



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 932 OF 2016**

1. **KENETH OMBALO OMONDI**  
2. **SALIM OMAR CHINAGO**  
3. **RAMADHAN KANONA MBOVU**  
4. **GEORGE OMONDI ODORIH .....CLAIMANTS**

**VERSUS**

**SANDY CARRIERS LTD.....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The claimants were employed by the respondent until they were terminated on account of redundancy on diverse dates in the year 2016. They have now brought this suit alleging that the termination on account of redundancy was not in accordance with Section 40 of the Employment Act and therefore unfair. Accordingly the suit seeks payment of terminal dues plus compensation for unfair termination.

2. The respondent never filed any defence despite service of process and the suit proceeded ex parte by way of written submissions on the strength of the record. The issues for determination herein are whether the termination of the claimant's services was unfair and whether the reliefs sought should be granted.

**CLAIMANT'S CASE**

3. The first claimant Mr. Kenneth Omondi stated in his written statement that he joined the respondent as a clerk in 2009 earning a basic salary ksh.16500 per month. He worked continuously until 26/7/2016 when he was served with a redundancy notice of one month. During the said notice period, he was given leave. He contends that the procedure followed to lay him off was not in compliance with Section 40 of the Employment Act and as such his termination was unlawful. He prayed for severance pay, salary for August, unpaid house allowance, compensation for unlawful termination, refund of welfare contributions and unpaid holiday totaling to ksh.560,225.

4. The second claimant Mr. Salim Chinago stated in his written statement that he joined the respondent in 2010 as a mechanic earning a basic salary of ksh.18000 per month. He worked until 26/7/2016 when he was served with one month redundancy notice and directed to go on leave during the notice period. He also contended that the procedure followed to lay him off was in breach of Section 40 of the Act and

therefore unlawful. He therefore prayed for the same reliefs as the first claimant.

5. The third claimant Mr. Ramadhan Mbovu stated in his written statement that he joined the respondent in 2010 also as a mechanic earning a basic salary of ksh.18000 per month. He worked until 16/9/2016 when he was served with one month redundancy notice and directed to go on leave during the said notice period. He also faults the procedure followed contending that it was in breach of Section 40 of the Act and as such the termination was unlawful. He prayed for similar reliefs as the other claimants above.

6. Lastly, the fourth claimant Mr. George Odoroh stated in his written statement that he joined the respondent in 2013 as a clerk earning a basic salary of ksh.16500. He worked until 24/8/2016 when he was served with one month redundancy notice and directed to take leave during the said notice period. He also faults the procedure followed contending that it was contrary to Section 40 of the Act and as such the termination was unfair. He prayed for similar reliefs as the other claimants herein.

### ANALYSIS AND DETERMINATION

7. There is no dispute that all the claimants herein were employed by the respondent until September and October 2016 when they were terminated on account of redundancy. There is also no dispute that the redundancy notice served on the claimants offered to pay them their outstanding salary plus severance pay. The issues for determination are as stated herein above.

#### **Unfair/unlawful termination**

8. The claimants uncontested pleadings, evidence and submission is that the procedure followed in terminating their services on account of redundancy was not in accordance with the mandatory procedure laid down by Section 40 of the Employment Act and that rendered the termination unfair and unlawful within the meaning of Section 45 of the Act. Section 40 provides that before terminating the services of an employee on account of redundancy, the employer shall first serve at least one month notice in writing to the employee (or his union if a member and the labour officer). Thereafter a fair selection process will be done to identify the staff to be laid off considering experience, first in last out principle, among others and finally pay the selected staff all their accrued benefits under the contract plus salary in lieu of notice and severance pay.

9. In this case, the said strict process was not followed before terminating services of the claimants on account of redundancy. Although redundancy notice was served on the claimants, the same was never served on the labour officer. In addition, the procedure followed in selecting the claimants for the redundancy was mysterious to the claimants as they were never involved in it. All what happened was them being served with redundancy notice, which also directed them to take leave during the notice period. Whereas in my view the direction for the claimants to take leave was lawful, the failure to involve them in the selection process was unfair because they were not given any hearing. Finally, the termination was in breach of Section 40 of the Act because the claimants were not paid all their accrued benefits under their contract of employment.

10. In view of the foregoing observation from the claimants evidence, I make a finding of fact that the purported declaration of redundancy of the claimants position was procedurally unfair for having been done in breach of Section 40 of the Act. The termination was also substantively unfair for lack of valid and fair reason as required under Section 43 and 45 of the Act. The said Sections puts the burden of proving the reason for terminating the services of an employee on the employer, and if he defaults to do so as in this case the termination becomes unfair.

#### **Reliefs**

11. Under Section 49 of the Act, I award claimants 6 months salary as compensation for termination of their services. In awarding the said compensation, I have considered the fact that the claimants had reasonable expectation to continue earning were it not for the said unfair termination. In addition, I have considered the fact that they never contributed to their termination through misconduct.

12. The claimants will also get house allowance in arrears because although they were paid basic salary, they were never provided with reasonable housing by their employer as provided for under Section 31 of the Act. I will therefore award them 15% of their basic pay for the years served because the default to pay was continuous within the meaning of Section 90 of the Act. They will also get the pay for their last month of service as offered by the redundancy notice. The claim for unpaid holidays and refund of welfare contributions are dismissed for want of particulars and evidence. Likewise the claimant for severance pay is dismissed because the redundancy has herein above been converted to unfair termination and adequate compensation granted.

### 13. Summary of individual awards

#### 1<sup>st</sup> claimant, Keneth Omondi

August 2013 salary .....16500

Compensation .....99000

House allowance ksh.2475x8 months.....118800

234,300

#### 2<sup>nd</sup> claimant Chinago

August salary.....ksh.18000

Compensation.....108000

House allowance ksh.2700x 48 months.....129000

255,600

#### 3<sup>rd</sup> claimant Ramadhan Mbovu

16 days salary (September 2016).....ksh.11,076.95

Compensation.....108,000

House allowance ksh.2700x60.....162,000

281,076.95

#### 4<sup>th</sup> claimant George Odoroh

August salary.....ksh.16500

Compensation.....99000

House allowance ksh.2474x36 months.....81,000

Ksh.204,600

All the claimants will be issued with certificate of service in accordance with Section 51 of the Employment Act.

### DISPOSITION

14. For the reasons that the claimants were unfairly and unlawfully laid off, I enter judgment for them in the aggregate sum of ksh975,579.95 plus costs and interest. They will also have certificate of service as prayed.

Dated, signed and delivered this 29<sup>th</sup> September 2017

**O. N. Makau**

**Judge**