



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 473 OF 2014

BETWEEN

ELIJAH MWOVA KATHURU.....CLAIMANT

VERSUS

TAHIR SHEIKH SAID TRANSPORTERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

IRB Mbuya & Company Advocates for the Claimant

Balala & Abed, Advocates for the Respondent

JUDGMENT

1. This Claim serves as a test case for related Cause Number 472 of 2014, 474 of 2014 and 475 of 2014. There are different Claimants, but one Respondent in all. The same Advocates represent respective Parties. The operative facts are similar. The Parties agreed on 21st November 2014, to have Cause Number 473 of 2014 as the test case.
2. The Parties seem to have watered down the order on test case, with the files, alongside Cause Number 172 of 2015 and 234 of 2015, later in the proceedings, consolidated and heard under reference file Cause Number 473 of 2014. It was agreed outcome in any event, applies to all the Claimants.
3. Cause Number 473 of 2014 was filed on the 8th October 2014. The Claimant Elijah Mwova Kathuru, states he was employed by the Respondent as a Mechanic from 11th April 2011 to 12th August 2015. His contract was terminated by the Respondent on 12th August 2014. The Respondent stated this was based on reduced volume of business. He was also handed a Certificate of Service dated 18th August 2014.
4. He was a Member of the Kenya Shipping, Clearing and Warehousing Workers Union. The Respondent was aware of his membership, and regularly deducted and remitted trade union dues in favour of the Union, from the Claimant's monthly salaries. The Respondent did not involve the Claimant's Union and the Labour Office in the redundancy process, contrary to Section 40 of the Employment Act 2007. The Respondent deducted N.S.S.F contributions from the Claimant's salary, but did not ever remit the contributions to N.S.S.F.

5. The Claimant prays for Judgment against the Respondent for:-

- a) 1 Month salary in lieu of notice.
- b) Compensation for unfair termination.
- c) Outstanding annual leave days.
- d) Punitive damages.
- e) Certificate of Service.
- f) Unremitted N.S.S.F contributions are refunded.

6. The Respondent filed its Statement of Response on the 18th November 2014. It concedes the Claimant was its Employee. Termination was on account of redundancy. The Claimant's Union and the Labour Office were involved in the process. The business was adversely affected by the ban on night travel imposed by the Government. There was a meeting held between the Claimant's Union and Respondent's Management. The Union was represented by Messrs. Okello Taabu and Oponyo Wawire. It was agreed in order to keep the business afloat, some of the Employee would have to leave on redundancy. Minutes of the meeting are exhibited in the Statement of Response. Termination was fair.

7. Elijah Kathuru and Joseph Musyoki gave evidence on their behalf and on behalf of their Co-Claimants on 15th July 2015, when Claimants' case closed. Personnel Manager Geoffrey Mbogho Mwakulomba gave evidence for the Respondent on 26th October 2015. Human Resource Manager Joseph Kithikwa gave evidence on 25th May 2016. Hearing closed with the consent of the Parties on 10th October 2016.

The Court Finds:-

8. There is sufficient evidence, that the Claimants' Trade Union was engaged by the Respondent in the process of redundancy. The Claimants were Members of the Shipping Union. The Union was represented by 2 Officers, Taabu and Wawire. There was a meeting of minds on the genuineness of the redundancy situation, and the need to have certain position declared redundant. The minutes of the meeting held between the Respondent and Claimants' Union indicate about 60 Employees were affected. Respondent's Witness, Mwakulomba gave the number at 111. It was not just the Claimants who were affected.

9. There however are certain defects in the manner the process was carried out. It is questionable whether the Respondent complied with Section 40 of the Employment Act 2007 in full.

10. First, although the Union was engaged in consultation with the Respondent, there is no record of a notice issued to the Union of the intended redundancy, advising on the extent of the process. There is no notice issued upon the Labour Office, and the Labour Office is not shown to have been involved in the consultative meetings on the process. It is not known what criterion was applied in selecting individual positions for redundancy.

11. The meeting of 3rd August 2014 reveals that the Respondent did not allow Employees to serve out their notice period. It was felt that if Employees were allowed to serve, the process would be sabotaged in some way. It was suggested Employees are paid notice.

12. Kithikwa, an Officer representing the Respondent, proposed Employees are also paid all the necessary dues. Some of the proposed dues included pending leave and severance.

13. The letters of termination issued subsequently provided for payment of gratuity, which the Court understands to mean severance pay under Section 40 of the Employment Act, calculated at 16 days'

salary for every complete year of service. Nothing else was offered in the letter of termination, and even what was offered, is not shown to have been paid before Employees were sent away.

14. Redundancy was faulty on procedure, and termination therefore unfair.

15. IT IS ORDRED:-

a) Redundancy was based on genuine economic reason, but lacking in fairness of procedure.

b) The Respondent shall pay to each Claimant: the equivalent of 4 months' salary in compensation for unfair termination; 1 month salary in lieu of notice; outstanding leave days as claimed; costs; and interest from the date of Judgment till payment is made in full.

c) Costs to the Claimants.

d) Certificates of Service to issue.

e) Judgment to apply in all the concerned files- Cause Numbers 172 of 2015, 234 of 2015, 472 of 2014, 473 of 2014, 474 of 2014, and 475 of 2014 as agreed by the Parties.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge