



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**CAUSE NO. 158 OF 2012**

**KOMBO KAI MTORO**

**CLAIMANT**

v

**PANAL FREIGHTERS LTD**

**RESPONDENT**

**JUDGMENT**

1. Kombo Kai Mtoro (Claimant) filed a Memorandum of Claim on 20 December 2012 against Panal Freighters Ltd (the Respondent) and the issues in dispute were stated as *unfair termination of Mr. Kombo Kai Mtoro from employment by the Respondent on account of redundancy and refusal to pay the rightful terminal dues.*
2. The Respondent filed its Statement in Reply on 23 January 2013 and I heard the parties on 22 May 2013.
3. The Claimant had initially filed the Claim in his own name but in the course of time the firm of Siocha Okemwa & Co. Advocates came on record for him.

**Agreed facts/issues**

4. It is agreed by both parties in the pleadings and during testimony that the Claimant was employed by the Respondent on 23 January 2007 as a port clerk at a salary of Kshs 12,000/- per month and that at the time of separation this had increased to Kshs 18,000/- per month.
5. The parties also agreed that the Claimant is entitled to Kshs 4800/- as wages worked for in June 2011, severance pay of Kshs 36,000/- for the four years served and also to be issued with a Certificate of Service.
6. Because of the agreement by the parties I entered an interim award in favour of the Claimant as stated in paragraphs 4 and 5 herein above.

**Disputed issues**

7. The disputed issues as agreed and presented by the parties at the commencement of the hearing were
  - i. Compensation for unfair termination
  - ii. Accrued leave days
8. The Claimant mentioned in the pleadings that he was seeking 12 months' maximum compensation for loss of employment but the pleadings did not challenge the termination as being unfair or unlawful.
9. But because the parties agreed on these issues I will deal with the disputed issues individually and at the same time make reference to the parties' evidence regarding the same and the applicable

law.

### **Compensation for unfair termination**

10. It is not disputed by the Respondent that the Claimant was terminated through a letter dated 8 June 2011 and marked as *KKM 3* in the Statement of Claim. The reason given in the letter for termination was internal restructuring process.

11. It is obvious to me that the Claimant was being declared redundant. Section 2 of the Employment Act defines redundancy to mean

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 an 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

12. The substantive provision of law governing redundancies is section 40 of the Employment Act. The section has set out the procedure an employer should follow when terminating the services of an employee through redundancy. Without repeating the conditions verbatim, an employer is expected to

- i. Notify the trade union of which the employee is a member, or the employee personally in writing and the local Labour Officer, at least a month in advance
- ii. Have regard to seniority in time, skills, ability and reliability of the employee to be affected by the redundancy
- iii. Consider any terms in a Collective Bargaining Agreement on terminal dues so as not to place a non-union employee at a disadvantage
- iv. Pay outstanding leave in cash
- v. Pay equivalent of one month wages in lieu of notice
- vi. Pay severance pay at a rate not less than 15 days pay for each completed year of service

13. The Respondent's only witness, Saada Musa admitted in cross examination that it did not inform the local Labour Officer about the declaration of redundancy of the Claimant. It is also notable that the termination letter was not copied to the local Labour Officer.

14. That the Respondent did not comply with one of the procedures set out is beyond doubt. Therefore the termination was procedurally unfair.

15. In my view, termination of employment through redundancy is also subject to the fair termination provisions of section 45 of the Employment Act. A termination through redundancy is envisaged in section 45(2)(b)(ii) of the Act, in that it is based on the operational requirements of an employer and therefore an employer must prove that the operational requirement is both valid and fair.

16. In the instant case no attempt was made by the Respondent to prove the validity and fairness of the operational requirements. The Court was simply informed that the retrenchment was necessary to cut costs and the Respondent had to lay off some employees to stay afloat and further that the Respondent moved offices from the town centre to a yard near Port Reitz. The Respondent needed to do more. It could have produced financial statements or evidence to show it was not making ends meet. The Respondent in my view failed to prove the reasons for the termination through operational requirements and therefore the termination through redundancy was also substantively unfair.

### **Appropriate relief**

#### **Compensation**

17. The Claimant sought the maximum 12 months' compensation. The award of the compensation though discretionary must be made on the basis of the 13 factors set out in section 49(4) of the Employment Act. The parties have already agreed on payment of severance pay. The Claimant's gross monthly earnings at the time of redundancy was Kshs 21,200/-. In the circumstances I would

award the Claimant the equivalent of one months' gross pay as compensation in the sum of Kshs 21,200/-

### ***Accrued/pending leave days***

18. The Claimant sought Kshs 60,375/- being accrued/pending leave days from 16 May 2011 to 25 July 2011 less 24 days he took before the termination. The Respondent had offered to pay Kshs 31,714/- being 37 days leave outstanding.
19. The Respondent's letter to the Claimant dated 12 May 2011 indicated that he had 59 pending leave days. It is not disputed that the Claimant proceeded on leave from 16 May 2011. He was terminated on 8 June 2011. Assuming, as is the practice that leave days are computed using working days, the Claimant had been on leave for some 17 days out of the 59 days. He had a balance therefore of 42 days. I have omitted 1 June 2011 because it was a public holiday.
20. I would award the Claimant payment of cash in lieu of the 42 leave days. To get the equivalent cash value of the 42 days I must get the daily rate of the Claimant. The formula to arrive at the daily rate through practice and custom is **Basic Salary + House Allowance = Daily Rate X y**, (y) **26** being the agreed number of leave days. Using this formula the daily rate of the Claimant was Kshs 796/- and this multiplied with 42 days give the equivalent of Kshs 33,438/-.

### **Conclusion and Orders**

21. I do find and hold that the termination of the Claimant through declaration of redundancy was both procedurally and substantively unfair and award and order the Respondent to pay him

- |                                       |               |
|---------------------------------------|---------------|
| a. One month salary in lieu of Notice | Kshs 18,000/- |
| b. Earned wages for June 2011         | Kshs 4800/-   |
| c. Severance pay for 4 years          | Kshs 36,000/- |
| d. One month compensation(gross)      | Kshs 21,200/- |
| e. Accrued leave                      | Kshs 33,438/- |

TOTAL

**Kshs 113,438/-**

22. There will be no order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 28<sup>th</sup> day of June 2013.**

**Justice Radido Stephen**

**Judge**

**Appearances**

Mr. Okemwa instructed by Siocha Okemwa &

Co. Advocates

for Claimant

Ms. Kayatta instructed by

M.K. Mulei & Co. Advocates

for Respondent