



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

**AT MOMBASA**

**CAUSE NO. 198 OF 2014**

**MAONYESHO KARISA KASHANGA .....CLAIMANT**

**VERSUS**

**KENYA KAZI SERVICES LTD .....RESPONDENT**

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

**INTRODUCTION**

1. This is a claim for ksh.4,835,255 being accrued termination dues plus compensation for unfair termination of the claimant's employment by the respondent on 2/10/2013.
2. The respondent has denied liability for unfair termination and averred that the claimant was lawfully declared redundant after the respondent massively lost business.
3. The suit was heard on 15/9/2014 and 14/10/2014 when the claimant testified as CW1 and the respondent called Richard Moronge Makori as RW1. Before the suit was heard the claimant withdrew the claim for future earnings being ksh.4,446,960.

**CLAIMANT'S CASE**

4. CW1 was employed by the respondent on 19/1/2002 as a Guard on casual basis vide a letter dated the same date. He worked continuously until 2/10/2013 when he was terminated on ground of redundancy. On the said date he had just finished an unpaid leave. After the going home redundancy, he was offered a fresh contract for a 3 months contract on new terms of ksh.5000 salary per month but he declined. He produced letter for redundancy and re-employment as exhibits 4(a) and (b) respectively. He then served a demand letter on 12/3/2014 followed by this suit.
5. According to CW1 his redundancy was unlawful because he was never served with any redundancy notice and no evidence was shown to prove that the labour officer and CW1's union had also been served with the termination notice. CW1 contended that he was stationed at the Head Office in Mombasa and as such he should not have been dismissed with others in other stations where business was lost. He prayed for annual leave earned in 2012 and 2013 because he applied for but never went due to pressure of work. He admitted that although he was later send on leave by the respondent, but the same was unpaid. He prayed for severance pay for 11 years served at the rate of 15 days per year. He prayed for compensation for unfair and unlawful termination. He further prayed for salary arrears arising out of alleged underpayment of salary during his service.
6. On cross-examination by the defence counsel, CW1 maintained that according to the Guard book at the respondent's office, his work station was at the main office. He however admitted that he

could be occasionally be assigned relieve duties. CW1 further admitted that he was a member of the Kenya National Private Security workers Union (union) which represented his interests. He denied ever agreeing to an unpaid leave. CW1 maintained that his union was never served with a notice for redundancy dated 1/9/2013. He denied that he was paid for overtime every month. He explained that when he went for his separation dues, he was told that there was no money and directed to wait. He maintained that although he applied for leave on 11/4/2013, he never went.

### **DEFENCE CASE**

7. RW1 is the HR officer for the respondent. He admitted that CW1 was employed by the respondent earning ksh.10912 basic salary plus 1637 house allowance. RW1 explained that before 3/10/2012, CW1 was temporarily stationed at the Head Office as security guard but could be posted to other stations like Bamburi cement. When the contract with Bamburi Cement ended on 20/9/2012 he continued working at the respondents office to a whole year. After the termination of the Bamburi Cement contract, the respondent sent all the affected guards on one month unpaid leave after negotiating with their union. Thereafter the guards were posted to other stations but CW1 remained at the Head Office to provide security but occasionally was send for relieve duties.
8. According to RW1, more business was lost from May 2013 and that forced the company to declare CW1 redundant because there was no position in the field stations where to send him. RW1 contended that the union and the labour officer were served with redundancy notice dated 1/9/2013 which he produced in court. He maintained that after serving the notice, RW1 met with the union and signed a memorandum of understanding on 3/9/2013 which he produced in court. Thereafter CW1 was served with a letter dated 2/10/2013 for termination of his services which offered to pay him one month salary in lieu of notice but CW1 refused to collect as other guards. According to RW1, CW1 was laid off after following the due process. He admitted that CW1 was entitled to severance pay but not compensation because he was never dismissed. He further admitted that CW1 was entitled to leave earned for the 10 moths worked in 2013 but denied the claim for leave for 2 years.
9. On cross examination by the claimant's counsel, RW1 contended that he explained the reason for the termination to the CW1. He maintained that prior to the termination letter to the CW1, he had personally served a notice to his union and the labour officer. He however produced no evidence to prove service of the notice on the union and the labour officer after being challenged to prove. He could also not produce any minutes of the meeting with the union either or after the alleged notice of redundancy.
- 10.As regards the leave applied by CW1 for 3/10/2012 -2/11/2012, RW1 confirmed that the same was unpaid leave but it was compensated for by cash in June 2013. RW1 could not however prove the said allegation upon being challenged to produce prove of such payment. He however explained that the leave for 2013 was factored in the calculation for the separation dues. He admitted that CW1 was entitled to payment in lieu of notice under the law upon being laid off. RW1 contended that although the payslips for September 2013 showed that his taxable salary was ks. 18000, that was an error because his correct salary was ksh. 11179 gross. He admitted that CW1 was officially stationed at the Head Office but could occasionally be assigned relieve duties outside. He also admitted that the people who were affected by the redundancy were those working in the outer stations due to loss of business not at the Head Office. He maintained that CW1 was offered new contract to work outside Mombasa at Mariakani but at new lower rate but he declined.
- 11.After the close of the hearing the parties filed written submissions which the court has considered in this judgment.

### **ANALYSIS AND DETERMINATION**

- 12.There is no dispute that CW1 worked for the respondent from 2002 to October 2013 as a guard stationed at the Head Office Mombasa. There is also no dispute that CW1 was laid off on ground of low business. The issues for determination are whether the said redundancy amounted to unfair termination and whether the relief sought ought to issue.

## **UNFAIR TERMINATION**

13. The claimant believes that his employment was unfairly terminated because his trade union and the labour officer were not served with a redundancy notice. Secondly he believes that it was unfair because he was not stationed in the field stations where business was lost, but at the Head Office where operations continued as usual. On the other hand the respondent has not proved service of the redundancy notice to the labour officer and the claimant's trade unions. The court expected some evidence either in the form of a copy with an acknowledgment stamp or a duly signed delivery book or a certificate of postage or courier service. In addition even if service of notices was to be presumed, the selection of the claimant for lay off was not done fairly. If the notice dated 1/9/2013 is anything to go by the selection criterion was captured in the last paragraph as follows

**“ the criterion for selecting the affected personnel is 'those whose positions have been terminated by each respective client”.**

The evidence on record is that CW1 was officially stationed at the Head Office Mombasa and as such his position was not affected by the termination of business by any client. He should therefore not have been laid off with the personnel in the field station. Consequently, his discharge through redundancy was rendered unfair termination for want of due process. It is now widely agreeable in our jurisdiction that when redundancy is done in breach of procedural fairness provided for under Section 40 of the Employment Act, that amounts to unfair termination.

## **RELIEFS**

14. Under Section 49 of the said Act, an unfairly terminated employee is entitled to compensation for unfair termination, pay in lieu of notice plus any accrued employment benefits. In the present case, CW1 is awarded one month salary in lieu of notice being Ksh.12629 as per the payslip produced by the defence. He will also get 12 months gross salary for unfair termination being ksh. 151,548. He will also get 2 years leave, the equivalent of the unpaid leave given in October 2012 and 2013 being the salary for the said two months that is to say ksh.25,258. The claim for severance pay is dismissed for the reason that the alleged redundancy has herein above been declared unfair termination. Even if the claimant intended to pray for service pay, the same still fail because he was a member of the NSSF and therefore disqualified from such remedy by Section 35(6) of the Employment Act.

## **DISPOSITION**

For the reasons stated above, judgment is entered for the claimant in the sum of ksh. 189,425 plus costs and interest.

**Dated, signed and delivered this 10<sup>th</sup> December 2014.**

**O. N. Makau**

**Judge**