



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 244 OF 2016**

**NAMAN MURIUKI .....CLAIMANT**

**VERSUS**

**P N MASHRU LIMITED .....RESPONDENT**

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

**IINTRODUCTION**

1. This is a claim for terminal dues plus compensation for the unfair termination of the claimant's contract of service by the respondent on 15/12/2015. The respondent denies that the termination was unfair and avers that it was done within the terms of contract of which allowed either party to terminate it with a notice of one month or payment of salary in lieu of notice. She further avers that she paid the claimant all his terminal dues including salary in lieu of notice and prayed for the suit to be dismissed. The hearing was dispensed with and instead the parties agreed to adopt their respective record and disposed the suit by written submissions.

**CLAIMANT'S CASE**

2. The claimant filed written statement on 23/3/2016 stating that he was employed by the respondent on 27/3/2013 as a mechanic and worked upto 15/12/2015 when he was summoned to the office by the HR officer and given a letter terminating his services the same date. That no reason was given and no hearing was accorded to him prior to the dismissal. He therefore contended that termination was unlawful and prayed for compensation for the unlawful termination plus one month salary in lieu of notice. As at the time of his termination, his salary was ksh.28350 per month. He confirmed that after the termination he was paid ksh.35357 but no particulars of the payment was given to him. That no certificate of service was given to him after the termination.

**DEFENCE CASE**

3. The respondent's HR officer Mr. Salim Joha filed his statement on 14/4/2016. He admitted that the claimant was employed by the respondent on 27/3/2013 as a mechanic earning ksh.27000 per month which was later increased to ksh.28350 per month. That the parties signed a written contract whose clause 23 entitled either party to terminate it with a notice of one month or payment of one month salary in lieu of notice. That pursuant to the said termination, clause, the respondent terminated the claimant's services and paid him ksh.35357 as terminal dues including one month salary in lieu of notice. That the claimant accepted the said dues by voluntarily signing settlement agreement. He therefore denied all the claims by the claimant including service pay and contended that under Section 36(6) (d) of the

Employment Act, the claimant was disqualified from that benefit because he was a contributor to the NSSF. In that respect he prays for the refund of ksh.28350 paid to him as service pay.

#### ANALYSIS AND DETERMINATION

4. There is no dispute that the claimant was employed by the respondent from 27/3/2013 to 15/12/2015 when he was terminated by the respondent. There is also no dispute that after the termination the claimant was paid ksh.35357. The issues for determination herein are:

- (a) Whether the termination was unlawful.
- (b) Whether the reliefs sought should issue.
- (c) Whether the ksh.28350 severance pay was erroneous and should be refunded to the respondent

#### **Unfair termination**

5. The claimant contends that the termination of his services was unfair because he was not given any reason and accorded any hearing. He also faults the termination because the employer never paid him all his lawful dues and issued him with certificate of service. The respondent has however maintained that the termination was lawful because it was founded on clause 23 of the contract of service which allowed either party to terminate the same by a notice of one month or salary in lieu of notice.

6. I have carefully perused the said contract of service and confirmed that clause 23 thereof entitled either party to terminate it by a notice of one or payment of one months salary in lieu of such notice. I have also confirmed from the termination letter dated 15/12/2015 that the respondent undertook to pay one month salary in lieu of notice which she indeed paid on 22/2/2016 vide cheque No. 000989. The particulars of the said payment are contained in the calculation of the final dues dated 20/12/2015 produced by the defence as an exhibit. The said calculation includes ksh.28350 as salary in lieu of notice.

7. After careful consideration of the evidence and submissions by both parties, I find nothing wrong with the termination of the contract herein by the respondent. She only exercised her right under clause 23 of the contract as claimant would have done had he decided to quit. The said clause 23 of the contract is in consonance with Section 36 of the Employment Act which guarantees freedom of contract subject to giving of prior notice or payment of salary in lieu of notice by the terminating party. That freedom of contracting is a fundamental principle which cannot be taken away from both the employer or the employee.

8. In view of the foregoing, I dismiss as without merits the contention by the claimant that the termination was unlawful because it was done without reason and before according him a hearing. In my view, freedom of contract was a valid and fair reason to warrant the termination and payment of salary in lieu of notice was fair procedure and prior hearing within the meaning of Section 41 of the Act was not required in this case. Such hearing is only mandatory if the termination is grounded on misconduct, physical incapacity or poor performance. Consequently, I find and hold that the claimant has not proved on a balance of probability that his termination was unlawful.

#### **Reliefs sought**

9. In view of the foregoing finding and the fact that the claimant was paid one month salary in lieu of notice on 22/2/2016, I dismiss the claim for salary in lieu of notice and compensation for unlawful termination. I also dismiss the claim for severance pay of ksh.42000 because he was not terminated on account of redundancy under Section 40 of the Act. The claim for certificate of service is however granted because it is his right under Section 51 of the Act.

#### **Refund of Severance pay**

10. The claim for refund of ksh.28350 paid as severance pay is also dismissed because it was not paid to the claimant through his fraud. Secondly, the relief is not founded on any pleaded counterclaim as provided by the rules of procedure.

DISPOSITION

11. For the reason that termination of the contract of service was lawful, I dismiss the suit with no order as to costs save for the order of issuance of certificate of service.

Dated, signed and delivered this 13<sup>th</sup> October 2017

**O. N. Makau**

**Judge**