



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 786 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> December, 2018)**

**GEORGE NJOGU NDUNGU.....CLAIMANT**

**-VERSUS-**

**KEROCHE BREWERIES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed his Memorandum of Claim on 24.5.2013 through the firm of E.M Wachira & Company Advocates claiming breach of his employment contract and wrongful termination of his services and failure by the Respondent to pay him his terminal benefits.
2. The Claimant's case is that he was employed by the Respondent on or about 5/6/2012 on a 24 months fixed term contract as a Transport and Fleet Logistics Manager. He served a 3 months' probation period which he successfully completed and continued serving with honesty, diligence and dedication. His salary was 50,000/= per month.
3. He avers that on 26/11/2012 the Respondent prematurely terminated his contract on false grounds of redundancy and without settling his terminal dues.
4. He seeks payment of salary for the remaining part of the contract – 900,000/=, severance dues 25,000 and prorata leave of 25,000/=.
5. The Claimant avers that his termination was spiteful and motivated by ulterior motives as his position was immediately advertised in Respondent's website for interested applicants to apply.
6. The Claimant attached his employment contract, the redundancy letter and the advertisement for the said position as part of his evidence.
7. The Claimant also indicated that he made a demand for payment to the Respondents and they did not pay. The Claimant gave oral evidence in Court and when cross-examined, he indicated that he was employed on 4.6.2012 and terminated on 26.11.2012. He was entitled to 21 days annual leave. He indicated that he was not paid 1 month's salary in lieu of notice.
8. He indicated that his position was advertised 1 week after his termination and so the reasons for the termination was not genuine.
9. The Respondent filed their Memorandum of Reply to the Claim on 14.8.2011 through M/S Mirugi Kariuki & Company Advocates. Their defence was merely a denial. The Respondent also failed to call any evidence during the hearing of this case. This in essence means that the Claimant's case remained undisturbed.
10. I have considered the evidence of the Claimant. I note that the Claimant was employed on a 24 month fixed contract. This contract was terminated when the Claimant had 17 months to serve. The Respondent attributed the termination as redundancy situation.
11. The redundancy situation however did not exist as the position the Claimant was occupying was advertised 1 week after the Claimant was terminated.
12. Other than this, the Respondent never gave the Claimant any notice before termination. The procedure envisaged under Section 44 of Employment Act 2007 was not adhered to. The said Section provides as follows:-

***(1) "An employer shall not terminate a 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 the 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 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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

13. It is my finding that the Respondent terminated the Claimant unfairly camouflaging it as a redundancy and without following due process.

14. I therefore find for the Claimant as prayed and award him as follows:-

*1. Payment of salary for the unserved part of the contract =  $18 \times 50,000 = 900,000/=$ .*

*2. Prorata leave for 5 months –  $5/12 \times 50,000 = 20,833/=$ .*

*TOTAL = 920,833/=*

*3. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this **18<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Karani holding brief for Wachira for Claimant – Present

Respondent – Absent