



**REPUBLIC OF KENYA**

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

**CAUSE NO 150 OF 2017**

**MARTIN WASONGA OBEL.....CLAIMANT**

**VS**

**COAST BUILDING & GENERAL CONTRACTORS LTD....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by Martin Wasonga Obel against, Coast Building & General Contractors Ltd. The claim is documented by a Memorandum of Claim dated 21<sup>st</sup> February 2017 and filed in court on 22<sup>nd</sup> February 2017. The Respondent filed a Reply on 16<sup>th</sup> March 2017.

2. When the matter came up for hearing on 24<sup>th</sup> January 2018, the Claimant testified on his own behalf and the Respondent called its Managing Director, Kuldip Singh Soar.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a General Tradesman Mechanic in August 2004 and later on 2<sup>nd</sup> May 2010. The Claimant’s salary was progressively increased from Kshs. 10,000 to Kshs. 17,160. The Claimant claims that he was underpaid and was not paid house allowance.

4. The Claimant avers that on 30<sup>th</sup> June 2016 at around 4.30 pm, he was verbally notified that the Respondent had decided to retire him from employment. He states that he was 49 years old at the time.

5. He further states that upon termination of his employment, he was not paid his terminal dues. He now claims the following:

- a. One month’s salary in lieu of notice.....Kshs. 21,384.50
- b. Underpayment from 1.3.2014 to 30.4.2015.....27,062.00
- c. Underpayment from 1.5.2015 to 30.6.2016.....59,143.00
- d. Accrued annual leave for 42 days.....60,452.30
- e. Compensation for unfair termination.....256,614.00
- f. Compensation for early retirement.....2,822,754.00

g. Certificate of service

h. Costs plus interest

### **The Respondent's Case**

6. In its Reply dated 13<sup>th</sup> February 2017 and filed in court on 16<sup>th</sup> March 2017, the Respondent states that the Claimant was engaged as a casual helper/labourer on an on and off basis from August 2004 to December 2009. From January 2010, he was engaged on a month to month basis.

7. The Respondent also states that the Claimant was employed as a Tradesman Mechanic from 2<sup>nd</sup> May 2010 up to 28<sup>th</sup> February 2011 when his terminal dues for the period 2004 -2011 were paid to him in full. From 2011, the Claimant was engaged on various casual contracts in the positions of General Tradesman and Ungraded Artisan, for which he was fully paid. Statutory deductions were made and duly remitted. The Respondent avers that at no time did the Claimant work for a full year.

8. Regarding the Claimant's conduct, the Respondent states that on several occasions, he appeared at the work place while under the influence of alcohol for which he was reprimanded.

### **Findings and Determination**

9. This cause raises three (3) issues for determination:

- a. The Claimant's employment status;
- b. Whether the termination of the Claimant's employment was lawful and fair;
- c. Whether the Claimant is entitled to the remedies sought.

### **The Claimant's Employment Status**

10. The Respondent's position is that the Claimant was a casual employee. Section 2 of the Employment Act, 2007 defines a casual employee as:

**“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”**

11. In support of its assertion that the Claimant was a casual employee, the Respondent produced several casual work contracts each running for a period of two (2) months. The Respondent also produced petty cash vouchers showing payment of salary to the Claimant. A perusal of these vouchers reveals that the maximum number of days per month for which the Claimant was paid, was thirteen (13), meaning that at any given time the Claimant did not work for a full month.

12. From the evidence on record, the Claimant was paid service pay for the period between 2004 and 2011. Thereafter, he was engaged on casual work contracts of 2 months each. These contracts provided inter alia:

**“We are pleased to offer you casual work as a General Tradesman in minor motor repair works on Contract basis from time to time for the next 2 months, at .....kshs per day inclusive of housing allowance.**

**Efforts will be made to provide you work on daily basis but there is no guarantee as this entirely depends on the available work. The nature of work and timings can vary depending on the operational requirements.”**

13. The Court was referred to its own decision in *Maurice Oduor Okech v the Chequered Flag Limited [2013] eKLR* where the distinction between a contract of service and a contract for services was made.

14. I think however that the issue now before the Court is somewhat different. My reading of the casual work contracts produced by the Respondent, coupled with the petty cash vouchers by which the Claimant's salary was paid, reveals that the Claimant was engaged in what is commonly known as piece work.

15. Section 2 of the Employment Act defines piece work as:

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

16. Black's Law Dictionary (Ninth Edition) gives the following definition:

**“Work done or paid for by the piece or job.”**

17. In my view, piece work employment contracts do not create any further rights or obligations other than those expressly provided for in the contract. None of the violations complained of in this claim stems from the subject employment contracts. The entire claim therefore fails and is dismissed with no order for costs.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 15<sup>TH</sup> DAY OF MARCH 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Katu for the Claimant

Miss Waihenya for the Respondent