



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 669 OF 2015**

**BETWEEN**

**MWINYI KOMBO STANLEY.....CLAIMANT**

**VERSUS**

**POLO AUTO FREIGHT FORWARDERS.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*I.R.B. Mbuya & Company Advocates for the Claimant*

*Marende Birir Shimaka & Company Advocates for the Respondent*

---

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 2<sup>nd</sup> September 2015. He states he was employed by the Respondent Company in May 2012 up to 27<sup>th</sup> July 2015. The Respondent is involved in transport services. He was employed as a Turn Boy, initially on casual terms. He earned Kshs. 8,000 on exit. His contract was terminated on the allegation that he stole a motor vehicle jerk. He claims termination was unfair, and seeks the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 17,061.
- b) Rest period pay for 39 months at Kshs. 88,717.
- c) Underpayments at Kshs. 297,150.
- d) Public holidays' pay at Kshs 17,061.
- e) Annual leave pay at Kshs. 43,829.
- f) Service pay at the rate of 15 days' salary for every completed year of service at Kshs. 25,591.

g) 12 months' salary in compensation for unfair termination at Kshs. 204,732.

h) Certificate of Service to issue.

i) Costs.

j) Interest.

K) Any other suitable relief.

2. The Respondent filed its Statement of Response on 15<sup>th</sup> October 2015. It denies to have employed the Claimant, stating the Claimant, at all material times, worked under the Respondent's driver. There was no direct relationship between the Parties. The Claimant was asked to make the missing car jerk available before he could return to work. He disappeared, never to return to work. The Respondent attempted to trace the Claimant to no avail. He did not work excess hours; work on Public Holidays; or Rest Days. He worked when there was work to be performed by him. The nature of Respondent's business was not continuous, requiring the Claimant's services throughout. He was given work when the Respondent secured some business. The Claim has no merit.

3. The Parties recorded an agreement in Court on the 27<sup>th</sup> July 2016, allowing the Court to consider and determine the dispute on the strength of the record. The dispute was last mentioned on the 19<sup>th</sup> September 2016, when Parties confirmed the filing of their Submissions.

#### Claimant's Position

4. The Claimant states he was in continuous employment, from early May 2012 to 27<sup>th</sup> July 2015. He was a regular Employee under Section 37 of the Employment Act 2007. Termination was not based on valid reason, and fair procedure. It was not shown that the Claimant was responsible for the missing car jerk. He was not granted a hearing on the allegation. Sections 41 and 45 of the Employment Act 2007 were disregarded. He submits he deserves compensation for unfair termination; notice pay under Section 36 of the Employment Act; annual leave pay; service pay; public holidays pay; and rest day compensation.

5. The Respondent takes issue with the Submissions filed by the Claimant, pointing out that the Claimant misleads the Court, in his submitting that the Respondent was absent during the hearing and did not file Response to the Claim.

6. On the substance of the Claim, it is the position of the Respondent that the Claimant admitted there was an issue raised by the Respondent about Respondent's missing car jerk. He was questioned about the missing jerk. He was given the choice to produce the jerk or be surcharged for the value of the item, at Kshs. 2,500. He disagreed and upon collection of his end-month salary, did not go back to work. He deserted for fear of being surcharged. His desertion amounted to an act of gross misconduct. He does not merit notice pay and compensation. He is not entitled to public holidays pay and rest days compensation. The nature of the Respondent's business entailed the Drivers and Turn Boys going for occasional trips when there was need to do so. It was not work carried out in succession every day. He rested when he was not on journey. This applies to the claim for annual leave also. The Claimant states in his Pleadings that he was employed as a Casual Employee initially. He did not tell the Court at what point in time, he was regularized. He was engaged whenever there was adequate work, and the prayer for underpayments cannot stand. The Respondent concedes the prayer for service pay.

#### The Court Finds:-

7. It is not true that the Respondent was absent when the dispute came up for hearing, or failed to file a Response, as submitted by the Claimant. The record shows both Parties were represented by Counsel at the hearing, and there is a Statement of Response on record.

8. The Claimant was employed by the Respondent as a Turn Boy for 3 years, 3 months. He worked from May 2012 to 27<sup>th</sup> July 2015. The Claimant indicated he was initially taken in as a Casual Employee. It is not necessary in the view of the Court, for the Claimant to state when he was de-casualized. The aggregate period of service is sufficient to lead the Court to conclude he was a regular Employee under Section 37 of the Employment Act, by the time he left employment.

9. There is common evidence that the Respondent lost its car jerk. The Claimant was involved in this loss, explaining the item was left at some Petrol Station in one of the trips. It is not clear from his Pleadings and Submissions why the item was left at a Petrol Station, and why it was irretrievable when the Respondent demanded it is retrieved. There was reason for the Respondent to conclude the Claimant had acted to the detriment of Respondent's business, and committed an act of gross misconduct under Section 44 [4] [g] of the Employment Act. He subsequently abandoned his position when threatened with surcharge. In the view of the Court, he did not discharge his burden of persuasion under Section 47 of the Employment Act, by showing that the Respondent acted without substantive justification.

10. That said, the Respondent did not subject the Claimant to a disciplinary hearing. There were no charges, either on the allegation of losing the car jerk, or for the offence of desertion. The Respondent alleges the Claimant came to Court too fast and there was no time to accord him a disciplinary hearing. The Respondent submits incorrectly that termination was on 27<sup>th</sup> July 2015, and filing of the Claim on 2<sup>nd</sup> September 2015, 'a week later.' It was not shown by the Respondent why the Claimant was not heard.

**11. The Court is convinced termination was fair in substance, but lacking on procedural fairness, and grants the Claimant 4 months' salary in compensation at Kshs. 32,000.**

12. The prayer for notice pay is declined, considering the Claimant's role in the events leading to termination.

**13. The prayer for service pay is conceded and granted at Kshs. 25,591.**

14. The documents presented by the Claimant to the Court are insufficient to support the claims for underpayments, public holidays' pay, rest days compensation and annual leave. The documents comprise a demand letter and a national identity card. He did not provide the Court with any wage instrument justifying the prayer for underpayments. He did not come out clearly in answering the Respondent's submission, that the nature of its business did not require the Claimant works in continuity. He was engaged when there were journeys to be undertaken. He was free when there were no journeys. The Court is not persuaded the Claimant was at work every day, including on public holidays and rest days, or that he worked in excess hours at any time. The nature of his work as a Turn Boy, involved accompanying his assigned Driver on occasional trips. It is not probable that this was done without a break during the 3 years 3 months, from Monday to Sunday of every week, and on all public holidays. The claims for underpayments, public holidays, rest days, and annual leave have no support and are declined.

**15. Certificate of Service shall be released to the Claimant under Section 51 of the Employment Act 2007.**

16. No order on the costs.

IN SUM, IT IS ORDERED:-

**a) Termination was justifiable but lacking in fairness of procedure.**

**b) The Respondent shall pay to the Claimant 4 months' salary in compensation for unfair termination at Kshs. 32,000 and service pay at Kshs. 25,591- total Kshs. 57,591.**

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

***d) No order on the costs.***

Dated and delivered at Mombasa this 25th day of November 2016

James Rika

Judge