



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 268 OF 2017

MWANGOLO NDINGA MWERO.....CLAIMANT

VS

T.S.S TRANSPORTERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 10th April 2017 and filed in court on 12th April 2017, the Claimant has sued the Respondent for unfair termination of employment. The Respondent entered appearance on 21st July 2017 but did not file any reply, in spite of adequate opportunity to do so. The Court therefore heard the Claimant *ex parte* on 8th March 2018.

The Claimant's Case

2. The Claimant pleads that he was employed by the Respondent as a mechanic (trained artisan) from the year 2006 until 10th October 2016 when his employment was terminated on account of redundancy.

3. The Claimant states that on 10th October 2016, he was issued with a termination letter backdated to 30th September 2016. On 10th October 2016, he was given a letter showing the tabulation of his terminal benefits, which tabulation he disputed.

4. The Claimant submits that in effecting the termination of his employment, the Respondent failed to comply with the provisions of Section 40 of the Employment Act, 2007.

5. The Claimant's claim is as follows:

- a) Notice pay @ 21,060 x 15% house allowance.....Kshs. 28,427
- b) Leave pay @ 28,427x10 years.....282,270
- c) Unremitted NSSF dues.....17,280
- d) Unremitted NHIF dues.....6,000
- e) 12 months' salary in compensation.....341,124
- f) Underpayment.....884,040

g) Gratuity for 11 years.....142,135

h) Certificate of service

i) Costs

Findings and Determination

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

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Termination

7. The termination of the Claimant's employment was communicated by letter dated 30th September 2016, stating as follows:

"Dear Sir

RE: REDUNDANCY

The above matter refers.

This is to inform you that we are unable to maintain the current workforce due to reduced volume of business.

You are therefore given one month notice effective today that at the end of this period you shall be given your final redundancy dues breakdown as stipulated in the redundancy process.

Yours faithfully,

T.S.S TRANSPORTERS LTD

(Signed)

MOHAMMED RAJAB WANINI

GENERAL MANAGER"

8. This letter is clear that termination of the Claimant's employment was on the ground of redundancy. 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."

9. The law allows termination of employment on account of redundancy subject to the following mandatory conditions set under Section 40 of the Employment Act:

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.

10. The Court did not see any effort on the part of the Respondent towards compliance with the provisions of Section 40 of the Employment Act and as held by this Court in ***Francis Maina Kamau v Lee Construction Co Ltd [2014] eKLR*** a redundancy termination which ignores these provisions is an unfair termination within the meaning of Section 45 of the Act.

Remedies

11. Pursuant to the foregoing finding, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process.

12. Reading from the pay slip submitted by the Claimant, he was paid a basic salary with no house allowance. I therefore invoke Section 31 of the Employment Act and allow a housing element at 15% of the basic salary. I further adopt the resultant figure of Kshs.24,219 as the Claimant's salary for purposes of this claim. This in my view, dispenses with the claim for underpayment.

13. Additionally, I award the Claimant one (1) month's salary in lieu of notice as well as gratuity as admitted by the Respondent in its letter dated 10th November 2016.

14. On the claim for leave pay, the Claimant testified that he took his leave for the years 2013 to 2015. He therefore claims leave pay for the antecedent years. Even if this claim were true, it would evidently be statute barred by dint of the latter part of Section 90 of the Employment Act, which requires claims on account of continuing injury to be brought within 12 months.

15. With this in mind, the only claim I will allow with regard to leave is what is admitted by the Respondent in its letter dated 10th November 2016. By this letter, the Respondent also admits owing the Claimant 10 days' salary for November 2016, which is therefore due.

16. Regarding the claims for unremitted NSSF and NHIF dues, the only thing to say is that these dues are payable to the respective statutory bodies and not to employees. These claims are therefore unsustainable.

17. In the end I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....Kshs. 290,628

b) 1 month's salary in lieu of notice.....	24,219
c) House allowance for 120 months.....	379,080
d) Gratuity for 10 years (24,219x16/30x10).....	129,168
e) Leave pay (as admitted by the Respondent).....	16,848
f) 10 days' salary for November 2016 (24,219/30x10).....	<u>8,073</u>

Total.....848,016

18. This amount will attract interest at court rates from the date of judgment until payment in full.

19. The Claimant is also entitled to a certificate of service and costs of the case.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF MAY 2018

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JUDGE

Appearance:

Mr. Otwere for the Claimant

No appearance for the Respondent