



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1993 OF 2012

KENNETH MUKHENGU MASINDE.....CLAIMANT

- VERSUS -

GERALD CUNNINGHAM.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 04.10.2012 in person and he prayed for judgment against the respondent for:

- a) Unpaid salary totalling to Kshs. 168, 300.00.
- b) House allowance totalling Kshs. 226, 950.00.
- c) Annual leave totalling Kshs. 16, 858.00.
- d) One month salary in lieu of notice Kshs. 16, 858.00.
- e) Compensation for unfair and frivolous termination Kshs.234, 600.00.

The claimant subsequently appointed Nyabena Nyakundi & Company Advocates to act in the case.

The response was filed on 13.06.2018 through Wasilwa & Company Advocates. The claimant prayed that the suit be dismissed with costs.

There is no dispute that at all material time the claimant was employed by the respondent as a personal driver from 18.01.2005.

The only issue for determination in the case is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows.

a) The Claimant testified that he was employed by the respondent as a driver on 18.01.2005. He testified that he was suddenly terminated on 27.05.2012 when the respondent send to the claimant a text message on phone thus, “**You just lost your job because Kate told me about your plans. I can’t trust you now**”. The claimant testified that the allegations were never brought to his attention. The claimant did not file the extract of the text message or exhibit the phone and the message because he stated that the cell phone had become obsolete and no longer in operation. The respondent’s evidence was that the claimant’s contract of service ended on 31.07.2010 upon a mutual agreement. The terms of the agreement were that the claimant was to sell his Peugeot 205 saloon car in excellent condition at a heavily discounted price of Kshs.85, 000.00 instead of the market price of Kshs. 220, 000.00. The claimant was to earn a severance pay of Kshs.55, 169.00 at 15 days for each of the 5.625 years of serves less Kshs.30, 000.00 being loan and leaving a balance of Kshs.25, 169.00. The claimant was to clear from the room the respondent had provided for his accommodation. The claimant admitted that the respondent sold him the car in 2010 but denied it was towards terminal dues. The Court has considered the evidence and finds that the parties separated effective 31.07.2010 upon mutual agreement. There is no reason to doubt the respondent’s documented evidence on the terms of the separation. The claimant cannot be trusted in his acceptance of the documentation throughout the service except the documents showing the separation arrangements. Having testified that he was sold the car in 2010 and in absence of his alternative account on the terms of the purchase of the car, the Court returns that on a balance of probability, the parties separated effective 31.07.2010 by mutual agreement. Allegations of unfair termination and compensation in that regard will collapse.

b) The prayer for payment after termination to May 2012 was obviously not justified and it will fail because the claimant was not in employment throughout that period.

c) The prayer for housing allowance will fail because the respondent provided reasonable housing accommodation for the claimant like it was done for other servants. The letter on separation asks the claimant to clear from the room provided for housing. The prayer will fail.

d) The prayer for severance pay will fail because as at termination the claimant was paid due severance pay.

e) The certificate of service was issued at separation and a copy was exhibited. The prayer will fail.

f) The Court returns that the claimant has failed to justify any of the remedies as prayed for.

In conclusion judgment is hereby entered and the claimant's suit is hereby dismissed with costs in favour of the respondent.

Signed, dated and delivered in court at Nairobi this Friday 30th November, 2018.

BYRAM ONGAYA

JUDGE