



**REPUBLIC OF KENYA**

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

**CAUSE NO. 270 OF 2013**

**DAVID OKOTH OLAYO.....CLAIMANT**

**v**

**LEAH MALOT.....RESPONDENT**

**JUDGMENT**

1. David Okoth Olayo (Claimant) sued Leah Malot (Respondent) on 20 August 2013 alleging that he was declared redundant by the Respondent but that she refused to pay him his terminal dues.
2. In a Response filed in Court on 1 October 2013, the Respondent contended that the termination of the Claimant's employment was lawful and that the claim was baseless, and that the reliefs sought were not available.
3. The Respondent also alleged that the Claimant did not surrender several tools of trade.
4. The Cause was initially heard on 29 July 2015, when the Claimant's evidence was taken.
5. The Respondent's case was scheduled for 23 November 2015, but on this date Mr. Akello for the Respondent sought an adjournment which was declined, and the Court ordered the Respondent's case deemed as closed.
6. However, towards the tail after completing the examination in chief of the Respondent, her counsel orally applied to be allowed to introduce further documents. The said documents were not in Court and the Court declined the invitation in a brief ruling rendered ex tempore.
7. It would therefore be appropriate for the Court to note that the conduct of the Respondent's counsel prosecution of the case was wanting in many respects, as evidenced by the record.
8. The Claimant filed his first submissions on 8 December 2015 (when Court ordered Respondent's case closed) and supplementary submissions on 12 August 2016, while the Respondent's submissions which should have been filed before 16 September 2016 were not on file by this morning.
9. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as *whether the Claimant was an employee of the Respondent, whether the termination of the Claimant's employment was unfair and appropriate remedies.*

**Whether Claimant an employee of the Respondent**

10. In paragraph 1 of the Particulars of the Memorandum of Claim, the Claimant pleaded that he was

employed by the Respondent as a Shop Assistant in 2006 and that he served until 28 June 2013.

11. The Respondent did not controvert the pleading in her Response, but in her testimony, she stated that the Claimant was an employee of Asis Photo Lab Ltd, of which she was one of the directors.

12. The Court however takes the Respondent's testimony with a pinch of salt.

13. One, there was no pleading at all traversing the Claimant's assertions as to who the employer was and the testimony was materially inconsistent with the pleaded case.

14. Case law is clear on the weight to be given to such testimony.

15. Two, and in my view, the Respondent as a director of Asis Photo Lab Ltd ought to have ensured that the Claimant was issued with a written contract in terms of sections 9(2) and 10(2) of the Employment Act, 2007, at least from the commencement of the Act on 2 June 2008.

16. No such written contract was issued or produced in Court, and therefore the Claimant cannot be faulted for bringing to Court the face behind the company alleged to have been his employer.

17. Three, section 2 of the Employment Act, 2007 extends the definition of an *employer* to include the agent, foreman, manager or factor of an employer/company.

18. If Asis Photo Lab Ltd exists in law and that was not proved, (the Court also notes that the Respondent produced a tenancy agreement between Benson Koin Morinke and Leah Malot t/a Asis Agrovot), for the purposes of the Employment Act, 2007, and considering that the Claimant was not issued with a written contract giving particulars of the employer, the Court finds that the Respondent was a proper and competent person to be sued as an employer.

### **Whether termination of employment was unfair**

19. The Claimant's pleaded case was that the separation was a case of redundancy.

20. In testimony, he stated that he was not given a letter or reasons for termination of employment. The termination was verbal.

21. The Respondent, in her pleadings gave several reasons for the separation and these all boil down to low business resulting in financial difficulties leading to the shop being closed down on account of rent arrears.

22. The facts as pleaded and repeated in testimony leave no doubt that the separation was not on account of any *misconduct, poor performance or physical incapacity* on the part of the Claimant.

23. It was involuntary on the part of the Claimant and therefore squarely falls under the category of redundancy.

### *Law on redundancy*

24. Section 40 of the Employment Act, 2007 has outlined certain conditions an employer ought to comply with before terminating an employee's service on account of redundancy.

### *Unfairness of the redundancy*

25. There is nothing on record to suggest that the Respondent complied with any of the conditions (written notice at least one month in advance to employee and the local labour officer, payment of not less than one month's wages in lieu of notice and payment of severance pay).

26. With the failure by the Respondent to comply with the statutory prerequisites, the Court is constrained to reach the conclusion that the termination of employment was unfair.

27. Before discussing appropriate remedies, the Court wishes to note that the Claimant reported a trade dispute to the Labour Officer and that after conciliation, the Labour Officer recommended that the Respondent pay the Claimant a total of Kshs 87,771/-, an amount which the Respondent failed to pay.

### **Appropriate remedies**

#### ***Wages for days worked***

28. The Claimant sought Kshs 1,763/- being the wages for days worked in June 2013.

29. The Respondent did not produce any evidence to show that the wages were paid.

30. The Claimant is entitled to those wages as of right.

#### ***Pay in lieu of notice***

31. The Respondent did not give the Claimant written notice of termination in terms of sections 35(1)(c) and 40(1)(a) & (f) of the Employment Act, 2007.

32. The Labour Officer also recommended payment of one month's wages in lieu of notice, and the Court agrees with the recommendation as it had a statutory basis.

#### ***Unpaid leave***

33. Unpaid leave of Kshs 27,768/- was also recommended by the Labour Officer, and the Court cognisant of the statutory role of the Labour Officer as a fact finder sees no reason to disturb the same.

34. In any case, the employment records were not produced by the Respondent and section 10(3) & (7) of the Employment Act, 2007 becomes implicated.

#### ***Service pay***

35. On account of service pay, the Claimant sought Kshs 46,280/- for the 7 years served.

36. This was also recommended by the Labour Officer.

37. The Court in this regard notes that there was evidence that the Claimant was a contributor to the National Social Security Fund would not be entitled to service pay.

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

38. An employee who leaves employment on account of redundancy is entitled to severance pay by operation of the law.

39. The Claimant did not plead severance pay, but it is a legal obligation upon the employer to pay severance pay. The Court has also considered that the Claimant is not entitled to service pay.

40. The Court would therefore award the Claimant the Kshs 46,280/- on account of severance pay.

#### ***Salary arrears***

42. In terms of salary arrears, the Claimant sought Kshs 189,982/-, and his testimony that at time wages were paid in instalments was not controverted by production of wage records.

43. The Claimant produced his own prepared summary of wage arrears and with no records from the Respondent, the Court would find in his favour.

### **Conclusion and Orders**

43. The Court finds and holds that the employment of the Claimant was unfairly terminated on account of redundancy and awards him and orders the Respondent to pay him

(a) Earned Wages	Kshs 1,763/-
(b) Wages in lieu of Notice	Kshs 11,460/-
(c) Unpaid leave	Kshs 27,768/-
(d) Severance pay	Kshs 46,280/-
(e) Salary arrears	Kshs 189,982/-
<b>TOTAL</b>	<b>Kshs 277,253/-</b>

44. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 7<sup>th</sup> day of October 2016.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant	Mr. Mugallo instructed by Kakai Mugallo & Co. Advocates
For Respondent	Mr. Akello instructed by A.K. Chepkonga & Co. Advocates
Court Assistant	Nixon