



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 234 OF 2015

PETER MAINA NGARI.....CLAIMANT

VERSUS

NOKRAS HOTEL LIMITED, MURANG'A.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 21st July, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 18.12.2015 through Kirubi, Mwangi Ben & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Kshs. 325, 000.00 being terminal benefits on the headings of pay for salary for 15 days in July 2015 Kshs. 75,000.00; double rate pay for public holidays Kshs. 30,000.00; pro-rate leave Kshs.70, 000.00; and one month salary in lieu of notice Kshs. 150,000.00.
- b. Kshs. 1,800,000.00 being 12 months' pay in compensation for unfair termination.
- c. Costs of the suit plus interest.
- d. Any other or better relief the honourable court may deem fit to grant.

The respondent's statement of defence and counterclaim was filed on 11.02.2016 through Ongicho-Ongicho & Company Advocates. The respondent denied that the claimant was its employee and further prayed that the suit be dismissed with cost. The document as filed appears not to make any counterclaim or prayers in that regard.

The claimant's case is that he was employed by the respondent as an auditor between 01.12.2014 and 15.07.2015 when his services were illegally, irregularly and without any justifiable reason terminated contrary to provisions of the Employment Act, 2007. He was paid the monthly salary by Maguna Andu Wholesalers or Maguna Andu Supermarket being a subsidiary of the respondent and all enterprises being owned and solely controlled by the owner of the respondent. It was the claimant's case that he was sometimes directly paid by the respondent. At termination, the claimant stated that he used to earn Kshs. 150,000.00 per month. Upon the claimant's advocates making demand and notice to sue by the letter dated 19.11.2015, the respondent denied that there existed employment relationship between the parties and the respondent denied the claims. The replying letter dated 01.12.2015 stated in part, **"Our client denies having employed your client as an Auditor as alleged in your letter. Our client contends that the your client was hired on piece work basis to carry out audit works as when such work arose. The services offered were strictly contractual on piece work basis and not employment *per se* to create employer-employee relationship."**

Parties opted to rely on the pleadings and the documents on record and to file final submissions.

The **1st issue** for determination is whether the parties were in a contract of employment. The respondent's case is that the respondent assigned the claimant consultancy and the specific duty being to carry out an audit and prepare reports and recommendations. The respondent's case was that the claimant was autonomous in the performance of the work, he was not subject to supervision and he could work at any hours of his own choice. It was submitted that section 18 (1) (b) of the Employment Act, 2007 applied, that is, the parties were in a contract of service for a task or piece work to be performed by the employee, the claimant, and in view of that piece work, the claimant was entitled to be paid by his employer at the end of the month in proportion to the amount of work which he had performed during the month or on completion of the work, whichever was earlier. The respondent further submitted that the claimant failed to prepare the reports and recommendations so that the consultancy was not renewed. The court has considered the respondent's line of submission and by invoking section 18 (1) (b) of the Employment Act, 2007, the court returns that the respondent has thereby conceded that the parties were in a contract of employment and the court returns as much.

The **2nd issue** for determination is whether the termination of the employment was unfair. The court has considered the claimant's letter dated 23.09.2015. The claimant states that the respondent's chairman communicated to him the decision to end the prevailing contract between the parties in favour of one that the parties were to negotiate and which was to be based on work done. The claimant further stated in that letter that the parties had not negotiated the new contract and 2 months and ten days or so had since lapsed. In view of that assertion, the court returns that the parties terminated the employment relationship in a mutual understanding that they would renegotiate a new contract. The court returns that the claimant is bound by that mutual arrangement and the claims for unfair termination will therefore fail together with the prayer for 12 months' salaries in compensation. It could be that the promise to negotiate a new contract failed to pass but that does not consume the parties' arrangement to terminate the employment upon such promise. Breach of the promise might constitute a cause of action but which has not been urged before the court and the less the court addresses the likely breach of that promise, the better, as it is not before the court.

The **3rd issue** for determination is if the claimant is entitled to the other remedies as prayed for. In the letter of 23.09.2015 the claimant tabulated his demands for final dues on the headings of 15 days worked, 6 public holidays since December 2014 at double rate, prorated leave earned for 7.5 months, and 28 days' pay in lieu of notice. The respondent has made no submissions in that regard. The court returns that on a balance of probability, the claimant has established the claims especially that in the respondent's witness statement, it is admitted that the salary of Kshs. 150,000.00 was agreed upon. The terminal dues will be allowed in the sum of Kshs. 325, 000.00 as prayed for.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. Payment of **Kshs. 325, 000.00** by 01.09.2017 failing interest to be payable thereon at court rates from the date of the suit 18.12.2015 till the date of full payment.
- b. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 21st July, 2017.**

BYRAM ONGAYA

JUDGE