



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1112 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**IBRAHIM KAMASI AMONI.....CLAIMANT**

**VERSUS**

**KENITAL SOLAR LIMITED.....RESPONDENT**

**JUDGMENT**

By memorandum of claim dated and filed on 29<sup>th</sup> June 2015 the claimant avers that he was employed by the respondent as Chief Technician on 15<sup>th</sup> February 2006 at a starting salary of Kshs.28,000. His terms were reviewed by letter dated 26<sup>th</sup> April 2009 to Kshs.35,000.

The claimant avers that in April 2013, without his consent, the respondent unilaterally reduced his salary to Kshs.27,000. On 3<sup>rd</sup> February 2014, his employment was terminated on grounds of low sales turnover. He avers that the termination was a redundancy carried out without compliance with the relevant legal procedure and was therefore unlawful.

The claimant further avers that in 2009 the respondent offered him a 2% commission on sales and that at the time of termination he had accumulated commissionable sales valued at Kshs.8,818,368 thus earning a commission of Kshs.176,367 which the respondent failed to pay him. He further avers that at the time of termination he had earned annual leave for 8 months, which he is entitled to.

The claimant prays for the following remedies –

- (a) A declaration that his termination was unfair with an order for payment of Kshs.420,000 being 12 months' salary as damages for unfair termination.
- (b) A declaration that the unilateral reduction of salary by the Respondent was unlawful and order for payment of retained salary of Kshs.80,000.
- (c) Severance pay at the rate of one month wages (Kshs.35,000) for each completed year of service totalling to Kshs.280,000.
- (d) One month pay in lieu of notice Kshs.35,000.
- (e) Accrued leave days of 8 months Kshs.280,000
- (f) Commissioned-earned Kshs.176,367
- (g) Housing allowance at 15% of basic Salary Kshs.388,800
- (h) Interest at Court rates from date of dismissal 3<sup>rd</sup> February 2014 until payment in full.

The respondent filed a response to the memorandum of claim on 20<sup>th</sup> July 2015 in which it admits employing the claimant and reviewing his terms of employment by letter dated 26<sup>th</sup> April 2007. The respondent further admits reducing the claimant's salary from Kshs.35,000 to Kshs.27,000 from April 2013 but denies that the decision to reduce the salary was unilateral.

The respondent states that the claimant was issued with notice of termination of employment on 3<sup>rd</sup> February 2015 in accordance with the Employment Act and the termination of his employment was lawful and procedural. It denies owing the claimant sales commission in the sum of Kshs.176,367. It further denies owing the claimant any leave and avers that the claimant applied for and availed himself of all his

annual leave. The respondent further avers that the claimant was paid his full terminal benefits and denies owing the claimant the sums claimed or any other sums at all.

When the case came up for hearing on 4<sup>th</sup> December 2017 the parties adjourned the case in order to attempt out of court settlement failing which they agreed to proceed by way of written submissions. The out of court settlement did not materialise and the case was disposed of by way of written submissions.

### **Claimant's Submissions**

The claimant submitted that the letter of suspension of service dated 3<sup>rd</sup> February 2014 amounted to a redundancy notice, that he was declared redundant without compliance with the law. He submits that the respondent did not observe the principle of seniority in time as he was released from employment while his less skilled juniors who joined the company after him were retained in service.

The claimant submits that he was not paid redundancy benefits under Sections 40(i) (e), (f) and (g) being notice, leave and severance pay. He was further not paid commission of Kshs.176,367 which is acknowledged by the respondent in correspondence dated 1<sup>st</sup> March 2014 as reflected at appendix 5 of claimant's documents.

The claimant relied on the decision of the Court of Appel in the case of **THOMAS DELA RUE (K) LIMITED -V- DAVID OPONDO OMUTELEMA [2013] eKLR** and **AFRICA NAZARENE UNIVERSITY -V- DAVID MATEVU & 103 OTHER [2017] eKLR**.

The claimant prayed for judgment as prayed in the claim.

### **Respondent's Submissions**

In its written submissions, the respondent reiterated the facts as set out in the claim and the response to the claim. The respondent further states that the termination of the claimant's employment was lawful and procedural, that the claimant was paid in lieu of notice and that he had applied for and taken all his leave days and had no pending leave. The respondent submits that the applicable law is Section 35(1)(c) of the Employment Act.

### **Determination**

The facts of this case are not contested. What is contested is whether or not the termination was a redundancy and whether it was procedural or for valid reason.

In the submissions of the respondent, no mention is made of the issues raised by the claimant. The respondent restricted its submission to the remedies sought by the claimant.

The claimant's letter of termination reads as follows –

*“03.02.2014*

*Ibrahim Kamasi Amoni*

*P.O. Box 1964 – 00202*

*Nairobi*

*Dear Sir*

#### **SUSPENSION OF SERVICE NOTICE**

*This is to notify you that due to the current low sales turnover, you are hereby notified that your services at Kenital Solar Limited will end by the end of this month. This serves as your notice.*

*You are therefore required to take your leave days for the remaining days of the month to cover your outstanding leave days.*

*Thank you for your services at Kenital*

*Yours Faithfully*

*SIGNED*

*Martin Kinoti*

*Kenital Solar Limited”*

The reason given for the termination of employment is “*due to current low sales turnover*”. Termination of employment on account of low sales turnover amounts to a redundancy as defined in Section 2 of the Employment Act being that –

**“redundancy”** means 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;

Blacks Law Dictionary Tenth Edition defines redundancy as “A situation in which an employee is laid off from work because the employer no longer needs the employee.”

What the respondent did was therefore to lay off the claimant due to low sales turnover as clearly expressed in the letter of termination.

The procedure for redundancy is provided for in Section 40, of the Employment Act. The Act provides that before an employer lays off an employee, he must notify the employee at least one month in advance, of the intention lay him off. Such notification must also be given to the local labour officer. The notification must explain the reasons for and extent of the redundancy.

The Act further provides that while selecting the employee to be laid off, the employer must apply the principle of “*last in first out*”. This is what is meant by the expression “*regard to seniority in time*” under Section 40(1)(c). The employer can only ignore the principle of seniority in time for demonstrated *skill, ability* and *reliability* of a particular employee.

In the present case, it is the claimant’s averment, which is not rebutted by the respondent, that he was the longest serving and the most skilled and therefore the respondent had no valid reason to lay him off and retain his relatively newer and less skilled colleagues. Indeed in the correspondence attached to the claimant’s documents, the respondent’s Mr. Martin Kinoti stated that –

*“We currently have three electricians, Ibrahim Amoni and James Gichinga with a gross pay of 27,000/= and Benson Kisibu with a gross pay of 20,000/=. In my opinion the release of Amoni will have bigger saving basing on their pay...”*

Section 47(5) apportions the burden of proof in a complaint of unfair termination or wrongfully dismissal as follows; the employee proves that the termination/dismissal was unfair; the employer justifies the grounds of termination. From the evidence on record, the claimant has demonstrated that the termination of his employment was indeed a redundancy and the same was carried out without compliance with the provisions of Section 40 of the Employment Act.

I thus find and declare that the respondent declared the claimant redundant without compliance with the procedure set out in law. Consequently, the redundancy amounted to an unfair termination of employment.

Under Section 40(1)(e), (f) and (g) an employee declared redundant is entitled to be paid outstanding leave in cash, one month’s notice or payment in lieu and severance pay at not less than 15 days salary per completed year of service.

The claimant was not given prior notification of the redundancy under Section 40(1)(b) which provides –

**(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**

The claimant was also released from employment without notice. Section 40(1)(e) provides that upon redundancy an employee is paid off any leave outstanding in cash and not asked to utilise the leave during notice period. The claimant is therefore entitled to any leave that was outstanding at the time of termination. The respondent has not submitted any evidence of the leave due and under Section 10(6) as read with 10(7) of the Employment Act, the court is entitled to accept the claimant’s evidence as the truth in the absence of production of records or other rebuttal by the respondent.

For the foregoing reasons I award the claimant the following –

### **1. Compensation**

Having worked for 8 years and taking into account the manner in which the claimant’s employment was terminated his expectations and the fact that he was not paid any terminal benefits, I award him 8 months salary as compensation in the sum of Kshs.216,000.

### **2. Unilateral Reduction of Salary**

I agree with the claimant that the reduction of his salary was unilateral. For a reduction of salary to be valid, an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter and causing the letter to be accepted by the employee. This is because salary is a fundamental term of employment whose reduction has negative impact on an employee’s livelihood and should not be done arbitrarily or unilaterally by an employer.

I however do not find it fair to award the claimant the salary reduction as the letter reducing the salary stated that he would make up the difference in sales commissions. He has claimed sales commissions in his claim, which I believe is reasonable compensation of the reduced salary.

I further take note that although the salary was reduced in April 2013; the claimant did not raise any issue over the same until after his employment was terminated in February 2014, about one year later. The prayer is therefore declined.

### **3. Severance Pay**

Having worked for 8 years, I award the claimant 8 years severance pay at 15 days salary per year, which amounts to Kshs.124,615.40.

### **4. Pay in Lieu of Notice**

The claimant's letter stated that he would be on leave during the period of notice. He did not state that he was not paid the salary for the month of February 2014 when he did not work. He was however not given notification of one month before the termination. I will therefore treat the period served as notification under Section 41(b) and award him notice of one month under Section 40(1)(f) in the sum of Kshs.27,000

I find that the claimant has proved that he is entitled to pay in lieu of notice.

### **5. Accrued Leave**

No evidence was produced by the respondent to prove that the claimant took leave during the period he worked for the respondent. In the letter of notice it is confirmed that the claimant had leave but not specified how many leave days he had.

I award the claimant 21 days leave for each year worked being 168 days. This amounts to Kshs.174,461.50.

### **6. Commission**

In the letter reducing the claimant's salary it is stated that he would make up the difference from commission. In the email correspondence attached in claimant's bundle of documents it is confirmed that the claimant had accumulated commissionable sales of 3,861,199 as at May 2012. No evidence has been adduced to controvert his claim that by the time he left employment his commissionable sales outstanding was Kshs.8,818,368 as claimed or that he had been paid any commission which according to the documents in the claimant's bundle was at 2% of sales.

I award the claimant commission in the sum of Kshs.176,367/=.

### **7. Housing Allowance**

According to the claimant's contract, his salary was gross meaning that it was inclusive of house allowance. The prayer for payment of house allowance is accordingly dismissed.

### **8. Interest**

The decretal sum will attract interest from date of judgment.

### **9. Costs**

The respondent will pay claimant's costs for this suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**