



15 x 5 x 20770/30 Kshs. 51.925

5) Overtime dues

45 hours per week

12 hrs x 6 days = 72hrs-45hrs=27hrs OT

27hrs x 4 weeks = 108hrs P.M.

108hrs x 1.5 x 20770/195=17,255 pm

17255 x 36 months Kshs.621,180

6) Compensation for unfair termination

Gross pay x 12 months

23,885.5 x 12 months Kshs.286,626

TOTAL CLAIM Kshs.1,008,420.64/=

Less amount paid Kshs. 84,645.00/=

Total balance due Kshs.923,775.64/=

c) Costs and Interest.

d) Any other relieve the Honourable may deem fit to grant.

The Respondent filed a Reply to the Memorandum of Claim in which it states that the Claimant's employment was terminated when the Respondent carried out a redundancy, that the redundancy was lawful and in compliance with section 40 of the Employment Act (the Act), that the ground of redundancy was that the Respondent was experiencing financial difficulties due to market forces and competition forcing it to reduce its labour force especially amongst the general workers.

The Respondent prays that -

1. This Honourable Court declares that the action by Eldoret Mattresses Limited to declare 8 employees redundant was fair procedural and lawful.
2. This Honourable Court declares that the Notice of redundancy dated 1st February 2015 is lawful and valid according to Section 40 of the Employment Act.
3. The memorandum of claim be dismissed with costs.

On the hearing date counsel for Respondent informed court that she did not intend to call any witness. The case therefore proceeded with the hearing of the Claimant's testimony following which parties filed written submissions.

### **Claimant's Case**

The Claimant testified that she was employed by the Respondent on 4th June, 2009 as cashier. She worked for the Respondent until 28th February, 2015 when her employment was terminated. She was told that the reason for termination was that the Respondent wanted to close the shop. She was told to collect her terminal benefits the following day. A total of 10 employees were terminated.

The Claimant testified that when she went to collect the terminal benefits she found that there were deductions for NSSF and NHIF. She further stated that she was not paid overtime, notice and salary for that month. She was offered payment of Shs.84,645 made up as follows -

(a) Notice	Shs.17,100
(b) Wages (15 days)	Shs. 8,550
(c) Add 5½ years Service	Shs.47,025
(d) Add leave	Shs.11,970
<b>Total</b>	<b>Shs.84,645</b>

The Claimant testified that she did not accept the payment because she was not paid overtime and off days yet she worked from Monday to Sunday.

The Claimant prayed for payments as prayed in the Memorandum of Claim.

### **Submissions**

In the written submissions filed on behalf of the Claimant, counsel reiterated the claimant's averments in her testimony in court.

For the Respondent it was submitted that the Claimant and the Labour Officer were notified of the redundancy by letter dated 1st February 2015 and the claimant was paid notice, 15 days salary, severance pay for 5½ years and leave in the total sum of shs.84,645.00 which she acknowledged as demonstrated in the acknowledgement at page 13 of the Claimant's bundle of documents. It is further submitted for the Respondent that the redundancy was necessitated by operational demands of the company and the Respondent acted in accordance with section 40 of the Employment Act.

### **Determination**

From the pleadings, evidence on record and submissions by the parties, the issues arising for determination are the following:-

1. Whether the claimant was unfairly terminated or declared redundant .
2. Whether the Respondent complied with fair procedure as provided in the Employment Act.
3. Whether the Claimant is entitled to the remedies sought.

### **Redundancy/Termination**

According to her averments in the Memorandum of Claim, the Claimant alleges that she was unfairly terminated by the Respondent. The Respondent however avers in the Reply to the Memorandum of Claim that the Claimant was declared redundant.

In her testimony the claimant stated that she was informed by the Respondent that the reason for termination of her employment was that the Respondent wanted to close the shop and that the total number of employees whose employment was terminated was 10.

From the foregoing it is apparent that the Claimant's employment was terminated through redundancy.

### **Was the Redundancy Fair?**

Section 40 of the Employment Act (herein after referred to as the Act) provides for the procedure for redundancy as follows -

#### **40. Termination on account of redundancy**

*(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.*

*(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.*

*(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.*

From the evidence on record it is not clear whether the Respondent complied with the procedure set out in section 40 of the Act. The Respondent has submitted in the written submissions that the Claimant and the Labour Officer were notified of the redundancy on 1st February, 2015. However, no copy of the letter giving notice was availed to the court. The Respondent decided not to call any evidence and there is no other evidence on record with respect to the said notice.

In any event, the evidence on record points to the fact that the redundancy was effected on 15th February, 2015 as the claimant was paid wages for 15 days according to the acknowledgement of payment at page 13 of the Claimant's bundle. This would mean that even if the notice was given it was short of the notification of a minimum of one month provided for under section 40(1) (a) 40(1)(b) in addition to the termination notice provided for under section 40(1) (f) for which the Respondent paid cash in lieu.

Having failed to prove that the Respondent fully complied with all the elements of section 40 of the Act, I find that the redundancy was unfair.

## **Remedies**

The Claimant prayed for a host of remedies which I consider individually below -

### **1. Pay in lieu of notice**

This was paid to the Claimant and she admitted the same during the hearing.

### **2. Pending Salary for 15 days**

The Claimant was paid salary for 15 days according to the acknowledgement at page 15 of the Claimant's bundle of documents and she confirmed receipt of sum of Shs.84,645 which was inclusive of 15 days wages for days worked.

### **3. Pending Leave**

According to the acknowledgement, the Claimant was paid for pending leave in the sum of shs.11,970.

### **4. Severance Pay**

The Claimant was paid severance pay for 5½ years although it is wrongly referred to as service in the acknowledgement.

### **5. Overtime**

During her testimony in court the Claimant stated that she worked from Monday to Sunday and what she was claiming was overtime worked on off days. However in the claim she prays for 12 hours overtime for 6 days at 27 hours per week. The weekly working hours used is 45 hours per week.

In the written submissions filed on behalf of the claimant no effort was made to clarify why 45 hours was used instead of the statutory 52 hours per week or why the claim was for 36 months.

I find that there was no proof of overtime worked and dismiss the claim.

### **6. Compensation for Unfair Termination**

Having found that the termination was unfair for failure to prove compliance with the statutory provisions on redundancy, I find that the redundancy was unfair. Taking into account all relevant factors, I award the claimant compensation equivalent to 2 months salary in the sum of Shs.34,200.

### **7. Costs**

In view of the fact that the Claimant did not succeed in most of the prayers sought but also taking into account the lacklustre manner in which the claim was defended, I award the Claimant only 50% of taxed costs.

**Judgement dated, signed and delivered this 30th day of March, 2017**

**MAUREEN ONYANGO**

**JUDGE**