



**REPUBLIC OF KENYA**

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

**CAUSE NO 68 OF 2017**

**[FORMERLY MOMBASA ELRC CAUSE NO 306 OF 2016]**

**JOSPHAT ULENJE MANDO.....CLAIMANT**

**VS**

**ARM CEMENT (formerly known as ATHI RIVER MINING LTD).....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This matter was initially heard by my brother, **Makau J** who heard the Claimant's case. Following transfer of Judges within the Court, I took over the matter and when the parties appeared before me, they agreed to proceed from where my brother Judge had stopped.

2. The Claimant's claim against the Respondent is contained in a Memorandum of Claim dated 12<sup>th</sup> April 2016 and filed in court on 15<sup>th</sup> April 2016. The Respondent filed a Memorandum of Reply on 7<sup>th</sup> December 2016.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a Welder Grade III on 25<sup>th</sup> March 2005. He earned a monthly salary of Kshs. 16,690. He worked until 20<sup>th</sup> February 2015 when his employment was terminated.

4. The Claimant avers that the termination of his employment was unfair as there was no valid reason for it and the terms of his employment contract were not observed. The Claimant adds that he was not paid his terminal benefits. His claim is as follows:

- a) One month's salary in lieu of notice.....Kshs. 16,690
- b) Unpaid leave for 9 years.....121,338
- c) Public holidays for 9 years.....115,560
- d) Unfair termination @ 12 months' salary.....200,280
- e) Costs plus interest

**The Respondent's Case**

5. In its Memorandum of Reply dated 7<sup>th</sup> December 2016 and filed in court on even date, the Respondent admits having employed the Claimant initially as a Welder on casual basis from 25<sup>th</sup> March 2005 until 31<sup>st</sup> July 2009.

6. From 1<sup>st</sup> August 2009, the Claimant's casual employment was converted to a renewable fixed term contract for an initial term of 6 months. The Respondent pleads that it was an express term of the Claimant's employment contract that renewal thereof would be subject to availability of work.

7. The contract was renewed continuously until 20<sup>th</sup> February 2015, when the Respondent was constrained to terminate it as a result of lack of any work requiring the Claimant's services. The Respondent maintains that the termination was lawful and fair, in accordance with the law and the terms of the Claimant's employment contract. The Respondent adds that the Claimant was paid all his terminal benefits,

inclusive of one month's salary in lieu of notice and leave pay.

### **Findings and Determination**

8. 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**

9. The letter terminating the Claimant's employment is dated 20<sup>th</sup> February 2015 and sates the following:

*"Dear Josphat,*

**RE: TERMINATION OF SERVICE**

*Due to the restructuring of the Company, work has reduced in some areas and the company is forced to lay off employees holding some positions.*

*Following this, it is with regret that we have to terminate your services effective 20.02.2015.*

*Please arrange to hand over any company property that may be in your possession to your supervisor immediately you receive this letter.*

*Yours faithfully,*

**For: ARM Cement.**

*(Signed)*

**V. BALAKRISHNAN**

**GM PROJECTS AND ADMINISTRATION**"

10. According to this letter, the Claimant's employment was terminated pursuant to restructuring leading to reduction of work. This falls within what is commonly known as redundancy.

11. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act 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 practice commonly known as abolition of office, job or occupation and loss of employment."***

12. It is now settled that redundancy is a legitimate form of termination of employment but there are stringent conditions to be found in Section 40 of the Employment Act that must be observed. These conditions have to do with adequate notice to the affected employees, their Trade Union and the Labour Office, a fair selection criteria based on length of service skill and reliability as well as payment of terminal dues.

13. Regarding the issue of notice, the Court of Appeal in ***Thomas De La Rue v David Opondo Omutelema [2013] eKLR*** and ***Kenya Airways v Aviation & Allied Workers Union of Kenya & 3 others [2014] eLKR*** confirmed that in cases of redundancy, two separate and distinct notices are required. The first which is the redundancy notice is issued to all employees likely to be affected by the redundancy and the second is a termination notice specific to each employee individually.

14. The requirement on selection of employees to be sent home on account of redundancy is intended to assure objectivity and fairness in the process.

15. From the evidence on record, the Respondent made no attempt to comply with any of the conditions set under Section 40 of the Employment Act. This renders the termination of the Claimant's employment substantively and procedurally unfair and he is entitled to compensation.

### **Remedies**

16. Flowing from the foregoing, 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 effecting the termination.

17. According to documents availed by the Respondent, the Claimant is entitled to the following dues:

- a) Leave pay for 4 days;
- b) Severance pay for 9 years;
- c) Salary for 20 days;
- d) Overtime worked;
- e) Travelling allowance;
- f) Baggage allowance;
- g) One month's salary in lieu of notice.

18. The Claimant denied receiving any of these dues and the Respondent did not produce any document to prove payment. These claims are therefore admitted and are payable.

19. The claim for public holidays was not proved and is dismissed.

20. The Claimant produced his payslips for the months of February and July 2014 showing that he earned a monthly basic salary of Kshs. 16,695 plus a house allowance of Kshs. 3,000. I have therefore adopted the cumulative figure of Kshs. 19, 695 as the Claimant's monthly salary for purposes of this claim.

21. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....	Kshs. 236,340
b) 1 month's salary in lieu of notice.....	19,695
c) Leave pay for 4 days.....	2,610
d) Severance pay for 9 years.....	146,804
e) Salary for 20 days.....	15,357
f) Overtime.....	864
g) Travelling allowance.....	4,000
h) Baggage allowance.....	<u>4,000</u>
<b>Total.....</b>	<b>429,760</b>

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

23. The Claimant will have the costs of the case.

24. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MALINDI THIS 6<sup>TH</sup> DAY OF JUNE 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Marubu for the Claimant

Mr. Kalimbo for the Respondent