



## REPUBLIC OF KENYA

### IN THE EMPLOYMENT & LABOUR RELATIONS

### COURT OF KENYA AT NYERI

CAUSE NO. 118 OF 2017

ALEX KIMANZI MUSYOKI.....CLAIMANT

VERSUS

ALIDI KENYA LIMITED.....RESPONDENT

### JUDGMENT

1. The Claimant herein sued the Respondent his erstwhile employer for relief upon his dismissal from employment. He was a walking sale representative earning Kshs. 21,000/- a month at the time of separation and that he was entitled to salary for the month of October and November 2016, one month salary in lieu of notice and severance pay. He averred that no reasons were given prior to the dismissal and therefore sought compensation and damages for the unlawful/unfair dismissal. He also sought costs of the suit.

2. The Respondent filed a defence in which it averred that the Claimant was not entitled to any of the reliefs he sought. It was averred that the Claimant's dismissal followed all due process and the Labour Officers duly informed before the Claimant was declared redundant. The Respondent thus sought the dismissal of the Claimant's case with costs.

3. The Claimant testified that he was in the field when he received the letter of termination. There was no hearing before the redundancy. He stated that there was no debt owed to the Respondent and none was due. The Claimant in cross-examination testified that he was owed money by the Respondent and that he received the letter of termination while in the field. The Respondent called its senior HR manager Tom Jackson Ndale who testified that the Claimant was retrenched after one of the major donors of the Respondent pulled out. He stated that the Labour Office was duly notified and the staff who were affected including the Claimant were notified of the intention to release them. He stated that the Claimant was entitled to only Kshs. 16,800/- for the days worked. He was not paid the sum as he did not go to the office and clear as was the procedure. He testified that the Claimant was required to go to the office and surrender the amount on sales made and clear. He stated that the Claimant was entitled to the pension scheme under ICEA Lion and the certificate of service he was to collect on clearance. He was cross-examined and he stated that the Claimant's dues were not paid and that the letter advising the Labour Officer of the redundancy was not copied to the Claimant. He said that the Claimant was notified and they had many discussions on the issue. He testified that the area that was affected the most was the mountain region where 34 employees were affected. He stated that they had not issued a demand letter or sued the Claimant for any sum and were willing to pay the Claimant once he cleared with the Respondent. He stated that the Claimant was given a notice to expire in November and that by the time the letter reached the Claimant, part of the 30 days had lapsed. He testified that there was no prior communication before the redundancy and that he did not initiate any disciplinary proceedings regarding the money that was stated to be owed to PK Stores. He was re-examined and stated that by the time the letter reached the Claimant 3 or 4 days had lapsed. No submissions were on record at the time of writing the Judgment.

4. The Claimant's termination was on account of redundancy. Section 40(1) of the Employment Act makes provision for redundancy. The said section provides as follows:-

*40. (1) An employer shall not terminate an employee's contract of service on account of redundancy unless the employer complies with the following conditions –*

*(a) Where the employee is a member of a trade union, the employer notifies the union to 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 intended date of termination on account of redundancy*

*(b) where an 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 and time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

(d) .....

(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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service. (Underline mine)

5. It is clear that in order for redundancy to hold it must be in strict compliance with section 40(1) of the Employment Act. The letter issued by the Respondent in respect to the redundancy was NOT in accordance with Section 40(1) of the Employment Act. It was not addressed to the Claimant and copied to the labour office, there is no indication that there was payment of the redundancy package provided in the Section. In law, the redundancy was required to be executed in terms of these provisions Employment Act. There is no evidence that the employer applied the test enumerated in sub-section 40(1)(c). There is no indicator that in the selection of employees in the Mountain region who were to be declared redundant, the Respondent had due regard to seniority, time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy such as the Claimant a walking salesman. The redundancy alleged to have been executed was a sham as far as the law is concerned. The Claimant is yet to receive his dues.

6. The upshot of the foregoing is that the Claimant is entitled to relief as follows:-

- a. Unpaid salary for October and November 2016 Kshs. 42,000/-.
- b. One month notice in lieu of notice Kshs. 21,000/-.
- c. Severance pay Kshs. 10,500/-.
- d. Compensation for the unlawful dismissal Kshs. 126,000/- being 6 months Salary.
- e. Costs of the suit.
- f. Interest on a), b), c) and d) above at court rates from date of judgment till payment in full.
- g. Certificate of service.

It is so ordered.

**Dated and delivered at Nyeri this 14<sup>th</sup> day of November 2018**

**Nzioki wa Makau**

**JUDGE**