



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1866 OF 2014**

**JOSEPH MAKANGA ONG'AYO.....CLAIMANT**

**v**

**JAPHETH WALUTILA.....RESPONDENT**

**JUDGMENT**

1. Joseph Makanga Ong'ayo (Claimant) instituted legal proceedings against Japheth Walutila (Respondent) on 22 October 2014 and he stated the Issues in Dispute as

- (a) Unlawful/unfair dismissal from employment
- (b) Underpayments of salary, and
- (c) Non-payment of terminal dues.

2. In a *Reply to Memorandum of Claim* filed on 14 January 2015, the Respondent denied that the Claimant was his employee or that the Court had jurisdiction over the dispute.

3. On 3 March 2015 the Respondent filed a *Notice of Preliminary Objection* contesting the Court's jurisdiction to entertain the Cause, on account of limitation.

4. In a ruling on 27 January 2016, the preliminary objection was dismissed paving way for hearing on 2 May 2018 when the Claimant testified and closed his case, and on 30 July 2018 when the Respondent testified and closed his case.

5. The Claimant's submissions were not on file by this morning while the Respondent filed his submissions on 4 October 2018.

6. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as itemised herein under.

**Jurisdiction/was there an employment relationship?**

7. The determination of the other heads of claims advanced by the Claimant will depend on whether the Court finds that there was an employment relationship.

8. Regrettably, this is one of those cases where it is purely the word of one witness against another and the Court is enjoined to look at the surrounding circumstances of ordinary life to help it unravel the facts.

9. The Claimant testified that he was employed by the Respondent in 2004 as a storeman and caretaker of the plot where the Respondent intended to construct a home at a salary of Kshs 2,500/- per month until he was dismissed in April 2013 and got replaced by a named person.

10. The Respondent on the other hand stated that he knew the Claimant in 2010 when he approached him at a site where he was putting up a home.

11. According to the Respondent, the Claimant who was introduced to him by his foreman requested him to be allowed to stay in one of the structures as he did not have any place to stay. The Respondent obliged him.

12. Save for giving the Claimant accommodation, the Respondent testified that he did not agree with the Claimant to perform any duties as an employee and that the Claimant left in 2013 due to heavy flooding which had hit the area.

13. On the contention that the Claimant started working for him in 2004, the Respondent stated that he only bought the plot in 2003 and started construction in 2009 after getting approvals from Mavoko Municipal Council.

14. From the evidence on record, the Court can deduce that there were some structures long before the Respondent secured approvals from the local authority to commence construction in 2009.

15. In the ordinary happenstance of life, an intending home builder does not meet and entrust the home construction site with materials to an unknown person without any consideration even if that person was introduced to them.

16. Such person will with all due respect have humanly needs such as food and may be, dependents.

17. It is not clear why the Respondent would have entrusted and or given accommodation to a near stranger he had no relationship with as he alleged.

18. It is not probable that the Respondent could have allowed the Claimant to stay at the construction site with all the construction materials when there was no arrangement in place for the security of the materials.

19. In the view of the Court, the narration by the Claimant is more probable, that the Respondent engaged him to secure the site and materials for a salary of Kshs 2,500/- per month.

20. As to when the employment relationship started, the Court notes that the Respondent did not bother to disclose when he purchased the plot (was content with disclosing date construction started), and in consideration of this, the Court concludes that the relationship commenced in 2004.

#### **Unfair termination**

21. The Respondent's case was anchored on the defence that there was no employment relationship.

22. In the submissions, it was urged that the Claimant had not proved his case to the standard stipulated by sections 107 and 109 of the Evidence Act.

23. The Court having concluded that there was an employment relationship will accept the Claimant's testimony that there was no notice prior to termination as true, and find that there was unfair termination of employment.

24. With the finding, the Court is of the opinion that the Claimant is entitled to the equivalent of 1 month pay in lieu of notice (Kshs 2,500/-) and the equivalent of 10 months wages as compensation (Kshs 25,000/-).

#### **Underpayments**

25. Although alleging underpayments, the Claimant did not set out either in the pleadings or testimony the prescribed minimum wages applying in the area where the contract was performed and the Court finds that this head of claim was not proved.

#### **Unpaid wages for 9 years**

26. The Claimant sought Kshs 854,917/- as unpaid wages for the 9 years he served the Respondent.

27. In the view of the Court this head of claim is caught up by section 90 of the Employment Act, 2007, as the same should have been presented within 12 months from the date of cessation thereof which was the date of separation.

#### **Leave**

28. The claim for leave is also caught up by section 90 of the Employment Act, 2007 as read with section 28(4) of the Act.

#### **Service gratuity**

29. Under this head the Claimant sought Kshs 35,621/- but he did not reveal how he arrived at the sum or formula used and the Court will decline the relief.

#### **Conclusion and Orders**

30. The Court finds and holds that the Claimant was an employee of the Respondent and that his employment was unfairly terminated and awards him

(a) Pay in lieu of notice Kshs 2,500/-

(b) Compensation Kshs 25,000/-

TOTAL Kshs 27,500/-

31. Claimant is denied costs for having failed to file and serve submissions as agreed and directed by the Court at the close of hearing.

**Delivered, dated and signed in Nairobi on this 23<sup>rd</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Mungai instructed by Namada & Co. Advocates

For Respondent Mr. Waiganjo instructed by Waiganjo Wachira & Co. Advocates

Court Assistant Lindsey