



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT MOMBASA**  
**CAUSE NUMBER 900 OF 2015**  
**BETWEEN**  
**RASHID JUMA RUBIA ..... CLAIMANT**  
**VERSUS**  
**PALM CREEK ACADEMIC SERVICES LIMITED..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Matete Mwelese & Company Advocates for the Claimant*

*Mogaka Omwenga & Mabeya Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 24<sup>th</sup> November 2015. He avers he was employed by the Respondent Company as a Driver, on the 7<sup>th</sup> January 2014. He earned a monthly salary of Kshs. 22,000. He used to transport Respondent's Pupils to and fro School. His contract was terminated by the Respondent without notice or cause, on the 10<sup>th</sup> August 2015. The Claimant avers he was served with a warning letter dated 10<sup>th</sup> August 2015 by the Respondent, with the allegation that the Claimant had dented the Respondent's Motor Vehicle. His contract was terminated the same day the letter of warning issued. The Claimant states termination was unfair and unlawful and seeks the following orders against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 22,000.
- b. Arrears of house allowance at 15% of Kshs. 22,000 x 24 months, at Kshs. 79,200.
- c. 12 months' salary in compensation for unfair termination at Kshs. 264,000.
- d. April 2014 unlawful deduction at Kshs. 18,000.
- e. August 2014 unlawful deduction at Kshs. 18,000.

Total .....Kshs. 401,200

The Claimant also prays for release of his Certificate of Service, and for costs of the Claim.

2. The Respondent filed its Statement of Response on the 19<sup>th</sup> February 2016. It concedes the Claimant was its Employee. It is denied that the Respondent terminated the Claimant's contract. The Claimant proceeded on annual leave on the 10<sup>th</sup> August 2015. He was scheduled to return to work on 28<sup>th</sup> August 2015. He did not return. He damaged the Respondent's Motor Vehicle and failed to repair it, contrary to the Respondent's Workplace Policy. Contrary to paragraph 3 of the Amended Statement of Response and Counterclaim, the Respondent states under paragraph 9, that there was no employment relationship between the Parties. The Respondent's position is that the Claimant deserted employment, and owes the Respondent 1 month salary in lieu of notice. The Respondent prays the Claim be dismissed with costs to the Respondent.

3. On 23<sup>rd</sup> February 2016, Parties agreed to have the dispute determined on the strength of their Pleadings, Bundles of Documents, and Submissions under Rule 21 of the Industrial Court [Procedure] Rules 2010. Submissions were confirmed to be filed, at the last mention in Court on the 22<sup>nd</sup> March 2016.

### **Claimant's Position**

4. There is no doubt, the Claimant submits, that there was an employment relationship between the Parties. The Respondent denies the presence of an employment relationship, but has gone on to exhibit contracts given to the Claimant, and Leave Application Forms. The Counterclaim itself is based on the presence of an employment relationship. Paragraph 9 of the Respondent's Statement of Response is therefore untrue.

5. The Claimant agrees he had applied for annual leave beginning 10<sup>th</sup> August 2015, to last up to 28<sup>th</sup> August 2015. His application was approved. Upon approval he was summoned by Respondent's Administrator Lydia Njeri, and issued the warning letter. He was dismissed on the same date after receiving the warning letter.

6. The Claimant was not accorded any hearing preceding termination. Section 41 of the Employment Act was disregarded.

7. It is not true that the Claimant deserted. It is alleged by the Respondent that the warning letter was served on the Claimant on 28<sup>th</sup> August 2015 after he resumed duty. There was no attendance register produced by the Respondent, to show the Claimant was not at work after 10<sup>th</sup> August 2015. There was no letter written to the Claimant by the Respondent, requiring the Claimant to explain the alleged desertion. There was no disciplinary process involving the offence of desertion.

8. The Claimant submits he has established he merits the remedies sought. Notice pay is merited. The pay slip indicates the column for house rent allowance as 'nil.' The item is merited under Section 31[1] of the Employment Act. Termination was unfair and compensation at 12 months' salary is merited. The claim on salary deduction in April and August 2015 was unchallenged. The Claimant issued demand before action, and merits grant of costs.

### **Respondent's Position**

9 The Respondent finally concedes, in its Closing Submissions, that the Claimant was its Employee. The Respondent did not terminate the Claimant's contract of employment. The Respondent approved Claimant's application for annual leave, beginning 10<sup>th</sup> August 2015. It is improbable that the Respondent would then terminate the Claimant's contract verbally on the same date.

10. The Claimant was on leave when inspection of his assigned Motor Vehicle KBS 412 Z, revealed the Vehicle had been dented, and haphazardly been repaired. The warning letter on the denting, issued on

10<sup>th</sup> August 2015, and was received by the Claimant on 28<sup>th</sup> August 2015. He was warned if the offence was repeated, he would have disciplinary action taken against him. The Claimant resumed duty on 28<sup>th</sup> August 2015. He received his August 2015 salary and disappeared. He did not report to work on 31<sup>st</sup> August 2015. The Respondent called the Claimant severally through phone. The calls went unanswered. On 10<sup>th</sup> September 2015, the Respondent wrote to the Claimant notifying him that he had failed to give 1 month notice of termination. The Claimant therefore terminated his own contract of employment.

11. Notice pay is unmerited, because the Claimant initiated termination. The salary of Kshs. 22,000 was consolidated, factoring in the housing element. Compensation is unmerited because the Claimant left of his volition. No pay slips were produced to support the claims for deductions for the months of April and August 2015. The Respondent prays for dismissal of the Claim, and grant of the Counterclaim, with costs to the Claimant.

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

12. It is safe to assume, that the Respondent's position on the presence of an employment relationship expressed in paragraph 9 of the Amended Response and Counterclaim, was abandoned as shown in the Closing Submissions. It is conceded in the Closing Submissions that the Claimant was an Employee of the Respondent. Certain actions taken by the Respondent against the Claimant, and certain employment records availed to the Court by the Respondent, leave no doubt the Claimant was employed by the Respondent as its School Driver.

13. The relationship appears to have broken down on 28<sup>th</sup> August 2015. The Claimant had applied for annual leave, commencing 10<sup>th</sup> August 2015, to end 28<sup>th</sup> August 2015. He testified on 10<sup>th</sup> August 2015, he was summoned by the Administrator, issued warning letter, and then verbally dismissed.

14. The Respondent denied having verbally or otherwise dismissed the Claimant. He was allowed to go on annual leave from 10<sup>th</sup> August 2015 to resume 28<sup>th</sup> August 2015. In his absence, the Motor Vehicle assigned to him was inspected. It was found to have been dented, and haphazardly repaired, contrary to the School Policy which required accidents are reported to the School, and repairs made by the School, with the costs shared between the School and the concerned Driver. The Respondent wrote the warning letter dated 10<sup>th</sup> August 2015, which was issued the Claimant when he returned to work on the 28<sup>th</sup> August 2015. He was paid his salary for August, and deserted employment. The Respondent realized the Claimant had not reported on 31<sup>st</sup> August 2015 and made attempts to call the Claimant thereafter. The calls went unanswered. On 10<sup>th</sup> September 2015 the Respondent wrote to the Claimant inquiring why the Claimant had not notified the Respondent he had terminated his employment. The Respondent advised the Claimant it considered him to have deserted.

15. Section 47 [5] of the Employment Act 2007, requires that in unfair termination or wrongful dismissal claims, the Employee has the obligation to prove the unfair or wrongful act has taken place, while the Employer has the obligation of justifying its act.

16. The Court was not persuaded by the Claimant that his contract was terminated by the Respondent, let alone unfairly or unlawfully terminated. There is oral and documentary evidence that he sought to go on annual leave. That application was approved, and the Claimant left on 10<sup>th</sup> August 2015 to return on 28<sup>th</sup> August 2015.

17. He alleges his contract was terminated by word of mouth on the same date he went on annual leave, the 10<sup>th</sup> August 2015. The same date, he was issued a warning letter. He did not come out clearly to deny that he went back to work on 28<sup>th</sup> August 2015 in accordance with his annual leave terms, and received his salary for the entire month of August.

18. The warning letter advised the Claimant against repairing the School Vehicle on his own, without making a report to the Respondent. He was told if he repeated the mistake in the future, disciplinary

action would be taken against him. There was no suggestion in this letter that other disciplinary sanctions such as dismissal had been considered. The warning sufficed. Any other decision taken based on the same complaint would be an aberration. It was for the Claimant to establish that he was indeed dismissed through word of mouth by the Respondent. He alleged the dismissal decision was communicated to him by the Administrator Lydia, in the presence of the Accountant Lucy. He did not make any attempts to have the evidence of these two Ladies recorded, particularly as the Respondent denied verbally or otherwise terminating the Claimant's contract. It is not clear to the Court why the Claimant would go back to work on 28<sup>th</sup> August 2015 when the warning letter was received by him, if his contract was terminated by the Respondent on 10<sup>th</sup> August 2015. Why would he be paid his full August 2015 salary, if termination was on 10<sup>th</sup> August 2015? The more plausible explanation is that made by the Respondent in its submissions: that the Claimant was on scheduled annual leave between 10<sup>th</sup> August 2015 and 28<sup>th</sup> August 2015; that he went back to work at the end of the annual leave; received the warning letter; he was paid his full August salary; and from 31<sup>st</sup> August 2015, deserted. The reason for desertion is unclear but the Court got the impression that it had something to do with the sharing of the costs for repair of the Motor Vehicle, which as can be read from the Submissions of the Respondent, the Claimant was not keen to accept. This however is speculative and perhaps unnecessary, the Claimant as stated above, having the burden of proving unfair or wrongful act has taken place. From the material on record, the Court is unable to find that the Claimant has discharged that burden, warranting the Respondent to be called upon to justify anything. It has not been shown termination was initiated by the Respondent.

19. It follows his prayers for notice pay, and compensation for unfair termination must fail.

20. The Claimant's pay slip is self-explanatory. Basic pay is the first item on this slip, and is shown to be Kshs. 22,000. Basic pay, as has been stated in the Court's past decisions, is that pay devoid of any allowances, paid to the Employee as consideration for his labour. Kshs. 22,000 is therefore what was paid to the Claimant, shorn of any allowances. If the Respondent intended Kshs. 22,000 to be a consolidated figure, it should have stated so in the pay advice. The Respondent did not show that the Claimant's contract contained a clause consolidating his salary, in terms of Section 31 [2] of the Employment Act 2007. The claim for house rent allowance is allowed. The Claimant did not work for 24 months as pleaded. He worked for 20 months. January 2014 to August 2015. ***He is granted 20 months' of house rent allowance at 15% of Kshs. 22,000 = Kshs. 66,000***

21. There was no adequate support in evidence for the claims for deducted salaries of Kshs. 18,000 each, for the months of April and August 2014. The Claimant did not provide the Court with his pay slips for the months, or any letters of demand made on the Employer concerning the items, to enable the Court conclude there were deductions made, and for what purpose such deductions could have been made. The item is unsupported and is rejected.

***22. The Certificate of Service is granted under Section 51 of the Employment Act.***

23. The Counterclaim for 1 month salary in notice pay is allowed for reasons stated in paragraph 18 of this decision. The Claimant initiated termination and left employment without notifying the Respondent. ***He shall pay to the Respondent 1 month salary in lieu of notice at Kshs. 22,000.*** Parties shall meet their costs of the dispute.

IN SUM, IT IS ORDERED:-

- a. ***The Claimant left employment of his own volition.***
- b. ***The Respondent shall pay to the Claimant Kshs. 66,000 in arrears of house rent allowance.***
- c. ***The Claimant shall pay to the Respondent Kshs. 22,000 in notice pay.***
- d. ***In total the Claimant shall receive the sum of Kshs. 44,000 from the Respondent in full and final settlement of the dispute.***
- e. ***Certificate of Service shall be released by the Respondent to the Claimant forthwith.***
- f. ***Parties to meet their costs of the dispute.***

**Dated and delivered at Mombasa this 1<sup>st</sup> day of July 2016**

**James Rika**

**Judge**