



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO.2048 OF 2014**

**CHARLES MUTUA MWANZI ..... CLAIMANT**

**VERSUS**

**INVESCO ASSURANCE COMPANY LIMITED ..... RESPONDENT**

**JUDGEMENT**

The issues in dispute;

- a. Unlawful/unfair dismissal of the claimant
- b. Failure to pay 13 months' salary
- c. Failure to pay terminal dues and benefits

1. The Claimant filed his claim on 17<sup>th</sup> November 2014 against the respondent, a limited liability company engaged in insurance and related matters. The Claimant employment was for the position of a Court Clerk from 25<sup>th</sup> September 2011 at a salary of Kshs.25, 000.00 per month. The employment was based on an oral agreement that was to be followed by a written agreement following 3 months' probation but this was never done.

2. The claim is that the Claimant was assigned duties in various stations away from his home where the Respondent paid for his subsistence allowances and other necessary disbursements. The Claimant diligently undertook his duties from 25<sup>th</sup> September 2011 by visiting various court stations and administrative offices for perusing court files and taking notes, making copies and serving summons. The Claimant remained under the supervision of the Respondent officers. Despite working for the respondent, salary for 13 months was not paid and on 22<sup>nd</sup> October 2012 the Claimant was terminated from his employment without any reasons being given or a notice being issued to him. The termination was effected when the Claimant asked the Respondent officer, Paul Gichuhi about his accrued salaries and other benefits.

3. The claim is for notice pay; accrued 13 months salaries not paid; service pay; NSSF dues not remitted; accrued leave; and house allowances all computed at Kshs.433,950.00. The Claimant is also seeking the payment of compensation for unfair termination and his costs.

4. In evidence, the Claimant testified that upon employment by the Respondent as court process Sever, he was sent countrywide to serve summons, peruse court files and get documents at police stations. He had an oral contract with the respondent. He was called by the Respondent senior officer to engage as he had not applied for the position. At the time the Respondent had a lot of work and his cousin was already employed, who proceeded to introduce the Claimant to the legal Officer Mr Gichuhi. Meetings by the legal officer were held on Tuesdays where work was allocated.

5. The Claimant also testified that his salary was verbally agreed upon and when on travel for work he was paid allowances. The Respondent wrote a letter introducing the Claimant as an employee. Paul Gichuhi wrote a letter introducing the Claimant to the judiciary and to enable him undertake his duties of perusing files. That despite the Claimant undertaking all his assignments, he was never paid his salaries. On 22<sup>nd</sup> October 2012 he came back from western Kenya and went to the legal officer to seek his intervention so that he could be paid his dues salaries but the legal officer said he was never a permanent employee of the respondent. He was also informed that his services were never required and he should leave the Respondent premises. That this was a case of unfair termination and hence the set out claims.

6. Upon cross-examination, the Claimant stated that in various communications and memos of the Respondent he was referred to as a court clerk or a process server. He had a letter directed at Executive officers of the court to enable him peruse court files. He was employed by the legal manager Mr Gichuhi but his contract was verbal. He was paid all travel allowances for his work. His immediate boss was Ndirangu a senior clerk with the Respondent who was in charge of all the clerks. That Mr Gachuhi had two offices are Bishop Magua and George Padmore building.

7. The Claimant also confirmed that he worked for other advocates especially Katunga Mbuvi, Ochieng Ogutu & Company Advocates. That the Respondent terminated his services without prior notice or warning.

## **Defence**

8. In defence, the Respondent stated that they did not employ the Claimant at all and therefore the issue of unlawful termination, failure to issue notice or warning does not arise. That there was never an employer and employee relationship and therefore no obligation to pay the set out claims of Kshs.433, 950.00. That the claim should be dismissed with costs.

9. In evidence, the Respondent called Paul Gichuhi an advocate who worked with the Respondent from 18<sup>th</sup> January 2010 to 7<sup>th</sup> April 2014. He joined the Respondent upon revival from statutory management and had to review all claims and for this purpose there was a team set up to investigate the same. There was excessive work load and thus he asked the head of court clerks, Patrick Maillu to get 2 or 3 independent court clerks to be engaged on ad hoc basis. The Claimant was one such clerk who was given ad hoc assignments. Instructions would be given per court station basis and a fee payable to each assignment. The fees payable would include perusal fees; transport allowance; and own professional fees. These payments were as structured as the clerks were not the employees of the respondent. The Respondent also issued the clerks with letters of authority to be allowed to peruse files.

10. The witness also stated that the new employments are advertised and the human resource office has to carry out interview but in the case of the claimant, he was on an ad hoc assignment hence not a full time employee. All Respondent staff are on the payroll and not paid allowances for their work and the Claimant was paid per assignment.

11. On cross-examination, the witness confirmed that the Claimant was sourced as the Respondent had a lot of work that was time-bound and the services of full time staff could not complete it within the required duration. There was need to outsource the excess workload. The Claimant was stop recruited for full time work but for ad hoc assignments. A standard letter was done for the Claimant to facilitate his work.

12. The witness also confirmed that when the Respondent does outsourcing of its work, a contract is written to this effect. The human resource office must however be notified to process the contract. No employment is done without a contract been drawn. Where a contract tis for a period of over 3 months, the human resource office has to know and do a contract. All the Respondent court clerks are on the payroll with the lowest earning kshs.30, 000.00 and none could be placed at 25,000.00 as alleged by the claimant.

13. The second witness for the Respondent was Josephine Githuka the acting human resource

manager since 18<sup>th</sup> January 2010. That her role is to recruit staff, undertake performance appraisals and discipline. She kept the records of all employees of the Respondent and the Claimant was not one such employee. There is a clear recruitment policy that follows strict requirements and in the case of the Claimant no such employment was given.

14. In cross-examination the witness started that she was not aware that the legal department had been overwhelmed with work so as to seek the services of *ad hoc* clerks for assistance. Where such a need arose, it had to be processed through the human resource office for sourcing under a contract. The Respondent policy is not to employ anybody without a contract. When clerks are sourced on an ad hoc basis, the Respondent has a policy on how they are paid. All court clerk salaries were from Kshs.30, 000.00 and not what the Claimant stated at kshs.25, 000.00.

### **Submissions**

15. The Claimant submitted that upon his employment by the Respondent he was allocated work out in different towns under the knowledge of Paul Gichuhi and under the supervision of Maillu as the head of the clerks. He was paid a per diem for his nights out for work but his salaries were never paid. He was suddenly terminated without notice or being given a hearing contrary to section 41 of the Employment Act, and his rights under article 10, 41 and 47 were violated with regard to fair labour practices and fair administrative action. There existed an employer and employee relationship between the parties herein and the resulting termination was unfair and should be paid compensation.

16. The Respondent submitted that the Claimant was given ad hoc duties and paid per work done but was not an employee of the respondent. He was issued with a letter of introduction so as to be able to undertake his duties and had no salary paid but an allowance for his work. That the Claimant worked for a number of persons or firms at the same time and was not solely at the control of the Respondent as an employee. That there was no notice issued to the Claimant as this was not applicable and all claims set out are not due.

### **Determination**

Whether the Claimant was an employee of the respondent

Whether there are any remedies due.

17. The Employment make provisions for various types of employment contract – fixed term contract, full time contract, casual or seasonal contract, or as the case may be. This is to ensure that at any given time an employee is aware of the terms of engagement and where there is a dispute, reference is given to the nature of contract. An employer therefore acts to their own detriment where they take up a worker without defined parameters of work by failure to reduce the terms of engagement into writing and the allocated work continues for periods over and above the legal minimums set out under section 37 of the Employment Act. Where casual work is allocated continuously and such work does not end within two (2) months, such an employee must be issued with a written contract of employment or by the operation of the law the status of such an employee must change. Section 37 must also be read together with section 10 where a contract of employment must be issued in writing within 2 months.

18. An employer is also allowed to issue a *contract of service* or a *contract for a service*. This is to enable an employer with seasonal work or work that is otherwise ad hoc to be undertaken within the parameters agreed upon by the parties. To otherwise leave an employee in an open-form of employment results in a suit such as this one.

Was the Claimant therefore an employee of the respondent? Section 2 of the Employment Act defines who an employee is so as to claim under the Act thus;

***“Employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;***

19. An employer has also been defined under the same section to mean;

***“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;***

20. In this regard therefore, an employee and an employer may enter into a contract of service as;

***... an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies***

21. An employee under a contract of service is solely employed by a particular employer for a fixed period or full time or contracted as the case may be. It is also permitted in employer and an to engage a person under a contract for a service that may be oral or written with specific terms but such an employee is not specifically under the control of the employer and can be engaged by various employers at the same time as his is a contract to render a set service. This was aptly captured in the case of **Christine Adot Lopeyio versus Wycliffe Mwathi Pere, Cause No.1688 of 2012;**

*[there is a fundamental difference] This differentiation relate to very fundamental issues noting that under a contract of service it customarily relates to an employee who is **subordinate** or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner.*

22. In this case, the Claimant admitted that he was introduced to the Respondent by his cousin already working with the Respondent and was sourced as a clerk, was issued with a letter of introduction to court executive officers as a court clerk and also was engaged as a court process server with various duties of perusing court files, serving court summons, attending at police stations to get documents. He travelled country wide to undertake his duties. He was paid all due allowances – transport, travel and fees – by the respondent. The only thing not paid was a monthly salary. That this was due for 13 months. He was terminated when he demanded for his salary.

23. Indeed, the letter issued to the Claimant by the Respondent in the assessment of the court is an introduction letter to the court stations where the assigned tasks are set out. Even where the Claimant may have been sourced and remained at the service of the Respondent for the court to infer an employment relationship, and despite the very well-choreographed evidence to lead to this fact, the Claimant lifted his own cover when he admitted to having been at the service of other employers, was allocated work similar to work he did for the Respondent for other law firms and gave the examples of Katunga Mbuvi Advocate and Ogutu & Company Advocates. Here the Claimant served such employees for service of summons and other court related matters.

24. By these admissions, the Claimant became removed from the exclusive subordinate direction of the respondent. His employment therefore was not of the nature of a contract of service, rather a contract for a service as directed. Indeed such work I find to have been ad hoc and not at the exclusive control of the Respondent and the allowances and fees paid to him were for each specific task. Indeed this is why the Claimant remained without a ‘salary’ for 13 months and did not make any demands for it. Upon court enquiry on the matter, the Claimant testified that he remained on his allowances paid when he was on the various assignments and was never paid his ‘salaries’.

25. With these admissions, it is apparent the claim herein is an afterthought, the Claimant was aware that he was on the full time employment of the respondent, and even where the Respondent did not reduce the contract for a service into employment, the circumstances prevailing between the parties do not confer employment for the Claimant to earn the entitlements set out. I find no employment relationship between the parties herein. This is a court of equity and where claimed rights do not arise, noting the circumstances of the case, nothing arise for the benefit of the claimant.

**With the question of employment thus addressed, there are no remedies for compensation; NSSF remittances; leave; and house allowances due to the claimant. The claim is hereby dismissed. Each party shall bear their own costs.**

DELIVERED in open court at Nairobi and signed this 11<sup>th</sup> days of February 2016.

**M. Mbaru**

**JUDGE**

In the presence of:

Court Assistant: Lilian Njenga