



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**

**CAUSE NUMBER 391 OF 2018**

**BETWEEN**

**MOHAMMED ALI SAID aka MWARABU.....CLAIMANT**

**VERSUS**

**SIMBA COACH LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Otieno Osewe & Company Advocates, for the Claimant*

*Sherman Nyongesa & Mutubia Advocates, for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim, on 12<sup>th</sup> June 2018. He states, he was employed by the Respondent Transport Company, as a Ticketing Clerk, in the year 2000. Around January 2018, his duty of ticketing was assigned to Bus Conductors. He was left with no role. He claims he was constructively and unfairly dismissed. He reported the grievance to the Labour Office. The Respondent refused to comply with the directives of the Labour Office. He was denied salary for January 2018; accrued annual leave over a period of 18 years; service; and public holidays' overtime. His salary was underpaid. His contract was terminated unfairly. He asks the Court to grant Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 19,909.
- b. January 2018 salary at Kshs. 19,909.
- c. Leave for 18 years at Kshs. 289,548.
- d. Service at 15 days' salary for each complete year of service at Kshs. 206,820.
- e. Underpayment of salary, May 2013 to February 2018, at a total of Kshs. 501,554.
- f. Public holidays 2000 to 2018 at a total of Kshs. 32,142.
- g. 12 months' salary in compensation for unfair termination at Kshs. 238,908.

Total...Kshs. 1,308,790.

- h. Declaration that termination was unfair.
- i. Costs.

j. Any other suitable relief.

2. The Respondent filed its Statement of Response on 19<sup>th</sup> July 2019. Its position is that the Claimant was at all times engaged as an independent contractor, called 'manamba,' [a slang term equivalent of a tout]. He was paid by the Respondent for every passenger or luggage booked with the Respondent. The Respondent pointed this out at the Labour Office. The Respondent could not comply with the directive issued by the Labour Office to pay terminal dues to the Claimant. The Respondent prays for dismissal of the Claim with costs.

3. The Claimant, his Witness Sammy Musyoka, and Respondent's Witness Ali Rashid, all testified on 18<sup>th</sup> September 2019 when hearing closed. The dispute was last mentioned on 13<sup>th</sup> December 2019, when Parties confirmed filing of their Closing Submissions.

4. The Claimant testified, he was employed by the Respondent, which initially operated as Interstate Limited. It was then rebranded as Falcon Limited. By the time of termination, the Respondent was Simba Coach Limited. Its management and ownership did not change. At the outset, the Claimant ticketed for Mombasa- Taveta route. He was later moved to Mombasa-Kitui route. Subsequently, he was instructed to leave ticketing to Conductors. He sought the assistance of the Labour Office. The Respondent disowned him alleging he was not its Employee. It is not true that the Claimant was merely a Manamba. He issued tickets to Respondent's Customers. He has exhibited samples of tickets issued. His last salary was Kshs. 8,000. He testified he was denied benefits outlined in his Statement of Claim.

5. On cross-examination, the Claimant testified, he was not given documents, showing the Employer changed business registration at any time. He was paid monthly, through salary voucher. He was asked to stop ticketing for Mombasa- Kitui route. He would be reassigned a role. He waited to no avail. The Respondent failed to attend conciliation at the Labour Office. He was not a Manamba. He was a regular Employee. He was paid monthly, and kept ticketing receipt book. He was underpaid. He merited Kshs. 19,000 to Kshs. 20,000 monthly salary. It was a difficult job.

6. Sammy testified that he worked with the Claimant for the Respondent. He too was a Ticketing Clerk. He worked from 1996. Sammy confirmed that the Respondent was called Tawfiq Bus, Interstate, Falcon Coach and lastly Simba Coach. He was an Employee from the beginning. The Claimant was a Ticketing Clerk, who was popularly known as 'Mwarabu wa Mzigo,' [Kiswahili for 'the Arab luggage handler.'] Sammy was clear that the Claimant ticketed for Mombasa-Taveta, then Mombasa-Kitui. The business was owned by Rashid Suleiman. No other Person, other than the Claimant, would keep the receipt book. On cross-examination, Sammy testified, he was not involved in human resource management. Rashid Suleiman did not own the business singly.

7. Ali Rashid testified he is a Ticketing Clerk working for the Respondent. He came to know the Claimant in 2009. The Claimant used to bring in passengers. Ali paid salaries to Drivers and other Employees. He used to pay the Claimant for luggage delivered. The Claimant was not an Employee of the Respondent. He reported to work in continuity. Ali did not know if the Claimant worked elsewhere. He stopped seeing the Claimant in 2018. The Claimant worked as he wished. Cross-examined, Ali testified, he was entrusted payment of salaries and also, ticketing of luggage. Claimant's duty was to bring in passengers and luggage. The receipts exhibited by the Claimant have his name and loader's name. They belong to the Respondent. There was no record showing that Ali paid any money to the Claimant.

#### **The Court Finds:-**

8. There is sufficient evidence to conclude that the Claimant was employed by the Respondent bus transport business as a Luggage Ticketing Clerk, in the year 2000.

9. He would not be expected to have been supplied documents by the Respondent showing change of registration from Tawfiq, Interstate, Falcon, to Simba. Business registration and form, is ordinarily at the initiative of the Employer. The Claimant was adequately supported in his evidence by Sammy, a long serving Ticketing Clerk of the Respondent.

10. There are tickets exhibited by the Claimant, which were acknowledged by Respondent's Witness, to belong to the Respondent. They were issued by the Claimant going by his *nome de guerre*, Mwarabu. The loader's names are stated. The Claimant held custody of these receipt books. The Court does not find Respondent's evidence to the effect that the Claimant was an independent contractor, believable. He was in formal employment. He would not be entrusted the level of responsibility he was entrusted, which included having custody of Respondent's receipt book, if he was simply a Manamba.

11. He was forced out of employment by the Respondent, after the luggage ticketing role was assigned to Conductors. The Respondent was at liberty to restructure its business operations, but should not have done so, in total disregard of the Claimant's entitlement under restructuring. The Respondent ought to have come out clearly and told the Claimant that his role had been taken over by Conductors, and therefore made redundant. He ought to have been paid redundancy dues, his role having been phased out, or merged with that of the Conductor.

12. His last salary was Kshs. 8,000. He claims underpayment of salary. He did submit on any relevant Wage Orders, to support this item. He did not provide the Court with any legal notices, and show how his claim on underpayment is computed under such legal notices. If any legal notices affecting Claimant's salary issued over the 18 years he worked, it was not for the Court to search for the notices and apply them to the Claim; it was entirely the role of the Claimant to bring these to the attention of Court, and show how much he deserved during which period, and how much was actually paid. All he told the Court in his evidence was that he merited Kshs. 19,000 or Kshs. 20,000 monthly, because he performed a difficult task. This is not evidence justifying a prayer for underpayment of salary. The prayer for underpayment of salary has not been established.

13. The Respondent did not allow the Claimant to take annual leave or pay him anything in lieu of leave. This understandably, was on the ground, that the Claimant was a Manamba. Once this premises is overruled as the Court has done, there is nothing to justify denial of annual leave entitlement to the Claimant. **The Court is satisfied that annual leave pay is merited, at a minimum of 21 days annually for 18 years, at Kshs. 116,307.**

14. Public holiday pay is claimed separately, for the period 2000- 2010, and 2010 -2018. The Claimant has not attempted to explain why there is a split. The particular holidays when the Claimant worked are not specified. There is no document to suggest he worked on a particular public holiday. The rate of Kshs. 766 claimed as the daily rate is not supported by any law. Overtime is in law based on hourly rate. The Claimant does not say what his hourly rate was. The prayer is rejected.

15. Termination was unfair. The Respondent as stated elsewhere, failed to come out in the open and inform the Claimant that his role had become superfluous. He was not involved in the process leading to the change in his position. He was paid nothing after 18 years of ticketing. Mwarabu left empty handed. The Respondent as stated above had the right under the law to restructure its operations, but did not do so in manner fair to the Claimant.

16. The Respondent failed to subscribe the Claimant to the N.S.S.F, or other Social Security Plans contemplated under Section 35 [6] of the Employment Act 2007, on the ground that the Claimant was not an Employee of the Respondent. This was, as in finding on annual leave above, a misconception. ***He merits service pay at the rate of 15 days' salary for 18 years of service, calculated at Kshs. 83,076.***

17. The Claimant had worked for 18 years. His record was unblemished. It was not because of any fault on his part, that he was rendered jobless. He was 51 years old, at the time of termination, going by his identity card on record. He did not tell the Court how many more years he expected to go on working, had his contract not been terminated by the Respondent. He did not say if he looked for alternative work. ***He is granted compensation equivalent of 5 ½ months' salary at Kshs. 44,000.***

18. ***The prayer for notice pay is granted at Kshs. 8,000.***

19. ***It is declared that termination was unfair.***

20. ***Costs to the Claimant.***

21. ***Interest at the discretion of the Court allowed, at the rate of 16% per annum from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a. It is declared that termination was unfair.***

***b. The Respondent shall pay to the Claimant: leave at Kshs. 116,307; service at Kshs. 83,076; compensation for unfair termination at Kshs. 44,000; and notice at Kshs. 8,000 – total Kshs. 251,383.***

***c. Costs to the Claimant.***

***d. Interest allowed at 16% per annum from the date of Judgment till payment is made in full.***

Dated and delivered at Mombasa this 21<sup>st</sup> day of February 2020.

James Rika

Judge