



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 966 OF 2016

EVANS NYAUKE OCHOLLA.....CLAIMANT

VS

TOSHA PETROL STATION.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by Memorandum of Claim dated 16th December 2016 and filed in court on even date, is for unlawful and unfair termination of employment.
2. In spite of due service, the Respondent did not file a reply. The Court therefore heard the Claimant *ex parte* on 10th April 2018.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 9th March 2015. Though employed in the position of Mechanic, the Claimant was assigned general duties. He earned a monthly salary of Kshs. 13,700.
4. The Claimant worked for the Respondent until 4th August 2015, when his employment was terminated. He avers that the termination of his employment was unlawful and unfair. He adds that the Respondent did not remit his National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) dues.
5. The Claimant’s claim against the Respondent is as follows:

- a. Salary for the month of August 2015.....Kshs. 13,700
- b. Notice pay.....13,700
- c. House allowance @Kshs. 2,192x6.....13,152
- d. Deducted and unremitted NSSF @400X6.....2,400
- e. Deducted and unremitted NHIF @ 400x6.....2,400
- f. Overtime.....33,288
- g. 12 months’ salary in compensation.....164,400
- h. Certificate of service
- i. Costs plus interest

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 4th August 2015 stating as follows:

“Dear Sir

RE: RETRENCHMENT OF EXCESS STAFF:

Due to management change of the organization. The management have decided to retrench some staff starting this month (sic).

The performance and income of the company for the last two (2) months. Also on your section of work the company has experienced low income (sic).

We terminate your contract from 04-08-2015.

You are required to clear with the office.

(Signed)

MANAGER

TOSHA BOMBOLULU”

8. From this letter, it is evident that the termination of the Claimant's employment was as a result of redundancy.
9. Section 2 of the Employment Act 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 practices commonly known as abolition of office, job or occupation and loss of employment.”

10. Redundancy is recognized in law as a legitimate form of separation from employment, subject to stringent conditions set out in Section 40 of the Employment Act. These conditions provide for adequate notice to the affected employees, their trade union and the Labour Office, fair selection criteria based on length of service, skill and reliability as well as payment of terminal dues.
11. The Court of Appeal in *Kenya Airways v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR* confirmed that the conditions set out under Section 40 are mandatory not optional. It follows therefore that an employer who ignores these conditions is guilty of unlawful and unfair termination of employment.
12. In the instant case, the Respondent made no attempt to comply with any of the conditions under Section 40 of the Employment Act. The Court therefore finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair.

Remedies

13. Flowing from the foregoing, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service coupled with the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

14. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provide as follows:

1. An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as

provided in paragraph (a).

15. The Claimant testified that he was not paid house allowance and the Court did not find any evidence that he was paid a consolidated salary. I therefore allow house allowance at the rate of 15% of the basic salary and adopt the resultant figure of Kshs. 15,755 as the Claimant's salary for purposes of this claim.

16. Regarding the claims for unremitted NSSF and NHIF dues, the only thing to say is that any such dues would be payable to the respective statutory body and not to the Claimant. The claim for overtime compensation was not proved and is dismissed.

17. Ultimately, I enter judgment in favour of the Claimant in the following terms:

a. 3 months' salary in compensation.....	Kshs. 47,265
b. 1 month's salary in lieu of notice.....	15,755
c. House allowance for 5 months.....	<u>10,275</u>
Total.....	73,295

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 plus costs of the case.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JULY 2018

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JUDGE

Appearance:

Mr. Otwere for the Claimant

No appearance for the Respondent