



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 376 OF 2015**

**BETWEEN**

**JACKSON GONA KONDE ..... CLAIMANT**

**VERSUS**

**AYOOB NOOR MOHAMMED & COMPANY LIMITED..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Matete Mwelese & Company Advocates for the Claimant*

*Inamdar & Inamdar Advocates for the Respondent*

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**JUDGMENT**

1. Jackson Gona Konde filed his Statement of Claim on 5<sup>th</sup> June 2015. He states he was employed by the Respondent on 5<sup>th</sup> December 2009 as a Turn Boy. He was promoted to a Heavy Commercial Driver in September 2012, a position he held until 7<sup>th</sup> June 2014, when the Respondent terminated the Claimant's contract of employment. He earned a monthly salary of Kshs. 25,392 as of the date of termination. He states he was not issued a letter of termination. He was not given a fair hearing. He was not issued any letter to show cause why disciplinary action should not be taken against him. There was no letter of warning. He states termination was unfair and unlawful, and prays for the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 25,392.
- b) Accrued annual leave for 5 years at Kshs 166,380.
- c) 12 months' salary in compensation for unfair termination at Kshs. 304,704.
- d) Travelling allowance for 5 years at Kshs. 100,000

Total ..... Kshs. 596,476

e) Costs.

f) Certificate of Service to issue.

2. The Respondent filed its Statement of Reply and Counterclaim on the 28<sup>th</sup> October 2015. Its position is that it employed the Claimant as a Turn Boy on 1<sup>st</sup> February 2010. Through a letter dated 13<sup>th</sup> April 2013, he was promoted to be a Driver. He was a Driver until 7<sup>th</sup> June 2014, when he voluntarily resigned. He did not give the Respondent notice, or pay the Respondent 1 month salary in lieu of notice. He earned a basic salary of Kshs. 22,080, and house allowance of Kshs. 3,312, monthly. He was paid Kshs. 15,878 as salary for May 2014, and for 6 days worked in June 2014. The Claimant resigned after failing to explain his unauthorized absence from work, on the 23<sup>rd</sup> and 25<sup>th</sup> May 2014. After his absence, he was involved in acts of insubordination and disregard of duties. He accepted the amount of Kshs. 15,878 in full and final settlement. He owes the Respondent 1 month salary in lieu of notice, which the Respondent demands, by way of Counterclaim. The Respondent prays the Court to allow the Counterclaim and dismiss the Claim with costs.

3. The Claimant, Respondent's Director Abdulrazak Nurmohammed and Respondent's Clerk Nicholas Mutuku Musembi, all gave evidence on 14<sup>th</sup> September 2016, when hearing closed.

**The Claim:-**

4. The Claimant testified he was employed by the Respondent in 2009. He worked up to 7<sup>th</sup> June 2014. His Employer told the Claimant the Employer did not wish to have the Claimant at the workplace anymore. The Director Nur told the Claimant so.

5. The Claimant had been asked to collect Respondent's Vehicle parked at the Respondent's yard. The Claimant was overseeing repair of another of Respondent's Vehicle at D.T. Dobie yard. The Claimant did not have any money to enable him collect the Vehicle. He asked the Respondent for money to facilitate retrieval of the Vehicle. The Respondent did not give him the money.

6. He was instead asked not to show his face again at the Respondent's workplace. He was given a draft resignation letter to sign on 7<sup>th</sup> June 2014. He did not sign the letter. The signature on the letter is not Claimant's signature. Respondent's Accountant Nasser Abdallah drafted the letter.

7. The Claimant reported the dispute to the Ministry of Labour. The Labour Office organized a conciliation meeting. The Respondent ignored conciliation. The Claimant was paid Kshs. 15,878 as shown in the Petty Cash Voucher dated 7<sup>th</sup> June 2014.

8. The Claimant subsequently instructed his Advocates to demand notice pay, compensation and annual leave pay. Demand issued, but nothing was paid. No reason was given to justify termination. He was not heard. The meeting allegedly captured in the audio disc availed to the Court by the Respondent did not take place. The Counterclaim has no merit. The Claimant never went on annual leave. He was denied travelling allowance. He was not paid sustenance allowance while in routine safaris. He prays for costs and Certificate of Service.

9. Cross-examined, he testified he was employed as a Turn Boy, then Matatu Driver. He was away in Malindi on 23<sup>rd</sup> to 25<sup>th</sup> May 2014. He called the Respondent while away to inform the Respondent of his absence.

10. He was at D.T Dobie on 20<sup>th</sup> May 2014. It is not true that he had been asked to wait there, until the Vehicle which was under repair, was repaired. He was called by the Respondent while there, and told to return to Respondent's workplace. He asked for fare. He was not facilitated. He walked a considerable distance to the workplace. By the time he reached there, he found the place locked. He went home. He was called to the office on 31<sup>st</sup> May 2014, and asked to explain his absence. It is not true that he told his

Employer to pay him his terminal dues, and let him go. Redirected, the Claimant told the Court he was in Malindi for 2 days. His Supervisor Nicholas authorized his absence. He went to D.T. Dobie on the instruction of the Respondent. He found the garage locked. He refused to sign the letter of termination.

**Response & Counterclaim:-**

11. Nurmohammed confirmed Claimant's employment history with the Respondent. The Claimant was absent from 23<sup>rd</sup> May 2014 to 25<sup>th</sup> May 2014, without lawful cause, or authorization. Nicholas did not have authority to grant the Claimant off-duty days. The Respondent is a small outfit, with the Directors directly involved in supervision of staff.

12. The Truck assigned to the Claimant was at D.T. Dobie for repairs. Spare parts were not readily available. The Claimant was supposed to be overseeing repair of his Truck at D.T. Dobie. He called Nurmohammed from D.T. Dobie asking for money, on 29<sup>th</sup> May 2014. Nurmohammed did not have ready M-pesa facility. He directed the Claimant to go pick the Truck and load a Client's cargo. The Claimant failed to do so, and the Respondent lost its Client.

13. Nurmohammed called the Claimant to his office on 31<sup>st</sup> May 2014. He asked the Claimant to explain his conduct with regard to the D.T. Dobie incident, and also, with regard to his unauthorized absence. Nurmohammed asked the Claimant where he got the fare to travel to Malindi. The Claimant disclosed he was assisted with the fare by his Brother. The Claimant was rough and arrogant. He dictated a statement to Nicholas and refused to sign. He was uncooperative. He demanded for his salary, saying he no longer wished to work. Nurmohammed recorded the conversation. The Claimant was paid salary for May and June 2014. Nasser drew the resignation letter. The Claimant signed the letter. He was paid Kshs. 15,878. Employees would utilize their annual leave days, or sell off their annual leave days. Travelling allowance was not provided for in the contract.

14. The Respondent issued warning upon the Claimant, before resignation. The Claimant refused to sign the warning letter. Nurmohammed attended conciliation meeting at the Labour Office on 18<sup>th</sup> July 2014; the Claimant was absent. Nurmohammed told the Court the Claimant did not issue Respondent with a notice before resignation. The Respondent pays for 1 month salary in lieu of notice.

15. In cross-examination, Nurmohammed testified the Claimant was absent on 23<sup>rd</sup> to 25<sup>th</sup> May 2014. He was issued warning letter on 7<sup>th</sup> June 2014. First it was on his absence. He refused to sign the warning letter. The signature on the letter is the Supervisor Nicholas's, not that of the Claimant. The Supervisor did have authority to grant Employees off-duty days. Employees sought such days from Nurmohammed. The Respondent instructed the Claimant it would withhold his salary; if he wanted to have his salary, he had to sign the resignation letter.

16. The recording of the meeting was done on 6<sup>th</sup> June 2014. Warning issued the following day. There was no other warning issued upon the Claimant. He worked for the month of May 2014. It was not fair to withhold his salary.

17. Nurmohammed told the Court he was not expected to write to the Claimant a letter to show cause why the Claimant should not have been disciplined. The Director recorded the meeting in audio disc because Claimant's attitude was wrong. The Claimant was paid Kshs. 15,878 by the Respondent, on termination. The Respondent paid this notwithstanding the Counterclaim of a similar amount. The Claimant was paid the amount on humanitarian ground. Nurmohammed concluded his evidence on redirection, with the statement that only him could grant Employees off-duty days.

18. Nicholas Mutuku Musembi told the Court he is a Clerk with the Respondent Company. The Claimant worked as a Driver. The Claimant was not at work on 23<sup>rd</sup> to 25<sup>th</sup> May 2014. He called Nicholas on phone saying he had travelled home to Malindi. He did not inform Nicholas before he travelled. He was asked by the Director to write a statement on return, explaining himself. He said he could not write. He asked Nicholas to write down what he said, but after Nicholas had done so, the Claimant refused to sign

his own statement. He stated there was no need to sign the statement as what he had stated was true. He was issued a warning letter. The letter was issued by the Accountant Nasser. Nicholas signed. The Claimant refused to sign.

19. Questioned, Nicholas stated he was acting as the Supervisor because the substantive Supervisor was not present. The Claimant called saying he was in Malindi. Nicholas did not authorize his absence. There was deduction made on the Claimant's salary for days absent. Nicholas did not know the conversation in the meeting called by Nurmohammed was being recorded. Nicholas signed the warning letter in witness. After some days, he heard the Claimant had resigned. Nicholas finally told the Court he called the Claimant, after the Claimant had absented himself without leave.

20. ***Did the Claimant resign voluntarily or was his contract terminated unfairly and unlawfully by the Respondent? Does he merit the prayers sought? Does he owe the Respondent notice pay?*** These in general are the questions at the heart of this dispute.

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

21. It is common evidence that the Claimant was employed by the Respondent. He was initially employed as a Turn Boy, and later as a Heavy Commercial Driver. He left employment under contentious circumstances, on 7<sup>th</sup> June 2014. He earned a gross monthly salary of Kshs. 25,392.

22. *Did he resign voluntarily or otherwise?* The Respondent provided a letter of resignation dated 7<sup>th</sup> June 2014, as the principal evidence of resignation. Other evidence includes an audio disc, and the oral evidence of Nurmohammed and Nicholas.

23. These pieces of evidence do not show that the Claimant gave up his job voluntarily. The letter of resignation was drawn by Nasser, Respondent's Accountant. It was not signed by the Claimant, although his name was indicated as a signatory.

24. The recording contained in the audio disc, as noted by the Court during the hearing, was not clear with respect to what the Person identified as Jackson in the transcripts said. It was only the voice of the Person identified as Abdulrazak which was clear. The conversation was not a civil engagement, but a form of dressing down between an Employer and an Employee, with one of the Parties sounding really worked up. If the recording was intended to show that the Claimant resigned voluntarily, it cannot achieve this objective. There is no section in the recording where the Claimant is heard to express a desire at voluntary resignation. Throughout, it was an angry Abdulrazak, demanding the unbowed Claimant signs resignation letter.

25. *Did the Respondent terminate the Claimant's contract unlawfully and unfairly?* Section 41, 43 and 45 of the Employment Act 2007 require the Employer to take the Employee through a fair procedure, and justify termination decision.

26. There is evidence the Claimant travelled to Malindi on 23<sup>rd</sup> to 25<sup>th</sup> May 2014, without the leave of his Employer. The Claimant did not deny he was in Malindi on these dates. He did not obtain any leave before he travelled. Nicholas, who is doubted to have had authority to grant off-duty days, testified the Claimant called him, while already in Malindi, saying he would not be available. Even assuming the Supervisor, and not necessarily the Director, could authorize an Employee to be off-duty, when did the Claimant obtain authorization from Nicholas? The Court is satisfied he went away to Malindi without the leave of his Employer, or without any lawful cause.

27. The Respondent did not explain the incident surrounding Claimant's duties at D.T. Dobie; and the loss of a Client, in clear terms. The details of the incident were given to the Court haltingly. The Court was left with the impression that the incident did not amount to substantive justification for termination. The Claimant's absence from work, without authorization or lawful cause, was an employment offence under Section 44 [4] [a] of the Employment Act 2007.

28. The Respondent consequently sanctioned the Claimant for the offence. There is a warning letter dated 7<sup>th</sup> June 2014. The warning served as a punishment for the offence of being absent from work, without the leave of the Employer, or lawful cause. Secondly, it was the evidence of Nicholas that the Claimant's salary for the days absent was deducted. These were 2 sanctions. The Respondent, while not conceding to have terminated the Claimant's contract, actually went ahead to terminate the Claimant's contract, advancing the same reasons over which he had been warned, and had his salary deducted. There were 3 forms of punishment, for the offence of 1.

29. The warning letter doubled as a letter to show cause. The Respondent writes "...show course [sic] why the company shouldn't take action against you..." Nurmohammed testified however that he did not see the need for a letter to show cause. The warning letter, assuming it was intended to serve also as a letter to show cause, was not followed with any hearing of the Claimant. There was no disciplinary hearing. The meeting recorded by the Respondent was solely to pressure the Claimant into resigning. The warning letter informs the Claimant that the Respondent had decided to hold onto the Claimant's salary, until he signed the resignation letter. Salaries and wages are protected under part IV of the Employment Act, and must be paid promptly when due. Employers who delay payment engage in wage offences and are liable to criminal prosecution and sanctions. The Respondent may have had valid ground in terminating the Claimant's contract, but adopted wrong and illegal tactics in forcing the Claimant out of employment.

30. The Court's view is that the Respondent had valid ground, in terminating the Claimant's contract, but procedure was fundamentally flawed. Termination was therefore unfair. ***The Claimant is granted the equivalent of 4 months' salary in compensation for unfair termination, at Kshs. 101,568.***

31. The Respondent did not issue the Claimant notice or pay to him 1 month salary in lieu of notice. Given the findings of the Court on the circumstances surrounding termination, the Claimant, not the Respondent, ***merits 1 month gross salary in notice pay, which is allowed at Kshs. 25,392.***

32. Nurmohammed gave no clear response to the prayer for annual leave pay. The Engagement Letter dated 13<sup>th</sup> April 2013, allowed the Claimant 24 days of annual leave after the first 12 months of service. The earlier contract of 2010 allowed him 21 days of annual leave. He claims he did not utilize any of his days, and received no payment in lieu of annual leave utilization. Nurmohammed stated Employees opt to utilize their annual leave days, or claim money in lieu. When they are paid money, they sign payment vouchers. He did not place the Claimant anywhere within this portrait. He did not say unequivocally if the Claimant went on annual leave, or was paid in lieu. He gave no records of annual leave utilization, or payment in lieu thereof. He gave a general legal/policy statement about annual leave.

33. The Court shall allow the prayer for annual leave pay, based on a minimum of 21 days per year, for 4 years beginning 1<sup>st</sup> February 2010, to 29<sup>th</sup> January 2014 and annual leave pay for a pro-rata period of 5 months for the period between February and June 2014. This is worked out as follows: gross salary of Kshs 25,392 divide by 26 working days= daily rate of Kshs. 976 x 21 days= Kshs. 20,508 x 4 years = Kshs. 82,035 + [8.75 x Kshs. 976= Kshs. 8,540] = Kshs. 90,575. ***The Claimant is granted Kshs. 90,575 in annual leave pay.***

34. The claim for leave travelling allowance, which the Claimant appeared to confuse with safari allowance, was not supported by the evidence. It was not in the contract of 2010 or that of 2013, or shown by any other evidential material, and is rejected.

35. ***Certificate of Service shall be released to the Claimant by the Respondent forthwith, as required under Section 51 of the Employment Act 2007.***

36. The Counterclaim is rejected.

37. No orders as to costs.

***IN SUM, IT IS ORDERED:-***

*a. Termination was unfair and unlawful.*

*b. The Respondent shall pay the Claimant: equivalent of 4 months' salary in compensation for unfair termination at Kshs. 101,568; 1 month salary in lieu of notice at Kshs. 25,392; and annual leave pay at Kshs. 90,575- total Kshs. 217,535.*

*c. Respondent to release to the Claimant his Certificate of Service forthwith.*

*d. The Counterclaim is rejected.*

*e. No order on the costs*

**Dated and delivered at Mombasa this 24<sup>th</sup> day of February 2017.**

**James Rika**

**Judge**