



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 267 OF 2017

NYIRO KIDZAO MWAKANGA.....CLAIMANT

VS

T.S.S TRANSPORTERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Nyiro Kidzao Mwakanga against his former employer, T.S.S Transporters Limited. The claim is contained in a Memorandum of Claim dated 10th April 2017 and filed in court on 12th April 2017. 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 states that he was employed by the Respondent as a mechanic from the year 2007 until 26th October 2016 when his employment was terminated on account of redundancy.

3. The Claimant further states that his employment was terminated by a post-dated letter bearing the date 1st November 2016. On 13th December 2016, he was issued with 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 Section 40 of the Employment Act, 2007.

5. The Claimant’s claim is as follows:

- a) Notice pay @ 21,060x15% house allowanceKshs. 28,427
- b) Leave pay @ 28,427x9 years.....255,843
- c) Unremitted NSSF dues.....17,280
- d) Unremitted NHIF dues.....6,000
- e) 12 months’ salary in compensation.....341,124
- f) Underpayment.....454,464
- g) Gratuity for 9 years.....127,922
- 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 effected by letter dated 1st November 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. From this letter, it is evident that the termination of the Claimant's employment was on account 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. Employers are allowed by law to terminate employment on the ground of redundancy but in doing so they must comply with the following mandatory conditions set by 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. From the evidence on record, the Respondent made no effort to comply with these conditions and as held by this Court in **Francis Maina Kamau v Lee Construction Co Ltd [2014] eKLR** such failure renders the ensuing termination unfair within the meaning of Section 45 of the

Employment Act.

Remedies

11. Pursuant to the foregoing finding, I award the Claimant (10) 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. According to 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.27,852 as the Claimant's salary for purposes of this claim. This in my view, dispenses with the claim for underpayment.

13. I further 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 13th December 2016.

14. The Claimant told the Court that he took leave in 2008 and 2009 only. He therefore claims leave pay for the subsequent years and in light of the fact that the Respondent did not produce any records to counter this claim, I allow it with respect to the years from 2010 to 2016.

15. 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.

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

a) 10 months' salary in compensation.....	Kshs. 278,520
b) 1 month's salary in lieu of notice.....	27,852
c) House allowance for 108 months.....	392,348
d) Leave pay for 6 years (27,852/30x21x6).....	116,978
e) Gratuity for 9 years (27,852x16/30x9).....	<u>133,690</u>
Total.....	949,388

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

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

19. 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