



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 747 OF 2016**  
**BETWEEN**  
**AMBROSE RIASI ..... CLAIMANT**  
**VERSUS**  
**KENYA FERRY SERVICES LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Ms. Mwainzi holding brief for Mr. Ratemo instructed by*

*Oduor Siminyu & Company Advocates for the Claimant*

*No appearance for Respondent*

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**JUDGMENT**

1. In his Statement of Claim filed on 5<sup>th</sup> October 2015, the Claimant prays for the following orders against the Respondent:-

- a) Declaration that termination was unfair and unlawful.
- b) Declaration that Respondent's continued withholding of Claimant's terminal benefits is unlawful and untenable.
- c) The Respondent to pay the Claimant:-
  - i. 3 months of annual leave at Kshs. 40,500.
  - ii. Severance pay at Kshs. 355,446.
  - iii. 1 month salary in lieu of notice at Kshs. 39,494.

iv. Half salary from January 2012 to January 2013 at Kshs. 236,964

Total.....**Kshs. 672,404**

d) Damages for wrongful and unlawful termination.

e) Any other award or benefit the Court may deem fit to grant.

2. He states he was employed as a Store Keeper on 18<sup>th</sup> September 1995. He later became Senior Procurement and Supplies Assistant.

3. He served for 18 years, up to 11<sup>th</sup> January 2013 when the Respondent terminated his contract of employment.

4. The Respondent justified its termination decision on the ground that the Claimant was involved in manipulation of the Respondent's payroll. A disputed Audit Report revealed 9 Employees, including the Claimant, had received excessive salaries as a result of payroll manipulation. Only 4 Employees were dismissed.

5. Termination was unfair and unlawful. The Claimant's Union, Dock Workers' Union, which represented the Claimant during the disciplinary hearing, was not given full opportunity to represent the Claimant. The Claimant was denied his benefits, after serving for 18 years.

6. The Respondent's Managing Director was served with the Summons, as borne out in the Affidavit of Court Process-Server Eric Maore, sworn on 27<sup>th</sup> January 2016. There was no Appearance or Response filed. Hearing was fixed for 7<sup>th</sup> December 2016. Hearing Notice was served upon the Respondent through Claimant's Advocates' Chambers. The Respondent did not attend Court on hearing.

7. The Claimant gave evidence on 7<sup>th</sup> December 2016, and closed his case on the same date. He filed his Closing Submissions on 3<sup>rd</sup> February 2017. The Claimant adopted the averments contained in the Statement of Claim, and documents attached to the Statement of Claim which include:- internal Audit Report of February 2012; notice to show cause why disciplinary action should not be taken against him, dated 11<sup>th</sup> January 2012; the letter of termination dated 11<sup>th</sup> January 2013; and letter dated 3<sup>rd</sup> November 2011, asking Respondent's Human Resource Department to recover mileage allowance from the Managing Director.

8. The internal Audit Report established there was fraud at the Respondent State Corporation, which consisted inflating of net salaries paid to some Employees.

9. Some Employees received mid-month salary advances, which were not recovered at the month's end; staff loan obligations were not recovered from their salaries; net salaries were over-quoted; and pay roll was falsified. The Report concludes that payroll system controls at the Respondent were unsatisfactory. It recommended strengthening of internal controls and disciplining of concerned Employees.

10. The letter of termination dated 13<sup>th</sup> January 2013 alleged the Claimant received a total amount of Kshs. 312,850 through payroll manipulation. This was the reason the Respondent terminated Claimant's contract of employment.

11. The Court does not think this was a valid reason justifying termination, under Section 43 and 45 of the Employment Act 2007.

12. Payroll administration is a management function. Section 20 of the Employment Act 2007 requires the Employer to give the Employee an itemized pay statement, at or before the time pay is made to the Employee. The details of gross pay, deductions and methods of payment are entirely given by the Employer.

13. It is therefore difficult to understand how the Employee in this case, influenced the hand of the Employer in payroll manipulation.

14. The Respondent State Corporation seems to have been rotten from the top, with regard to payroll administration.

15. The letter dated 3<sup>rd</sup> November 2011 from the Financial Controller to Human Resource Manager, directed the latter to recover a staggering sum of Kshs. 2.5 million from the Managing Director himself, incurred in false mileage claims.

16. The Claimant and other junior Employees did not actively falsify any document, to receive excess salaries. They were not shown to have done anything that would be taken as manipulation of the payroll system, to confer on themselves any unearned benefits.

17. And if they did, why would the Respondent spare some of the Employees, by requiring overpaid sums are deducted from their salaries, while dismissing the Claimant altogether? Why spare the Managing Director himself, while recovering Kshs. 2.5 million from the Managing director in falsified mileage?

18. The Claimant correctly submits he was discriminated against. Different standards applied to Employees alleged to have committed the same or similar offences at the workplace.

19. It was not the role of the Claimant to alert his Employer that the Employer had failed completely, in the administration of the payroll. The Claimant is not shown to have done anything improper, to obtain an excess salary. It was not clear, if he obtained such a salary, why it was not sufficient to recover the excess through payroll check-off. The amount paid to Managing Director in excess, was to be recovered through payroll deductions.

20. There is ample reason to conclude, on the material before the Court, that termination was not justified.

21. The Claimant was taken through a disciplinary process, with the participation of his Trade Union. There is nothing to show his trade union was denied full opportunity to represent the Claimant. Fair procedure was followed.

**22. It is declared termination was not based on valid reason, and therefore unfair. Fair procedure was followed.**

**23. The Claimant is granted compensation the equivalent of 10 months' gross salary, at the rate of Kshs. 57,488 per month, totaling Kshs. 574,880.**

**24. He is allowed the prayer for 1 month basic salary in lieu of notice of claimed – at Kshs. 39,494.**

25. The Court has looked for material in the record warranting grant of half salary from January 2012 to January 2013, and found none. The item is unsupported in the Pleadings, Submissions, and Evidence of the Claimant. It is rejected.

26. Similarly there is no support for severance pay of Kshs. 355,446. Severance pay is considered under Section 40 of Employment Act on redundancy. The Claimant did not leave on redundancy.

27. The Claimant did not say during which leave-earning period, he was denied annual leave. He makes the prayer for 3 months of annual leave pay in a vacuum. The item is declined.

**28. He is granted costs and interest at 14% per annum, from the date of Judgment.**

IT IS ORDERED:-

***a) Termination of the Claimant's contract of employment was not based on valid reason, therefore unfair.***

***b) Fair procedure was observed.***

***c) The Claimant is granted compensation for unfair termination, the equivalent of 10 months' gross salary at Kshs. 574,880; and 1 month basic salary in lieu of notice at Kshs. 39,494 – total Kshs. 614,374.***

***d) Costs to the Claimant.***

***e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

Dated and delivered at Mombasa this 31<sup>st</sup> day of March 2017.

James Rika

Judge