



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 1527 OF 2014**

**TOM WAFULA MASINDE.....CLAIMANT**

**VS**

**URGENT CARGO HANDLING LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by Memorandum of Claim dated 2nd September 2014 and filed in Court on even date, seeks relief for unlawful dismissal and failure to pay terminal dues. The Respondent did not file any reply in spite of due service, and the Court therefore heard the Claimant *ex parte* on 15th December 2015.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 17th February 2006 in the position of Driver. His monthly salary, as at the time of leaving employment, was Kshs.20,379.00.

3. The Claimant states that sometime in the month of October 2013, while working at the Respondent's Mombasa Branch, he was notified that the Transport Department had been de-linked from the Respondent to operate under a company known as Uni Group.

4. The Claimant was required to sign a fresh employment contract with Uni Group but he declined to do so because his contract with the Respondent had not been terminated in accordance with the law. From the month of November 2013, the Claimant's salary was withheld.

5. It is the Claimant's case that the Respondent's action of withholding his salary amounted to constructive dismissal. He claims the following:

- a. A declaration that the Respondent's action amounted to constructive dismissal which was unlawful and unfair
- b. One month's salary in lieu of notice.....Kshs.20,379.00
- c. Unpaid salary for the month of November 2013.....20,739.00
- d. Leave pay for 6 years.....122,274.00
- e. 12 months' salary as damages for constructive dismissal.....244,548.00
- f. Costs plus interest

**Findings and Determination**

6. There are two issues for determination in this case:
  - a. Whether the Claimant was constructively dismissed from employment;
  - b. Whether the Claimant is entitled to the remedies sought.

**Constructive Dismissal?**

7. The Claimant states that following his refusal to sign a fresh employment contract with Uni Group, the Respondent stopped his salary. He maintains that this amounts to constructive dismissal.

8. Constructive dismissal may be defined as a situation created by an employer which renders continuation of an employment relationship untenable, thus forcing an employee to leave employment (see *Emmanuel Mutisya Solomon v Agility Logistics (Cause No 1448 of 2011)*).

9. According to the Claimant, he was coerced by the Respondent to sign a fresh employment contract with Uni Group and when he resisted, his salary was stopped. It seems to me that the arrangement pursued by the Respondent in this regard amounts to what is commonly known as outsourcing or transfer of business.

10. As held by **Mbaru J** in *Elizabeth Washeke and 65 Others v Airtel Networks (K) Ltd and Another [2013] eKLR* in an outsourcing or transfer of business arrangement, the terms and conditions of service of employees must be secured and each affected employee must give individual consent to be outsourced or transferred. An employee who is not willing to move must be given the opportunity to terminate their employment with full benefits. It follows therefore that any outsourcing or transfer of business that does not adhere to these parameters amounts to an unfair termination of employment.

11. According to the evidence adduced before the Court, the Claimant was simply told to sign a fresh employment contract with Uni Group and once he declined to do so, his salary was stopped. In my view, the Respondent's action amounted to unfair termination of employment within the meaning of Section 45 of the Employment Act, 2007 and the Claimant is entitled to compensation.

**Remedies**

12. In light of the finding that the Respondent's action amounted to an unfair termination of the Claimant's employment, I award the Claimant seven (7) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service plus the Respondent's conduct in the termination transaction. I further award the Claimant one month's salary in lieu of notice. In the absence of leave records, the claim for leave pay succeeds and is allowed.

13. The Claimant testified that he did not work in the month of November 2013 and the claim for salary thereof therefore fails and is dismissed.

14. In the final analysis I make an award in favour of the Claimant in the following terms:

a. 7 months' salary as damages for unlawful termination.....	Kshs.142,653.00
b. 1 month's salary in lieu of notice.....	20,379.00
c. Leave pay for 6 years (20,379/30x21x6).....	<u>85,592.00</u>
<b>Total.....</b>	<b>248,624.00</b>

15. I further direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case.

16. The award amount will attract interest at court rates from the date of the award until payment in full.

17. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS**

**26TH DAY OF FEBRUARY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Wathome for the Claimant

No appearance for the Respondent