



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1029 OF 2013**

*(Before Hon. Justice Mathews N. Nduma)*

**RICHARD KIMATHI.....CLAIMANT**

**VERSUS**

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

**J U D G M E N T**

1. The suit was commenced by a Statement of Claim on 6<sup>th</sup> July, 2013. The cause of action arose on 9<sup>th</sup> July, 2010. The suit was filed within the three (3) years period prescribed under section 90 of the Employment Act, the Preliminary Objection has no merit and is dismissed.
2. The Claimant seeks relief set out under paragraph 8 of the Statement of Claim and prays a declaration be issued that the employment of the Claimant was unlawful and wrongful and that he be paid compensation in respect thereof.
3. The Claimant further seeks payment of terminal benefits totaling Kshs.813,537.00 as set out under paragraph 8.
4. The Claimant seeks grant of a certificate of service as per section 51 of the Employment Act, 2007, costs and interest.
5. The Respondent filed a Memorandum of Defence dated 29<sup>th</sup> July, 2013 in which it denied the claim in its totality. The Respondent filed list of documents in support of the defence on 15<sup>th</sup> February, 2017.
6. The Respondent asserts that the Claimant was never an employee of the Respondent but was a salesman on commission basis. That the Claimant regularly failed to attain the sales target provided contrary to the basis of his engagement.
7. That the Claimant was not dismissed from employment but he habitually absconded his duties without any reason.
8. All the Claims for payment of terminal benefits are denied.
9. The Respondent puts the Claimant to strict proof thereof.

**Testimony**

10. The Claimant (CW 1) testified under oath and stated that he was employed by the Respondent as a Salesman from 4<sup>th</sup> March, 2001. The initial salary was Kshs.2,700 per month and it was increased to 3,120. He was stationed at Embu, where he distributed cigarettes and reported to office daily. That his immediate supervisor was Mr. Ngure at the time he left employment.
11. That he was not granted annual leave; worked during public holidays without payment of overtime; and was not paid house allowance.
12. That on 9<sup>th</sup> July, 2010 he was asked to fuel the motor cycle he was given to perform his work. He had no money to do so and his employment was consequently terminated.
13. The Claimant reported a dispute to the Ministry of Labour, Embu. The Ministry of Labour computed the claim and wrote to the Manager of the Respondent Mr. Bryan Mantu demanding that the Claimant be paid Kshs.382,646.10 tabulated in the said letter.
14. The Respondent wrote to the District Labour Officer Mr. B. M. Mbuvi, stating that the Claimant absconded duty on 12<sup>th</sup> July, 2010 and

therefore was not owed any money by the Respondent. The letter is dated 31<sup>st</sup> August, 2010.

15. Demand letter was written by the Claimant's Advocate on 28<sup>th</sup> June, 2013 and the suit was subsequently instituted.

16. Under cross examination by Advocate Okoth M. for the Respondent, the Claimant insisted that he was a salaried employee with pay slips and was not a commissioned sales person.

17. That he achieved his sales target of 4,500 regularly. That he was underpaid. He produced two pay slips and said that the employer retained the rest. He prayed to be awarded as per the Statement of Claim.

18. RW 1, was Jenard Mwaniki Nyaga. He is the group Human Resource & Administration Manager of the Respondent. He adopted his witness statement dated 31<sup>st</sup> March, 2017 and filed on the even date.

19. He told the court that to the best of his knowledge, the Respondent never employed the Claimant. That he was employed by a dealer and the Respondent only kept his records for purposes of reconciliation and payment of commission. That at no time was the Claimant paid a salary by the Respondent. The Claimant was exclusively a Commission Agent and was entitled to commission payments based on the volume of cigarettes sold.

20. As from 12<sup>th</sup> July 2010, to the date of filing suit, the Claimant had absented himself from linco stores, where he worked. The Respondent never dismissed the Claimant. It was not possible for the Respondent to dismiss a Commission Agent who was not Respondent's employee in the first place. He prayed the suit be dismissed with costs. RW 1 produced copies of commission statement and end month report by the Claimant for the months of January and February, 2010.

21. RW 1 also produced pay slips for the year 2001 and 2010. The pay slips show commission earned for 26 days worked each month. The slips shows the sales achieved each month and sales target for the month.

22. The amounts paid each month differed according to the sales achieved.

### **Determination**

23. The issues for determination are as follows:-

(i) Whether the Claimant was a commission agent or an employee of the Respondent?

(ii) If the answer to (i) above is in the affirmative, whether the Claimant absconded work or his employment was unlawfully terminated?

(iii) What reliefs, if any is the Claimant entitled to?

### **Issue i**

24. Regarding the issue whether the Claimant was a Commission Agent or an employee of the Respondent, the court notes that no contract of agency or employment was produced by either party.

25. The court solely relies on the conflicting testimony of CW 1 and RW1 and documentary evidence before court.

26. In this regard, both parties produced pay slips for different months. The slips produced by the Claimant are similar to those produced by the Respondent. They all have employee number BRK054 by the name Kimathi Richard the Claimant and are classified as 'Commission pay roll'. They bear different amounts of commission earned depending on the sales achieved in 26 days worked in each month. They also bear a sales target for each month.

27. From the totality of evidence before court, the Claimant never received a monthly salary but was paid commission at the end of each month for the sales achieved.

28. Based on these facts, the court finds that the Claimant was engaged as a commission agent but was not an employee of the Respondent.

29. The court further finds that there was no letter of appointment of the Claimant as an employee nor was there a letter of termination of his employment.

30. Evidence before court tends to support the view that the Claimant abandoned work when the Respondent was unable to provide fuel for the sales, motor cycles and requested the Claimant to fuel the bike and to be reimbursed later.

31. The Claimant has failed to prove that he was an employee of the Respondent and has further failed to show that his employment was unlawfully and unfairly terminated by the Respondent.

32. In terms of section 107, 108 and 109 of the Evidence Act, Cap 80 Laws of Kenya, the Claimant bears the onus of proving his case on a

balance of probabilities. The Respondent has sufficiently rebutted the allegations by the Claimant to the satisfaction of the court.

33. The Claim for compensation for unlawful dismissal fails therefore and is dismissed.

34. Having found that the Claimant was not an employee of the Respondent, the issues (ii) & (iii) above are determined in favour of the Respondent. All the Claims set out under paragraph 8 of the statement of claim lack merit and are dismissed except for the prayer for grant of a certificate of service as a commission agent.

35. In the final analysis, judgment is entered in favour of Claimant as against the Respondent with respect to the failure by the Respondent to grant the Claimant a certificate of service. The Respondent is directed to provide one within 14 days of this judgment. The rest of the suit is dismissed. The Respondent to pay a third (1/3) of the costs of the suit.

**Dated and Signed in Kisumu this 12<sup>th</sup> day of October, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 26<sup>th</sup> day of October, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Nyabena for Claimant

Mr. Okoth for Respondent

Daniel Ngumbi – Court Clerk