



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1993 OF 2012**

(Before Hon. Lady Justice Hellen S. Wasilwa on 24<sup>th</sup> July, 2017)

**KENNETH MUKHENGI MASINDE .....CLAIMANT**

**VERSUS**

**MR. & MRS. GERALD CUNNINGHAM..... RESPONDENT**

**JUDGMENT**

1. Before the Court is a Claim for unfair dismissal filed through a Memorandum of Claim dated 4<sup>th</sup> October 2012 where the Claimant seeks:

*i. Payment of unpaid salaries and terminal dues tabulated as:*

*a. Salary*

<i>August 2011</i>	<i>17,000.00</i>
<i>September 2011</i>	<i>17,000.00</i>
<i>October 2011</i>	<i>17,000.00</i>
<i>November 2011</i>	<i>17,000.00</i>
<i>December 2011</i>	<i>17,000.00</i>
<i>January 2012</i>	<i>17,000.00</i>
<i>February 2012</i>	<i>17,000.00</i>
<i>March 2012</i>	<i>17,000.00</i>
<i>April 2012</i>	<i>17,000.00</i>
<i>27 days in May 2012</i>	<i>15,300.00</i>

*b. Housing Allowance @ 15% of the salary 226,950.00*

<i>c. Annual Leave (1 year, 5 months)</i>	<i>15,858.00</i>
<i>d. One Month Wages in lieu of notice</i>	<i>19,550.00</i>
<i>e. Severance Pay @ 15 days per year</i>	<i>59,500.00</i>
<i>f. 12 months wages as full compensation</i>	
<i>For fair and frivolous dismissal</i>	<i>234,600.00</i>
<i>g. Certificate of Service</i>	

<b><i>TOTAL</i></b>	<b><i><u>725,758.00</u></i></b>
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### **Facts of the Claim**

2. The Claimant was employed by the Respondents who are husband and wife jointly as their driver on the 18<sup>th</sup> of January 2008 up until May 2012. The Respondents work at UNEP/DEWA Gigiri and stay at Runda off Mimosa Lane. He earned a monthly salary of Kshs 17,000.00 but did not have a formal contract. He was not issued with housing allowance nor was he given any accommodation inspite of promises to do so. He was also not given his annual leave for the year 2010.

3. The Claimant states that he was paid his salary from August 2011 up until May 2012 when he was dismissed. He had earlier been informed by Mr. Cunningham that he would be paid at the end of March 2012 but this did not materialize. He was dismissed via text message on the 27<sup>th</sup> of May 2012 at 00.54.25 hours. He was not given a reason or explanation for his dismissal, nor was there an indication as to payment of his dues.

4. The Claimant went to the Ministry of Labour and no solution was forthcoming and has now come to Court for restitution.

### **Submissions**

The Claimant submits that he served under the Respondents diligently for seven years and five months with a clean record. He submits that there was no formal/written contract between the parties and therefore his employment was governed by the provisions of Section 7 and 8 of the Employment Act 2007.

6. He submits that Section 7 of the Employment Act 2007 states that ***“No person shall be employed under a contract of service except in accordance with the provisions of this Act”***.

7. That an employer shall at all times at her own expense provide a reasonable housing accommodation for each of his employees or shall pay to the employees such sufficient sum as rent in addition to the wages or salary of the employment as will enable the employee to obtain reasonable accommodation.

8. These terms he submit are reasonable statutory requirement conditions provided by the Act, further that Section 48 (1) (a) and (b) recognizes the basic terms and conditions of employment as is always provided through the regulations of wages and conditions of employment general orders. They submit that Legal Notice No 207 of 1990 Regulations of Wages (General) Order No. 4 provide for housing allowances at 15% of the employees basic monthly wage as housing allowance. Not providing housing allowance is a violation of the above quoted provisions of the law and an infringement of the Claimant’s Fundamental Labour Right.

9. He submit that the Respondents failure to pay wages when they were due was a violation of Section 18 (2) of the Employment Act 2007, where the nature of the Claimant’s contract was one where wages/salaries were due at the end of the month. Withholding of the salaries was unlawful especially as it

was the source of income for food, shelter and other basic needs.

10. He submits that all employees are guaranteed fair labour practices under Article 41(1) of Constitution. He submits that the dismissal via text message dated 27<sup>th</sup> May 2012 without notice or payment of his terminal dues was a violation of this right, he was not accorded a hearing or given proper explanation, a further violation.

11. The Claimant submits that the actions of the Respondent were also a violation Section 44(2) of the Employment Act 2007. He submits that he was entitled to the reliefs sought.

12. He submit that the Honourable Court has exclusive jurisdiction to listen and determine the matter and ask the Court to consider it in accordance with Section 45 (5) and find that:

***a. There was no valid reason given for the dismissal.***

***b. There was no fair reason for the dismissal.***

***c. No question had been raised regarding his conduct and capacity or capability.***

***d. Dismissal/termination procedures were not followed and as such declare the dismissal/termination unfair and unlawful.***

13. He prays that the Respondent be directed to pay the Claimant the amounts due and that they are also awarded the costs of the suit.

14. The Claimant came to Court and reiterated the facts in the Memorandum of Claim.

15. The Claim proceeded undefended because the Respondent despite service failed to enter appearance/file any defence and on the day scheduled for hearing also failed to appear in Court.

16. There is evidence that the Respondent had employed the Claimant as a driver as evidenced from Appendix KM1(a), KM1 (b), KM2(a) O2(b), O2(c ) O2(g) which are letters written by Respondent requesting that the Claimant be issued with a ground pass to enable him access UN Gigiri grounds on various occasions.

17. There is also Appendix KM 03 a letter from the Ministry of Labour Appendix KM 03 showing that he was being paid Kshs.17,000/= per month.

18. This evidence has not been controverted by the Respondents who have knowledge of the existence of this Claim.

19. I find the Claimant has established his Claim as required by law and I find he is entitled to the following:

***1. 12 months' salary as damages for unlawful termination =  $12 \times 17,000 = 204,000/=$ .***

***2. Unpaid salaries for the month of August 2011 to April 2012 – 9 months =  $9 \times 17,000 = 153,000/=$ .***

***3. Salary for 27 days in May 2012 = 15,300/=.***

***4. 1 months' salary in lieu of notice = 17,000/=.***

***5. House allowance at 15% salary =  $15\% \times 17,000 \times 9 \text{ months} = 22,950/=$ .***

**Total = 616,250/=**

***6. Issuance of Certificate of Service.***

***7. The Respondent will pay costs of this suit with effect from the date of this judgment.***

Read in open Court this **24<sup>th</sup> day of July, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Claimant

No appearance for the Respondent