



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 103 OF 2017**

**ABRAHAM KARUMI GICHUKI.....CLAIMANT**

**VERSUS**

**MASTERMIND TOBACCO (K) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued his erstwhile employer for his alleged unlawful and wrongful dismissal, failure to make statutory payments of house allowance and failure to pay outstanding salary and terminal dues including allowances. The Claimant was engaged as a marketing management trainee on 31<sup>st</sup> January 2007 and upon completion of probation, was confirmed as a permanent employee. He averred that he earned a monthly basic salary of Kshs. 15,000/-. He averred that by letter of 9<sup>th</sup> July 2007 his terms were reviewed to Kshs. 22,000/- basic salary. He averred that by a letter dated 26<sup>th</sup> January 2008 he was promoted from sales representative II to sales representative I and his monthly basic salary enhanced to Kshs. 35,000/-. He averred that in 2009 he was orally promoted to the position of sales manager and his monthly basic salary enhanced from Kshs. 35,000/- to Kshs. 66,200/- which was his salary as at the time of his summary dismissal. He averred that in the course of his employment on 24<sup>th</sup> August 2014 he was sent to the Respondent's company manager to Mombasa to supervise and oversee the sales of the company's products in Mombasa which was having its annual Agricultural Society of Kenya (ASK) show. He averred that he was shown which vehicle to board being Mitsubishi Canter registration number KAE 184V and left for Mombasa. He averred that at Maji ya Chumvi the driver had an accident with another truck and they were both injured and robbed by the members of the public who came to rescue them. He averred that the lorry was ransacked as were their belongings and that upon visiting the scene the Police held the other driver responsible. He averred the Respondent was informed of the accident and the need for money to tow the company vehicle and that the Respondent informed the Claimant to expend his own money which would be reimbursed. The Claimant averred that as a result he used Kshs. 140,000/- which the Respondent never refunded. He averred that he was instructed on 26<sup>th</sup> August 2014 to return to Nairobi and continued to work until 20<sup>th</sup> September 2014 when he was handed a letter of summary dismissal. He averred he was never accorded a hearing nor given notification of a hearing by the Respondent. He averred that he had worked for the Respondent for 7 years but the Respondent had not made any provision for housing allowance and neither was he provided with accommodation by the Respondent. He thus sought salary for the month of September 2015 – Kshs. 66,150/-, pay in lieu of notice – Kshs. 793,800/-, severance pay for 7 years – Kshs. 450,796/-, salary in lieu of 21 days paid up leave entitlement – Kshs. 45,000/-, compensation for lack of house allowance – Kshs. 840,000/-, compensation for unlawful termination – Kshs. 793,800/- and refund of the sum of Kshs. 140,000/- paid in respect of towing charged of the Respondent's vehicle after the accident. He also sought a certificate of service as well as costs of the suit.

2. The Respondent filed a defence in which it averred that the Claimant was grossly negligent in the execution of his duties as employee occasioning monumental loses to the Respondent. The Respondent averred that the Claimant was paid a consolidated salary which included house allowance. The Respondent averred that on 24<sup>th</sup> August 2014 at about 11.00am the Claimant was sent to travel to Mombasa to supervise the sales of the Respondent's products at the Mombasa ASK show. The Respondent averred that it was the company policy that no vehicle would be driven at night without the express permission of the Respondent's management. The Respondent averred that the Claimant was issued with an allowance of Kshs. 35,000/- for use at the show and a cheque of Kshs. 45,500/- and a voucher for Kshs. 2,000/- for official payments at the show. The Respondent averred that at 11.00am the Claimant left the Respondent's premises via gate 'B' and was expected to have reached Mombasa at 6.00pm the same day. The Respondent averred that at about 11.00pm a whole 12 hours after departure from Nairobi, the Claimant and the driver were involved in an accident at Maji ya Chumvi a clear testimony that the Claimant had engaged in frolics of his own using the company's vehicle. The Respondent averred that nowhere in the Police abstract did the Police absolve its driver Ashford Reche of blame for the accident and that indeed on 25<sup>th</sup> August 2014, the following day after the accident the driver was issued with a notice of intended prosecution which confirmed he was not blameless in the accident. The Respondent averred its vehicle was damaged and it unilaterally suffered the costs of repairs of the vehicle with no contribution from the Claimant. The Respondent averred that on 26<sup>th</sup> August 2014 it received a complaint from the Claimant's immediate supervisor who was the regional sales manager requesting the human resources manager to commence disciplinary hearings against the Claimant. The Respondent averred that a notice to show cause was issued to the Claimant on 1<sup>st</sup> September 2014 and the Claimant gave a written response to the notice to show cause. The Respondent averred that on 16<sup>th</sup> September the findings of the disciplinary hearing of the Claimant were communicated to the HR manager and having considered the report the Respondent decided to dismiss the Claimant for gross misconduct effective 20<sup>th</sup> September 2014 and duly paid the Claimant his terminal dues. The Respondent averred no notice of intention to sue was issued or received disentitling the Claimant to costs for the suit. The Respondent prayed that the statement of claim herein ought to be dismissed with costs to the Respondent.

3. The Claimant testified and reiterated his claim but the Respondent did not avail its witnesses at the hearing which failure was subject of a Ruling of the Court. The Respondent and Claimant did not file any submissions. The Claimant sought relief for his dismissal which included notice, unpaid house allowance and the refund of the money alleged to have been expended towards the towing charges. The issues that the Court isolates for determination are

(a) Whether the Claimant was afforded a hearing before dismissal

- (b) Whether the Claimant is entitled to house allowance
- (c) Whether the Claimant paid for towing charges
- (d) What remedies are available, if any, for the dismissal of the Claimant

4. As regards the hearing prior to dismissal, the Claimant was issued a notice to show cause, copy whereof was exhibited by the Respondent. The Claimant's response was contained in a reply he wrote in which he narrated the incident in great detail. He denied being aware of any company policy barring the use of a company vehicle beyond 8.00pm. The accident that the motor vehicle was involved in was at 11.00pm which runs counter to the expected arrival time at Mombasa. The Claimant and the driver having left Nairobi at 11.00am ought to have arrived at Mombasa barring any major traffic delays before 7.00pm that day. It is curious that the vehicle was not at Mombasa at the time of the accident and it seems there was cause for the allegations of misconduct leveled against the Claimant. He seemingly did not give a proper explanation as required by the Respondent and the Claimant's dismissal was therefore within the law as he could be dismissed for misconduct.

5. The Claimant asserts he was not paid house allowance for 7 years. He did not attach any payslip save for one attached for his June 2014 pay. The fact of non-payment of house allowance is a claim in the nature of special damages and should be proved strictly. No other payslip was produced and no explanation was given for the failure to adduce evidence for the alleged non-payment. I find that in respect of June 2014 no house allowance was paid. Under Section 31 of the Employment Act, housing or house allowance where no housing is provided are statutorily underpinned. The house allowance is 15% of the basic pay which means the Claimant was entitled to Kshs. 9,930/- in respect of house allowance for June 2014.

6. The Claimant availed a bill issued to him for Kshs. 140,000/- but no receipt for the sum was availed as evidence. This discounts the averment that the Claimant paid for the towing charges as the Respondent in its defence attached the cash sale in respect of the towing charges for the vehicle. The sum therein is Kshs. 31,380/- which is a fraction of the Kshs. 140,000/- the Claimant sought. It therefore does not seem plausible the towing charges from Maji ya Chumvi to Taru Police station would be Kshs. 140,000/- or that the Claimant actually paid for the towing as he alleged.

7. Regarding the balance of the Claimant's claims, the Claimant's contracts of service did not provide for payment of notice beyond one month. He is therefore not entitled to the notice for 12 months sought in his claim. He is also not entitled to any remedy for the alleged unlawful dismissal as the Court finds his dismissal was lawful to the extent he was heard prior to dismissal and the dismissal was for just cause. He did not avail any evidence relating to his alleged unpaid leave. No leave schedule was availed to show a balance of leave days if any. He also did not show that he was not paid his terminal dues as no effort was made to extract or adduce the evidence to prove the specific claims relating to non-payment. In the final analysis I find the claim was largely unproved and the Claimant is only entitled to Kshs. 9,900/- for the unpaid June 2014 house allowance. As the Respondent did not adequately defend the suit up to and including the hearing, each party will bear their own costs for the suit.

It is so ordered.

**Dated and delivered at Nyeri this 9<sup>th</sup> day of November 2020**

**Nzioki wa Makau**

**JUDGE**