



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 270 OF 2016**

**BETWEEN**

**SAIDI MBOGO MWALIMU .....**  
**CLAIMANT**

**VERSUS**

**PASTA ENTERPRISES LIMITED .....**  
**RESPONDENT**

*Rika J*

***Court Assistant: Benjamin Kombe***

***Nyange Sharia & Company Advocate, instructed by Kituo Cha Sheria, Advocates for the Claimant***  
***Aboo & Company Advocates for the Respondent***

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**JUDGMENT**

1. The Claimant, Mwalimu, filed his Statement of Claim on 1<sup>st</sup> April 2016. He states he was employed by the Respondent as a Driver, on 30<sup>th</sup> September 2015. He earned a monthly salary of Kshs. 29,000. He was sent by the Respondent to Kampala Uganda, on 12<sup>th</sup> December 2015, to collect Respondent's Truck registration KBJ 119 T, which had been left without a Driver, after the Driver assigned to it, died at Kampala before he could make the return journey to Mombasa. The Truck did not have sufficient fuel and had mechanical defects. The Claimant was therefore delayed in his travel from Kampala. He arrived in Mombasa on 23<sup>rd</sup> December 2015. The Respondent alleged the Claimant had siphoned the fuel, and dismissed the Claimant without notice, or justifiable cause. He prays the Court to declare that termination was unfair and grant the Claimant Judgment against the Respondent for:-

- a. Salary for 1 day worked on 30<sup>th</sup> September 2015 at Kshs. 966.
- b. Balance of October 2015 salary at Kshs. 1,500.
- c. Mileage allowance at Kshs. 7,500.
- d. Compensation for wrongful deduction of cost of 240 litres of diesel at Kshs. 18,439.

- e. Compensation for wrongful deduction of Kshs. 2,000 paid for security of Respondent's Truck while it was stalled on return journey.
- f. Notice pay at Kshs. 29,000.
- g. 12 months' salary in compensation for unfair termination.
- h. Certificate of Service to issue.
- i. Costs.
- j. Any other suitable remedy.

2. The Respondent filed its Statement of Response on 28<sup>th</sup> May 2016. Its position is that the Claimant was employed as a Driver on 30<sup>th</sup> September 2015, and placed on probation of 3 months. He was assigned duty to retrieve Respondent's Truck from Kampala, and was paid mileage allowance of Kshs. 2,500. The Truck had sufficient fuel to return to Mombasa. The Claimant did not inform the Respondent about fuel shortage while in Kampala. He engaged 2 Guards at Kshs. 500 per Guard per Night, while he had been instructed by the Respondent to pay Kshs. 200 per Guard per Night. The Respondent in the end was dissatisfied with the Claimant's performance and did not confirm his employment. Termination was not unfair. The Claimant received all his dues. The Respondent asks the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant confirmed the details of employment pleaded in his Statement of Claim, in his evidence in Court on 27<sup>th</sup> September 2017. He earned Kshs. 20,000 as captured in his exhibited pay slips. He found the Truck in Kampala with 200 litres of fuel. He called Respondent's Operations Manager who advised the Claimant to depart Kampala, with the fuel that was in the Truck. He drove up to Kericho where the Truck ran out of fuel. He called the Operations Manager, who instructed another Driver who was in the vicinity of Kericho, to donate 100 litres of fuel to the Claimant. The Claimant drove on to Nairobi where he again ran out of fuel. He was added 100 litres, paid for through m-pesa. At a place called Kokotoni in the outskirts of Mazaras, the Claimant was assisted with 40 litres which was brought to him by Respondent's pick-up.

4. The journey was punctuated with other afflictions. The Truck broke down. The Claimant called the Operations Manager, who advised the Claimant to secure the services of Guards, to guard the Truck during the night. He did so and paid 2 Guards a total of Kshs. 2,000. The Respondent deducted this amount from the Claimant's salary.

5. On return the Claimant was slammed with a letter of termination. He was paid a measly sum of Kshs. 1,795 as the totality of his terminal dues. The Respondent alleged that the Truck had consumed extraordinarily large volume of fuel. He was not given notice, or heard before termination.

6. Cross-examined, Mwalimu told the Court the Truck had 200 litres of fuel at Kampala. He was sent Kshs. 2,000 to pay the Guards. His contract had a probation period of 6 months. The Claimant worked for 3 months. He was on probation at the time of termination. Redirected, the Claimant told the Court the journey from Kampala to Mombasa lasted 11 painful days. He really suffered.

7. Respondent's Operations Manager William Gharama Charo gave evidence on the same date as Mwalimu, 24<sup>th</sup> September 2017, bringing the hearing to a close.

8. His evidence is that the Claimant was employed by the Respondent as a Driver, and placed on 6 months' probation, commencing 30<sup>th</sup> September 2015. He was sent to Kampala to collect Respondent's Truck, as told in his evidence. He was given by the Respondent an allowance of Kshs. 2,000. This was not a mileage allowance as alleged by the Claimant. The Respondent also paid for Claimant's transport to Kampala.

9. While at Kampala, the Claimant called the Respondent saying ignition keys could not be traced. He said nothing about low fuel level and mechanical issues. He called while at Kericho to complain about insufficiency of fuel. The Respondent deducted cost of fuel from Claimant's dues, because the Truck had been sufficiently fueled.

10. He was asked to find Guards to keep the Truck secure overnight, at Kshs. 200 per Guard per Night. He instead secured the service at Kshs. 500 per Guard per night, which amounted to Kshs. 2,000 for 2 nights the Truck was stuck. He was give reasons for termination.

11. Cross-examined Charo told the Court there was given to Drivers on ordinary journeys to Kampala, mileage allowance of Kshs. 16,000 per journey. This was given when Drivers drove loaded Trucks. Fuel must have been spent while the deceased Driver drove to Kampala. Charo would not know how much fuel was in the Truck, upon its arrival at Kampala. The Statement of Response states probation was for 3 months. 3 months were over by the time of the incident. The Claimant spent 11 days driving from Kampala to Mombasa. He was given Kshs. 2,000 for the journey. Charo told the Court there was some amount added to this, but did not have proof of such added amount.

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

12. On cross-examination, Mwalimu testified he signed a contract of employment which had probationary period of 6 months. He conceded he worked for 3 months. He testified he was on probation when his contract was terminated.

13. Other arguments about whether the Claimant was, or was not on probation, at the time his contract was terminated, are unhelpful.

14. Probationary contracts are regulated under Section 42 of the Employment Act 2007. It is not correct as submitted by the Claimant, that the normal probation is 3 months, and there was no justification shown by the Respondent, why the Claimant needed to serve probation of 6 months, instead of 3 months.

15. Section 42[2] states that a probationary period shall not be more than 6 months, but may be extended for a further period of not more than 6 months, with the agreement of the Employee. Under subsection [3], the aggregate period shall not exceed 12 months. The upper limit is 12 months, while the lower limit is 6 months. The Claimant's contract, according to his evidence gave a period of 6 months. He worked for 3 months. He was still on probation when termination took place.

16. The Court adopts the principles on probationary contracts discussed in *Carole Nyambura Thiga v. Oxfam [2013] e-KLR* and *Danish Jalang'o & Another v. Amicabre Travel Services [2014] e-KLR*, which decisions have been availed to the Court and the Claimant through Submissions filed by the Respondent. Probationary Employees do not have the legal capacity to claim compensation for unfair termination under Section 41, 43 and 45 of the Employment Act 2007. The prayer for compensation for unfair termination is rejected.

17. The prayer for declaration that termination was unfair is rejected.

18. The notice period under Section 42[4] of the Employment Act is a minimum of 7 days. The Claimant prays for 30 days' salary in notice pay. He has not persuaded the Court why the Court should grant him notice pay beyond the statutory minimum. **He is granted 7 days' salary as notice pay at Kshs. 5,384.**

19. The Court does not understand the prayer for 1 day salary for work done on 30<sup>th</sup> September 2015. This is the day the Claimant reported for duty, and the Court would expect salary for the work done for the first month, would reflect in his salary for October 2015. The item is rejected.

20. The Court has not seen anything about balance of October 2015 salary of Kshs. 1,500 in the Claimant's Statement of Claim, other than on the prayers, and nothing is recorded in the Claimant's oral evidence about this balance. The prayer is rejected.

21. There is however evidence that the Claimant was sent to Kampala by the Respondent, to retrieve Respondent's Truck, upon demise of the designated Driver.

22. Charo was not able to say what amount of fuel was in the Truck when it arrived at Kampala. It is expected fuel was consumed on the road to Kampala. The Claimant's assertion that he found 200 litres in the Truck when he arrived at Kampala seems to the Court credible.

23. The Respondent did not treat the Claimant reasonably in the whole journey to and from Kampala. He was given a paltry Kshs. 2,000 to sustain himself during the long journey. Charo was not able to show that any additional assistance was accorded to the Claimant.

24. The Claimant was compelled to constantly call the Respondent for fuel which was availed to him in dribs and drabs. The Truck broke down and the Claimant was compelled to engage Guards. He paid them Kshs. 2,000 for 2 nights. Shockingly, the Respondent deducted the cost of 240 litres of fuel and the cost of guarding, from the Claimant's dues.

25. The effect was that the Claimant left employment with a sum of Kshs. 1,795 as terminal dues.

26. The Respondent was bound to act reasonably, notwithstanding that the Claimant was under probation. It was wrong to send the Claimant to Kampala without adequate resources, and take away from his dues, once the Claimant returned from his arduous journey.

27. Even a probationary Employee is entitled to reasonable conditions of work, to enable him meet the ends of the probationary contract. It is not reasonable to send a Driver to Kampala with Kshs. 2,000 in his pocket, and expect that Driver to return to Mombasa without difficulties. The Court stated in the case of **Danish Jalang'o**, that where a Probationary Employee establishes breach of contract, he would be entitled to contractual damages, depending on the gravity of the contractual breach.

28. The Court is satisfied that the Respondent acted in breach of the probationary contract, in its conduct towards the Claimant, in his journey to and from Kampala. It was not for instance, explained to the Court in clear terms, why the Claimant was not paid mileage allowance set at Kshs. 16,000 per journey, but was instead given an undefined allowance of Kshs. 2,000 only. The Court cannot accept the suggestion by Charo that this was because the Claimant was driving an unloaded Truck. Why was fuel availed to the Claimant in dribs and drabs? Why would money paid for guarding Respondent's property be deducted from Claimant's dues? On the whole it was wrong not to facilitate the Claimant adequately for the journey, and to impose deductions on his dues once he was back in Mombasa. The Respondent placed heavy barriers in the way of the Claimant, making it impossible for the Claimant to perform his probationary contract. **The Claimant merits contractual damages, rather than compensation for unfair termination, which the Court grants under the prayer for any other relief the Court may find fit and just to grant, at Kshs. 40,000.**

29. The prayer for mileage allowance as suggested above should have been paid to the Claimant. He prays for Kshs. 7,500 while Charo testified mileage allowance was paid at Kshs. 16,000 per journey to and from Kampala. What the Claimant seeks is about half of the amount stated by Charo, and is reasonable considering he was paid Kshs. 2,000, and his transport to Kampala catered for by the Respondent. **He is allowed mileage allowance of Kshs. 7,500.**

30. There was no evidence that the Claimant siphoned any fuel on his journey from Kampala. The Respondent did not show how it came to the conclusion that loss of 240 litres could be attributed to the Claimant. There was no proof of such a loss. **The Respondent shall refund to the Claimant the sum of Kshs. 18,439, deducted as cost of fuel.**

31. As observed above the Claimant procured the services of Security Guards to the benefit of the Respondent and its property. The cost of guarding should not have been deducted from Claimant's dues. **The Respondent shall refund to the Claimant Kshs. 2,000 deducted as guarding costs.**

32. Certificate of Service is guaranteed to Employees who have worked, at the time of termination, for at least 4 consecutive weeks. A Probationary Employee, who has completed at least 4 consecutive weeks in employment, is entitled to a Certificate of Service. ***The Respondent shall avail the Claimant his Certificate of Service forthwith.***

33. ***Costs to the Claimant.***

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

IN SUM, IT IS ORDERED:-

***a. It is declared termination was in breach of Claimant's probationary contract.***

***b. The Respondent shall pay to the Claimant: 7 days' salary as notice pay at Kshs. 5,384; general damages for breach of contract at Kshs. 40,000; mileage allowance at Kshs. 7,500; fuel deduction at Kshs. 18,439; and guarding cost at Kshs. 2,000- total Kshs. 73,323.***

***c. Certificate of Service to issue.***

***d. Costs to the Claimant.***

***e. Interest granted at 14% per annum from the date of Judgment, till payment is made in full.***

**Dated and delivered at Mombasa this 8<sup>th</sup> day of March 2018.**

**James Rika**

**Judge**