



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA CAUSE NO. 1723 OF 2011

SAMSON NDOMBI KEYA.....

CLAIMANT

VS

MUMTAZ S.HIRANI.....

RESPONDENT

JUDGMENT

1. The Claimant filed his Claim on 7th October 2011 and the issue stated to be in dispute was the Wrongful and unfair dismissal of the Claimant's service and failure by the Respondent to pay terminal benefits to the Claimant. The Respondent filed a Response on 28th October 2011 in which she denied the claim.
2. On 18th May 2012 the case herein proceeded before Judge Paul Kosgey who had continued to sit in terms of Section 33 of the Industrial Court Act 2011. The appearances were as follows Court Clerk Elly Jometho, Ms. Winnie Talam for the Claimant and Mr. Kabaruu for the Respondent.
3. At the hearing, Mr. Kabaruu stated that there were 2 issues in contention i.e. whether Claimant left employment on his own violation or it was the Respondent who put an end to the employment. There was also the issue of overtime of 3 hours every day. Miss Talam added that there was the issue of house allowance as well.
4. Miss Talam called the Claimant Samson Ndombi Keya who testified that he lives in Kibera and is unemployed. He was employed as a driver and worked for the Respondent from 15th July 2010 and the salary was 12,000 later raised to 15,000. He did not get a letter of appointment and he worked up to 1st July 2011. On that day he reported to work and Respondent said the car was not washed properly and that he didn't know to drive properly. She told him to go in her husband's presence. He had never been warned at all. The Respondent didn't pay salary for that month. He had taken a salary advance of Ksh. 12,000 and the balance of Ksh. 3,000 is what she refused to pay. He testified that he used to driver her to the office and would report at 25 minutes to 6 a.m. or 20 minutes to 6 a.m. There was a book at the gate showing the time of entry of all employees. An extract of the book produced as Appendix SNK3. It is GreVillas Staff Book copy. Upon leaving work he would sign out too.
5. The Respondent had two cars, he washed the cars and at times the husband would drive the 1st car. The Claimant would clean the Respondent's car and also water the flowers. At 9 a.m. he would take her to the office. He would go to buy vegetables from city markets for her

at 11 a.m. At noon he used to take her home for lunch. At home while Respondent was eating he would water the flowers in her garden. He never took lunch. After lunch he took her to office at Aga Khan Hospital. He would stay with secretary until 3.20 p.m. when he would pick her child from school at Limuru Road Aga Khan Academy and take the child to the office. At 4 p.m. he would pick the Respondent's husband from Koinange Street. He used to close about 5.15 p.m. The Claimant would take him home then leave for his house after signing out. The Respondent's family live in Brookside Westlands. This was usually around 5.40 – 6.00 p.m. was thus Claimant's time for leaving work every day. The aforesaid book shows the same. The Claimant stated that he used to get a payslip which he signed to acknowledge payment. The Kshs. 15,000 was not broken down. He stated the Respondent didn't remit NSSF dues at all and that what was stated in the payslip was just basic pay. He produced Appendix 4 in support. He stated that he used to live in Uthiru at the time and prays to court to grant him his dues, Notice pay, etc. as stated in the Memorandum of Claim.

6. He was Cross-examined by Mr. Kabarú and stated that the salary was raised to 15,000 in September 2011 after 2 months of service. He stated that he didn't leave employment and didn't return keys to Respondent. He stated that he didn't sms her husband and that one day she quarreled the Claimant in May 2011. She came out of house saying he hadn't finished washing the car and that he was too slow. He denied this and the Respondent said she would look for another driver. He went off as he was told to go on the same day. He sent sms to Respondent's husband stating that he was willing to continue working for them. He then went back and continued working. At the end of June 2011 Respondent claimed the car was not washed properly. She said he could go and she will sort herself out. The husband sided with her and the Claimant was told to leave and that he could take her anywhere he wanted. Claimant stated he did not terminate the employment himself. He started work at 6.20 – 6.25 a.m. by washing cars, at 9.00-9.15 a.m. he would take Respondent to hospital. Before lunch he would buy vegetables at the city market. It could take him one hour buying as he looked for the cheapest prices. Over lunch hour he would water her plants and return her to the office at about 2 p.m. He used to go to the market every day. Respondent would also send him to other places for errands. The husband used to close his business at 5.15 p.m. Claimant used to sign the book when going out, he took advance of Ksh. 12,000. He stated that he served notice of intention to sue in company of a Kituo cha Sheria representative. That marked the end of the Claimant's case.

7. Mr. Kabarú called the Respondent Mumtaz Hirani. She stated the following :- I am the Respondent, a doctor at Aga Khan Hospital. I employed the claimant as a driver at Ksh. 13,000 which was raised to 15,000 per month. It was all inclusive. He brought a petty cash voucher which he used to sign. It is SMK 4. He used to take his salary from my secretary. He was sent to me by my husband's friend. I wanted him to drive my son. We used to go to the mosque every day as I and my husband were priests. We used to go at 3 a.m. We used to open and close the mosque and return to the house at 6.30 a.m. claimant used to report about 6.45 a.m. He used to clean the cars. My husband used to take my daughter to school and come home. After breakfast claimant dropped my husband in the office and bring the car to the mosque then come to my office. He used to run certain errands. He didn't take me home for lunch because of traffic. I worked continuously. He dropped keys and went for lunch between 12 and 2 p.m. At 2.45 he picked my daughter from school and drop her home, then drop the keys to my husband and park vehicle in front of his office. My husband is a driver but he could drop Claimant near Kangemi sometimes. My husband drives himself home. He had no work after 4 p.m. If Claimant stayed beyond 4 p.m. he was waiting for a lift from my husband. I have my own car. He dropped my girl at home and not my office. He had more than one hour for lunch. I didn't sack him. He had a habit of disappearing in the morning after dropping keys with my secretary. In November my family visited me from US. He showed me an SMS from a Mzungu who wanted to employ him and asked for a salary of Kshs.15,000. He asked for 15,000 and I agreed. In May 2011 one day I called him to take me to Getrude Pangani clinic. He came at 2 p.m. he said he

had social reason. He threw the keys to my secretary saying he did not want my job. He SMSd me and my husband saying he was sorry. He was asked to come on Sunday. He apologized for leaving and promised not to repeat the mistake. My husband agreed to retain him. MH1 is the text message. One day when we came from mosque I found the car was muddy. This was July when he left the job. When I asked him he said he didn't want my job. He said he wanted to go. He asked for money. I told him to come to the office. He came and I was busy. He never came back until after a month with someone from Sheria. He is the one who left employment. I didn't sack him. The book annexed is wrong. He never used to be home in the evening. He never came back home. There was no reason. After dropping the car to my husband he wouldn't come home. We have main gate and individual gates. The book is kept at main gate. It doesn't mean he had reported for work. The claim should be dismissed with costs. I pray for one month's notice as he didn't give me notice. That's all.

8. She was Cross-examined by Ms. Talam and stated the following:- His salary was inclusive of house allowance. We had a verbal agreement. He drove my husband to work between 8.15 – 8.30. My affidavit of 24th October 2011 says at times he took my child to school. He never performed his work well. I used to ask him about the shortcomings particularly the disappearance. I didn't write the complain. Ours was a verbal contract. The book at the gate was for controlling entry to the house for security. The maids and drivers would report and indicate their arrivals. It was to record arrivals and exits. He was to report at 6.45, go for lunch at 1 p.m. and leave at 4 p.m. after dropping the car to my husband. Part of duties was to drop my husband in the morning. But my husband used to drive. There was a parking problem.

9. The second witness for the Respondent was not present and hearing was deferred twice. On 15th October 2012 the matter appeared before me and the appearances were: Mr. Kabaru Ndegwa for the Respondent, Ms Talam for the Claimant. The case was deferred to 19th November

2012 as the time allocation was inconvenient to the Counsel for the Respondent.

10. The witness was sworn and stated the following in examination in chief: My names are Charles Mwangi Ngang'a. I am the supervisor of the Night Armour Security Limited. They are contracted to guard Grevilla Apartment. This is where the Respondent lives. I am aware the Claimant worked for the Respondent. He worked in January 2011. I never saw him on the premises. I have a Register which was with guards at the gate which was to be signed off by staff who were reporting on or off duty. The claimant used to report for duty at 7.00-7.30 a.m. and he was not handing over as he was giving car to the owner. I never saw his signature. I used to check the Register everyday. Extracts have been attached when he left work. These were done after except the incoming ones. He used to sign the following day. He never came to premises to sign off. I checked register daily.

11. The witness was cross examined by Miss Talam and stated the following:- The claimant reported to work according to the information given by the Guard at the gate. He was referred to the Register and SNK 3. On 1st March 2011 – 6.18 a.m. On 2nd February 2011 – 06.20 a.m. He stated the entries are wrong. The book is kept by the Guard Joseph Oriento. He left the company. He is no longer with us. The book is for correct entries. I interfered to find out why they were not following procedures. The claimant never used to sign as he left. He used to hand over the car elsewhere. He never came to Apartment. The Claimant signed off the next day. He should have signed as he left premises. The signing could be done the next day as the guard was not aware what was being signed. The signature by Mumtaz was in the evening. The next day when signing in one could sign off for the day before. I raised it with management on the people who are signing wrong. It was not an issue unless there is a complaint. That marked the end of the case for the defence.

12. The witnesses all were in agreement that the Claimant worked for the Respondent. According to the Claimant the hours of work were longer than was acknowledged. In the case, the Claimant produced extracts of the log-in register and at the end of the trial, the actual Log In Register was produced. In it, the Claimant was shown to have reported to work at times 6.20 a.m. and at times he would report at 6.00 a.m. or 6.35 a.m. One can therefore safely say that on average he reported at 6.15 a.m. or thereabout. The hours of work were from that time till he knocked off which was at times at 4.15 p.m. (if the Respondent is to be believed) or 5.15 p.m. or a little later (if the Claimant is to be believed). In the absence of a proper clock-out system, it is difficult to determine the precise time the Claimant left his place of employment. In the premises on the morning timings are precise as the evening check-out was made retrospectively the following morning. Be that as it may, it is clear the Claimant did put in some time beyond the usual times. He would work for 9-10 hours daily. This was beyond the statutory periods of 8 hours. He thus would be entitled to pay for the extra hours worked which were 2 per day. Using his pay as the determinant, the amount due would be Kshs. 625/ for 5 days a week aggregating to Kshs. 2,500/- per month and **Kshs. 30,000/-** for the year. He is entitled to this sum.

13. The proof of payment attached to the Claimant's Claim showed the payment made was 15,000/- per month. The employer is bound by law to keep/maintain records of employment. The Claimant exhibited the slip which was stamped by the Claimant's employer indicating payment and confirming receipt of Kshs. 15,000/- per month. No statutory deductions were made and it is clear that the sum did not include house allowance. Housing is a right to which all Kenyan's are entitled to and the Constitution under Article 43(1)(b) makes provision for the same. Section 31(1) of the Employment Act is also clear. The Claimant was entitled to Housing. Rather than opine as the Respondent did the amount of 15,000/- **necessarily includes house allowance** the same must be provided expressly. The rate applicable in the period of employment was Kshs. 1,536/- per month. The Claimant was in employment for 1 year and the total due under this head is **Kshs. 18,432/-**.

14. As no statutory deductions were made, the service pay is due in terms of Section 35 of the Employment Act. The service pay in this case is **Kshs. 7,500/-** which is pay for 15 days for each year worked.

15. In the final result, the Claimant succeeds to the extent that he is awarded

? Kshs. 30,000 for overtime

? Kshs. 18,432/- for house allowance

? Kshs. 7,500/- for service pay.

The balance of the Claim was unproved and the claims for payment in lieu of Notice and unpaid salary are dismissed.

16. The Claimant will also have costs and interest on the lower scale.

It is so ordered.

Dated and delivered in Nairobi on this **15th** day of January 2013.

Justice Nzioki wa Makau

Judge