



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NO. 241 OF 2016**

**JOHN NYAKUNDI.....CLAIMANT**

**VERSUS**

**DEVSHIBHAI & SONS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for unfair termination of his employment, Notice pay, leave pay and gratuity.
2. The Claimant states that he was employed by the Respondent in May 2010 as a stone cutter supervisor earning a daily wage of Kshs. 12,000 which he served the Respondent continuously for 5 years.
3. He stated that throughout his engagement with the Respondent he was not granted leave as required by law neither was he compensated for the same.
4. It is stated that the Respondent did not remit NSSF deduction throughout the time when the claimant was employed, therefore prayed to be awarded gratuity.
5. The circumstances leading to his employment termination was that, the claimant fell ill sometimes in May, 2015 and sought for permission through the Respondent's foreman one Mr. Patrick Shikweya which was granted and the claimant later on wrote a formal letter on 3<sup>rd</sup> August, 2015 now addressing it to the Respondent seeking for permission to be away from work due to illness.
6. The claimant stated that when he reported to work after, feeling better, he was fired on the spot. He was aggrieved by the actions of the Respondent and prayed for judgment for against the respondent for ;-
  - 1) **One month salary in lieu of Notice**
  - 2) **Leave for 5 years.**
  - 3) **Gratuity for 5 years.**
  - 4) **Compensation**
  - 5) **Cost of this suit to be borne by the Respondent.**
7. The Respondent entered Appearance and filed a response to the claim on the 28<sup>th</sup> July, 2017, denying ever employing the claimant and putting him to strict proof thereof on all the contents of the claim.
8. The Respondent stated that the claimant was contracted as a stone dresser between April and July, 2012 and asked by one of the Respondent supervisor to provide personnel to supply building materials for a period of 3 months which he agreed and performed up to task.
9. The respondent used to pay the claimant who could in turn pay his people. The said works were completed in July, 2012 and the Respondent did not contact the Claimant ever after.
10. The Respondent therefore contends that the claim is scandalous as it has never employed the Claimant.

11. During hearing the claimant, **John Nyakundi, CW-1** testified that he was employed by the respondent as a stone cutter in the year 2010 earning a daily wage of Kshs. 1,000/- and was later promoted to be a supervisor of the stone cutters and was now paid Kshs 1,200. He stated that he worked for the respondent for 5 years without any leave.
12. He testified that sometime in May, 2015 he was injured at work and sought for permission to seek medical attention which he was granted by his manager however on his return he was turned back by the Respondent as he was still sick.
13. He stated that he was paid on weekly basis and was given money to pay all the other *fundis*, but insisted that he was an employee of the Respondent but never signed the muster roll.
14. On cross examination, he testified that he was employed by the Respondent but was not issued with any documentation. He stated that he was taught how to cut stones and later promoted to be the supervisor. He also testified that he had a team of personnel who could come and work at the site depending on the available work and those personnel were decided by Patrick the Respondent's foreman. He testified that he was employed to supervise the other employees and could still do stone cutting and was paid depending on the feet worked.
15. On further cross examination, he stated that he left employment since his eye was injured and he sought treatment at a Naivasha Hospital. However he admitted that he had no record in court to affirm the said illness and treatment thereof. He then maintained that he was an employee and the employees that he was managing are all casuals for the Respondent.
16. The Respondent called two witnesses in support of its case, **Eugine Nzioki Kilovoo, (RW-1)**, The Respondents Administrator who stated that the Respondent keeps records of all its employees and in the master Roll the claimant does not appear anywhere. He therefore testifies that the claimant is not the Respondent employee, therefore the termination is not possible since he was not an employee in the first place. RW-1 then produced the Respondent Muster Roll.
17. On cross examination, the Witness told the court that the claimant was a contractor for 3 months which job was concluded.
18. The Respondent's 2<sup>nd</sup> Witness, **Mr. Patrick Lisuuli Shikwea** testified that he was the one that gave the claimant work of chiseling construction stones and would pay him by end of each week. He stated that he agreed with the claimant to come with some more casual and he would give the claimant money to pay the casual he came along with. He therefore told Court that the claimant was never an employee of the Respondent and therefore the claim is baseless.

#### **Submissions.**

19. The Respondent submitted that the claimant was not an employee but an independent contractor who was paid per week for work done that is for the number of feet of dressed stones.
20. The Respondent therefore urged this Court to dismissed the claim as the Claimant has failed to prove his case to the required standard.
21. The Claimant on the other hand did not file any submissions in support of their case.
22. I have examined the evidence and submissions of the parties herein. The claimant's case is that he was an employee of the claimant from May 2015 earning 1,200 per day.
23. The respondent denied ever employing the claimant as claimed. The respondent avers that the claimant was but a casual who was given work of dressing stones and he would be paid at the end of the week.
24. The respondent produced receipts of petty cash vouchers they allege they paid to the claimant during that period he did the contract in February and March 2012.
25. In their submissions however, respondent indicated that they contacted the claimant independently to dress stones between April and July 2012.
26. No contract was produced however to prove this allegation. The claimant also failed to prove he was employed by the respondent as alleged from 2010 to 2015.
27. He didn't produce any evidence of even how he was remunerated by the respondent if he was indeed an employee. He called no witness to corroborate his case.
28. In the absence of any proof that the claimant was employed by the respondent, the claimant's case must fail.
29. I found that the claimant has not discharged the burden of proof as expected.
30. I therefore dismiss this case accordingly with no order of costs.

**DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

JUDGE

**IN THE PRESENCE OF:**

**MR. JUMA HOLDING BRIEF KORONGO FOR CLAIMANT – PRESENT**

**COURT ASSISTANT - FRED**