



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1164 OF 1999**

**LIVINGSTONE GAITHUMA NJOROGE ..... PLAINTIFF**

**VERSUS**

**NIAZONS (K) LIMITED ..... DEFENDANT**

**J U D G E M E N T**

This suit was filed in court on 11th June, 1999 to claim from the defendant a sum of Kshs.700,000/= being his terminal benefits when he left the latter's employment plus costs of the suit and interest.

He had been employed by the defendant as a consultant engineer on 7th March, 1991 at the salary of Kshs.30,000/= which rose to Kshs.100,000/= by the time he left his employment on 30th September, 1998.

The plaintiffs' quarrel with the defendant is that though he left the defendant he has never been paid his terminal benefits which he put at Kshs.700,000/=, calculated at one month's salary per year.

The defendant filed a defence on 15th July, 1999 in which it denied the plaintiff was its employee, hence was not entitled to terminal benefits.

In court on 7th February, 2001 the plaintiff reiterated that though he had called been on as a consultant engineer of the defendants' project, he was nevertheless its employee and that though he resigned, from the defendants employment he was still entitled to terminal benefits.

The defendant, represented by Mohamed Zafar Niaz (DW1), stated that though the plaintiff had been engaged by the former, he was not its direct employee and was therefore not covered in the building and construction regulations.

Two issues arise here, one whether the plaintiff was a direct employee of the defendant and two whether he is entitled to terminal benefits.

On the first issue evidence adduced itself tends to give an affirmative answer. The terms of engaging a consultant are quite different from those of engaging a direct employee.

In the former case, the consultant is not placed on the payroll of the employer and given a number or paid salary on monthly basis as was the case with the plaintiff herein.

A consultant is engaged on a particular project and his remuneration calculated on a percentage of the project contract sum which is paid in lump sum, but this is not what happened herein.

In this case the letter of employment dated 7th March, 1991 offered the plaintiff employment on

contract terms for the period the project would take and gave him a salary of Kshs.30,000/- per month plus transport.

And when the plaintiff accepted and joined the defendant, he was given personal number 639; then on 1st August, 1993 his salary was increased by Kshs.10,000/=. (See exhibit 2).

Though the plaintiff said the letter of employment (exh. 1) was placed before him for signature 4 years after he was employed this did not make a difference given that he signed in it without raising any issue over its date.

He was even introduced “To whom it may concern” in a letter dated 18th August, 1997 (exh.3) when the plaintiff wanted to visit his wife and son in Sarajevo Bosnia and the United State of America respectively, and even granted leave by the defendant as shown in exhibit 4.

These are not acts which apply to a consultant who is engaged to design and/or supervise a project for and on behalf of a contractor and they point to the plaintiff as an employee of the defendant.

Having decided on the first issues is the plaintiff entitled to terminal benefits? He claims these in his plaint.

Both parties agreed that the defendant maintained no pension scheme for its employees. But the plaintiff, who admitted he resigned from the defendants services, testified that during his time there he had seen many members of staff getting retirement benefits.

He even called a witness Christom Wainaina Kinywa (PW1) who testified that he too resigned from the defendant’s services but was paid his terminal benefits.

I do not actually understand this line of contention. There must be a difference between resignation or retirement. In case of the latter, the known practice is that the retiree will be paid retirement benefits but in case of the former, the issues of retirement or terminal benefits does not arise so long as the parties issue the requisite notices.

Of course if there were monies deducted from ones salary, and remitted to either the pension scheme and/or National Social Security Fund, these are payable to the contributor on resignation or as per the regulations governing such funds.

PW1 did not give the court any evidence to persuade it that he resigned and was paid terminal benefits by the defendant.

Legal Notice No.153 produced by Counsel for the plaintiff is clear in paragraph 2 that

***“This order shall apply to all persons (other than managerial and executive staff) employed in an undertaking which consists carrying on, for gain of one or more of the following activities.....”.***

***all of which concern construction works.***

The plaintiff was referred to as Chief Engineer of the defendant company, hence of a managerial or executive staff and therefore not covered by those regulations.

Though the plaintiff did not tend his letter of resignation before the court, and the defendant denied receiving such letter, I am of the view that he absconded from duty and that he is not entitled to payment of terminal benefits by the defendant.

Consequently, I rule that the plaintiff has not proved his claim for Kshs.700,000/= against the defendant on a balance of probabilities and do hereby dismiss this suit with costs.

Delivered and dated this 6th June, 2001.

**D.K.S AGANYANYA**

**JUDGE**