



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 111 OF 2016**  
**MARTIN BARASA LUTILO.....CLAIMANT**  
**VERSUS**  
**FOTON EAST AFRICA LIMITED.....RESPONDENT**

Claimant in person

Okundi for respondent

**JUDGMENT**

1. The suit was filed vide statement of claim dated 27<sup>th</sup> January 2016. The claimant seeks maximum compensation of 12 months' salary for unlawful termination of employment and payment of terminal benefits totaling Kshs.733,750/=.

**Facts of Claimant's Case**

2. The claimant was employed by the respondent as a Production Manager on 2<sup>nd</sup> September 2013. The claimant earned a consolidated salary of Kshs.150,000/= per month. The employment was on a one year contract and same was renewed on 5<sup>th</sup> January 2015 for a further one year to end on 5<sup>th</sup> January 2016.

3. The claimant was declared redundant on 17<sup>th</sup> January 2015 before the expiry of the contract. The declaration of redundancy did not follow the provisions of Section 40 of the Employment Act, 2007 in that no notice was given to the claimant and to Labour Officer. No reason and extent of redundancy was given. No severance pay was paid and the claimant was aggrieved by the unlawful decision hence this suit.

4. The claimant testified under oath in support of particulars of claim. Twenty of the claimant's subordinates were also declared redundant.

5. The claimant received terminal benefits which included service pay for one year worked but had worked for two years and four months. He got 17 days salary worked in December 2015. The claimant also received 20 days' salary in lieu of leave days not taken and was paid in lieu of one month's notice. Total payment was Kshs.410,000/=.

6. The claimant seeks:

- a. Balance of service pay in the sum of Kshs.225,000/=. Claimant states he worked from 2<sup>nd</sup> September 2013 and stopped working on 5<sup>th</sup> January 2015.
- b. The claimant was entitled to Kshs.20,000/= bonus pay per month subject to meeting the targets on Safety, Quality and Quantity and Cost Control. Evaluation was done and kept by the employer and he was not paid. He claims Kshs.240,000/=.
- c. The claimant was entitled to Kshs.15,000/= fuel allowance per month and the claimant seeks Kshs.97,500/= in respect thereof.
- d. Claimant claims airtime allowance in the sum of Kshs.45,000/=.
- e. Claimant also seeks Kshs.95,000/= for 19 days remaining in his contract of service and
- k. Kshs.31,250/= for unpaid leave days.

7. The claimant produced a certificate for best performance in the year 2013. The company said claimant was declared redundant due to poor work performance which the claimant denies. Claimant states that no effort was made to correct his performance if it was poor, which is denied. He was not given show cause letter nor was he subjected to a disciplinary hearing.

8. Claimant states that no receipts were required for payment of fuel and airtime allowance.

9. Claimant conceded that he only had one outstanding leave day.

## **Response**

10. Memorandum of Response was filed on 15<sup>th</sup> March 2016. The claimant concedes that the claimant's contract was renewed on 5<sup>th</sup> January 2015 for one year and earned a monthly gross pay of Kshs.150,000/= and was entitled to a monthly bonus of Kshs.20,000/= upon adherence to safety, quantity, quality and cost control. Each item was payable Kshs.5,000/= upon being attained.

11. Respondent avers that the contract was terminated due to poor work performance and was not redundancy under Section 40. Respondent states that it had a right to terminate the contract for no reason assigned. The terminal benefits are also challenged.

12. RW1 testified under oath. Mr. George Otieno was the Acting General Manager. He told the court contrary to the pleadings, that the claimant's employment was terminated on account of redundancy. That the claimant was one of employees declared redundant. That the claimant was notified of the decision and so was the Ministry of Labour. The union was also notified. That the claimant was paid terminal benefits in the sum of Kshs.410,000/=.

13. The claimant did not complain upon payment. He came to court without making a demand. The claimant was not a union member.

14. Respondent prays the suit be dismissed with costs.

## **Determination**

The issues for determination are as follows;

1. Was the termination of employment of the claimant for a valid reason?
2. Was the termination done in terms of a fair procedure?

### 3. What remedies are available to the claimant?

#### **Issue I and ii**

16. The narrative by RW1 on the reasons for termination of the employment of the claimant contradicts the pleadings by the respondent. Whereas the case pleaded is that the termination was due to poor work performance, RW1 told the court under oath that the claimant was declared redundant.

17. The claimant testified that he was declared redundant with twenty (20) of his subordinates without any notification. He was called in the morning, informed of the decision and the respondent paid his terminal benefits that were not sufficient and he claims the balance set out in his statement of claim.

18. The letter of 17<sup>th</sup> December 2015, clearly shows that the claimant was declared redundant due to poor work performance. The law only envisage declaration of redundancy under Section 40 of the Employment Act, 2007 for operational reasons not connected to the conduct of the employees.

19. For these reason, the respondent lacked a valid reason o terminate the employment of the claimant in violation of Section 43 as read with Section 45 of the Act.

20. In declaring the claimant redundant for poor work performance, the respondent violated the procedural requirements under Section 40 of the Act in that the claimant and the Ministry of Labour were not given a month's notice. The selection criteria envisaged in the law was not disclosed to the claimant. He was not paid severance pay in terms of the law. The claimant however received terminal benefits and notice pay in terms of Section 40.

21. The claimant is entitled to compensation in terms of Section 49 of the Act. The claimant was on a fixed term contract with only 19 days left to its expiry. The court considers the premature termination a violation of the law. The claimant wished to continue working and to be paid benefits upon expiry of the term.

22. The claimant also expected a renewal of contract. Claimant does not seek reinstatement. The court awards the claimant:

- a. Three (3) months' salary as compensation for the unlawful and unfair termination of employment in the sum of Kshs.450,000/=.
- b. The claimant has established that he was entitled and was not paid severance pay for full period served in the sum of Kshs.225,000/=.
- c. The claim for bonus was not proved because no evaluation took place in terms of the contract.
- d. The claim for fuel and air time equally fails for failure to produce receipts for reimbursement.
- e. The claimant conceded that he had taken leave except for one day. He is awarded Kshs.5,000/= in lieu of one leave day.
- f. The claim for 19 days remaining of the contract is dismissed the court having awarded the claimant compensation for premature termination.

Total award to the claimant is **Kshs.680,000/=**.

- g. Interest on the award is to be paid at court rates from date of judgment till payment in full.
- h. Costs to follow the outcome

**Dated and Delivered at Nairobi this 30<sup>th</sup> day of June 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**