

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 896 OF 2017

JAPHET NYAMBU .....

CLAIMANT

VERSUS

CHINA

CITY

LIMITED

.....RESPONDENT

JUDGMENT

**Introduction**

1. By the Statement of Claim dated 1<sup>st</sup> December 2017, the Claimant sued the Respondent herein, seeking the following reliefs;

- I. House allowance with effect from 9th June 2017 to 13<sup>th</sup> September 2017 (70,000 X 15/100 X 3 months) Kshs. 35,500/=
  - II. One month's salary in lieu of Notice. Total Kshs. 105,000/
  - III. Punitive damages.
  - IV. Any further entitlement and or order that this Honourable court may be proved at the hearing of the case hereof.
- 2.** By their Statement of Response dated 15<sup>th</sup> March, 2018, the Respondent denied the Claimant's claim, contending that in the circumstances of the matter, the Claimant doesn't have a cause of action against them, and that the reliefs he has sought cannot be availed to him.
- 3.** At the hearing, the parties adopted their witness statements filed herein as part of their evidence in chief. After hearing their cases, the Court directed them to file written submissions. They complied. Their Counsel's respective submissions are on record.

## **Claimant's case**

4. The Claimant states that he was first employed by the Respondent as a Crane Operator from 9th June 2017. His contractual remuneration was KShs 70,000 [monthly salary], KShs 10,500 [house allowance], and an annual leave entitlement equivalent to one month's salary, bringing his total monthly entitlement to Kshs 150,500.
5. He states that he diligently rendered his services to the Respondent until 13th September 2017, when the Respondent unlawfully terminated his employment without issuing any valid reason or observing due process. Despite issuing a formal demand, the Respondent declined to pay his terminal dues, prompting him to file this claim.
6. The Claimant asserts he is owed house allowance for the three months [9th June 2017 to 13th September 2017], work and one month's salary in lieu of notice, amounting to Kshs. 105,500.

7. Cross-examined by Counsel for the Respondent, the Claimant stated that he was employed to work at all the Respondent's sites. His remuneration was paid monthly and not daily.
8. He further testified that, although his payslip indicated his employment as a piece-rate worker, he had not been employed as such, since he was being paid monthly, and his monthly salary was fixed at KShs. 70,000. His monthly salary was consolidated and covered 'everything covered on the pay slip.' House allowance was listed on the pay slip.
9. Referring to the last pay slip, the Claimant testified that it shows a payment for 19 days. This amount was not an overpayment. The Accounting Department best understands the reason for the sum, as they are responsible for calculating the September 2017 payment.

### **Respondent's case**

10. The Respondent called one witness, Lucy Njeri Mungai, who testified on their behalf. The witness testified that following an award of a contract by the Kenya National Authority to execute the dualing of the Mombasa-Mariakani [Mombasa - Kwa Jomvu section], the Claimant was temporarily engaged as a Crane Operator on a need basis during the lifetime of the project. It was a term of the engagement that his daily salary was agreed at KShs. 2,333 and a monthly allowance, Kshs. 1,422.

11. The witness stated that there was no written agreement between the parties since the nature of the engagement was temporary, with wages calculated daily. The parties agreed to a consolidated payment based on the number of days worked, including the house allowance. The Claimant was compensated adequately for all days worked during his engagement, as evidenced by the pay slips he duly signed.

12. On or around 13th September 2017, the Claimant's employment ended, and all his dues were paid, with an overpayment of 6 days since he was paid for 19 days instead of 13.

13. She stated that the engagement concluded inherently upon the completion of the construction works. The Respondent was not required to issue any form of termination notice.

#### **Claimant's submissions**

14. The Claimant's Counsel submits that the fact that there existed an employment relationship between the parties is undisputed. The Respondent's assertion that the Claimant was being paid a daily wage is incapable of belief. It makes no sense.

15. It is further submitted that the amount stated as the house allowance the Claimant was earning, Kshs. 1,442 per month, is impractical and does not constitute a reasonable allowance that would enable him to secure suitable

accommodation as envisaged by Section 31 of the Employment Act.

16. Furthermore, the Claimant contends that the Respondent did not adhere to the statutory notice requirements specified in Section 35(1)(c), as no written notice was issued. He asserts that the Respondent was either required to provide appropriate notice or to compensate with salary in lieu of notice pursuant to Section 36.

17. To reinforce his submissions, the Claimant relied on the case of **Samuel Ajwang Owade v Chandaria Industries and Obatta v Radar Limited**.

18. The Claimant asserts that the termination lacked any legal or logical foundation. He is entitled to compensation for unfair dismissal amounting to KShs. 840,00, representing twelve months' gross salary.

### **Respondent's submissions**

19. The Respondent identifies two issues for determination in this matter: what was the nature of the employment relationship between the Claimant and the Respondent, and whether the Claimant is entitled to the reliefs sought.
20. The Respondent states that Claimant was employed as a piece rate worker, in terms of section 2 of the Employment Act, 2007. Counsel for the Respondent further submits that section 18[1] of the Employment Act provides for how piece rate workers ought to be remunerated. Considering the provision, there can be no doubt that the Claimant was a piece rate worker, and was paid in conformity with the provisions of the section and more particularly subsection 18[1][b].
21. In evidence, the Respondent's witness emphasised that the Claimant admitted he was paid per day worked and that the project concluded in September 2017. Furthermore, the Claimant signed the pay slips without raising any objections. The Respondent's witness, Lucy Njeri, presented job cards,

pay slips, and internal records that confirmed the Claimant's piece-work engagement and the inclusion of a house allowance in the consolidated pay. She stated that the last pay slip, dated 13th September 2017, reflected full settlement of dues and that all documents bore the Claimant's signature.

22. The Respondent relied on the case of **Justin Mutunga David v China Road & Bridge Corporation (K) Ltd [2018] eKLR** and **Benson Omuyonga v Laxmanbhai Construction Ltd**, arguing that project workers cannot expect continuity beyond the life of the project.

23. The Respondent further relied on the case of Daniel Charo Karani v Daniela Malanchini [2022] eKLR to support the position that the Claimant knowingly signed the documents presented to him, including pay slips showing payment for piece work.

24. Regarding the prayers sought, the Respondent's Counsel argues that the house allowance was already

included in the consolidated pay. The Respondent relied on the case of Justus Morara Nyaswambu & Another v Windsor Flowers Ltd [2022] eKLR to support this point. On notice pay, he contends that section 35 of the Employment Act excludes contracts for specific tasks or piecework and cites Asakhulu v West Kenya Sugar Co. Ltd (Appeal 1 of 2023) to assert that notice does not apply to such arrangements.

25. Concerning punitive damages, the Respondent submits that they are unavailable in employment matters. Punitive damages are not listed in sections 49 and 50 of the Employment Act, which set out reliefs awardable in disputes like the instant one. He further places reliance on **Wilson Githu Rutinu v Orpower 4 Inc Ltd [2020] eKLR** and **Wanyama Murabwa John v IEBC [2021] eKLR**.

## **Analysis and determination**

### **Issues**

- I. What was the nature of the employer-employee relationship between the Claimant and the Respondent?
- II. Was the Claimant unfairly dismissed from employment?
- III. Is the Claimant entitled to the reliefs sought?

26. There is no dispute that, from 9th June 2017 to 13th September 2017, the Claimant worked as a crane operator for the Respondent, earning a monthly salary of KShs 70,000 plus additional benefits. The Claimant claimed he was hired under an indefinite contract, which the Respondent terminated without any cause. Conversely, the Respondent argued that the Claimant was employed on a project-based, piecework basis for the Mombasa–Mariakani Highway (A109) project, paid at daily rates, with the total sum covering all entitlements.

27. **Section 2 of the Employment Act** defines piece work as any work for which the pay is ascertained by the amount

of work performed, irrespective of the time occupied in its performance.

28. **Section 18 of the Employment Act**, which provides for when wages or salaries can be due, states;

*“ [I] Where a contract of service entered into under which a task or piece -work is to be performed by an employee, the employee shall be entitled to -*

*a) When the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task the following day, in which case he shall be entitled to be paid upon completion of the task; or*

*b) in the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is earlier.”*

29. When disputes arise over the nature of an employee's contract, the labels used by the employer or employee are irrelevant. The court must analyse the actual characteristics to identify the true nature of the employment agreement. This involves examining the type of work, the terms of engagement, and the payment pattern.

30. In my opinion, workers such as Machinery Operators, Bulldozer Operators, and Excavator Operators involved in construction or road projects are generally employed on a piece-rate or project basis. The inherently temporary and task-specific nature of construction activities, characterised by distinct durations, does not inherently facilitate permanent and pensionable employment. Such employment status is only attainable when a worker is expressly engaged under an open-ended contract with continuous service and accompanying employment benefits.

31. For the foregoing reason, I am persuaded by the holding in **Justine Mutunga David v China Road & Bridge Corporation [K] Limited [2018] eKLR**, thus;

*“As regards unlawful termination, the Claimant did not prove that his termination was unlawful, as projects do come to an end, as observed by Rika J. in **Benson Omuyonga v Laxmanbhai Construction Ltd [supra]** cited by the Respondent. In my view, projects have a finite life span, unlike which may continue for a considerably lengthy period of time, a project cannot have permanent employment contemplated. In this case, the project was a road project that came to an end, and therefore, the Claimant could not anticipate working beyond the life of the project.”*

32. This Court observes that the Claimant did not present any evidence contradicting the Respondent’s assertion that his employment did not extend beyond the project's conclusion, or that it was terminated before the conclusion of the project.

33. Based on the foregoing premises, this Court concludes that the Claimant's contract was project-based. It concluded upon the completion of the project. It was not terminated as he alleged. Given the nature of the engagement, the fact that termination was not explicitly stated to have occurred before the project's conclusion, and the certainty that the Claimant possessed or ought to have possessed—that his contract's duration depended on the project's lifespan—I hold that a termination notice under section 35 of the Employment Act was not necessarily required.

34. further provides that a worker engaged under a piece-rate contract is entitled to payment proportionate to the work performed, either at the end of each day or month, or upon completion of the work.

35. I have not lost sight of the fact that pay slips provided by the Claimant and the Respondent clearly show that he was paid on a piece-work basis.

36. In the upshot, this Court concludes that the Claimant's employment was not terminated unlawfully or unfairly as he alleged. It came to an end when the above-stated contract concluded.

37. The Claimant seeks compensation for the unpaid house allowance. The Respondent contended that the Claimant's monthly pay was consolidated. Thus, inclusive of the house allowance. In his evidence under cross-examination, the Claimant admitted this fact. Furthermore, undeniably, the pay slips have a specific item and amount for the house allowance. I am unable to fathom what informed the Claimant's claim for a house allowance.

38. Having found as I have hereinabove, that the Claimant's employment was not terminated as alleged. I will not have any legal or reasonable basis to award notice pay, which is inherently associated with claims for unfair termination/dismissal.

39. The claim for punitive general damages, although awardable in claims for unfair termination if a violation of an

employee's constitutional rights is proven and the necessary factors favouring the award are sufficiently demonstrated, was not established. No evidence was presented to support this claim. The relief is declined.

40. By reason of the foregoing premises, I find the Claimant's case lacking in merit. It is hereby dismissed with costs.

Read, Signed and Delivered this 27<sup>th</sup> Day of November 2025.

OCHARO KEBIRA

JUDGE