



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 512 OF 2014**

**KEVIN OTIENO OGWEL**

**CLAIMANT**

**V**

**ELDORET MATTRESS LTD**

**1<sup>ST</sup> RESPONDENT**

**DANIEL NGUGI T/A KAMTINGA SERVICES LTD 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. On 28 March 2017, the parties informed the Court that they had agreed to have the Cause determined on the basis of the record and submissions to be filed.

2. Towards this end, the Claimant filed his submissions on 24 April 2017, while the Respondents were to file submissions before 30 May 2017 (the submissions were not on file by this morning).

1. The parties had earlier filed *Agreed Issues* on 18 January 2017. The Issues were casually, nay poorly drafted.

2. The Court will examine the *Agreed Issues* in light of the pleadings and the submissions.

**Whether Claimant was employed by the Respondent**

5. The Claimant's pleaded case was that he was employed by the Respondents and served until July 2014 (the witness statement filed in Court simply stated that the Claimant was employed by the Respondent without specifying whether he was employed by either Respondents or one of the Respondents).

6. The Respondents in paragraphs 6, 11 and 12 of the *Reply to Memorandum of Claim* appeared to accept that the Claimant was one of the 1<sup>st</sup> Respondents employees and was not part of the 10 employees affected by redundancy in June 2014.

7. The Claimant's name also appears as number 27 in a copy of a muster roll filed by the Respondents.

8. The Claimant on his part filed a document dated 11 June 2014, *An Acknowledgment* of final dues from Kamtinga Services Ltd.

9. By virtue of the 2<sup>nd</sup> Respondent having paid the Claimant final dues and the 1<sup>st</sup> Respondent producing a muster roll with the name of the Claimant, the Court finds that both Respondents had an employment/

contractual relationship with the Claimant.

### **Whether Claimant was unfairly dismissed**

10. Issues 2, 3, 4, 5 and 6 of the *Agreed Issues* spoke to the procedural and substantive fairness of the separation between the parties.

11. The Claimant's pleaded case was that he was unfairly dismissed sometime in July 2014. In the written statement, the Claimant alleged his dismissal was procedurally unfair.

12. The Respondents pleaded case on the other hand was that the Claimant was not among 10 employees whose positions were declared redundant due to operational reasons in June 2014 and was still an employee by November 2014.

13. Assuming that it is normally the employer who knows the reasons for terminating the contract of an employee, and again assuming that the Claimant's position was not declared redundant, it was incumbent upon the Respondents to demonstrate why the Claimant was paid final dues including *payment in lieu of notice* on 11 June 2014 if the employment relationship subsisted.

14. The Court can therefore conclude on the basis of the *Acknowledgment* dated 11 June 2014 that there was termination of the Claimant's employment under circumstances rendering it devoid of procedural fairness.

### **Pay in lieu of notice**

15. The Claimant was paid and acknowledged payment of 1 month pay in lieu of notice and nothing turns on this head of claim.

### **Overtime**

16. Overtime required proof of work beyond the contractually agreed working hours and/or prescribed working hours and because no evidence was led, this head of claim cannot survive.

### **Compensation**

17. The Claimant served the Respondents for about 1 year.

18. Considering the length of service, the Court is of the view that the equivalent of 2 months wages as compensation would be fair and appropriate.

19. Before concluding, the Court observes that the Cause was taken so casually that none of the parties even raised the question of *discharge* the Claimant gave through the *Acknowledgment* dated 11 June 2014, when he received Kshs 15,328/-.

### **Appropriate remedies/Orders**

20. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondents to pay him

(i) Compensation Kshs 21,400/-

21. The parties took the litigation casually, and therefore the Court orders that each party bears own costs.

**Delivered, dated and signed in Nakuru on this 20<sup>th</sup> day of July 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Morande instructed by Chepkwony and Co. Advocates

For Respondents Mr. Maitha instructed by Gicheru & Co. Advocates

Court Assistant Nixon