



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 197 OF 2017**

**BETWEEN**

**SHADRACK MUSEMBI KALOKI .....CLAIMANT**

**VERSUS**

**UNIK DRIVING SCHOOL.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*A.O. Hamza & Company Advocates for the Claimant*

*Njeru & Company Advocates for the Respondent*

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**JUDGMENT**

1. This Claim was filed on 10<sup>th</sup> March 2017. The Claimant states, he was employed by the Respondent Company as a Driving Instructor, in April 2009. His contract was terminated unfairly by the Respondent, in April 2016.
2. On or about 31<sup>st</sup> March 2016, the Claimant avers, he was assigned a Driving Student by the Respondent. The Claimant unlocked the car, instructed the Student to take the Driver's seat, as the Claimant took the Instructor's [Front Passenger's seat].
3. The Student opened the Driver's door without minding the oncoming traffic. A Toyota Prado car, belonging to Ketty Tours Company was fast approaching, and hit Respondent's car door, bending the door.
4. The Claimant was informed by Respondent's Director Osman, that Ketty Tours Company had sent Kshs. 10,000 to the Respondent, to fix the damaged door. Osman told the Claimant that Osman's brother, who is Osman's Co-Director, had paid Kshs. 7,000 to Ketty Tours, and incurred an additional cost of Kshs. 5,000 on repairing the damaged door.
5. The Claimant was told by Respondent's Directors on 14<sup>th</sup> April 2016, that the Respondent had resolved the Claimant pays to the Respondent a sum of Kshs. 8,000, failing which, the Claimant's contract would be terminated.
6. The Claimant explained his inability to pay the amount to the Directors. He requested the money is recovered through salary check-off. The Directors declined to do this and asked the Claimant not to show his face at Respondent's workplace again. The Claimant reported the dispute at the local Labour Office, whereupon he was asked by Osman to withdraw his report, and would be paid all his terminal benefits. Nothing was paid

7. He prays for Judgment against the Respondent in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 14,000.
- b) Leave pay of 6 year at Kshs. 84,000.
- c) Overtime at 2.5 extra hours a day, for 5 days a week, over a period of 7 years at Kshs. 551,250.
- d) Service pay over a period of 4 years [2009-2012] at 15 days' salary for each of the 4 years at Kshs. 33,600.
- e) Unpaid house allowance over the entire period worked, of 84 months, at 15% of Kshs. 14,000, amounting to Kshs. 176,400.
- f) 12 months' salary in compensation for unfair termination at Kshs. 168,000

Total...Kshs. 1,027,250

- g) Declaration that termination was unfair.
- h) Costs.

8. The Response was filed on 10<sup>th</sup> April 2017. It is not denied that the Claimant was employed by the Respondent as an Instructor. He was employed in 2009, and left on his own volition in the 2012. He returned in July 2012, and continued working until 30<sup>th</sup> April 2016 when he quit. The accident involving Respondent's Driving Student and the Claimant, was occasioned through Claimant's negligence. He failed to give proper instructions to the Student. The Respondent incurred a loss of Kshs. 10,000 in motor vehicle repair. The Claimant wanted a loan of Kshs. 10,000 from the Respondent while he still owed the Respondent money from a previous facility. The Respondent was sympathetic and offered to reduce reimbursement due from the Claimant to Kshs. 5,000. This would be recovered from Claimant's monthly salary. He would continue working. He did not report to work. He terminated his own contract. He worked for a period of 4 years only.

9. He was entitled to 1 free day every week. He worked half day on Saturdays. During the rest of the week, he worked from 8.00 a.m. to 12.30 p.m. and from 2.00 p.m. to 5.30 p.m. He does not merit overtime pay. He was absent from 2009 to July 2012. He is not entitled to service pay. House allowance was part of what the Claimant received as monthly salary. The whole Claim is exaggerated. The Respondent prays for dismissal of the Claim with costs.

10. The Claimant testified, and rested his case, on 23<sup>rd</sup> October 2017. Respondent's Managing Director, Zulfikar Ali Yusuf Ahmed, testified on 14<sup>th</sup> February 2018, and 4<sup>th</sup> June 2018. Supervisor Stephen Kebabe Manyisa, Driving Instructor James Mutie Kilonzi, and General Manager Khalid Ashraf Malik, all testified for the Respondent on 11<sup>th</sup> July 2018, when hearing closed. The matter was last mentioned on 24<sup>th</sup> October 2018, when Parties confirmed the filing of their Submissions.

11. The Claimant told the Court he was initially employed by the Respondent in 1998. He was dismissed and reemployed between 2009 and 2016. He was a Driving Instructor.

12. On 31<sup>st</sup> March 2016, the Claimant was instructing a Student from Pakistan. The Student told the Claimant he had been driving for 7 years, but wished to take driving lessons in Kenya, to familiarize himself with the Kenyan roads.

13. The Claimant opened the Driver's door for the Student. The Student reversed without minding what was behind. There was a collision with an oncoming vehicle belonging to Ketty Tours Company.

14. There was mutual damage. Mohammed told the Claimant that the Respondent had paid Kshs. 7,000 to Ketty Tours as the cost of repairing Ketty's car. The Respondent's own car cost Kshs. 5,000 to repair, Mohammed advised the Claimant. The Claimant was asked to cater for the cost of repairing both cars.

15. He was suspended and asked to pay Kshs. 8,000 to the Respondent, if he wished to continue working. He asked for a loan to enable him pay. His request was denied.

16. The Claimant lodged a complaint with the Labour Office. The Respondent demanded that the Claimant withdraws the complaint, and would be paid his terminal benefits. He was offered Kshs. 15,000 less the cost of repairing the cars. N.S.S.F contributions were remitted from the year 2013. He was not paid house allowance. He worked excess hours without compensation.

17. Cross-examined, the Claimant told the Court he first worked for the Respondent, in 1998. He left and returned in 2009.

18. The Student Driver from Pakistan told the Claimant that he already had a driving license. The Claimant did not see this License. As an Instructor, the Claimant agreed it was his duty to instruct the Student. It was not due to Claimant's negligence that the accident occurred. The Claimant was asked to pay Kshs. 8,000 as the cost of repairing the damaged cars. He asked for a loan from the Respondent, to enable him pay, a request which was denied. He complained at the Labour Office, but did not exhibit any letter from the Labour Officer to show such a complaint was made. The Respondent paid to the Claimant terminal dues less the cost of repairing damaged cars. The Claimant acknowledged receipt of terminal dues.

19. N.S.S.F dues were not remitted by the Respondent from 2009 to 2013. The Claimant was imprisoned from 2004 to 2008. It is not true that he was not at the Respondent's between 2009 and 2012. He did not have evidence of employment for this period. There is no pay slip over this period. He was paid salary at the end of April 2016, not terminal dues. He was not told that his salary was all-inclusive. He had off-duty days. He procured employment elsewhere, 1 month after leaving the Respondent. Redirected, the Claimant told the Court he left prison in 2008. He was recalled by the Respondent in 2009, and worked till 2016. There was no written contract. His salary was Kshs. 14,000. Kshs. 15,000 offered as terminal benefits cannot have been his terminal dues.

20. Director Ahmed told the Court, that the Claimant was employed on probation for 3 months, in 2009. He left after 3 months, and returned in 2012. He commenced in July 2012. He was a Driving Instructor. He worked till April 2016.

21. In March 2016, he was assigned a Student, to give driving instructions to. He did not caution the Student not to open the door, until all was safe. The car was parked off-the road at Moi Avenue, Mombasa. A car from a Tours Company hit the Respondent's car on the door. The Student was spared, but the car damaged. The Claimant was to blame. He breached safety regulations. He was careless.

22. The damage to the Tour Company car was assessed at Kshs. 10,000. The Claimant agreed this is deducted from his salary in installments. Respondent's car was also damaged. It would cost Kshs. 5,000 to repair Respondent's car. The Claimant would therefore pay Kshs. 15,000 to the Respondent through a monthly check-off. The Respondent would pay Ketty Tours its cost of repair, and deduct this from the Claimant's salary. Deduction was to begin at the end of April 2016.

23. The Claimant asked for a loan of Kshs. 5,000 from the Respondent. The Respondent declined the request. The Claimant did not report back. He was soon seen working for another Driving School in Mombasa. He was paid his terminal dues through a petty cash voucher, at Kshs. 28,000, less his obligation to the Respondent.

24. The Respondent did not unfairly terminate the Claimant's contract. He continued to work after the accident. He left of his own volition to work for another Driving School. The Respondent started contributing to N.S.S.F account in 2013. Claimant's card had issues before this date. There was no provision for overtime. Ahmed confirmed the working hours given in the Statement of Response. The Claimant took annual leave every year. He was paid in lieu of leave as shown in the petty cash vouchers.

25. Cross-examined, Ahmed told the Court the Claimant left after 3 months of probation, and returned in July 2012. He was a good Employee. He was confirmed in July 2012. The Claimant failed to instruct his Student properly. The Student was not rude to the Claimant. The Claimant had agreed that he was at fault. Osman did not witness the accident. The Claimant asked for a loan of Kshs. 5,000. It was not to pay for the damage. The Claimant disappeared. It is not true that he was told if he did not pay for the damage resulting from the accident, he should leave employment. He left of his volition. Redirected, Ahmed testified that the Claimant was liable for the accident.

26. Manyisa testified that the Claimant was liable for the accident. The Claimant conceded liability. This was not done in writing. He was

paid terminal dues. It is not documented by the Respondent that N.S.S.F contributions were made by the Respondent to Employees' accounts. Concession of liability did not have to be in writing. N.S.S.F Statements filed by the Claimant show contributions were made, Manyisa told the Court in closing his evidence.

27. Kilonzi and Malik restated the narratives made by other Witnesses for the Respondent.

**The Court Finds:-**

28. Parties do not agree on the date the Claimant was employed by the Respondent. The Claimant states he worked uninterruptedly, between 2009 and 2016. He had earlier worked interruptedly from 1998. He spent a stint in prison. He left prison in 2008, and was taken back by the Respondent in 2009, until 2016.

29. The Respondent's position is that the Claimant was employed on probation of 3 months, in the year 2009. He worked to the end of the probation period, and returned in July 2012. He was confirmed in July 2012, and worked until end of April, 2016. He worked for 4 years, not 7 years as claimed.

30. Section 10 [7] of the Employment Act 2007 requires that if, in any legal proceedings an Employer fails to produce a written contract, or the written particulars prescribed in subsection [1], the burden of proving, or disproving an alleged term of employment stipulated in the contract, shall be on the Employer.

31. The date on which the Employee's continuous period of employment began, is under Section 10, subsection 1, a particular of employment.

32. The Respondent concedes at no time was the Claimant issued a written contract. None was therefore produced before the Court, proving the position stated by the Respondent on the date of employment, or disproving the position of the Claimant.

33. The Court upholds the position of the Claimant, which is, that he was employed by the Respondent as a Driving Instructor in April 2009, and left in April 2016. He completed 7 years of service.

34. The main question is whether his contract was terminated by the Respondent; and whether if so, termination was fair. Other issues revolve around terminal benefits payable to the Claimant.

35. The Court proposes to deal with the other issues first, before reverting to the main issue.

36. There was no evidence that the Claimant worked 2.5 excess hours daily for 5 days every week, for 7 years. It was not persuasive that the Claimant would be putting in such hours, instructing Learner Drivers. There was no evidence that such excess hours were necessary and authorized by the Respondent. The hours of work were as stated in the evidence of Director Ahmed. The prayer of overtime pay of Kshs. 551,250 is rejected.

37. The Claimant seeks annual leave pay over a period of 6 years. The Respondent states the Claimant utilized his annual leave, or sold his leave days to the Respondent. There are 2 petty cash vouchers exhibited by the Respondent, indicating the Claimant received Kshs. 5,950 in 2013, and Kshs. 1,300 in 2014, as leave pay. There is no other evidence of leave utilization or encashment. The Claimant has not shown that he was entitled to 30 days of annual leave every year. He is allowed annual leave pay based on the statutory minimum of 21 days annually, for 6 years, less the amount of Kshs. 7,250 shown to have been paid by the Respondent to the Claimant in the years 2013 and 2014. This works out as follows-  $Kshs. 14,000 \text{ divide by } 26 \text{ working days} \times 21 \text{ days} \times 6 \text{ years} = Kshs. 7,250 = Kshs. 60,596$ . ***The prayer for annual leave pay is allowed at Kshs. 60,596.***

38. On service pay, the Court agrees with the Claimant that N.S.S.F contributions were made by the Respondent into his account, with effect from the year 2013. There is a Provisional Member Statement of Account exhibited by the Claimant, supporting this position. There are no remittances shown for the period 2009 to 2012 when the Claimant, was still in the Respondent's employ. ***He is allowed the prayer for service pay over this 3 - year period, calculated at daily rate of Kshs. 538 x 15 days = Kshs. 8,076 x 3 years = Kshs. 24,230.***

39. The prayer for arrears of house allowance, over the whole period worked, appears unconvincing. It is not in the Claimant's Witness Statement, or in the letter of demand issued by his Advocates to the Respondent, before filing of the Claim. It is not in any document about the complaint lodged with the Labour Office. The Claimant's oral evidence was that he did not know if the housing element was factored in, in the monthly salary received by him. He has not established that he is owed arrears of house allowance. The prayer is rejected.

40. It is not clear from the evidence of both Parties if the Claimant left employment of his own volition, or his contract was terminated by the Respondent.

41. The Claimant was assigned duty to instruct a Learner Driver on 31<sup>st</sup> March 2016. It is clear he did not perform his duty carefully and properly. He was a Driving Instructor. He did not instruct his Student carefully and properly. This led to the accident involving Respondent's car and Ketty Tours' car. Both cars were damaged. The Respondent would have been entitled to summarily dismiss the Claimant under Section 44 [4] [c] of the Employment Act 2007.

42. But the Respondent did not do this. The Respondent states it required the Claimant to pay for the costs of repairing the damaged cars, through salary check-off. The Claimant asked for a loan of Kshs. 5,000. It was the position of the Respondent, if the Court understood the evidence of the Respondent that, the loan sought was unrelated to meeting the costs of repairing the 2 cars. The Respondent refused to grant the facility to the Claimant, as he had un-cleared obligations. The Claimant left and never returned after this. He was shortly found to be working for Respondent's competitor.

43. The Claimant's position is that he was told to raise Kshs. 8,000 in cost of repairing the cars, to be allowed to continue working. He was told to leave, as he was not able to raise this amount.

44. The two accounts are less than persuasive. The Respondent's account has gaps. There are gaps in the Claimant's account too. He soon found alternative work with Respondent's competitor.

45. The Claimant did not establish that termination was at the instigation of the Respondent. He did not show that his contract was unfairly terminated. He had an obligation to do so, under Section 47 of the Employment Act. In the circumstances, it would not be necessary to require the Respondent to justify termination. The Parties appear to have reached a tacit agreement that, after the Claimant had occasioned the accident of 31<sup>st</sup> March 2016, the employment relationship was not working as it should. The Claimant had walked out before on the relationship. He had returned and was taken back into the fold. After the accident of 31<sup>st</sup> March 2016, it was difficult for Parties to sustain an employment relationship based on trust and confidence. There was mutual release, and discharge from obligations.

46. The Court shall treat termination to have been through mutual understanding of the Parties. It was a mutual separation, in a relationship with a history of breakages. Parties had been in and out of the relationship. The Employee had ready suitors. In light of this, the prayers for notice pay and compensation for unfair termination have no foundation and are rejected.

IT IS ORDERED:-

***[a] Termination was through mutual separation.***

***[b] The Respondent shall pay to the Claimant annual leave pay at Kshs. 60,596 and service pay at Kshs. 24,230- total Kshs. 84,826.***

*[c] Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

*[d] No order on the costs.*

Dated and delivered at Mombasa this 25<sup>th</sup> day of January 2019.

**James Rika**

**Judge**