



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 964 OF 2011**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 24<sup>th</sup> February 2016)**

**BENSON ODERO AYIEYE .....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED .....RESPONDENT**

**JUDGMENT OF THE COURT**

1. On 10.6.2011, the Claimant filed his Memorandum of Claim through the firm of Andrew Ombwayo & Advocates. The Claimant's case is that he was an employee of the Respondent as a Caretaker/Gardener from on or about 1993 till on or about 16<sup>th</sup> June 2005 when he was wrongfully terminated.
2. The Claimant avers that he was initially employed in 1993 till August 2000 earning a monthly salary of Kshs.1,000/=. He then requested his employer for a salary rise as per his letter dated 27<sup>th</sup> January, 2000. On 2<sup>nd</sup> October 2000, the Respondents increased his allowance from 1,000 to 1,500/=.
3. On 16.6.2005, the Claimant avers that his services were terminated by the Respondent's Accountant without any reasons or notification.
4. The Claimant's claim is for 1 months salary in lieu of notice, service pay for 12 years, leave pay, salary underpaid. He also prays for costs of this suit.
5. The Respondents filed their Statement of Response on 8/7/2011 through the firm of Mohammed & Kinyanjui Advocates. They however failed to attend Court during the hearing and the Court ordered the Respondents case closed on 7/12/2015 and directed parties to file their submissions.
6. From the Statement of Response the Respondents deny unlawfully terminating the Claimant's employment.
7. The Respondents deny that the Claimant was their employee and earned a monthly salary of 1,000/= as alleged.
8. They also deny increasing the Claimant's alleged salary to Kshs.1,500/= from 20.9.2000 or at date whatsoever as alleged.
9. The Respondents further deny terminating the Claimant's salary nor that he is entitled to the prayers sought.

10. The Respondents have submitted that the Employment Act 2007 does not apply in this case.
11. They however aver that the Claimant was granted various contracts on and off by the Respondent to render specific services at the Respondents Kisumu showground stand and paid against his “cash sales invoices.
12. That the Claimant was never a casual or permanent employee and rendered his services to the Respondent as an independent contractor over whom the Respondent exercised no control or supervision and that the relationship was never converted into an employee – employer relationship.
13. I have considered the evidence submitted before Court and submissions filed. The issues for determination are as follows:

1. ***What the applicable law is in this case.***
2. ***Whether the Claimant was an employee of the Respondent and whether he was unlawfully terminated.***
3. ***What remedies if any to grant in the circumstances.***

14. On the 1<sup>st</sup> issue, the Claimant avers that he worked for Respondent and was terminated on 16.6.2005. During this period, the Employment Act Cap 226 was the law in force as the Employment Act 2007 came in force in 2008 and cannot therefore operate retrospectively to this case. I will therefore refer to Cap 226 (now repealed) as the operative law in determining this case.

15. On the 2<sup>nd</sup> issue, on the relation between Claimant and Respondent, the Claimant exhibited Appendix 2, a letter he received from the Respondent’s Kisumu Branch Manager dated 2.10.2000 informing him that his allowance had been increased from 1,000 to 1,500/= with effect from September 2000.

16. Appendix 3 are payment vouchers showing payments given to the Claimant as the cost of maintaining National Bank of Kenya Limited stand at Mamboleo showground for May 2003 and January 2005. No appointment letter was produced. The payment voucher shows that the Claimant was being paid an allowance to maintain the show grounds but I do not find this as qualifying to be an employment relationship qualifying the Claimant to be an employee of the Respondent.

17. The Claimant had even applied for a job as a driver to the Respondent on 27.1.2000 and this application would not have been made if he was in Respondent’s employment.

18. This Court finds that the Claimant was not an employee of the Respondent in the strict sense of an employment contract where the employer exercises control and supervision over the work of an employee.

19. I however find that the Claimant served the Respondent as a Caretaker taking care of their premises and being paid Kshs.1,500/= allowance monthly. To terminate this engagement, the Respondent ought to have given the Claimant 1 month notice which they didn’t. Also having been in this relationship, they ought to have paid him some exgratia payment.

20. I therefore find for Claimant and award him:

1. ***1 month allowance as notice = 1,500/=***
2. ***50,000/= exgratia payment for service rendered for 12 years.***

Respondent to pay costs of this case.

Read in open Court this 24<sup>th</sup> day of February, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

P. K. Njoroge holding brief Ombwayo for Respondent – Present

Nyabena holding brief Ngara for Claimant – Present