



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 965 OF 2011**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 22<sup>nd</sup> November 2017)**

**BONIFACE INGOSI.....CLAIMANT**

**VERSUS**

**STELLA BUILDERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Memorandum of Claim on 17<sup>th</sup> June 2011 through the firm of Messrs Ochieng Ogutu and Company Advocates. It is the Claimant's case that the Respondent employed him in March 2007 as a Foreman at a salary of 800/= per day. That he used to work 7 days a week from 6 am.
2. He avers that he worked for Respondent upto January 2011. Then his salary was 900/= daily. On 3<sup>rd</sup> January 2011 he came to work after a break from 27<sup>th</sup> December 2010 and he was informed that his work had been changed and he would be given a sub-contractor.
3. The Claimant gave oral evidence and informed Court on cross-examination that he used to be paid weekly 4,200/= and was never paid overtime. He stated that he was never given any appointment letter and was not a member of NSSF.
4. The Claimant called 1 witness one Daniel Ayieta who stated that he knows the Claimant because Claimant was their foreman when he worked for the Respondent for 11 months with effect from November 2009 to October 2010.
5. He told the Court that he was paid during weekends but has an employment card which he showed Court. He indicated that the cards were issued every Monday and would be taken back to the Respondents in the evening.
6. The Respondents on their part filed a Memorandum of Response on 11<sup>th</sup> July 2011 through the firm of M/s R. N. Kitonga Advocates. The Respondents deny ever employing the Claimant in March 2007 as alleged but aver that they engaged the Claimant to perform piece work at their site in Karen for which he was paid upon completion.
7. That the Claimant never worked continuously for them because they had sub-contractors who used to do the work for them. They also deny receiving any demand notice in this case as the notice was sent to a wrong address No.38214-00600 Nairobi whereas their correct address is 38214-00623 Nairobi.
8. The Respondent called 1 witness who gave oral evidence and stated that the Claimant nor his witness

was known to him. He also stated that the claim is not true because they registered their company on 29.5.2008. He denied that Claimant was ever their employee. They also deny employing Daniel Ayieta (CW2). The witness's evidence contradicted their written defence because whereas in the defence they admit employing the Claimant on piece work basis, the witness denies knowledge of the Claimant nor employing him.

9. He also denied they have documents to show that the Claimant had been hired on piece work basis.

10. I have examined all evidence submitted by the parties plus their submissions filed. The issues for determination are as follows:

**1. Whether Claimant was an employee of the Respondent.**

**2. If yes, whether he was lawfully terminated.**

**3. Whether the Claimant is entitled to remedies sought.**

11. On the 1<sup>st</sup> issue, the Respondents' defence at paragraph 4 states as follows:-

***“the Respondent denied that the Claimant was employed by it in March 2007 as alleged in paragraph 3 of the Statement of Claim but avers that the Claimant was engaged by the Respondent to perform piece work at their site in Karen for which he was paid upon completion and puts the Claimant to strict proof of his allegations”.***

12. These averments concede to some sort of an employment relationship with the Claimant which was on piece work basis or on casual basis.

13. The evidence of RW1 on other hand contradict the above statement as RW1 denied knowing the Claimant or even employing him in whatever form.

14. The Claimant informed Court he was an employee of the Respondent and the statement of defence seem to agree to a relationship. The terms of this engagement are not clear because no agreement has been provided to Court. In any case, the Respondent having admitted to employing the Claimant on piece work basis was expected to produce the employment records to prove their assertion.

15. Section 74 of the Employment Act 2007 expects an employer to keep employment records as enumerated therein and which contains written records of all employees employed by him with whom he has entered a contract under this Act.

16. Section 79 of Employment Act also requires an employer to keep a register in which he has entered all employees particulars.

17. In this case whether the work is casual, permanent or piece work, those records are expected to be kept by the employer. In this case, the Respondent failed to produce any such records to prove their allegation of piece work.

18. Section 10(7) of Employment Act states as follows:-

***“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.***

19. Since the Respondent has not produced any register or records as envisaged to prove the nature of this relationship, the burden of proving or disproving assertions made by the Claimant rest on him.

20. I therefore make a finding that the Claimant was an employee of the Respondent as admitted in the

Memorandum of Defence and who was paid weekly as per the evidence of CW1 and CW2.

21. On issue of how this relationship was terminated, in absence of any evidence to the contrary, I find that the Claimant was verbally terminated as he has stated.

22. The Counsel for Claimant wrote demand notice to the Respondent on 10<sup>th</sup> February, 2011 after termination on 3<sup>rd</sup> January 2011 but Respondent never responded. I take then that their silence was an indication of acceptance of what the Claimant had demanded.

23. On issue No. 3, in view of the termination which I find unlawful and unfair, I find for Claimant and award him as follows:

**1. 1 month salary in lieu of notice = 4,200 per week x 4 weeks = 16,800/=.**

**2. Service pay for 3 years at 15 days for each year worked = 3 x ½ x 16,800 = 25,200/=.**

**3. 10 months salary for unfair and unlawful termination = 16,800 x 10=168,000/=.**

**Total due = 210,000/=**

**4. Plus costs and interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 22<sup>nd</sup> day of November, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Respondent

No appearance for the Claimant