



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**

**(BIMA TOWERS)**

**CAUSE NO. 53 OF 2014**

**ROBERT KARISA KADENGE**

**CLAIMANT**

**v**

**KENYA KAZI SERVICES LTD**

**RESPONDENT**

**JUDGMENT**

1. Robert Karisa Kadenge (Claimant) was initially employed by Tudor Security Services Ltd with effect from 21 May 2003 as a security guard before his services were transferred to Kenya Kazi Services Ltd (Respondent).
2. On or around 2 October 2013, the Respondent wrote to the Claimant to inform him that his services were being terminated on account of redundancy.
3. On 21 October 2013, the Respondent offered the Claimant a fixed term three month employment as a security officer at a salary of Kshs 5,218/- inclusive of house allowance. The Claimant accepted the offer by signing the employment letter.
4. On 27 February 2014, the Claimant filed a Statement of Claim against the Respondent contesting the termination through redundancy on 2 October 2013 and seeking Kshs 4,562,585/- on account of wrongful termination, severance pay, pay in lieu of notice and other dues.
5. The Respondent was served and on 28 May 2014 it filed a Memorandum of Defence. The Cause thereafter proceeded to hearing on 10 July 2014.

**Claimant's case**

6. The gravamen of the Claimant's case is outlined in paragraph 4 of the Statement of Claim that

*The Claimant avers that on 2 October 2013, the Respondent without any lawful cause and/or justification wrongfully and/or unlawfully and/or illegally and/or unprocedurally terminated the Claimant's employment.*

7. In testimony, the Claimant stated that he was employed by the Respondent in 2003.
8. Regarding the termination, the Claimant testified that he went on his annual leave on 2 September 2013 and resumed on 2 October 2013 and was issued with a redundancy letter. He stated that prior to the termination letter, he had not been given any notice or pay in lieu of notice and that he did not know the reasons for the redundancy.
9. On why the termination was unfair, the Claimant stated that after the redundancy, he was called by the Respondent and reengaged at a reduced salary and deployed to Mariakani.
10. He further stated that he was not paid any dues and that he was not a member of a Union.
11. In cross examination, the Claimant stated that 81 other employees were affected by the

- redundancy and that the reason given was that Respondent's clients had terminated assignments contracts. He stated that in his case he had been deployed to guard Atta Kenya Ltd and this client had also terminated its contract with the Respondent.
12. The Claimant denied attending a meeting on 2 September 2013 called between employees and the Respondent to discuss the redundancy.
  13. The Claimant also confirmed signing a new contract with the Respondent and that he was deployed to Mariakani and that he quit after only one month, because the salary was low.

### **Respondent's case**

14. The Respondent pleaded that due to consistent financial constraints over 2 years it had experienced massive loss of business through termination of guarding service contracts with clients such as Mbaraki Port Warehouses (K) Ltd, Premier Flour Mills, Spedag Interfreight (K) Ltd, Alpha Group of Companies, Symbion and Ideal Ceramics Ltd.
15. The Respondent called Richard Njoroge, its Human Resources Officer to testify. He stated the Respondent gave notices of redundancy to the Claimant, Ministry of Labour and Kenya National Private Security Workers Union (appendix 11).
16. The witness further stated that he had a meeting with the workers including the Claimant on 2 September 2013 and that the minutes of the meeting show that the Claimant was present (the minutes were not produced). During the meeting, the employees were informed that several of the Respondent's clients had terminated guarding service contracts and that those deployed to those clients would be affected.
17. He also stated that the employees were informed that if the situation improved they would be reengaged and that when this happened later in the month, some 56 employees including the Claimant were reengaged.
18. On the terminal benefits payable to the Claimant, the witness stated that the Claimant had not cleared with the Respondent and filed the present Cause before he was paid. But the benefits had been calculated (appendix 15). These were leave travelling allowance, pay in lieu of notice, days worked and longevity allowance which totaled Kshs 48,246/-.

### **Evaluation**

19. The Claimant's case as presented is one of unfair termination through redundancy. Section 40 of the Employment Act, 2007 is therefore clearly implicated.
20. Both parties agree that the Claimant was not a member of any union.
21. Termination through redundancy has been the subject of judicial debate in several recent cases. The jurisprudence is just starting to stabilise. Some of these are *Kenya Airways Ltd v Allied & Aviation Workers Union Kenya & Ar*, Nairobi Civil Appeal No. 46 of 2013, *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR and the decision of this Court in *KUDHEIHA v Mombasa Sports Club* (2014) eKLR.
22. In the *De La Rue* case the Court of Appeal held that sections 40(a) and 40(b) of the Employment Act, 2007 provide for two different kinds of redundancy notifications depending on whether an employee was a member of a union or not.
23. In the *Kenya Airways Ltd* decision at paragraph 40, Maraga J held that both substantial justification and procedural fairness are mandatory requirements in challenges to redundancy
24. In the instant case, it is agreed that the Claimant was not a member of a union. The notification therefore should have been sent to him directly and the local labour officer and in writing one month in advance, pursuant to section 40(1)(b) of the Employment Act, 2007.
25. Evidence before Court is that a meeting was held with the employees on 2 September 2013. But it is contested whether the Claimant was present in that meeting.
26. There is also evidence that a notice letter dated 1 September 2013 was written to the Kenya National Private Security Workers Union and copied to the County Labour Officer but this notice is not of much assistance to the Respondent's case because the Claimant was not a member of the Union.
27. The first and only written notification to the Claimant about the redundancy was the letter dated 2 October 2013 (appendix 13). The letter advised the Claimant his services were being terminated

- on account of redundancy with effect from 3 October 2013, the very next day.
28. The notice was clearly too short and not in conformity with the requirements of section 40 (1) (b) of the Employment Act, 2007.
29. In actual fact, the letter was not notifying the Claimant of the impending redundancy but declaring him redundant.
30. On this ground alone, the Court is satisfied that the termination of the services of the Claimant was unfair because of lack of adherence to the procedure stipulated by law. No proper notice was given.
31. Because of the conclusion reached, the Court is of the view that it need not examine whether the Respondent had valid and fair reasons to terminate the services of the Claimant on the ground of operational requirements or whether the Respondent has proved the reasons.
32. Before discussing appropriate relief, the Court wishes to note that the service agreement/contract offered to the Claimant for the period 21 October 2013 to 21 January 2014 was invalid in terms that it provided for a monthly wage of Kshs 5,218/- inclusive of house allowance. The prescribed minimum wage for Mariakani was Kshs 5,218/- exclusive of house allowance.

### **Appropriate relief**

#### ***One month salary in lieu of notice***

33. The Claimant sought Kshs 10,912/- as one month pay in lieu of notice. Pursuant to section 40(1) (f) of the Employment Act, 2007 the Claimant is entitled to this relief.

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

34. Under this head, the Claimant sought Kshs 62,953/- The formula of how the sum was arrived at was given in the pleadings. The Court would award the Claimant this relief pursuant to section 40(1) (g) of the Employment Act, 2007.

#### ***Lost salary upto retirement***

35. The Claimant sought Kshs 4,264,284/- under this head. No evidence was led as to the retirement age. No contractual or statutory foundation was laid for this head of claim.
36. Section 49(1) (b) of the Employment Act, 2007 is not applicable to support a claim for loss of income to retirement but rather to the wages which would have been earned during notice period.

#### ***Compensation***

37. The Claimant under this head of claim sought Kshs 224,436/- being the equivalent of twelve months gross wages as contemplated by section 49(1)(c) of the Employment Act, 2007.
38. This remedy is discretionary and the Court ought to consider any, some or all of the factors outlined in section 49(4) of the Act. The Claimant had served the Respondent for around 10 years. He testified that he has not secured alternative employment.
39. Considering the enumerated factors, the Court would award him the equivalent of five months gross wages as compensation. The Claimant was earning Kshs 12,549/- monthly on average. The Court would assess the compensation in the sum of Kshs 62,745/-.

#### ***Costs***

40. Parties did not file submissions as directed and in this respect the successful Claimant is denied costs.

### **Conclusion and Orders**

41. The Court finds and holds that the termination of the services of the Claimant through redundancy was unfair and awards him and orders the Respondent to pay him

a. One month salary in lieu of Notice	Kshs 10,912/-
b. Severance pay	Kshs 62,953/-
c. 5 months compensation	Kshs 62,745/-

TOTAL

**Kshs 136,610/-.**

42.The total award to attract interest from date of judgment until full payment.

43.Each party to bear its own costs.

**Delivered, dated and signed in open Court in Mombasa on this 8<sup>th</sup> day of September 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Kenga instructed by Kenga & Co. Advocates

For Respondent Mr. Molenje, senior Legal Officer, instructed by Federation of Kenya Employers