



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**

**CAUSE NO. 358 OF 2016**

**NIXION OPIYO ORINDA.....CLAIMANT**

**VS**

**HABO GROUP OF COMPANIES.....1<sup>ST</sup> RESPONDENT**

**BOOLMAT E.A. COMPANY LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for Kshs.512,056.98 being terminal and contractual benefits plus compensation for unfair termination of the claimant's employment by the respondent on 1.12.2014. The respondent never filed any defence despite being served with the summons. Therefore the suit proceeded exparte on 7.9.2016 when the claimant sought and obtained directions to dispose the suit by written submissions on the basis of his pleadings, witness statement and documentary evidence filed.

**Analysis and Determination**

2. After carefully considering the pleadings, evidence and submissions placed before the court, it is clear that the claimant was employed by the second respondent which is a subsidiary of the first respondent and that his service was terminated by the first respondent by the letter dated 1.12.2014. The issues for determination are:

- a. **Whether the termination of the claimant's employment was unfair.**
- b. **Whether the claimant is entitled to the reliefs sought in his suit.**

**Unfair Termination**

3. Under section 45(2) of the Employment Act termination of employees employment is unfair if the employer fails to prove that the termination was grounded on valid and fair reason(s) and that it was done after following a fair procedure. Valid and fair reason is one which is true and relates to the employees conduct or the operational requirements of the employer. Fair procedure in my view is one which is in consonance with the law and the principles of natural justice regarding fair hearing.

4. In this case the reason for termination was redundancy and the procedure followed in terminating the

claimant's contract of employment was summary as captured by following excerpt from the termination letter dated 1.12.2014:

**“Following the recent restructuring of the company, your position has been rendered redundant. A decision has therefore been made to terminate your services with effect from 1<sup>st</sup> December 2014”.**

5. The letter was served upon the claimant on 4.3.2015 when he was called back from suspension where he had been since 25.11.2014. The claimant has stated in his witness statement dated 25.1.2016 that, the procedure for terminating employment on account of redundancy provided under section 40 of the Employment Act was not followed because no prior notice was served on him and the Labour Office.

6. After careful consideration of the evidence presented and the said Section 40 of the Act, I agree that the procedure followed by the respondent in terminating the claimant's services was in breach of the law and was therefore unfair. The procedure provided by the said law for termination of employment on account of redundancy is coined in mandatory terms and leaves no room for discretion on the part of the employer.

7. One of the key procedural requirement is the mandatory service of redundancy notice on the employee or his trade union, and the Labour Officer. In this case the redundancy on the claimant's position was declared and took effect on 1.12.2014 before any prior notice of one month in writing was served on him and the Labour Officer. That procedural default rendered the termination of his employment contract unfair within the meaning of section 45 read with section 40 of the said Act.

### **Reliefs.**

#### **Notice and Compensation**

8. Under section 49 I award the claimant Kshs.20,000 being one month salary in lieu of notice plus Kshs.240,000 being 12 months gross salary as compensation for unfair termination. In awarding the said compensation I have considered the fact that the claimant did not contribute to the termination through misconduct.

#### **Unpaid Salary**

9. The claimant prayed for his unpaid salary for the 5 months he was on suspension plus the salary for March 2015. This claim is dismissed because the alleged suspension period was not there. The true position is that the claimant was discharged from work from 1.12.2014 and therefore he is not entitled to salary for the period after dismissal.

#### **In House Savings**

10. This prayer is granted as prayed being Kshs.28,800 because it is supported by clause 2 of the Appointment Letter.

#### **Unpaid Leave.**

11. This payment is not founded on either the law or contract. What is the right to unpaid leave valued at Kshs.20,000?

#### **Severance Pay**

12. This claim is not allowed because the redundancy has herein above been declared unfair termination and fully compensated.

#### **Unlawful Loan Deductions.**

13. This claim has not been particularized and substantiated both in the pleadings and the claimant's written statement. I therefore dismiss it.

**Certificate of Service**

14. This prayer is granted because it is a right under section 51 of the Employment Act for all employees.

**Disposition.**

15. For the reasons stated above, I enter judgment for the claimant in the sum of **Kshs.288,800** plus costs and interest. He will also have Certificate of Service.

**Signed, dated and delivered at Mombasa this 20<sup>th</sup> day of January, 2017.**

**O.N. MAKAU**

**JUDGE**