

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CASE NO. 818 OF 2013

CHARLOY SIKUKU MADIANGI.....CLAIMANT

VERSUS

BUNSON TRAVEL SERVICE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent stating that he was employed on 2nd December 2004 as a motorbike operator and that on 7th April 2011 he was dismissed from employment as a result of the loss of a motorbike under his care. He averred that he was not paid any house allowance and was aggrieved by the decision to terminate his services summarily for no valid reasons. He thus sought the payment of salary for days worked in April 2011 Kshs. 4,969/-, salary in lieu of notice Kshs. 19,580/-, punitive and aggravated damages, compensation equivalent to 12 months Kshs. 234,960/- and the unpaid house allowance Kshs. 232,212/-, costs of the suit plus interest.

2. The Respondent filed a statement of response in which it was averred that the Claimant failed to work within the company's laid down procedures. The Respondent averred that an inquiry was undertaken regarding the loss of the motor bike and the Claimant was given ample opportunity to defend himself against the allegations made, whereat he was heard in the face of his impending termination and he did not satisfactorily explain himself. The Respondent averred that the Claimant absconded duty and failed to initiate the clearance procedures of the Respondent. The Respondent averred that the house allowance was consolidated in the salary of the Claimant in terms of Section 31(2)(a) of the Employment Act. The Respondent accused the Claimant of not reporting the theft of the motor bike forcing the Respondent to delay in lodging an insurance claim after making a police report later and obtaining a police abstract. The Respondent asserts that the dismissal was for just and lawful cause and that the suit should be dismissed with costs.

3. The Claimant testified and reiterated that his dismissal was unfair as he was not accorded a chance to defend himself. He stated that the motorbike was stolen from the Respondent's yard after he had parked it there and he did not pick the motorbike as the same was taken before he reported to work. He did not have a police abstract indicating that he reported the loss to the Police. The Respondent called David Wachira Mwangi who testified that he was the finance director and the in-charge of the assets including the motor bike that the Claimant was alleged to have lost. He was one of the persons present at the hearing. He stated that the motorbike was lost from the Respondent's yard and the Claimant did not report the loss to the Police and could not offer a proper explanation as to how the motorbike was taken using the Claimant's name and ridden away.

4. In the written submissions filed, the Claimant submitted that Section 41 of the Employment Act was abridged and that he did not get a chance to defend himself. Reliance was placed on the case of **Abisalom Ajusa Magomere v Kenya Nut Company Limited [2014] eKLR**. The Claimant submitted that the Respondent did not give him any house allowance. He relied on the case of **Christian Samba Obath v Fossil Fuels Limited [2016] eKLR** where the court held that the house allowance was not indicated on the payslip. He urged the grant of the orders sought in his claim. The Respondent did not file any written submissions.

5. From the evidence adduced it was clear that there was loss of a motor bike that the Claimant is stated to have been responsible for. He asserts that the theft occurred at the Respondent's yard and he was not present at the time of the loss. The Claimant indicated that he used to work for the Respondent and on occasion would take the bike home as he would work beyond the normal working hours. He would be entrusted with banking of the Respondent's cash collections at Westlands. The Respondent asserts that the dismissal was for just cause being the loss of a motor bike entrusted to the Claimant. The Claimant was of the view that he was not paid house allowance since his employment in 2004. House allowance is payable at the rate of 15% of basic pay. It would be odd that the Claimant worked for nearly 9 years without house allowance and never raised the issue. In any event, if any house allowance was due and payable, the same would be limited to the period of 3 years prior to dismissal in terms of Section 90 of the Employment Act. He was paid a basic salary of Kshs. 19,580/- as at the time of his dismissal. His contract did not make provision that the salary was consolidated. In the premises he was entitled to house allowance at the rate of 15% of basic pay which amounts to Kshs. 105,732/- for the 3 years preceding termination. As regards the loss, it was the evidence of parties that the motorbike was stolen from the Respondent's yard without the involvement of the Claimant though the thief managed to use the Claimant's name and had a key. In the analysis of the evidence, it is clear there was mischief that the Claimant participated in by deliberately delaying his arrival to a point in time when the motorbike was stolen. He did not deny that the theft was perpetrated by someone who used his name. In the view of the court, he was not dismissed without any basis. He was allowed to give his side of the story and was ultimately dismissed as the explanation was wanting. The Respondent was therefore justified in the dismissal for the theft. The Claimant is therefore not entitled to notice, he also not entitled to compensation. The only success he has is in relation to house allowance for which he will get a judgment against the Respondent for Kshs. 105,732/-. He will also have costs on this sum as well as interest thereon at court rates from date of judgment till payment in full.

- i. Kshs. 105,732/- being unpaid house allowance for 3 years
- ii. Costs on the sum in i) above

iii. Interest thereon at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nairobi this 19th day of October 2018

Nzioki wa Makau

JUDGE