



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 364 OF 2017

ANDREW OGINA.....CLAIMANT

VERSUS

THOMAS AND PIRON GRANDS LACS LTD.....RESPONDENT

JUDGMENT

1. This Cause was heard on 12 November 2020 when Andrew Oginga (the Claimant) testified and closed his case and on 23 November 2020 when the Human Resources Manager of Thomas & Piron Grands Lacs Ltd (the Respondent) testified.

2. The Claimant filed his submissions on 15 December 2020, while the Respondent filed its submissions on 26 January 2021.

3. The Claimant identified the Issues for determination as:

- (i) Whether the Claimant was a permanent employee of the Respondent.
- (ii) Whether the termination of the Claimant's employment was fair.
- (iii) Whether the Claimant is entitled to the reliefs sought.

4. The Court has considered the pleadings, evidence and submissions and adopts the Issues as identified by the parties.

**Nature of employment relationship**

5. The Claimant testified that the Respondent employed him on 11 April 2015 as a carpenter and that he served continuously until separation on 17 January 2017.

6. To demonstrate the employment relationship, the Claimant produced a copy of a Provisional Statement of Account, which shows that he was employed on 1 April 2015 by the Respondent.

7. The Respondent in the Response contended that the Claimant was never its employee.

8. The Respondent's witness, however, testified that the Claimant was employed in a project within Kisumu as a daily casual employee.

9. Casual employees are paid on a daily basis, and their wages are not subject to monthly standard National Social Security Fund deductions.

10. The Statement produced by the Claimant shows that the Respondent was deducting and making intermittent monthly standard deductions.

11. The Respondent would not have been making standard monthly deductions if the Claimant was a casual employee paid at the end of the day.

11. The Court also notes that the Respondent made National Social Security Fund deductions for more than 3 consecutive months at some point and, by virtue of section 9(1) of the Employment Act, 2007 was under an obligation to issue a written contract to the Claimant.

13. By virtue of sections 9 and 37 of the Employment Act, 2007, the Claimant was deemed to be on a term contract of 1-month at each time.

### **Unfair termination of employment**

14. The Respondent's pleaded primary defence to the unfair termination claim was that the Claimant was a casual employee. During testimony, it was still asserted that he was a casual employee.

15. The Court has discounted the contention that the Claimant was a casual employee.

16. With the conclusion that the Claimant was on a term contract, the Respondent should have issued him with a 1-month notice of termination as demanded by section 35(1)(c) of the Employment Act, 2007.

17. Since the written notice was not issued, the Court finds that this was a case of unfair termination of employment.

18. The Court also notes that although the Respondent's witness testified that the construction in Kisumu was completed, handed over, and the employees discharged, no evidence or documentation on completion or handover was placed before the Court and more so considering the Claimant's testimony that at the time of separation, the project was still going on.

### **Appropriate remedies**

19. The Claimant sought compensation for unfair termination of employment, salary in lieu of notice and accrued leave.

20. The Claimant served the Respondent for about 2 years, and in consideration of the length of service, the Court is of the view that the equivalent of 1-month gross salary would be fair (gross wage was Kshs 24,000/-).

21. The Court will also allow the equivalent of a 1-month salary as pay in lieu of notice.

### **Accrued leave**

22. The Claimant did not lay any evidential foundation to this head of the claim regarding the years of accrued leave or number of days.

23. Despite the provision of section 10(3) of the Employment Act, relief is declined.

### **Conclusion and Orders**

24. The Court finds and declares

- i) The Claimant was on a term contract and not casual employment basis.
- ii) The Respondent unfairly terminated the Claimant's employment.

The Claimant is awarded:

i) Compensation                   Kshs 24,000/-

ii) Salary in lieu of notice Kshs 24,000/-

**TOTAL                               Kshs 48,000/-**

26. The Claimant to have costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 24<sup>th</sup> day of February 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant                   Ms. Otieno instructed by Odhiambo Ouma & Co. Advocates

For Respondent               Mr. Dachi instructed by Nyaanga & Mugisha Advocates

Court Assistant               Chrispo Aura