



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1815 OF 2014

ALEX VIHASI MWALA.....CLAIMANT

v

METAL CROWNS LIMITED.....RESPONDENT

JUDGMENT

1. Alex Vihasi Mwala (Claimant) was employed by Metal Crowns Ltd (Respondent) on 16 March 2011 as a Machinist and on 21 May 2012 the Respondent wrote to him to inform him that his employment was being terminated on account of reduced work load.
2. The letter advised the Claimant that he would be paid salary up to 21 May 2012, any outstanding leave days, 40 days' pay in lieu of notice and gratuity.
3. The Claimant was aggrieved, and on 13 November 2014 he lodged a Statement of Claim with the Court stating the Issues in Dispute as
 1. Unlawful and wrongful termination of Mr. Alex Vihasi Mwalah
 2. Failing to give notice or pay in lieu of notice 12 months period of preparation for termination as required by law
 3. Failing to follow the right and lawful procedure while terminating the Claimant from employment
 4. Failing to pay the Claimant his wages according to Wages Guide 2013.
4. Upon service, the firm of Morara Apiemi & Nyangito Advocates came on record for the Respondent.
5. On 8 December 2016, Kabue Thumi & Co. Advocates filed a *Notice of Change of Advocate* to come on record for the Respondent.
6. Despite the advocates coming on record, no Response was filed on behalf of the Respondent.
7. On 3 April 2017, Omwakwe & Associates came on record for the Claimant and on 4 April 2017, the Court gave directions as to the filing of appropriate documents with a view to having the Cause heard.
8. On 6 September 2017, the Deputy Registrar served notices upon the advocates on record to attend Court on 24 October 2017 for purposes of giving directions.
9. When the parties appeared, the Deputy Registrar fixed the hearing for 9 July 2018.
10. The Claimant testified and was cross examined. He filed submissions on 12 July 2018 while the Respondent filed its submissions on 27 August 2018 (Court will not consider the evidence sneaked in with the Claimant's submissions in the form of a collective bargaining agreement).
11. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination into 3 being, *whether the termination was unfair, whether there was breach of contract/statute and appropriate remedies/orders.*

Unfair termination of employment

12. The reason given in the letter terminating the Claimant's employment was reduced work load.
13. In terms of the law, the separation was on account of operational reasons and therefore involuntary on the part of the Claimant.
14. The separation, the Court finds was on account of redundancy and therefore the procedural provisions of section 40 of the Employment Act, 2007 became applicable.
15. There being no evidence that the local labour officer and the Claimant were given 1 month advance written notification, the Court finds that the separation was unfair.
16. On the substantive justification for the termination on account of reduced work load, the Respondent did not file a Response or present a witness in Court to discharge the burden placed upon employers by sections 43 and 45 of the Employment Act, 2007.

Breach of contract/statute

Underpayments

17. The Claimant alleged that he was paid below the prescribed minimum wages (asserted he was paid Kshs 565/- per day instead of Kshs 609/- per day).
18. During the period of Claimant's employment, the applicable Order was Legal Notice No. 64 of 2011.
19. During the period, the daily wage for a machinist was Kshs 492/- and because the Claimant was earning more than that, the Court is unable to agree that he was underpaid.

House allowance

20. An employer is under obligation to provide housing or in lieu pay an employee house allowance. A default would amount to breach of contract/statute.
21. Where an employee is on a daily wage, the same is inclusive of house allowance and the Court therefore finds no breach in the instant case.

Leave

22. The Claimant did not lay any evidential foundation for this head of claim and the Court also notes that the termination letter indicated he had no outstanding leave days.

Appropriate remedies

Pay in lieu of notice

23. The termination letter indicated payment of 40 days' pay in lieu of notice and the Court finds that nothing turns on this relief.

Compensation

24. The Claimant served the Respondent for about 1 year and in consideration of the length of service, the Court is of the view that the equivalent of 2 months' gross wages would be appropriate (Court will multiply the daily wage by 26 to get approximate monthly wage).

Severance pay

25. Claimant was informed of entitlement to gratuity and the Court declines this relief.

Accrued leave

26. Claimant did not lay a foundation for this claim and it is declined.

Underpayments

27. Claimant did not prove he was underpaid.

Lost income

28. The Claimant did not lead any evidence or provide legal justification for this relief.

Conclusion and Orders

29. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(a) Compensation **Kshs 29,690/-**

30. Claimant to have costs on half scale.

Delivered, dated and signed in Nairobi on this 2nd day of November 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Omondi instructed by Omwakwe & Associates

For Respondent Ms. Magu instructed by Kabue Thumi & Co. Advocates

Court Assistant Lindsey