



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 1265 OF 2012**

**BETWEEN**

**DANIEL MUSYOKI MUTUA .....**  
**CLAIMANT**

**VESRUS**

**WEMA TECHNICAL SERVICES.....**  
**RESPONDENT**

*Rika J*

*Cc M. Kidemi*

*Mr. Maingi instructed by Musili Mbiti & Associates, Advocates for the Claimant*

*Mr. Kamotho instructed by N.K. Mugo & Company Advocates for the Respondent*

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

**AWARD**

1. This dispute involves similar issues as in ***Industrial Court Cause Number 1262 of 2012 between Cosmas Mutua Kimatu v. Wema Technical Services Limited***, which was determined by this Court in an Award delivered on 21<sup>st</sup> January 2014. In that dispute the Claimant was employed as a Turn Boy by the Respondent. The Court found his contract was unfairly terminated by the Respondent, and granted compensation and terminal benefits. The same Advocates are on record in both matters, and ideally, the files should have been consolidated.
2. The Claimant in the instant Claim filed his Statement of Claim on 25<sup>th</sup> July 2012. He was employed as a Driver by the Respondent in September 1998. He earned a monthly salary of Kshs. 17,000. His contract was terminated on 9<sup>th</sup> June 2012. He Claims his contract was unfairly terminated, and seeks:-
  - a. One month salary in lieu of notice at Kshs. 17,000;
  - b. Severance pay from September 1998 to June 2012 at Kshs. 119,000;
  - c. Annual leave pay of 294 days at Kshs. 166,000;
  - d. Unremitted N.S.S.F Contributions at Kshs. 12,800; and
  - e. Twelve months' salary for unfair termination at Kshs. 204,000

Total ..... Kshs. 519,400

He prays for interest, costs, certificate of service and any other suitable relief.

3. The Respondent filed its Statement of Reply on 16<sup>th</sup> November 2012. It is the position of the Respondent that the Claimant was not its Employee. Alternatively and without prejudice to this position, the Respondent avers the Claimant deserted duty. He is not owed any dues by the Respondent.

4. The Claimant testified and closed his case on 3<sup>rd</sup> December 2013, while the Respondent testified through its Director Raphael Wahogo Kamanu on 7<sup>th</sup> June 2013 when the hearing closed. The dispute was last mentioned in Court on 4<sup>th</sup> July 2013 when the Parties confirmed the filing of their Final Arguments and were advised by the Court Award would be delivered on notice.

*The Court Finds and Award:-*

5. As in Cause 1262 of 2012, there is sufficient evidence to show the Parties in the dispute were in a regular employment relationship. Raphael confirmed in his evidence that he started to engage the Claimant as a Driver in 1998. There were M-pesa Statements showing money was consistently deposited by Raphael in the Claimant's Account. The Claimant would not be deemed to have been in casual employment from 1998, as stated by Raphael. Section 37 of the Employment Act 2007 confers on the Claimant the character of a regular employee, given the cumulative number of years worked. Raphael testified he stopped giving the Claimant more work in June 2012. There was no termination. This was a mere play of words. Any termination involves the cessation of work, and the statement by Raphael was just another way of saying he terminated the Claimant's contract of employment.

6. Raphael confirmed the finding in the other Cause that the Respondent experienced diminished work in its business. It is fair to conclude a redundancy situation occurred and severance pay is awardable and is **granted at 15 days' salary for each completed year of service calculated Kshs. 17,000 divided by 26 working days= Kshs. 653 x 15= Kshs. 9,807 x 13 years completed in service = Kshs. 127,500.** The Respondent did not grant the Claimant annual leave or purchase the leave days from the Claimant, perhaps because the Respondent believed employment was irregular. **The Claim for 294 days of annual leave pay is well founded and allowed as prayed at Kshs. 166,000.** The Claim for **notice pay of one month is likewise justified and allowed at Kshs. 17,000.** The Claimant did come out clearly on the prayer for N.S.S.F deductions. He only used the N.S.S.F Statements to demonstrate that Wema was his Employer. There was no explanation given to the Court by the Claimant, how the amount of Kshs. 12,800 arose. This prayer is rejected. The Respondent did not observe the termination and redundancy law laid down under Section 40, 43 and 45 of the Employment Act 2007. Termination was therefore unfair, and the Claimant shall have **2 months' salary in compensation for unfair termination at Kshs. 34,000.** In sum-

- a. **Termination was unfair;**
- b. **The Respondent shall pay to the Claimant severance pay at Kshs. 127,500; leave pay at Kshs. 166,000; notice pay at Kshs. 17,000; and compensation at Kshs. 34,000 – total Kshs. 344,500;**
- c. **This sum shall be paid within 52 days of the delivery of this Award;**
- d. **The Respondent shall release the certificate of service to the Claimant forthwith; and**
- e. **No orders on the costs and interest.**

Dated and delivered at Nairobi this 12<sup>th</sup> day of February 2014

**James Rika**

**Judge**