



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 414 OF 2013**  
**JACKSON MUIRURI MWANGI.....CLAIMANT**  
**VS**  
**SINOHYDRO CORPORATION (K) LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by Memorandum of Claim dated 26th March 2013 is for compensation for unlawful termination of employment and payment of terminal dues. The Respondent filed a Statement of Response on 24th June 2013 but did not call any witnesses. The Claimant testified on his own behalf.

**The Claimant's Case**

2. The Claimant states that he was employed by the Respondent as a driver effective 8th July 2009. He worked as such until 14th April 2012 when his employment was terminated on account of reduction of work in the Respondent Company. At the time of termination, the Claimant's monthly salary stood at Kshs. 10,200. It is the Claimant's case that the termination of his employment was without justifiable cause and was unprocedural.

3. He claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 10,200
- b) Loss of future earnings (10,200x12).....73,140
- c) Severance pay for 3 years.....24,380
- d) Leave pay for 6 years.....25,578
- e) Certificate of service
- f) Costs plus interest

**The Respondent's Case**

4. In its Statement of Response dated 21st June and filed in Court on 24th June 2013, the Respondent

states that it had no employment relationship with the Claimant. The Respondent therefore denies any statutory or contractual breach as alleged by the Claimant.

### **Findings and Determination**

5. There are three issues for determination in this case:

- a) Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by the Court;
- b) Whether the termination of the Claimant's employment was lawful;
- c) Whether the Claimant is entitled to the remedies sought.

### **Employment Relationship?**

6. In its Statement of Response, the Respondent denies the existence of an employment relationship. On his part, the Claimant produced an employment card and a contract worker salary form both issued to him by the Respondent. The Respondent did not challenge the authenticity of these documents and the Court found no reason to disbelieve the Claimant's testimony in this regard.

7. It is the responsibility of the employer to issue an employment contract and an employer who fails do so cannot use their failure to defeat an employee's claim. On the whole, the Court finds that there was indeed an employment relationship capable of enforcement.

### **The Termination**

8. Having established the existence of an employment relationship between the parties, I will now examine the legality of the termination of the Claimant's employment. From the Claimant's testimony which the Respondent did not challenge in evidence, the termination was caused by reduction in work. This would fall under what is commonly known as redundancy.

9. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act , 2007 define redundancy as:

***“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”***

10. The law recognises redundancy as a lawful form of termination of employment but there are stringent conditions to be observed. Section 40 of the Employment Act sets out the following conditions precedent to be met by an employer before terminating employment on account of redundancy:

***a) where the employee is a member of a trade union, the employer notifies the union of 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 the 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, paid off the leave in cash;*

*f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*

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

11. While the law recognises redundancy as a legitimate form of termination of employment, it must be undertaken within the law and as held by this Court in *Francis Maina Kamau Vs Lee Construction [2014] eKLR* where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the redundancy becomes an unfair termination within the meaning of Section 45 of the Act.

12. From the evidence adduced before the Court, there was no attempt on the part of the Respondent to comply with the law on redundancy and the resultant termination was therefore unfair and the Claimant is entitled to compensation.

### **Remedies**

13. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service alongside the Respondent's conduct in the termination transaction. In addition, I award the Claimant one (1) month's salary in lieu of notice as well as severance pay for two (2) completed years of service. In the absence of leave records to counter the Claimant's testimony that he never went on leave, I allow the claim for leave pay.

14. Finally I make an award in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation for unfair termination.....Kshs. 30,600
- b) 1 month's salary in lieu of notice.....10,200
- c) Severance pay for 2 years (10,200/30x15x2).....10,200
- d) Leave pay for 2 years (10,200/30x42).....14,280
- e) Prorata leave for 8 months (10,200/30x1.75x8).....4,760
- Total.....70,040**

(f) The Claimant is also entitled to a certificate of service and the costs of this case. The Award amount will attract interest at Court rates from the date of the Award until payment in full.

15. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF APRIL 2016**

**LINNET NDOLO**

## **JUDGE**

### **Appearance:**

Mr. Nyabuto for the Claimant

Mr. Rono for the Respondent