



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**  
**CAUSE NO. 187 OF 2014**

(Before Hon. Lady Justice Maureen Onyango )

**FRANCIS RECODER AGUNDA .....CLAIMANT**

**VERSUS**

**GOGNI RAJOPE CONST. LTD & ANO. ....RESPONDENT**

**J U D G E M E N T**

In the Memorandum of Claim dated 5th August, 2014 and filed on the same day the Claimant alleges that he was employed by the 1st Respondent on 13th January, 2001 as a grader operator and served the Respondent with loyalty until, 12th August, 2013 when the Respondent terminated his employment on grounds that it was experiencing financial difficulties.

The Claimant further alleges that his salary for July and August, 2013 were not paid. He also claims that he was never paid house allowance or provided with accommodation for the entire period he worked for the Respondent. He further claims that he was never granted annual leave for the entire period of employment. He avers that the termination of his employment contravened the provisions of Section 41 and 47, was unlawful and unjustified. At the time of termination his salary was Shs.36,550 per month.

He seeks the following remedies:-

- |     |  |                        |                   |
|-----|--|------------------------|-------------------|
| (a) | Severance pay being                      | <u>25 x 36550 x 12</u> | = 365,500         |
|     |  | 30                     |                   |
| (b) | Three months' salary in lieu of notice   | 36550 x 3              | = 109,650         |
| (c) | Damages for wrongful dismissal           | (36550 x 12            | = 438,600         |
| (d) | Accumulated annual leave                 | 12 x 36550             | = 438,600         |
| (e) | Salary for the month of July and August, | 36550 x 2              | = <u>73,100</u>   |
|     | <b>Total</b>                             |                        | <b>=1,425,450</b> |

(f) The Respondent be ordered to reinstate the claimant in the position that he served in prior to his wrongful dismissal.

(g) Costs of this suit.

(h) Interest on (a) and (c) above.

The Respondent filed a reply to the Memorandum of Claim denying all allegations in the Memorandum of Claim including the jurisdiction of this court.

On the hearing date the court directed with the consent of the parties, that they proceed by way of written submissions.

In support of the claim the Claimant filed a letter of termination dated 12th August, 2013, and a demand notice dated 19th February, 2014.

For the Respondent, a list of documents was filed on 6th April, 2015 consisting of payslips for September, October, and December, 2012, February, April, and June, 2013, leave application and approval for 2010 and 2011.

For the Claimant it was submitted that the termination amounted to a wrongful redundancy as the Respondent failed to comply with the procedure set down in Section 40 of the Employment Act and therefore the Claimant is entitled to severance pay. It was further submitted that he is entitled to full compensation and pay in lieu of leave with exception of 2010 and 2011 for which leave forms were produced by the Respondent. It was submitted that he is entitled to pay in lieu of notice and salary for July and August, 2013 that was not paid.

The Claimant relied on Cause No. 203 of 2011; *Engineer Francis N. Gachuri v Energy Regulatory Commission*, and the case of *Hebson Ngaruiya Waigi v Equitorial Commercial Bank Ltd [2013] eKLR*. The first authority is on unfair termination while the second is on unlawful redundancy.

For the Respondent it was submitted that it released the Claimant when it was forced to slow down on the project for which the Claimant was employed and this was categorically communicated to the Claimant in the letter of termination. The Respondent submitted that what it did amounted to down sizing, restructuring or retrenchment, a term not defined in the Employment Act. The Respondent referred to the definition of restructuring as given in the Court of Appeal decision in the case of *William Jacks & Company MSDn Bhd v Balasingam [1997] 3 CIJ 235* and the decision of the Court of Appeal of New Zealand in the case of *Brighouse Limited vs Bilderbeck [1994] 2 ERNZ 243 [CA]*. The Respondent further submitted that courts have held that employers have a prerogative to make positions redundant to enhance operations and prevent closure and that Section 45(2) is intended to veil employers under such circumstances so that the same does not amount to wrongful dismissal. The Respondent further submitted that the remedy sought by the Claimant is only available where a labour officer has found as a fact that the termination was wrongful and that in the instant case there has been no involvement of a labour officer.

The Respondent submitted that the termination of the Claimant's employment was not clouded with malice or bad faith but was reasonable and fair and the Claimant's prayer in this regard must fail.

### **Issues for determination**

Parties framed issues for determination as follows:-

#### **For Claimant:**

1. Whether the termination of the Claimant was procedural in the circumstances.
2. Whether the Claimant was granted leave by the Respondent for the entire period that he served the Respondent.
3. Whether the Claimant was paid leave allowance for the entire period that he served the Respondent

#### **For Respondent:**

1. What was the Claimant's monthly pay?
2. Was the termination of the Claimant justified/or wrongful?
3. If (1) above is answered in the affirmative, under what heading is the claimant entitled to be compensated?
4. Is the Claimant entitled to severance pay? If so is any part of the claim statute barred?
5. Is the Claimant entitled to pay in lieu of notice for one or three months?
6. If the Claimant is awarded pay in Lieu of notice, is he still entitled to general damages for wrongful termination?
7. Did the Claimant take and proceed on annual leave? If so, is he entitled to claim the same and if not, is any part of the claim statute barred?
8. Is the Claimant entitled to salary for the months of July and August, in full.
9. What is the quantum, if at all, of the dues to the claimant?

I will address all the issues raised by the parties but not necessarily in the terms or order in which they have been raised.

The facts under which the Claimant left employment are not contested. The letter of termination expressly stated it was as a result of difficulties with payments that was being experienced in the road construction section under which the Respondent operated. The Respondent admits in its submissions that positions may become redundant due to restructuring or reorganisation. As pointed out by the Respondent, the term restructuring is not defined in the Employment Act. However, the Act defines "redundancy" in terms that encompass restructuring as follows:-

*“redundancy” means 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;*

Section 40 of the Act provides for the process of redundancy as follows:-

#### *Termination on account of redundancy*

*(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, 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.*

From the foregoing it is apparent that the Claimant was declared redundant, and that the Respondent did not comply with the provisions of Section 40. This therefore means that the termination of the Claimant's employment was unlawful to the extent that it was a redundancy that was not compliant with the procedure in Section 40(1) of the Employment Act in that neither the Claimant nor the Labour Officer were notified of the intended redundancy one month in advance or at all.

Having been declared redundant the Claimant is entitled to payment set out under Section 40 (1) as follows:-

- (i) Notification of one month before being declared redundant as provided under 40 (1) (a) as read together with (b) with copy to labour officer
- (ii) Notice of one (1) month or pay in lieu as provided under subsection (1) (f).
- (iii) Any leave due under subsection (1) (e)
- (iv) Salary for days worked
- (v) Severance pay as provided under subsection (1) (g).

The redundancy having been unlawful, it amounts to an unfair termination of employment as provided under Section 45 and the Claimant is entitled to compensation for unfair termination.

The Claimant has not proved any exceptional circumstances to warrant reinstatement. He has not contested the Respondent's reason that it was experiencing financial strain. Reinstatement under such circumstances would not be desirable or even feasible, taking into account the fact that the Respondent was unable to pay his July and August, 2013 salary, as admitted in the Respondents' submissions.

For the foregoing reasons I award the Claimant the following remedies based on his salary of Shs.31,500 as admitted in Respondent's submissions inclusive of house allowance Shs.5000:-

- (i) Pay in lieu of notification of redundancy..... Shs. 31,500
- (ii) Pay in lieu of termination notice ..... Shs. 31,500
- (iii) Salary for days worked in July, 2013.....Shs. 31,500
- (iv) Salary for days worked upto 12th August, 2013.....Shs..12,600
- (v) Severance pay at 15 days salary per year worked 2001 to 2013 (12 years) at (15,750 x 12)at 15,750 .....Shs.189,000

### **Annual Leave**

The Claimant submitted that he did not take leave for the entire period that he was in employment while the Respondent submitted leave application forms and leave approval letters for leave taken as follows:-

- (i) 1st December to 31st December, 2010
- (ii) 13th May, 2011 to 31st May, 2011

There is no evidence that the Claimant took any other leave other than the leave in the leave forms submitted by the Respondent.

The Respondent submits that the Claimant's prayer for leave is time barred with the exception of leave due from 2011.

Section 74(1)(f) of the Employment Act provides that *an employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars of an employees annual leave entitlement, days taken and days due specified in section 28.* The Section does not limit leave to any specific years and neither does Section 40 (1) (e). In any event leave is a continuing wrong and does not lapse so long as the claimant is still in employment and continues accumulating the same.

Section 10(7) provides that where an employer fails to produce records that are required to be kept under any law it shall be the onus of the employer to controvert the Claimant's allegations.

Section 10(6) provides that the employer shall keep records for 5 years after the date of termination of employment.

The employer having failed to prove that the Claimant took leave other than the 45 days taken in 2010 and 2011, is liable to pay the Claimant for leave not taken for the entire period of employment of  $(21 \times 12) = 252$  days less 45 leave days taken leaving a balance of 207 days. At the rate of basic salary of Shs.24,978 per month this amounts to Shs.172,348.20 which I award to the Claimant.

The termination having been unfair, and taking into account the length of service of the Claimant, the fact that there was valid reason to declare the Claimant redundant but the legal procedure was not followed and that the Claimant has been awarded severance pay, it is my opinion that compensation of 6 months salary is reasonable in the circumstances and I award the Claimant Shs.(31,500 x 6)= Shs.189,00/=.

The Respondent shall pay Claimant's costs

Dated, signed and delivered this 4th day of November, 2015

**MAUREEN ONYANGO**

**JUDGE**