



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO. 763 OF 2014**

**ANDREW WAIRE NDUNU.....CLAIMANT**

**VERSUS**

**EXPRESS AUTOMATION LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was commenced by the Claimant on 9<sup>th</sup> May 2014. He sought the resolution of an issue he framed as the wrongful dismissal from employment and non-payment of terminal dues. He averred that he was employed by the Respondent in August 2013 as a service coordinator in the Respondent's service department. He stated that on 31<sup>st</sup> March 2014 he received a termination letter and that the dismissal was without justifiable cause. He averred that it was alleged that the Respondent was downsizing but no other staff was laid off and that there was no prior communication that there was an intended downsizing. The Claimant averred that the Respondent has been hiring new staff and that the Respondent did not follow the law in declaring the Claimant redundant. The Claimant sought salary in lieu of notice, leave not taken for one month (for 2013/2014), 12 months compensation for loss of employment and unexpired duration of the contract (17 months), costs of the suit and interest at commercial rates.
2. The Respondent filed its statement of response on 6<sup>th</sup> June 2014. In it, the Respondent averred that the Claimant had been employed on 1<sup>st</sup> August 2014 as a service coordinator at a salary of Kshs. 25,000/- and was relieved of his services at the Respondent on 31<sup>st</sup> March 2014 due to downsizing as a result of the current economic crisis. The Respondent averred that it had been facing harsh economic times and was forced to downsize and hire temporary employees to replace permanent employees as the temporary employees ask for a relatively lower salary compared to the permanent staff. The Respondent denied that it had acted in breach of the contract or in disregard of the law. The Respondent stated that the Claimant during his employment was entrusted with a machine which went missing during his employ and that the machine mysteriously reappeared later. The Respondent averred that the Claimant has been called to collect the cheque but has declined or refused to do so. The Respondent denied that the Claimant had suffered any loss or damage or that he is entitled to any of the orders sought in his claim. The Respondent urged the Court to dismiss the suit with costs.

3. The Claimant testified on 18<sup>th</sup> May 2016 and stated that he was dismissed by the Respondent allegedly because the Respondent was downsizing. The Claimant also testified that the Respondent alleged a money counting machine had gone missing though it was not under his jurisdiction. He testified that he was dismissed without cause as he was not notified of the impending redundancy and neither was the labour officer notified.
4. In cross-examination he testified that the Respondent hired new staff. He however admitted that he did not have any evidence of this. He felt discriminated against on account of his dismissal as the downsizing only affected him. He stated that the only machines he had interacted with were the used ones under repair and that the machine alleged to have been missing was a new machine. He testified that he did not handle the machine he was accused of taking. He stated that the machine went missing on a day he was on leave and that he had been cleared before the issue of the machine was raised. He admitted that he was called to collect the cheque but he refused as it was for less than what he expected. He also did not get the certificate of service as the receipt was dependent on him taking the cheque. He stated that he had only gone for one day off and not 11 days.
5. In re-examination he stated that it was difficult for him to obtain documents relating to other employees as he was not part of management. He testified that the machine went missing on a day he was off.
6. The Respondent called Sylvia Muthoni Wachira who testified that she was an assistant human resource manager of the Respondent. She stated that the company was undergoing downsizing and that it was going through economic hardships. She testified that he was to clear and upon clearance he would be paid. He did not clear and had not obtained the director's signature. She stated that there was the issue of the machine that was to be returned. A cheque for one month's notice and leave for two days was prepared and ready for his collection and they kept calling him to collect the cheque but he declined. She testified that upon receiving the memo of claim the matter was out of the Respondent's hands. She denied that the Claimant was discriminated against.
7. In cross-examination she testified that the contract the Claimant had was for 2 years. She admitted that there was no attachment to show that the Claimant is the one who had the machine. She testified that there were many people who were terminated alongside the Claimant. She stated that the Claimant had taken 11 leave days and that basically, the contract provided for one month notice and the payment by cheque was in lieu of notice.
8. In re-examination she testified that it was not necessary to give the list of employees made redundant. She stated that the Respondent opted to pay the Claimant notice instead of having him work through the notice period.
9. The parties sought to file submissions and the Claimant filed his submissions on 30<sup>th</sup> May 2016 while the Respondent filed submissions on 17<sup>th</sup> June 2016. The Claimant submitted that the Respondent did not follow due process as provided for in Section 41 of the Employment Act before terminating the Claimant and that the reasons for termination were not valid contrary to Section 45(1) of the Employment Act. The Claimant submitted that the Respondent had a duty in terms of Section 43 of the Act to prove the reasons for termination were valid. The Claimant relied on the cases of **Beatrice Achieng Osir v Board of Trustees Teleposata Pension Scheme Cause No. 665 of 2011** (unreported), **Edward Kabogo Munene v Equity Bank Limited Cause No. 1123 of 2012** (unreported), **Peter Maroko Omondi v Pandya Memorial Hospital [2014] eKLR**, and **Jane Wairimu Machira v Mugo Waweru & Associates Cause 621 of 2012** (unreported).
10. The Respondent submitted that the Claimant's dismissal was procedural. The Respondent submitted that it gave out reasons and proof of termination as provided for under Section 43, 45 and 47 of the Employment Act. The Respondent submitted that it accorded the Claimant substantive fairness and relied on the case of **Mary Mutanu Mwendwa v Ayuda Ninos De**

**Africa (Anidan K) [2013] eKLR** and stated that summary dismissal is provided for under Section 44 of the Employment Act. The Respondent submitted that the Claimant did not follow the correct channels in resolving the claims and that having dismissed for cause the Claimant could not claim. The Respondent relied on the cases of **Sarah Wanyaga Muchiri v Henry Kathii & Another [2014] eKLR** and **Kenya Plantation and Agricultural Workers Union v James Finlay (K) Ltd [2013] eKLR**. The Respondent submitted that the managerial decision to lay off some of its workers was not based on any discriminative selection or procedure. The Respondent submitted that the Claimant was terminated on account of redundancy and was given communication on this. Reliance was placed on the case of **CMC Aviation Limited v Mohamed Noor [2015] eKLR** on the issue of damages to be paid if the Claimant is successful.

11. The claim was mounted by the Claimant against his erstwhile employer. He asserted that the dismissal was unlawful. In the testimony adduced by parties, it is clear the Claimant was employed by the Respondent and was terminated vide a letter of dismissal dated 31<sup>st</sup> March 2014. The Respondent in its pleadings and testimony was of the firm view that the notice to be paid to the Claimant was sufficient. The Respondent therefore submitted that the Claimant's termination was procedural and accorded with the tenets of the law. The Claimant on his part asserts that it did not. The dismissal letter signed by the director Naushad Ali Luhar was to the following effect:-

**RE: TERMINATION OF SERVICES**

*This is to inform you that you are being relieved of your duties as of 31<sup>st</sup> March 2014, due to downsizing exercise that the company is carrying out.*

*You are required to surrender all company items issued to you and your final dues will be paid upon receiving confirmation from your department head, that all company items have been surrendered back to the company.*

*Any loss of any company equipment or items will be deducted from your final dues.*

12. In any suit for unlawful termination, it is the duty of the employee to prove the termination was unlawful. On part of the Respondent there is a duty to prove that the dismissal was justified. From the submissions of the Respondent, it was not clear what was being advanced – redundancy or dismissal for cause. If it was dismissal for cause or redundancy, the Respondent was duty bound as per Section 43 of the Employment Act to prove the reasons. It did not bode well for the Respondent to assert that it did not need to avail proof of the employees declared redundant.

13. Section 40 of the Employment Act provides that in order for an employee to be declared redundant, the employee should be notified. The only letter advanced for the notification is the dismissal letter reproduced above. It was not copied to the Labour officer. Section 40 of the Employment Act makes provision for termination of contracts on account of redundancy 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;

(e) upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(f) the employer has where leave is due to an employee who is declared redundant , paid off the leave in cash;

(g) 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

(h) 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.

14. The Claimant is yet to receive the payment envisaged under Section 40. If the Claimant was declared redundant as the letter states, the redundancy was not in conformity with the law. Termination thus was *contra statute* and the Claimant succeeds. The orders that can be granted are based on the considerations under Section 49 of the Employment Act. The conduct of the Respondent is material. The Respondent did not notify the relevant officials and/or the Claimant, the Respondent did not issue a certificate of service or pay service. There is no requirement to pay for the balance of the contract.

15. The Claimant sought 12 months compensation and to the Court that is on the higher side given the contract was for 2 years only. The Court awards the following:-

- i. One month salary in lieu of notice Kshs. 28,528/-
- ii. Leave due Kshs. 28,528/-
- iii. 6 months compensation Kshs. 171,168/-
- iv. Costs of the suit
- v. Interest on i), ii), iii) and iv) at Court rates from the date of judgment till payment in full.

Orders accordingly.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of July 2016**

**Nzioki wa Makau**

**JUDGE**