



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

**AT MOMBASA**

**CAUSE NO. 26 OF 2014**

**DAVID MWANIKI MALUKI .....CLAIMANT**

**VERSUS**

**SANDIES TROPICAL VILLAGE (T/A Palm Hotel (K) Ltd).....RESPONDENT**

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

**INTRODUCTION**

1. The claimant brings this suit seeking employment terminal dues plus compensation for unfair termination of employment by the respondent on 3/1/2014. In total the claimant prays for ksh.2,568,232 plus costs and interest.
2. The respondent has denied liability and averred that the termination of the claimant's employment was fair and all his terminal dues were paid to him.
3. The suit was heard on 25/6/2014 and 27/8/2014 when the claimant testified as CW1 while the defence called Huzefa Hamididin Mansurali and Emmanuel Gande Malingi as RW1 and 2 respectively.

**CLAIMANT'S CASE**

4. CW1 produced letter of appointment dated 23/4/2012 (exh.1) to prove that he was employed by the respondent for a fixed term contract starting 16/6/2012 to 16/6/2014. His salary was ksh.94644 per month. He worked until 3/1/2014 when he was served with letter (Exh.3) terminating his services effective from the said 3/1/2014. The reason for termination was economic situation. According to CW1 that was redundancy declared on him without following the lawful procedure and as such it amounted to unfair termination of his services. He was not served with any prior notice and he was also not afforded any hearing before the termination. As a result of the termination he was financially strained.
5. CW1 denied that the respondent was experiencing any financial crisis at the time of his dismissal. He blamed his sudden termination to his bad blood with Mr. Joseppe a colleague manager in the respondent. He contended that after his dismissal the respondent employed another officer at a higher pay than what CW1 was earning. In addition the respondent bought 2 new cars and increased the salaries for some staff including Mr. Joseppe.
6. CW1 prayed for one month salary in lieu of notice, severance pay for 2 years services,

unpaid bonus at 30% of salary, prorata leave for January 2014 plus 12 months gross salary for unlawful termination all totaling to ksh.2,568,232 plus costs and interest.

7. On cross examination by the defence counsel, CW1 denied that employees were terminated between 2012 and 2013 when he served as the head of HR for the respondent. He viewed his termination as declaration for redundancy because the reason cited was restructuring and economic hardship. He admitted that the employment contract provided for 2 months termination notice or salary in lieu of notice. He further admitted that he was paid 2 months salary in lieu of notice and signed clearance form.

### **DEFENCE CASE**

8. RW1 is the respondent's Assistant Financial Controller. He confirmed that the CW1 was the respondent's HR Manager between 2012 and 2013. according to RW1, the respondent experienced financial crisis after incurring losses of about ksh.60million. As a result the respondent laid off workers including CW1 who was also paid all his dues including accrued leave days. He however denied that CW1 was entitled to any bonus pay.

9. On cross examination by the claimant's counsel, RW1 maintained that CW1 was not entitled to any bonuses under the written contract. He confirmed that CW1 was laid off on 3/1/2014 as part of a big group which were terminated from 2012.

10. RW2 is the respondents HR Officer since 1-4-2014. Previously he was the Assistant HR officer since 2005. He confirmed that CW1 was his boss as the HR officer from 16/6/2012. He confirmed that CW1's contract of employment provided for 2 months termination notice or salary in lieu of notice under clause 5. According to RW2, CW1 was paid 2 months salary in lieu of notice and cleared with the company. RW2 confirmed that about 104 employees were terminated between 2012 and 2014 including th claimant. He maintained that CW1 was terminated fairly.

11. On cross examination by the claimant counsel, RW2 confirmed that he was not personally involved in the termination of CW1. He admitted that the termination of the CW1's employment was not according to the redundancy law under the Employment Act.

12. After the close of the hearing, both parties filed written submission of which the court had carefully considered together with the pleadings and the evidence tendered in making this decision.

### **ANALYSIS AND DETERMINATION**

13. It is not disputed that CW1 was employed by the respondent under a fixed term contract running between 16/6/2012 to 15/6/2014. It is also not in dispute that on 3/1/2014, the respondent terminated CW1's contract of service without any prior notice for the reason of economic hardship and restructuring. It is also not in dispute that after the said termination, CW1 was paid 2 months salary in lieu of notice. It is also not in dispute that the procedure for redundancy under the Employment Act was not followed in terminating the claimant's services on the grounds cited.

14. The issued for determination is whether the termination of the claimant's employment was unfair and whether the reliefs sought ought to issue.

### **Unfair termination**

15. The reason cited for the termination of CW1's employment was a good reason for declaring the CW1 redundant. He was however allegedly terminated under Clause 5 of the employment contract which is in relation to Section 36 of the Employment Act. This court holds the view that whenever an employer wishes to discharge employee under Section 36 of the said Act or as a right stipulated under a clause in the contract of employment, the employer need not cite a reason.

Likewise an employee is at liberty to terminate his services without citing reasons provided that he serves the requisite notice under Section 36 of the said Act or as per the terms of the contract of service. However the moment the employer cites a reason for the termination then an obligation is created to follow the statutory procedure either for redundancy under Section 40 of the Act or disciplinary hearing as provided for under Section 41 and 45 of the Act. In the present case the court is satisfied that the termination of the claimants services on ground of economic hardship was unfair because Section 40 of the Employment Act was not followed to formally declare CW1 redundant.

### **Reliefs awarded**

16. Under Section 49 of the employment Act, an unfairly terminated employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. In this case, CW1 admitted in evidence that he was paid 2 months salary in lieu of notice. He will therefore not get any other pay in lieu of notice as prayed. He also prayed for severance pay under Section 40(g) of the said Act but again the same is declined because the termination of his services was not under Section 40 of the Act. The prayer for bonus pay is also dismissed for lack of evidence and particulars. That prayer was not proved by written evidence which is the only evidence which can alter a written contract. The prayer for damages for loss of employment and money for family upkeep is also dismissed for lack of legal or contractual basis. It is not provided for under Section 49 of the Employment Act or in any other known law or judicial precedents in our jurisdiction or at all. The prayer for leave accruing after dismissal is also dismissed for lack of proper legal basis.

17. The claimant is however granted 3 months gross salary being ksh.283,932 as compensation for the unfair termination. The reason for granting only 3 months pay is because the claimant's contract of service was due to lapse in 5 months time were it was not for the unfair termination. There was no guarantee that the employer was to extend the contract beyond 15/6/2014. The court has considered the fact that the claimant was paid 2 months gross salary in lieu of notice which when added to the 3 months gross pay awarded now total to 5 months gross pay. This award is fair and reasonable because in other words it puts the claimant to the financial position he would have been had he worked for the unexpired period of the contract.

### **DISPOSITION**

18. For the above stated reasons, judgment is entered for the claimant against the respondent for ksh.283,932 plus costs and interest.

Orders accordingly

**Dated, signed and delivered this 7<sup>th</sup> November 2014.**

**O. N. Makau**

**Judge**