



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 474 OF 2014**

**CHARLES ONDIEK OKEMWA.....CLAIMANT**

**v**

**ELDORET MATTRESS LIMITED.....1<sup>st</sup> RESPONDENT**

**DANIEL NGUGI t/a KAMTINGA SERVICES LTD.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Charles Ondiek Okemwa (Claimant) commenced legal proceedings against Eldoret Mattresses Ltd (1<sup>st</sup> Respondent) and Kamtinga Services Ltd (2<sup>nd</sup> Respondent) on 2 October 2014 alleging unfair termination of employment and that he was underpaid in the course of employment.
2. The Respondents filed a joint Response on 8 December 2014, and the Cause was heard on 2 October 2015. The Claimant testified while the Respondent opted not to call any witnesses.
3. The Court has considered the pleadings and evidence and identified the issues for determination as, *whether the termination of Claimant's employment was unfair and appropriate remedies/orders.*

**Whether termination was unfair**

4. The Claimant's case was that the Respondents terminated his employment on 2 July 2014 without notice to himself or the Union of which he was a member.
5. The Respondents case was that the termination of the Claimant's employment was due to redundancy.
6. Termination of employment on account of redundancy is subject to compliance with sections 40 and 45(2)(b)(ii) of the Employment Act, 2007.
7. Ordinarily, it is the employer who knows the reason for terminating the employment of an employee and on account of this, the Court takes it as contended by the Respondent, that the termination of the services of the Claimant was on account of redundancy.
8. It was therefore incumbent upon the Respondents to demonstrate that it complied with the conditions set out in section 40 of the Employment Act, 2007.
9. The Respondent did not discharge the burden. It did not demonstrate that the Claimant and or the Union of which he was a member, was notified in writing at least 1 month in advance.
10. The Respondents did also not demonstrate that the Local Labour Officer was notified.
11. On account of this singular failure, the Court finds that the termination of the employment of the

- Claimant through redundancy was procedurally unfair.
12. Assuming that I am wrong in reaching that conclusion, I would still find that the termination of employment was substantively unfair because the Respondent did not prove that the redundancy was on account of its operational requirements.
  13. Although the Court encouraged the parties to attempt and reach an out of Court settlement before delivery of this judgment, the parties did not indicate whether any such agreement was reached.

### **Appropriate remedies/Orders**

#### ***1 month pay in lieu of notice***

14. Under this head the Claimant sought Kshs 12,200/-. By virtue of section 40(1)(f) as read with section 35 of the Employment Act, 2007, the Claimant is entitled to 1 month pay in lieu of notice.
15. He confirmed in testimony that he was paid dues which included pay in lieu of notice.

#### ***Overtime***

16. The Claimant's testimony that he worked from 8.00am to 8.00pm was not challenged or controverted.
17. The computation of overtime was equally not interrogated by the Respondents and the Court would find for the Claimant as set out in the Memorandum of Claim.

#### ***Severance pay***

18. Section 40(1)(g) of the Employment Act, 2007 provides for payment of severance pay.
19. The Claimant confirmed that he was paid some dues. Among the computations was a sum of Kshs 18,300/- on account of service.
20. None of the parties clarified what the service pay was anchored on and in this regard and in the circumstances of this case, the Court declines to award severance pay but will consider this in awarding compensation.

#### ***Compensation***

21. The Court has reached the conclusion that the termination of the Claimant's employment was unfair.
22. Pursuant to section 49(1)(c) of the Employment Act, 2007, compensation is one of the primary remedies. The remedy though is discretionary and section 49(4) of the Act has outlined the factors to consider.
23. The Claimant served the Respondent for about 3 years and the Court would award the equivalent of 4 months gross wages as compensation/-, (Claimant's testimony was that he was earning Kshs 12,200/-).

### **Conclusion and Orders**

24. The Court finds and holds that the termination of the Claimant's employment through redundancy was unfair and awards him and orders the Respondents to pay him
  - a. Overtime Kshs 354,725/-
  - b. 4 months wages compensation Kshs 48,800/-

**TOTAL Kshs 403,525/-**

25. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 29<sup>th</sup> day of January 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Morara instructed by Chepkwony & Co. Advocates

For Respondent Mr. Tombe instructed by Gicheru & Co. Advocates

Court Assistant Kosgei