



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO 243 OF 2018**

**JAMES MGHANGA INDUSIA.....CLAIMANT**

**VERSUS**

**NEW GENERATION SELF HELP SERVICE STORE LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 17<sup>th</sup> April 2018, the Claimant filed a claim against the Respondent, seeking relief for unfair termination of employment as well as payment of terminal dues. The Respondent responded by way of a Response and Counterclaim dated 3<sup>rd</sup> August 2018 and filed in court on 10<sup>th</sup> September 2018. The Claimant filed a Reply to the Respondent’s Response and Defence to Counterclaim on 17<sup>th</sup> October 2018.
2. The matter proceeded to full hearing, where the Claimant testified on his own behalf and the Respondent called its Transport Manager, George Mbogho Shaghasha and Human Resource Officer, Esther Njeri Samba. Both parties further filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a Driver from 14<sup>th</sup> April 2017 until 13<sup>th</sup> December 2017, when his employment was terminated. He gives his monthly salary as Kshs. 18,871.
4. The Claimant claims that on 13<sup>th</sup> December 2017, he reported to work as usual but his employment was terminated, without a termination letter.
5. The Claimant pleads that the termination of his employment was unlawful and unfair, as there was no valid reason for it and he was not given an opportunity to be heard.
6. The Claimant tabulates his claim as follows:

- a. 1 month’s salary in lieu of notice.....Kshs. 18,871
- b. 12 months’ salary in compensation.....226,452
- c. Deducted penalties.....14,405
- d. Certificate of Service
- e. Costs plus interest

**The Respondent’s Case**

7. In its Response and Counterclaim dated 3<sup>rd</sup> August 2018 and filed in court on 10<sup>th</sup> September 2018, the Respondent admits having employed the Claimant as a Driver, at a gross monthly salary of Kshs. 22,000 which translated to a net salary of Kshs. 18,871.

8. The Respondent denies terminating the Claimant's employment on 13<sup>th</sup> December 2017 without a termination letter, and states that if at all there was a termination, it was effected during probation as the Claimant had served for only 8 months.

9. The Respondent avers that on 13<sup>th</sup> December 2017, the Claimant had been tasked with transporting goods from Mombasa to Nairobi and upon reaching Voi, he carelessly and negligently parked motor vehicle registration number KBJ 006P trailer ZC 7101, in a trench next to the Respondent's office. The Respondent adds that the goods container had not been locked to the trailer as required.

10. The Respondent states that it had to call a breakdown and crane to pull the trailer from the trench and to stabilize and lock the container.

11. The Respondent further states that as a result of the Claimant's negligence, which exposed the Respondent to risks and expenses, the Claimant was summoned to the Human Resource Office and asked by the Human Resource Officer, one Lynn Mwende David to wait for a show cause letter, which was being typed but the Claimant left.

12. The Respondent claims that the show cause letter was not issued to the Claimant because by the time it was ready, he had left. The Respondent therefore denies terminating the Claimant's employment and accuses him of leaving without informing anyone where he had gone.

13. By way of counterclaim, the Respondent claims the following from the Claimant:

- a. Kshs. 12,000 being breakdown charges;
- b. Kshs. 160,000 for crane services;
- c. Kshs. 18,871 being 1 month's salary in lieu of notice.

### **Findings and Determination**

14. There are three (3) issues for determination in this case:

- a. Whether the Claimant has made out a case of unlawful termination;
- b. Whether the Respondent has proved its counterclaim against the Claimant;
- c. Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

15. The Claimant accuses the Respondent of unlawfully terminating his employment verbally, without notice. In denying this claim, the Respondent states that the Claimant himself left employment without notice, after realising that the Respondent was preparing to initiate disciplinary proceedings against him. In this regard, the Respondent states that the then Human Resource Officer, Lynn Mwende David, asked the Claimant to wait for a show cause letter, which was being typed but the Claimant left and did not return.

16. Lynn Mwende David was not called as a witness and the account of events attributed to her remained hearsay with no probative value. The Respondent's Transport Manager, George Mbogho Shaghashi told the Court that after the incident of 13<sup>th</sup> December 2017, he sent the Claimant to the Human Resource Office and assigned the truck to another driver. He added the Claimant was not heard because he did not wait. There was however no evidence of any efforts made by the Respondent to summon the Claimant for disciplinary proceedings.

17. As it stands, the only evidence available is that the Claimant's employment was terminated without recourse to due process as provided under Section 41 of the Employment Act. Because the Claimant had no chance to respond to the accusations made against him, at the shop floor, the said accusations remained unproved and unverified, meaning that there was no valid reason for the termination as required under Section 43 of the Act.

### **The Respondent's Counterclaim**

18. By its counterclaim against the Claimant, the Respondent seeks the sum of Kshs. Kshs. 12,000 being breakdown charges and Kshs. 160,000 for crane services. In addition, the Respondent asks for Kshs. 18,871 being 1 month's salary in lieu of notice.

19. In support of its counterclaim the Respondent produced two receipts dated 13<sup>th</sup> December 2017 and 15<sup>th</sup> December 2017. However, since the charge of negligence levelled against the Claimant was not proved, these expenses cannot be assigned to him. In similar fashion, the allegation that the Claimant left employment without notice was not proved and the counterclaim for 1 month's salary in lieu of notice is therefore not sustainable.

20. In the result, the Respondent's counterclaim against the Claimant fails and is dismissed.

### **Remedies Available to the Claimant**

21. Before determining the remedies available to the Claimant, I need to deal with a preliminary issue raised by the Respondent; that because the Claimant was still on probation at the time of termination, he cannot lay a claim for unlawful and unfair termination of employment.

22. I will say two things on this issue; first, a probationary contract as defined by Section 2 of the Employment Act ought to be in writing and no such contract was placed before the Court. Second, in a recent decision by a three-judge bench of this Court (**Mbaru, Abuodha and Ndolo JJ**) in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR it was held that Section 42(1) of the Employment Act, which excludes employees serving probation from the procedural fairness safeguards of Section 41 of the Act, is inconsistent with Articles 41 and 47 of the Constitution hence null and void.

23. Pursuant to the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's short employment stint but also the finding that the employment came to an end as a result of the Respondent's unlawful conduct.

24. I further award the Claimant one (1) month's salary in lieu of notice.

25. The claim for deducted penalties was not proved and is disallowed.

26. Finally, I enter judgment in favour of the Claimant as follows:

a. 6 months' salary in compensation.....Kshs.113,226

b. 1 month's salary in lieu of notice.....18,871

**Total.....132,226**

27. This amount will attract interest at court rates from the date of judgment until payment in full.

28. The Claimant is also entitled to a Certificate of Service plus costs of the case.

29. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ngonze for the Claimant

Mr. Mathare for the Respondent