



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.131 OF 2015**

*(Before D. K. N. Marete)*

**ZACHARY KIBITOK KEMBOI.....CLAIMANT**

**VERSUS**

**EAGLE MOTOR CYCLE LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated vide a Memorandum of Claim dated 24th April, 2015 and filed on 27th instant. It does not expressly disclose the issue in dispute on its face.

The respondent, by a Reply to the Memorandum of Claim denies the same and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent as a Technician by the respondent on 1st June, 2013 at his shop at Eldoret and was underpaid and earned a salary of Kshs. 7500.00. This amount was paid to him until he was unprocedurally declared redundant. It is the claimant's further case that he served the respondent dedicatedly, unsavory and was without any warning or lawful warning in his employment record until the date of termination.

On 6th June, 2014, he was summarily dismissed from employment on purported grounds of hard economic times. It is his contention that this was contrary to Section 40 and 44 of the Employment Act, 2007 as follows;

- i. The letter dated 6<sup>th</sup> June 2014 purporting to unlawfully dismiss him expressly noted that he was terminated with immediate effect;*
- ii. That claimant was given a one day notice as the termination notice;*
- iii. The ground for summary dismissal of the Claimant by the Respondent is not one of the grounds set out under section 44(4) and section 40 of the employment Act.*
- iv. The respondent violated due procedure as enumerated under section 40 of the Employment Act.*

and further that this was unfair as it offended Section 45 (2) (a) and (b) (1) as follows;

i. *The reason given for the termination was not a fair one;*

ii. *The respondent did not give evidence of the alleged economic hardship the business was facing;*

The claimants further case is that he did not appeal against the termination as the respondent had no structures or provisions or substantive reasons for unlawful termination that would have formed the basis of an appeal. He prays as follows;

a. *The Claim be allowed in entirety with costs to borne by the Respondent;*

b. *Any other or further relief that this Honourable Court may deem fit and just to grant.*

c. *CLAIMS*

1. *A maximum compensation as per Section 49 (c) of the Employment Act and section 15 of the Labour Institutions Act;*

2. *A Certificate of Service as per Section 51 of the Employment Act;*

3. *Costs and interest of this Suit.*

*BROKEN DOWN AS FOLLOWS;*

1 month pay in lieu of notice 12,184 (Basic pay) + 1,827 (House Allowance) Kshs.14,011

2. Severance Pay 15 Days \* 1 year \* 12,184 (Basic pay)/30 days Kshs.6,092

3. Leave Dues

21 Days \* 1year \* Basic pay \* House Allowance/26 Days Kshs. 11,316

4. Underpayment of Wages

*Legal Notice No. 197 of 1<sup>st</sup> May 2013 to June 2014*

*Basic + House Allowance- Current Pay 12,181 + 1,824 – 7500= 6,511 x 12 months Kshs. 78,132*

5. *Compensation for unfair termination/redundancy*

*Gross Pay x 12 months Kshs.168,132*

6. *Responsibility allowance Kshs. 60,000*

***TOTAL Kshs. 337,683/=***

The respondent denies that the claimant was its employee as described in the claim. She further avers that there was no employment contract *inter parties*. It is her further case that a notice of redundancy was issued to the claimant before his discharge of his casual duties as a technician. That on 6th June, 2014 the claimants services were lawfully terminated in accordance with the Employment Act, 2007.

It is the respondent's further case that in declaring the claimant redundant she cited her grounds for so doing as his services were superfluous and unnecessary and were not needed for any available job. She submits that she was going through rough economic times and that the motor bike and spares industry had become flooded and therefore the termination on grounds of redundancy was lawful, fair and procedure on the following grounds;

11. ....

- a. *That the termination notice was duly issued to the claimant as provided for under section 35 (1) c & 36 of the Employment Act.*
- b. *The respondent duly followed the laid down procedures as envisaged in the Employment Act specifically section 15, 40 and 41 of the Employment Act in effecting the said termination.*
- c. *The Respondent duly communicated to the claimant the reason for the termination as being redundancy and economic hardship.*

She, in the penultimate contends that the reliefs sought in the claim are untenable, illegal and not in tune with the Employment Act, 2007 and prays that the same be dismissed with costs.

This matter came to court variously until the 31st July, 2015 when it was heard with the respective parties testifying in reiteration of their cases.

The issues for determination therefore are;

1. Was there an employment relationship *inter parties*?
2. Was there a case for redundancy in the termination of the claimant?
3. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
4. Is the claimant entitled to the relief sought?
5. Who bears the costs of the case?

The 1st issue for determination is whether there was an employment relationship between the parties. The respondent in her response to the claim denies this. The claimant contends a case of employment and annexes a union membership card for KUCFAW which defines and evidences the employment. He further annexes a copy of his identity card to tally this. This is further supported in the testimonies of CW1-Zachary Kibitok Kemboi, the claimant and CW2 – Josephat Amachika Ojuok. It is further reiterated in his written submissions.

DW1, Jairus Juma Obala in his defence testimony attests to a case of employment of the claimant by the respondent. He moves on to narrate on the ground of redundancy as a ground of termination of the employment of the claimant. In their written submissions, however, the respondent twists this to sound like the testimony was one of joining the company as a trainee. The respondent's witness in open court testified to a case of employment of the claimant as a technician earning a salary of Kshs. 7,500.00. The respondent in all other aspects denies this. I find that on a balance of probabilities and also a preponderance of evidence, the claimant was an employee of the respondent and hold as such. The respondent version is mere denial.

The 2nd issue for determination is whether there was substantive redundancy in the termination of the employment of the claimant. The respondent contends and testified to this extent while the claimant rubbished the same. It is the claimant's submission that the respondent in her purported redundancy did not pursue or comply with Section 40(1) of the Employment Act, 2007 as follows;

*40 (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions-*

- a. *where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the*

*date of the intended date of termination on account of redundancy;*

*b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*

*c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

*d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

*e. The employer has where leave is due to an employee who is declared redundant not less than one month's notice or one month's wages in lieu of notice; and*

*f. The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

The claimant in support of his submission sought to rely on the authority of **Julie**

**Tupiran Njeru V Kenya Tourist Board Industrial Cause Number 886 of 2010 (Rika , J on 12<sup>th</sup> April, 2011)** the honourable court held as follows:-

*a. Termination of employment through redundancy being an involuntarily termination must be procedurally fair and substantively justifiable and must follow the law on unfair termination in particular under sections 43 and 45 of the Employment Act, 2007.*

*b. Fairness of the redundancy process includes engagement of the employee by the employer in adequate consultations which should precede any decision on termination.*

*c. Fairness of the redundancy process further requires the employee to be informed on the selection criteria and must involve the participation of the claimant in evaluation and scoring system.*

*d. The principle of First in, Last Out (FILO) or Last In, First Out (LIFO) would have been another acceptable mode of determining who was to be selected for termination on account of redundancy.*

*e. There are four forms of Notification envisaged in the law of redundancy; the first one announces to the affected employee the intention to declare the redundancy, which notice meant to pave way for consultations. The second one is the normal termination notice.*

*f. Even in straightforward and genuine case of redundancy, the employer must ensure there is a valid reason in the process of selection of each individual position for redundancy.*

I therefore agree with the submissions and case for the claimant and find that the respondent did not pursue the process and law on redundancy in the circumstances. Issue No. 2 is thus answered.

The claimant further sought to rely on the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013)eKLR** the Honourable Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

Section 45 of the Employment Act, 2007 provides that:

*“No employer shall terminate the employment of an employee unfairly,*

*A termination of employment by an employer is unfair if the employer fails to prove;*

- a. *That the reason for the termination is valid;*
- b. *That the reason for the termination is a fair reason-*
  - (i) *Related to the employee's conduct, capacity or compatibility; or*
  - (ii) *Based on the operational requirements of the employer;*
- c. *That the employment was terminated in accordance with fair procedure”*

Again, the claimant sought to highlight the ingredients of fair termination through the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

- a. *That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*
- b. *That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- c. *That the employer has heard and considered any explanations by the employee or their representative;*
- d. *where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

In the absence of compliance with the law on redundancy and fair termination as set out above. I find that the termination of the employment of the claimant was wrongful, unlawful and unfair. And this answers the 3rd issue for determination.

The 4th issue for determination is whether the claimant is entitled to the relief sought. Having passed the test on issues No's 1-3 above and particularly No.3, the claimant is entitled to the relief sought.

I therefore allow the claim and order relief as follows;

- i. One months pay in lieu of notice = Kshs.7,500.00
- ii. Eight months compensation for unfair termination of employment

8 x Kshs. 7,500 =Kshs.60,000.00

**TOTAL =Kshs.67,500.00**

iii. That the respondent be and is hereby ordered to issue a certificate of service to the claimant.

iv. That the costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 17th day of February 2016.

**D.K.Njagi Marete**

**JUDGE**

## Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Co. Advocates for the Claimant.
2. Rioba Omboto instructed by Rioba Omboto & Co. Advocates for the Respondent.