



## REPLIC OF KENYA

### IN THE INDUSTRIAL COURT OF KENYA IN NAIROBI

CAUSE NO. 1235 OF 2013.

**EDWARD PATRICK MBOGO ..... CLAIMANT**

**VERSUS**

**KENCALL EPZ LIMITED ..... RESPONDENT**

### JUDGEMENT

1. This claim was filed on 6<sup>th</sup> August 2013 by the claimant Edward Patrick Mbogo for unlawful declaration of redundancy or unfair termination by the respondent Kencall EPZ Limited. The respondent was served on 7<sup>th</sup> August 2013, they acknowledged receipt of the same but there was no appearance or defence filed. At the hearing the court being satisfied that the respondent was properly served and failed to enter appearance or file a defence or attend at the hearing, proceeded with the claimant's hearing.
2. The claimant stated that on 6<sup>th</sup> January 2010 he was employed by the respondent as an Agricultural Expert earning Kshs.60, 000.00. That he had earlier started work with the respondent from 17<sup>th</sup> October 2009 in the Agriculture Project of the respondent and in 2010 he was promoted to the position of team leader but was terminated on 23<sup>rd</sup> August 2012 on the basis of redundancy and was issued with a Certificate of Service. He was told to go later for his dues and was issued with a letter that indicated the dues owed to be kshs.527, 868.44 that was to be paid in three instalments in May 2013 at kshs.200, 000.00, Kshs.200, 000.00 was to be paid in June 2013 and the balance was due in July 2013 but this was not honoured by the respondent.
3. In August the claimant came to court under a certificate of urgency and his claim is for pay due in August 2012 at kshs.53, 935.00, accrued house allowance that was due to him as he was only paid a salary that was not inclusive of housing, severance pay, three months pay in lieu of notice, annual leave for 2012, travel allowance for 2013 and compensation for 12 months on the basis that he was unfairly terminated. He is also seeking general damages due to what he has gone through commuting from his rural home to Nairobi to follow up on his dues. Before he was terminated he had started building a house for his family but he was forced to stop due to his termination or being declared redundant. He was forced to move his family since he did not have a job.
4. The claimant is now seeking to be reinstated back to his position without loss of benefits and in the alternative he should be paid for days worked at kshs.53, 395.00
  - i. *Accrued house allowance at kshs.288, 000.00*
  - ii. *Gratuity/severance pays at kshs.127, 409.10*
  - iii. *3 months pay in lieu of notice at Kshs.207, 000.00*
  - iv. *Annual leave for 2012 at kshs.66, 889.00*
  - v. *Leave travelling allowance for 2013 at Kshs.5, 000.00*

- vi. *Unpaid arrears at Kshs.486, 838.00*
- vii. *12 months compensation at kshs.828, 000.00; and*
- viii. *General damages emoluments at Kshs.288, 000.00*

*All amounting to kshs.3, 786,084.00.*

5. Part of the documents attached to the claimant's claim is his letter of employment that spelt the terms for his engagement by the respondent as Agricultural Expert from 6<sup>th</sup> January 2010 with the applicable terms outlined therein. This letter is signed by George Aseno for the respondent and the claimant has signed in acceptance of the terms of his engagement by the respondent and dated this on 6<sup>th</sup> January 2010. There is no record of the reason as to why the claimant was terminated by the respondent. This was not attached to the claim but on 14<sup>th</sup> September 2012, the respondent wrote a letter for the claimant indicating that he was their employer from 17<sup>th</sup> October 2009 to 23<sup>rd</sup> August 2012. In evidence the claimant stated that he was declared redundant and or unfairly terminated. Further to the above, on 19<sup>th</sup> April 2012, the respondent wrote to the claimant an outline of his terminal dues that included gratuity/severance pay, which infer that this was case for redundancy where gratuity and severance pay become payable.
6. This claim is filed by the claimant herein and has the duty to prove his case based on which this court will assess and award. In the respondent letter dated 19<sup>th</sup> April 2013, in calculating the claimant's terminal dues, it is noted that his termination was due to redundancy. There was no clear evidence to indicate there was an unfair process used against the claimant in the process of redundancy as governed by section 40 of the Employment Act. Even where there was a case of unfair termination, the duty was on the claimant to show that his termination was not valid, it was unreasonable and the respondent did not follow due process as under section 41 and 45 of the Employment Act. These were not established at all.
7. Further to the above, the claimant stated that the respondent was to make payments of his terminal dues as outlined in their letter dated 19<sup>th</sup> April 2013, he was to be paid kshs.200,000.00 in May 2013, 200,000.00 in July 2013 and the last payment of Kshs.127,838.00 being due in August 2013. This claim was filed under Certificate of urgency on 6<sup>th</sup> August 2013. Despite the respondent undertaking to pay this amount, they seem to have defaulted forcing the claimant to come to court but part of the labour relations process involve a party making a demand notice to the other party before coming to court. This is to help resolve labour disputes as amicably as possible and to give the other party a fair chance to make good a claim before proceeding to court. There was no demand notice made to the respondent even where there was an undertaking to pay. The claimant on the due date for the last payment of August 2013 waited for only 6 days and filed this matter under Certificate of Urgency.
8. At the hearing it emerged that the claimant had occasion to consult with one Dishon Angoya who drafted the pleadings for him and paid Kshs.3, 000.00 for this service. In essence the claimant did not serve a notice upon the respondent nor did he give reasonable time to the respondent to pay the due amounts as already agreed.
9. On the claims as outlined, the claimant had a letter of appointment that outlined his terms of employment. There was no provision or allowances due to him under his contract for housing, gratuity and or severance pay is provided for under the respondent undertaking and termination notice was for one month or pay for one month based on the terms of the letter of appointment, there was no cogent evidence to indicate that this notice was not issued before the declaration for redundancy. Leave pay was included in the terminal dues letter and there was no provision for leave travel allowance as under the letter of appointment. Where there was a policy to pay for this allowance, this evidence was missing. Unpaid salaries are admitted as Kshs.5, 161.29 the claimed amount at the hearing of Kshs.486, 838.00 is not reflected as how it became due in view of the admitted amounts.
10. Where there is no proof of unfair termination or good reasons as to why this court should make provisions for compensation and payment of general damages, this court will not grant. There was no clarity in this claim that the claimant was unfairly terminated as outlined under section 45 of the Employment Act, the general claim that this was a case of redundancy and or unfair termination without any outline as to how this arose, make it hard for this court to award in this

regard. General damages will also not be awarded where this was not proved as to how it arose and linked to the respondent. The claim that the claimant has been forced to stop the construction of his house and has moved his family from where they used to reside, cannot be found to have been caused by the respondent, the employment letter that the claimant got upon his employment by the respondent spelt clearly that he could be terminated upon issuance of a one month notice. He cannot therefore attribute his current suffering to the respondent. Even where this is indirectly related, the claimant has not shown any effort in mitigating his circumstances that has been frustrated by the respondent. This would will therefore not award compensation or general damages as claimed.

11. This was a case of redundancy as indicated by the letter dated 19<sup>th</sup> April 2013 from the respondent. The claimant equally in evidence stated this much. In such circumstances, to order a reinstatement would be a miscarriage of the very principle that there ought to be fair labour practices between parties to an employment relationship. The claimant did not show that the respondent circumstances have improved from the last date his position was declared redundant nor has he shown that there is a vacancy available the can fit his credentials. It will therefore be a miscarriage of justice to order a reinstatement.

**In conclusion, this claim must fail and is hereby dismissed in its entirety. The amount of Kshs. 3,000.00 deposited herein by Dishon Angoya be released tot eh claimant in costs.**

**These are the orders of this court.**

**Delivered in open court and dated at Nairobi this 30<sup>th</sup> day of October 2013.**

**M. Mbaru**

**Judge**

**In the presence of**