



**REPUBLIC OF KENYA**

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

**CAUSE NO 647 OF 2015**

**HASSAN SULEIMAN KITOHE.....CLAIMANT**

**VS**

**STEELMAKERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Hassan Suleiman Kitohe worked for Steel makers Limited in the position of First Hand Furnace Operator. He brought this claim following termination of his employment in February 2013. The claim is documented by a Memorandum of Claim dated 19<sup>th</sup> August 2015 and filed in court on 31<sup>st</sup> August 2015.

2. The Respondent filed a Statement of Response on 23<sup>rd</sup> October 2015 but did not call any witnesses, in spite of due opportunity to do so. The Claimant testified on his own behalf.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent in July 1999, initially on casual basis but was retained in employment for a continuous period of 14 years. The Claimant was not issued with a written contract of employment. As at the time of termination, he earned a daily rate of Kshs. 945.

4. Sometime in February 2013, upon reporting to work, the Claimant was informed by the Smelter, one Rajab Ali that his name was on a notice issued by the Respondent's Controller, one Menon to the effect that his employment alongside that of other workers employed as first hand men, had been terminated. The reason given by the Respondent for the termination was shortage of scrap metal.

5. The Claimant states that the termination of his employment was unlawful and unfair. Specifically, there was no valid reason for it and due procedure was not followed.

6. The Claimant further claims that the Respondent did not pay his National Social Security Fund (NSSF) dues until 2008. He therefore claims service pay for the antecedent period. His detailed claim is as follows:

- a) One month's salary in lieu of notice.....Kshs. 24,570
- b) Leave pay for 14 years.....277,830
- c) Service pay from 1999 to 2008 @ 15 days per year.....178,605
- d) 12 months' salary in compensation.....294,840
- e) Punitive damages
- f) Certificate of service
- g) Costs plus interest

**The Respondent's Case**

7. In its Statement of Response dated 21<sup>st</sup> October 2015 and filed in court on 23<sup>rd</sup> October 2015, the Respondent states that the Claimant was a casual employee, carrying out different duties. The Respondent denies the Claimant's averment that he worked continuously from July 1999 until February 2013. According to the Respondent, the Claimant was engaged on the basis of availability of work on a day to day basis.

8. In response to the claim for unlawful and unfair termination, the Respondent states that the termination of the Claimant's employment was in full compliance with the law. The Claimant was given the requisite notice following shortage of material and conclusion of agreed duties.

9. It is the Respondent's case that the Claimant was a casual employee and is therefore not entitled to any dues.

### **Findings and Determination**

10. There are three (3) issues for determination in this case:

- a) The Nature and Status of the Claimant's employment;
- b) Whether the Claimant has made out a case for unlawful and unfair termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

### **Nature and Status of Claimant's Employment**

11. In its Statement of Response, the Respondent states that the Claimant was a casual employee, assigned different duties. On his part, the Claimant maintained that he worked continuously for a period of 14 years. What is common between the parties is that the Claimant's employment was not documented. The law places this responsibility on the Respondent.

12. The Respondent did not produce any document showing the casual status of the Claimant's employment. In the circumstances, I invoke the provisions of Section 10 (7) of the Employment Act, 2007 and adopt the Claimant's testimony that he worked continuously for the Respondent from July 1999 until February 2013.

### **The Termination**

13. The Claimant told the Court that termination of his employment was effected by way of a general notice posted on a notice board. All the Respondent states is that the termination was in compliance with the law pursuant to requisite notice following shortage of material.

14. If indeed the reason for termination of the Claimant's employment was lack of material, this would fall within the province 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.”***

15. An employer who seeks to rely on redundancy as a reason for termination of employment must comply with 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.***

16. The law is now settled that failure to observe the aforesaid conditions renders the ensuing termination unfair within the meaning of Section 45 of the Act (see *Francis Maina Kamau v Lee Construction Co Ltd [2014] eKLR* and *Mwangolo Ndinga Mwero v T.S.S Transporters Ltd[2018] eKLR*). In the instant case, the Respondent made no effort to comply with any of the conditions under Section 40 of the Employment Act. The termination of the Claimant's employment was therefore substantively and procedurally unfair and he is entitled to compensation.

### **Remedies**

17. In light of the foregoing findings, I award the Claimant twelve (12) months' salary in compensation. In making this award, I have considered the Claimant's length of service and the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

18. The Respondent did not produce any leave records to prove that the Claimant utilised his leave days. The claim thereon therefore succeeds and is allowed.

19. By his own admission, the Claimant was a contributing member of the National Social Security Fund (NSSF). The claim for service pay is therefore without basis and is dismissed. No basis was laid for the claim for punitive damages which therefore also fails and is dismissed.

20. In sum, I enter judgment in favour of the Claimant as follows:

a) 12 months' salary in compensation.....	Kshs. 340,200
b) 1 month's salary in lieu of notice.....	28,350
c) Leave pay for 13 years (945x21x13).....	257,985
d) Prorata leave pay for 7 months (945x1.75x7).....	<u>11,576</u>
<b>Total.....</b>	<b>638,111</b>

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

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

23. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> DAY OF JULY 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr Muganda for the Claimant

Mr Alwenya for the Respondent