

4. Overtime difference

18,578 – 14,011.6 = 4,566.4

45 hours per week

12 hours x 6 days = 72 – 45 = 27 hours overtime

27 hours x 4 weeks = 108 hours per month

108 hours x 1.5 x 12,184/195 = 10,044 – 4,566 per month

5,478 x 36 months Kshs.197,208

5. Compensation for unfair termination

Gross pay x 12 months

14,011.6 x 12 months Kshs.168,139.2

TOTAL CLAIM KSHS.467,739.6

Less amount paid Kshs.152,777

TOTAL BALANCE DUE KSHS.314,962.6

The respondent filed a reply to memorandum of claim in which it states that it operates as a general merchant store in Eldoret Town within Uasin Gishu County dealing in general wholesale supplies of assorted goods and employs different categories of employees including general workers and casual employees.

It states that due to financial difficulties arising from market forces and competition, the respondent reorganised and reduced its supplies to the market necessitating the downsizing of its labour force which mainly affected general workers who were declared redundant in accordance with Section 40 of the Employment Act. It states that the claimant was declared redundant lawfully together with seven other employees and was not unfairly terminated as alleged in the memorandum of claim. The respondent prays that the claim be dismissed.

In view of the fact that the respondent admitted terminating the employment of the claimant albeit by way of redundancy, the parties opted to proceed by way of written submission.

Determination

It is not in dispute that the claimant was employed by the respondent. It is also not in dispute that the claimant was declared redundant. In the witness statement the claimant states that he was paid shs.113,780 as service pay.

The claimant did not plead in the claim what his title at work was or describe what job he was employed to perform for the respondent. He stated in the witness statement that his first salary was Kshs.10,500 and his last salary Kshs.18,885. He however used a salary of Kshs.12,184 as basic pay and housing allowance of Kshs.1,827.6 as house allowance as the basis of tabulation of his terminal dues.

Neither the claimant nor the respondent described the procedure undertaken in declaring the claimant redundant. The respondent having not attached notices to the Labour Officer or to the claimant and the other employees declared redundant and going by the provisions of Section 10(7) and 74(1) to the effect that it is the responsibility of the employer to keep and produce records and that where such records are not produced the burden shifts to the employer, I find that the redundancy did not comply into the provisions of Section 40 of Employment Act on the procedure for redundancy.

The court will therefore presume that no notice was given to the claimant or the Labour Officer and therefore awards the claimant one month's salary as notification for redundancy under Section 40 (1) (b) and a further one month's salary in lieu of notice under Section 40(1) (f). The court presumes that what was paid to the claimant was severance pay. It is not clear how much was paid to the claimant as in the witness statement he states he was paid shs.113,780 while in the tabulation of terminal dues he deducts the sum of Kshs.152,777 under the head (less amount paid).

The prayers in respect of leave and overtime are not pleaded in the claim or mentioned in the witness statement and are therefore not payable.

In the final analysis I award the claimant only notice and notification in the total sum of **Kshs.28,023.20/=**.

The respondent shall also pay claimant's costs.

DATED AND SIGNED AT NAIROBI ON THIS 4TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 30TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE