



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 210 OF 2013

JACOB KIPKOSGEI MITEL.....CLAIMANT

- VERSUS -

KENYA VEHICLE MANUFACTURERS LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th June, 2014)

JUDGMENT

The claimant **Jacob Kipkosgei Mitei** filed the statement of claim on 11.07.2013 through Gordon Ogola & Associated Advocates. The claimant prayed for judgment against the respondent for orders:

- a. **1 month pay in lieu of notice Kshs.269,000.00.**
- b. **Underpayment of Kshs.5,019,300.00.**
- c. **Annual leave Kshs.371,889.40.**
- d. **12 months' gross salary compensation of Kshs.3,228,000.00.**
- e. **Retirement benefits or severance pay of Kshs.3,228,000.00.**
- f. **Compensation to retirement age.**
- g. **Total claim of Kshs.8,888,189.40.**

The respondent **Kenya Vehicle Manufacturers Limited** filed the memorandum of defence and counterclaim on 31.10.2013 through the Federation of Kenya Employers. The respondent prayed that the court finds that the claimant's dismissal from employment was lawful and fair; uphold the respondent's decision to dismiss the claimant; and to dismiss the claimant's claim with costs.

The claimant filed the reply to response and defence to counterclaim on 4.12 2013 through Geoffrey Otieno & Company Advocates.

The claimant's testimony was that he was appointed as the management accountant by the respondent on 16.09.2008. He reported on duty following the appointment on 1.10.2008. He served well and in November 2008, he was promoted to the position of Finance Manager. It was his case that at promotion, the management merged positions of management accountant and that of finance manager into that of finance manager and the person he replaced used to be paid Kshs.269,000.00 per month.

The claimant testified that on 24.07.2012, the managing director asked the claimant to avail the debtors' report comprising the fuel the staff drew on credit from the respondent's filling station and the advances made to staff thereby triggering the claimant's termination. The claimant testified that he approved advances below Kshs.20,000.00 and the respondent's managing director approved advances above Kshs.20,000.00.

The claimant's testimony was that he drew advances and the amount accumulated and he failed to repay at the prescribed time because his parents were ailing and his dear mother subsequently passed on. On 6.09.2012, the managing director asked the claimant to explain the indebtedness. He wrote an explanation letter dated 6.09.2012 admitting the indebtedness to the respondent including Kshs.397,000.00 being fuel drawn on credit and Kshs.115,000.00 and Kshs.310,749.00 being advances. He requested for time to re-plan his finances to repay the debts within the shortest time possible by approaching his bank for funds to repay.

The claimant testified that it was his duty to ensure that the debts for fuel drawn and advances were recovered every end month but he failed to do so in his own case. He ended up owing the company Kshs.800,000.00 against his salary of Kshs.116,000.00 per month and which was not acceptable under the respondent's regulations. It was the claimant's case that for advances below Kshs.20,000.00, the managing director saw the list of those advanced and the amounts long after the payment had been effected upon the claimant's approval.

The respondent's witness Joseph Otieno Ojira (**RW**) testified that the managing director approved advances for all managers including the claimant. RW showed in his evidence that on 18.7.2011, 22.7.2011, 27.7.2011 and 3.8.2011 the claimant's petty cash voucher form used for applying for advances was not approved by the managing director yet the claimant received the advances per the relevant petty cash vouchers.

RW was the respondent's administrative officer at the time and he kept all employees files and when the claimant was promoted, he was not to be paid like the person he replaced as the managing director confirmed the same upon RW's inquiry. RW testified and the claimant admitted that the claimant had not refunded the owed money being Kshs.822,279.00.

The court has considered the pleadings, the evidence and the submissions.

The first issue for determination is whether the claimant's dismissal was fair. The dismissal letter dated 7.09.2012 is clear that the claimant was dismissed for owing the respondent Kshs.822,749.00 flowing from the advances and credit fuel drawings that had accumulated. The claimant admitted the liability in his explanation letter. The court finds that the respondent was entitled to dismiss the claimant on account of abuse of fiduciary responsibility bestowed upon the claimant and the office the claimant held. The court returns that the claimant's dismissal was not unfair.

As submitted for the respondent, the claimant has failed to establish any basis for the alleged underpayment. As the dismissal was not unfair, all the other prayers made for the claimant will fail. There is no dispute that the claimant owed the respondent **Kshs.822,749.00** as counter-claimed and the court finds that the respondent is entitled accordingly.

In conclusion, judgment is entered for the respondent against the claimant for:

- a. A declaration that the claimant's dismissal by the respondent was not unfair.
- b. The claimant to pay the respondent **Kshs.822,749.00**.
- c. The claimant to pay the respondent's costs of the suit.

Signed, dated and delivered in court at Nakuru this **Friday 20th June, 2014**.

BYRAM ONGAYA

JUDGE

