu Mpasua- employed on 3<sup>rd</sup> October 1989 as a security guard;

b) 2<sup>nd</sup> Claimant: Comfort Mugoywa Luvai- employed on 15<sup>th</sup> January 2006 as an operations clerk;

c) 3<sup>rd</sup> Claimant: Zacharia Ananda- employed on 31<sup>st</sup> June 2009 as an operations clerk.

4. The Claimants aver that on diverse dates in the month of June 2015, they were summoned to the Respondent's main office in Eldoret, by the Personnel Manager, Mr. Otiso. They were notified that there was shortage of work and the Respondent Company could not sustain them beyond 30<sup>th</sup> June 2015.

5. It is the Claimants' case that their employment was unfairly terminated. They accuse the Respondent of bias and discrimination and state that there was no genuine case of redundancy. They allege that after their termination, the Respondent recruited other employees to replace them.

6. The Claimants further state that, in effecting the termination of their employment, the Respondent did not comply with the provisions of Section 40 of the Employment Act, 2007. They add that they were not paid their full terminal dues.

7. The Claimants' claims are as follows:

**1<sup>st</sup> Claimant: Hassan Mwalimu Mpasua**

a) One month's salary in lieu of notice.....Kshs. 10,954

b) Gratuity (18 days x 26 years x 421).....197,028

- c) Severance pay for 26 years (15 days x 26 years x 421).....164,190
- d) House allowance.....84,000
- e) Salary for May and June 2015.....14,000
- f) Compensation for unfair termination.....131,448

**2<sup>nd</sup> Claimant: Comfort Mugoywa Luvai**

- a) One month's salary in lieu of notice.....Kshs. 14,173
- b) Severance pay for 9 years (15 days x 9 years x 545).....73,591
- c) House allowance.....91,200
- d) Salary for June 2015.....7,600
- e) Compensation for unfair termination.....170,076

**3<sup>rd</sup> Claimant: Zacharia Ananda**

- a) One month's salary in lieu of notice.....Kshs. 14,173
- b) Severance pay for 6 years (15 days x 6 years x 545).....49,050
- c) House allowance.....84,600
- d) Salary for June 2015.....7,050
- e) Compensation for unfair termination.....170,076

8. The Claimants also pray for certificates of service, costs plus interest.

**The Respondent's Case**

9. In its Memorandum of Reply dated 25<sup>th</sup> August 2016 and filed in court on 29<sup>th</sup> August 2016, the Respondent admits having employed the Claimants as pleaded in the Memorandum of Claim save that the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants worked as messengers.

10. The Respondent states that in April 2015, the Claimants were notified of shortage of work. The Claimants were therefore aware of the considerable scaling down of the Respondent's operations by the time they ceased working in May 2015.

11. The Respondent denies the Claimants' allegations that there was no genuine case of redundancy. The Respondent further denies discriminating against the Claimants. The Respondent reiterates that there was serious shortage of work, necessitating reduction of workforce in an effort to sustain the business. No persons had been recruited to replace the Claimants.

12. The Respondent avers that it complied with the provisions of Section 40 of the Employment Act and duly paid each of the Claimants salary for May 2015, salary in lieu of notice and severance pay. The Claimants confirmed receiving the payment in full and final settlement. The Respondent maintains that no further payments are due to the Claimants.

**Findings and Determination**

13. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimants' employment was lawful and fair;
- b) Whether the Claimants are entitled to the remedies sought.

**The Termination**

14. According to the Respondent, the Claimants' employment was terminated on account of reduction of work. To my mind this falls within what is commonly known as redundancy.

15. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act , 2007 define redundancy as:

**“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”**

16. While the law recognizes redundancy as a legitimate form of termination of employment, it places a heavy responsibility on the employer to demonstrate that first, the redundancy is genuine and second, that proper procedure has been followed.

17. In this regard, Section 40 of the Employment sets the following mandatory conditions to be met by every employer considering the termination of employment on the ground of redundancy:

**a) where the employee is a member of a trade union, the employer notifies the union of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.**

18. The Claimants claim that there was in fact, no reason for declaring them redundant because soon after their exit, the Respondent hired new employees to replace them. The conditions set under Section 40 of the Employment Act operate as a safeguard and an assurance that the provision for redundancy will not be used for collateral purposes. The procedures and processes set therein are therefore mandatory and not optional.

19. This position was affirmed by the Court of Appeal in *Thomas De La Rue v David Opondo Omutelema [2013] eKLR* and *Kenya Airways Limited v Aviation and Allied Workers Union & 3 others [2014] eKLR*. In its submissions filed in court on 14<sup>th</sup> February 2018, the Respondent admits its failure to comply with Section 40 of the Employment Act. It follows therefore that the termination of the Claimants' employment was unfair within the meaning of Section 45 of the Act.

## **Remedies**

20. In light of the foregoing finding, I award compensation to the Claimants as follows:

a) 1<sup>st</sup> Claimant: Hassan Mwalimu Mpasua

12 months' salary.....Kshs. 84,000

b) 2<sup>nd</sup> Claimant: Comfort Mugoywa Luvai

9 months' salary.....68,400

c) 3<sup>rd</sup> Claimant: Zacharia Ananda

6 months' salary.....42,300

21. In making these awards, I have taken into account the Claimants' respective periods of service as well as the Respondent's conduct in effecting the termination of their employment.

22. These amounts will attract interest at court rates from the date of judgment until payment in full.

23. The Claimants did not adduce any evidence to support any of the other claims which therefore fail and are dismissed.

24. The Claimants will have the costs of the case.

25. These are the orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> DAY OF APRIL 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Osore for the Claimants

Mr. Mwakireti for the Respondent