



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO1432 OF 2012**

**EPHANTUS NDIRANGU MURAGE ..... CLAIMANT**

**VERSUS**

**MEMUSI TRADING LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The issue in dispute is the service benefits owed to the claimant.
2. The Claimant filed his claim on 22<sup>nd</sup> August 2012. He was employed by the Respondent as the Finance and Operation manager earning Kshs.1, 44,752.00 per year from 10<sup>th</sup> December 2010. The employment was terminated on 19<sup>th</sup> March 2012 through redundancy.
3. The Claimant is seeking his service pay benefit based on his salary; interest earned on the same; the redundancy pay package paid on 28<sup>th</sup> May 2012 should attract interest and payment with respect to the loss of earning capacity.
4. The Claimant also filed a reply to the defence and stated that the sum of Kshs. 16,614.00 was not an overpayment but rather part of his dues.

**Defence**

5. In defence the Respondent case is that they settled the claimants' terminal dues, he was paid over and above what he was entitled to. The claim should be dismissed with costs.

**Submissions.**

6. Both parties agreed on the issues in dispute and that the only matter that remained unresolved was the issue of service pay. Submissions were therefore filed on this issue only.
7. The Claimant submitted that upon employment on 10<sup>th</sup> December 2010 he was terminated on grounds of redundancy on 19<sup>th</sup> March 2012. The terminal payments were;
  - a. Salary for days worked in April 2012 at Kshs.74,244.00
  - b. Leave due kshs.74,244.00
  - c. Severance pay Kshs.69,603.00

Total before tax Kshs.218, 091.00

Total after tax Kshs.158, 271

d. Refund of money deducted for a period of 6 months for pension Kshs.18,096

**Total dues Kshs.176, 367.00**

8. The Claimant also submitted that the service pay was not in accordance with the 15 days worked for each year. That this amount should have been computed at salary per month and for each year a pay equivalent to 15 days for each year served. That interest on this pay should be at court rate of 12% and the redundancy pay should also be paid with interest. That a sum of Kshs. 16,614.00 paid late should attract interest.

9. On their part, the Respondent submitted that they paid the Claimant all his dues. Such dues included;

- a. 18 days worked in April 2012;
- b. Accumulate leave;
- c. Severance pay for 15 days per year
- d. 6 months pension contributed.

10. The Claimant has relied on clause 9 of his contract of employment. That the service pay was paid in full despite the provisions of section 35(5) and (6) of the Employment Act where the employer is not bound to make such pay where statutory deduction are remitted. That the claim should be dismissed.

**Determination**

11. Termination of the Claimant was on grounds of redundancy. Section 40 of the Employment Act govern redundancy situations. The terminal dues payable in a redundancy situation are also outlined under section 40 (1) (e) to (f) thus;

*(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 to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.*

12. What is due in a redundancy situation is not similar to what is due in an ordinary termination case. In this case the employer has to pay;

- a. Pay leave due in cash;
- b. One months' notice pay;
- c. 15 days for each completed year worked as severance pay.

13. Such **severance pay** is not similar to **service pay**. One is due under section 40(f) while the other is due under section 35(5) of the Employment Act. One is paid due to redundancy while the other is due to termination where an employer was not making statutory remittances. Severance pay is payable in one situation only that of redundancy while service pay can be paid in both scenarios where there is a termination and the employer was not remitting the statutory dues as under section 35(6) of the Employment Act. In this case, the Claimant is seeking for *Service pay* that was not paid in accordance with the employment contract at clause 9. The Claimant has computed his dues with interest and late payments' interest. What is due is *severance pay* and not *service pay* and in the interests of justice, what will be computed is such *severance pay* as this is what is legally due in a case of redundancy.

14. The Claimant worked from the Respondent from 10<sup>th</sup> December 2010 to 19<sup>th</sup> march 2012. The

Claimant had served for 15 months.. Where the claimants' last salary paid was Kshs.120, 646.00, in a redundancy case such as this one and under the provisions of section 40 of the Employment Act; his dues were;

- a. One month notice pay at kshs.120, 646.00;
- b. Leave due computed at 16 days Kshs.24,129.00; and
- c. Severance pay at Kshs.60,323.00

**Total Kshs.205, 098.00**

15. These are the redundancy dues payable to the claimant. Where there were other entitlements such as pay for days worked, the pension contribution or other allowances, benefits or emoluments, these are his entitlements together with the redundancy package.

16. The Claimant stated that he received two cheques for Kshs.159, 753.00 and another for Kshs.16, 614.00 all being Kshs.176, 367.00. This Amount was less taxes and included other payments for days worked and pension contribution.

17. The balances of the monies paid must put into account the statutory provisions and dues under section 40 of the Employment Act being the sum of Kshs.205, 098.00 payable in a redundancy; what the Claimant was entitled to as of right upon termination due to redundancy; and less what was paid by the respondent.

**18. Section 40 of the Employment Act dues are kshs.205, 098.00.** These amounts includes notice pay that had not been earlier computed; it includes leave pay that had been overstated as well as severance pay that was also overstated. The dues should thus be;

- a. Redundancy package at Kshs.205,098.00;
- b. Salary for days worked Kshs.74, 244.00;
- c. Refund for pension deduction Kshs.18, 096.00;

**Total payable Kshs.297, 438.00**

Less paid amount before tax kshs.236, 187.00.

**Total due Kshs.61, 251.00**

19. The above dues are subject to the provisions of section 49(2) of the Employment Act. The computations above are subject to tax deductions. It is the duty of the employer such as the Respondent to refer all redundancy cases to the Labour Officer as under section 40(1) (a) for advice on the payments due to employees affected by such a process. Such an officer facilitates the computation and application of the law. Due to such non-reference, costs incurred by the Claimant herein are payable.

**Judgement is hereby entered for the Claimant for the sum of kshs.61, 251.00 less tax due. The Claimant is also awarded his costs herein.**

Delivered in open court at Nairobi and dated this 14<sup>th</sup> day of October 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant.....

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