



**2REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAIROBI**

**CAUSE NO. 171 OF 2015**

**HUKA GABABA ELEMA.....CLAIMANT**

**VERSUS**

**PATEL DAHYABHAI.....RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit on 11.2.2015 alleging that he was employed by the respondent from 2009 to 2014 when the respondent wrongfully and unfairly terminated his employment and refused to pay terminal dues. He therefore prayed for the following reliefs:

- (a) The sum of Kshs. 535,848.73/- as particularized in paragraph 5 of the claim.
- (b) Compensation for unfair termination to a maximum of 12 months wages amounting to Kshs. 134,988.00/-
- (c) Costs of this suit.
- (d) Interest on (a) and (b) at the prevailing bank commercial rate from the date of dismissal to the time of payment.

2. The Respondent filed defence on 16.3.2015 denying the claimants claims entirely. The respondent further averred that he employed the claimant as a casual employee and paid him a daily wage or on piece work basis. He therefore prayed for the suit to be dismissed with costs.

**Evidence**

3. The Claimant testified as Cw1 by adopting his written statement dated 10.6.2019 and produced three (3) documents filed on 5.8.2018 as his exhibits. In brief, he stated that he was employed by the respondent form 2009 to 2014 as a day watchman earning Kshs. 5000 per month. He further stated that the salary was paid via Mpesa or cash but it did not include house allowance.

4. He contended that from June 2014 to December 2014 the respondent never paid him salary but was calling him to his house to give him bread and maize flour. He contended that the respondent was staying on the upper floor of the building while the ground floor constituted shops.

5. He further stated that he never got any off days but worked every day including public holidays. He further contended that when he persisted in demanding his salary, the respondent dismissed him and told him to go wherever he wanted. He therefore prayed for the reliefs sought in the suit.

6. In cross-examination, the claimant contended that he was working from 6 a.m. to 6 p.m. He admitted that he was never given any letter of appointment but maintained that he started working in 2009 and left in 2014. He however could not remember the date and the month, in 2014 when he was dismissed.

7. He maintained that he was being paid by Mpesa and cash but he did not sign anywhere for the salary. Referring to his Mpesa statement, he admitted that he was being paid in bits which he called instalments. He contended that the respondent had a night watchman and another person called John. He maintained that the respondent was his employer.

8. The Respondent testified as Rw1. He also adopted his witness statement dated 5.9.2019. In brief, he admitted that he knew the claimant from 2013 when he forcefully took possession of the premises along Kirinyaga Road which he brought from an auction in 2009. HHe stated that between 2009 and 2013, the premises were under the control of the previous owner Mr. Mwangi.

9. RW1 further testified that when he took over the premises, he found the claimant doing odd jobs of garbage collection because the City Council had issues of garbage collection along Kirinyaga Road. He denied ever employing the claimant as a day guard on monthly basis and contended that he only hired him on periodic basis for piece work for which he paid him the agreed wages upon completion through Mpesa.

10. Referring to the Mpesa statement produced by the claimant, RW1 contended that the first time he paid the claimant was on 16.6.2013 being Kshs. 1000. On 1.7.2013 he paid another Kshs. 1000 and Kshs. 9000 separately. On 5.9.2013, he paid the claimant Kshs. 100 and a further Kshs. 3000 separately. Lastly, he paid him Kshs. 2500 on 27.12.2013 for piece work done. He denied that the claimant worked for him continuously.

11. RW1 further denied the allegation that the claimant went to his house to demand salary. He could not remember the exact date when the claimant disappeared and contended that he had no control over his whereabouts or when he appeared for work. He maintained that he never employed the claimant continuously for one month.

12. In cross-examination RW1 admitted that he made payments to the claimant by Mpesa but denied ever paying him any cash. He maintained that he made all the payments related to the said premises by cheque or Mpesa. He further admitted that when he took over the premises, he found Mr. Mwangi a caretaker and a lady who was a cleaner and he retained them in the same capacity.

13. RW1 denied knowledge of John Kinyanjui whose name appears in the claimant's Mpesa statement. Finally, he contended that the premises in issue was a commercial premises and denied ever residing there.

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

14. The claimant submitted that the Mpesa statement he produced was sufficient proof that he was indeed employed by the respondent. He further argued that the respondent had a burden of producing employment records to rebut the alleged employment relationship but he did not. He further contended that there was no evidence that possession was taken in 2013 and as such he had made out a prima facie case.

15. For emphasis he relied on **Irene Atieno v Henry De'Souza & Another [2010] eKLR**, **Nancy Kilivwa v Reshphal Nyota & another [2017] eKLR** and **Richard Machani Luka v Kuldeep Singh Devgan [2014] eKLR** where the courts were unanimous on the obligation of the employer to rebut allegations by the employees using employment records as required under section 10 (7) of the Employment Act.

16. The claimant further submitted that he did nothing wrong to justify his dismissal except his request for his salary arrears. He further contended that he worked under harsh conditions including underpayment, no leave or holidays and prayed for judgment as prayed in his suit.

#### **Respondent's submissions**

17. The Respondent submitted that he never employed the claimant continuously for a monthly salary and reiterated that he only engaged him on piece work basis as and when work was available. He contended that the Mpesa statement on record is proof that the claimant was not his regular employee and that until 2013 he was being paid by one John Kinyanjui.

18. He argued that the claimant has not adduced any evidence to prove that Mr. Kinyanjui was his agent. He reiterated that he only hired the claimant on piece work basis as and when the need arose. Consequently, he contended that he could not terminate the claimant's employment which never was.

19. In addition, the respondent submitted that the claimant is not entitled to the reliefs sought because he was never employed permanently but on piece work basis. He therefore prayed for the suit to be dismissed with costs.

#### **Issues for determination**

20. After careful consideration of the pleadings, evidence and submissions, the following issues arise for determination.

- (a) Whether the claimant was employed by the respondent and if so, on what terms.
- (b) Whether the claimant was unfairly dismissed by the respondent.
- (c) Whether the claimant is entitled to the reliefs sought herein.

#### **Employment relationship**

21. The claimant's case is that he was employed by the respondent as a day guard at his premises from 2009 to 2014 for a salary of Kshs. 5000 per month. He relied on his Mpesa statement as the evidence of such employment relationship. The respondent's case, however, is that he never employed the claimant continuously for one month or for the alleged salary of Kshs. 5000/- per month but only on piece work basis to do odd jobs like garbage collection as and when the need arose. He denied the alleged dismissal and contended that he had no control over the claimant whether or not he appeared for work.

22. Section 2 of the Employment Act defines employee and contract service as follows:-

**“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;**

**“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;**

23. In Kenya, the law recognises different forms of employment including casual piece work, fixed term contract and contract for indefinite term otherwise referred to as permanent employment.

24. After careful consideration of the evidence tendered and especially the Mpesa statement produced by the claimant, it is clear that the claimant started receiving payment from the respondent on 16.6.2013. The said payments were neither regular nor constant. They ranged from as little as Kshs. 100 to as high as Kshs. 9000. The last payment was Kshs. 2500/- and was made on 27.12.2013.

25. In my view, the said mode of payments corroborates the evidence by RW1 that he took over possession of the premises in 2013 and continued engaging the claimant to do odd jobs of garbage collection on piece work basis. Section 2 of the Act defined piece work as follows:

***“any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.”***

26. It is trite law that he who alleges must prove his allegation in order for the court to find in his favour. In this case, the claimant alleges that he was employed by the respondent on monthly basis from 2009 to 2014. He has however not proved on a balance of probability that he was employed by the respondent continuously for that period.

27. He also did not prove that Mr. John Kinyanjui who was paying money to him between 2009 and 2013 was the respondent’s agent. He never called Mr. Kinyanjui or John Mwangi who was the caretaker before June 2013 as his witness to confirm that he was indeed employed by the respondent as a day guard from 2009 to 2014.

28. Consequently, I find and hold that the claimant did not work for the respondent continuously as a day guard from 2009 to 2014 as alleged. I am however, satisfied that he was employed by the respondent on piece work basis as and when the need arose from June 2013 to December 2013.

#### **Unfair dismissal**

29. In view of the finding that the claimant was a piece work employee, and his last payment was on 27.11.2013, the court returns that he was not unfairly dismissed in 2014 as alleged. He did not produce any termination letter or call any eye witness to confirm that he was indeed dismissed by the respondent. In fact during cross examination, he admitted that he did not recall the date and the month in 2014 when he was dismissed for demanding his salary. He alleged that the respondent did not pay his salary from June to December 2014 and when he went to demand for the same he was dismissed. He, however did not prove that he worked for the respondent in 2014 nor did he produce any proof that he was paid salary for January to May 2014.

30. Under section 47 (5) of the Employment Act, the burden of proof is on the employee who alleges that he was unfairly terminated. In this case, I find that the claimant has failed to discharge that burden of proof and agree with the respondent that he had no control over the claimant because he only engaged him on piece work basis. Accordingly, I distinguish this suit from the precedents cited by the claimant.

#### **Reliefs**

31. In view of the finding herein that the claimant was a piece work employee who never worked continuously for one month, I return that he is not entitled to the reliefs sought and proceed to dismiss the suit with costs.

**Dated, signed and delivered in open court at Nairobi this 13th day of March, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**