



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 926 OF 2012**

**PHILIP CHACHA MANGARE.....CLAIMANT**

**VERSUS**

**NATION MEDIA GROUP LIMITED..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent his erstwhile employer for the determination of a dispute he framed as unlawful termination and refusal to pay accumulated unpaid house allowance & terminal benefits. The Claimant averred that he was employed as a driver on 21<sup>st</sup> June 2004 and that he was entitled to terminal benefits and accumulated house allowance all amounting to Kshs. 1,346,346/-. He thus sought an award for the claim against the Respondent for the said sum as well as twelve months salary as compensation for wrongful termination and costs together with interest of the claim.
2. The Respondent was opposed to the Claim and filed a Memorandum of Response. The Respondent averred that the Claimant was employed on temporary terms and the contract between the parties provided that no other benefits would be payable to the Claimant above the salary of Kshs. 10,000/- which was agreed on. The Respondent averred that the Claimant was paid overtime and was given rest days. The Respondent averred that the Claimant was dismissed for misconduct and was not eligible for the annual bonus which was a discretionary payment by the Respondent.
3. The Claimant testified that he worked as a driver for the Respondent for over 7 years and that he distributed newspapers and parcels for the Respondent countrywide. He testified that he was alleged to have carried passengers on a trip from Nairobi to Kisumu. He stated that on reaching Nakuru he stopped to buy water and as he did so his keys were snatched from the ignition and the Respondent's Chief Security officer was the one who took the keys. The Claimant testified that two people he did not know got into the vehicle passenger side and photos taken. The Claimant testified that the Chief Security officer appeared drunk and a bottle of Viceroy in his pocket. He was suspended on return to Nairobi and was later given a termination letter.
4. The Claimant in cross-examination testified that on employment in 2004 he did not raise an issue about the payment of 10,000/- and that later asked for house allowance. He had no letter showing that he had asked for this. He accepted that bonus is paid according to performance. He testified that he was not paid any overtime. He was shown a bundle of documents filed by the Respondent and was referred to the payslips appearing in the exhibit and admitted that overtime was paid. He testified that he was paid notice as well as 20 leave days.

5. The Respondent called 2 witnesses – Mr. James Kamau Gachora Operations Supervisor and Mr. Samuel Kipngetich Koskey Head of Security. The first defence witness testified that the Claimant worked in his department and that the Claimant was paid overtime as shown by the payslips.
6. In cross-examination the witness testified that he recorded the overtime that the Claimant worked leading to the payment of overtime to the Claimant for extra hours worked. He testified that one must work for 185 hours before one qualifies for overtime and the rate per hour was 1.5 and 2.0 for holidays. He testified that if overtime is not indicated it is not due.
7. The second defence witness Mr. Koskey testified that he knew the Claimant and never had a quarrel with the Claimant who was a former employee of the Respondent. He testified that he was assigned duties of checking on the Respondent's vehicles along Nairobi-Nakuru-Eldoret highway on 16<sup>th</sup> October 2011. He testified that reports had been given that the drivers of the Respondent would often pick passengers and parcels for hire contrary to company policy. He testified that an ambush was laid at Carnation Hotel Nakuru and that the Claimant parked the Respondent's vehicle and two members of the public boarded the vehicle and he immediately moved in and switched off the engine. He testified that he did not know the 2 members of public and that he was not drunk because he is a teetotaler and does not smoke. After confronting the Claimant the Claimant refused to disclose the identity of the 2 people who had boarded the vehicle and refused to record a statement with the police who were involved in the operation. He testified that the Claimant did not report to him the following day as directed and that he was invited as a witness on 27<sup>th</sup> October 2011 at a disciplinary hearing.
8. In cross-examination the witness testified that he asked the Claimant why he had stopped there and the Claimant gave no answer. He testified that he worked with the police and they were present at the operation. He testified that he made a management decision to allow the Claimant proceed with his journey and deliver the parcels and newspapers. He wrote a report to Mr. Francis Kago and the report contained the photos that had been taken of the vehicle and the passengers. He did not have the report and did not also have the report of the disciplinary meeting. He testified that present at the meeting were the Claimant, Veronica Chirchir of HR department, union shopsteward to represent the Claimant, Francis Kago GM distribution and the witness. He testified that at Carnation he was with the operations manager and 2 police officers.
9. In re-examination the witness testified that the Claimant's letter of termination referred to the management disciplinary meeting held.
10. Parties made written submissions and the Claimant submitted that he was employed from 21<sup>st</sup> June 2004 till 31<sup>st</sup> December 2004 and was retained as employee until 26<sup>th</sup> November 2008 when the Respondent gave the Claimant a letter confirming his position. He worked until 7<sup>th</sup> November 2011 when the Respondent dismissed him from service. The Claimant submitted he was entitled to accumulated unpaid house allowance, salary payment in lieu of notice, overtime, weekly rest days and public holidays should have been paid. The Claimant submitted that he was entitled to house allowance in terms of Section 31 of the Employment Act 2007. It was submitted that the Claimant worked diligently for the Respondent but he was not given any notice nor was he given any warning and thus he was entitled to compensation. The Respondent did not file any submissions.
11. The Claimant's case is that he was unfairly dismissed from service. In the letter of termination dated 7<sup>th</sup> November 2011 addressed to the Claimant stated in *parre materia* as follows:-

*Reference is made to the incident of 16<sup>th</sup> October 2011 whereby while on a routine check the Group Security Manager found you with two unauthorised passengers at an unapproved location for stoppage. On 18<sup>th</sup> October you were placed on unpaid suspension for one week to 24<sup>th</sup> October 2011.*

*During the disciplinary hearing of 27<sup>th</sup> October 2011 in the presentence of the management team*

and the Chief Shop steward the following were established.....

The Claimant signed the letter at the bottom.

12. The letter of termination is clear evidence that a disciplinary process was undertaken. The Claimant in his pleadings and testimony had stated that he was not accorded a hearing. He was untruthful even testifying that the security officer who was at the scene was drunk yet the man is a teetotaler and was accompanied by policemen. The Claimant declined to record a statement at the scene. The Claimant denied that he had been paid overtime but the records show otherwise. In his payslips from 2008 house allowance was paid as was overtime. In relation to the period before June 2008, the law applicable is the Employment Act cap 226 (now repealed). Provision was made under Section 9 of the Employment Act cap 226 on housing as follows:-

*9. Every employer shall at all times, at his own expense provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to his wages or salary, as will enable the employee to obtain reasonable accommodation:*

*Provided that if, by reason of the conditions of employment, and wages payable, any person is placed at a disadvantage by the application of this section, the Minister may by notice in the Gazette, exclude the application of this section to that person and that person shall instead be dealt with as shall be specified in the notice.*

13. The Respondent did not avail the Claimant of this for the period between 2007 and 2008. In the premises the Claimant would be entitled to payment of house allowance. As the law in place at the time did not provide a rate I will apply the rate of 15% of basic pay which was Kshs. 15,000/-. The net pay under this head is Kshs. 27,000/-.

14. The Claimant failed to prove that he was entitled to any sum for overtime, public holidays or a weekly rest day. He was summarily dismissed for just cause and he was therefore not entitled to any notice. His claim succeeds only in part and therefore he is not entitled to costs.

15. In the final result I enter judgment for the Claimant against the Respondent for Kshs. 27,000/- each party to bear their own costs.

Orders accordingly.

**Dated and signed at Nairobi this 7<sup>th</sup> day of July 2014**

**Nzioki wa Makau**

**JUDGE**