



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 173 OF 2018**

**BETWEEN**

**DALMAS OUMA GOR.....CLAIMANT**

**VERSUS**

**YALFA CARGO HANDLERS LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

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*Otieno Asewe & Company Advocates for the Claimant*

*Omondi Waweru & Company, Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 27<sup>th</sup> March 2018. He avers, he was employed by the Respondent as a Tyre Supervisor, sometime in March 2009. His last salary was a rate of Kshs. 15,000 a month.

2. He was unable to complete his work on time, on 22<sup>nd</sup> September 2018, because only 2 of the 6 Employees under his supervision, were present. He explained delay. However, on 25<sup>th</sup> September 2018, he was placed on compulsory leave. He returned at the end of the imposed leave, only to be advised to take a second leave. Upon returning at the end of the second leave, he was told another Employee had taken his place. He was dismissed without notice and justifiable cause. He never went on annual leave. He prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 15,000.
- b. 12 months' salary in compensation for unfair termination at Kshs. 180,000.
- c. Annual leave of 21 days a year, for 6 years at Kshs. 72,702.
- d. Service at 15 days' salary for 6 years at      Kshs. 51,930  
Total.....Kshs. 319,632.
- e. Declaration that termination was unfair.
- f. Costs.

g. Interest.

3. The Respondent filed its Statement of Response on 14<sup>th</sup> May 2018. It is a general denial. It is denied that the Claimant was an Employee of the Respondent. Consequently, all claims flowing from alleged employment relationship, are denied.

4. The Claimant gave evidence, as did Respondent's Human Resource Manager Macklean Chilumo Mkenye, and rested Parties' respective cases, on 4<sup>th</sup> November 2019. The Cause was last mentioned on 14<sup>th</sup> February 2020, when Parties confirmed filing of their Closing Arguments.

5. The Claimant adopted his Witness Statement, which is a replica of his Statement of Claim, in his oral evidence. He relied on 5 documents exhibited as number 1 to 5. He restated his employment history with the Respondent, and the terms and conditions of employment. He was not issued a written contract. He was placed on compulsory leave twice, and in the end, advised by the Respondent that another Employee had taken his place.

6. On cross-examination, he affirmed he did not have a written contract. He was not issued a letter of termination. There were days he took off-duty days. He signed leave application forms. He was called for a meeting on a Saturday. His absence was discussed at the meeting. He left employment in November 2017, and secured another job in December 2017. He was subscribed to N.S.S.F. He took 41 days of annual leave. He was entitled to 24 days a year. He was paid salary for the 41 days he was on leave. Redirected, he told the Court that he did not apply for leave of 41 days.

7. Mkenye confirmed that the Claimant was an Employee of the Respondent. The Claimant took annual leave. He left the Respondent to work for another Company. He was subscribed to N.S.S.F. On cross-examination, the Witness told the Court the Claimant's contract was not terminated by the Respondent. The Claimant failed to return to work. Mkenye conceded that the Claimant's Brother worked for the Respondent, and the Respondent could have communicated to the Claimant, through his Brother, after the Claimant failed to show up. The Claimant did not apply to go on leave. He was placed on compulsory leave. Redirected, the Witness told the Court he could not follow up the Claimant, as the Claimant was working for another Company.

**The Court Finds:-**

8. Although the Respondent pleads that the Claimant was not its Employee, this has been discounted by the evidence of Respondent's Witness, Macklean Chilumo Mkenye.

9. The date of employment, terms and conditions of employment, are as stated by the Claimant in his Statements of Claim and Witness.

10. There is evidence that he was twice sent on compulsory leave. The Respondent did not investigate any employment offence during the period of successive compulsory leave. There was no recorded disciplinary hearing. There was no letter of termination. After being sent away twice on compulsory leave, the Claimant was advised his position had been taken over by another Employee. His contract was effectively terminated. It is neither here, nor there, that he took another job opportunity immediately he left the Respondent. He had been placed on purposeless compulsory leave of 41 days.

11. The Respondent did not show valid reason justifying termination, and procedure was manifestly flawed. He merits compensation for unfair termination and notice pay.

12. He had worked for 9 years, from 2009 to 2018. His record was unblemished. He did not contribute to the circumstances leading to his forced exit. He mitigated the effects of his loss of employment, by securing alternative job immediately after termination. **He is granted equivalent of 7 months' salary in compensation for unfair termination at Kshs. 105,000.**

13. **Notice pay is allowed at Kshs. 15,000.**

14. The Claimant told the Court he signed leave forms exhibited by the Respondent. He was advised to take leave of 41 days before termination. His prayer for leave of 6 years, out of 9 years worked, is not clearly supported by evidence and is rejected.

15. It is conceded that the Claimant was actively subscribed to N.S.S.F. He does not merit service pay under Section 35[5] of the Employment Act.

16. **No order on the costs and interest.**

IN SUM, IT IS ORDERED:-

**a. Termination was unfair.**

**b. The Respondent shall pay to the Claimant equivalent of 7 months' salary in compensation for unfair termination at Kshs. 105,000 and notice at Kshs. 15,000 – total Kshs. 120,000.**

**c. No order on the costs and interest.**

**Dated and delivered at Mombasa this 26<sup>th</sup> day of March 2020.**

**James Rika**

**Judge**