



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 325 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 14<sup>th</sup> March 2016)**

**CHARLES A. SONGORO.....CLAIMANT**

**VERSUS**

**CHANA WU YI LIMITED..... RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant herein Charles A. Songolo filed his Statement of Claim on 29.2.2012 in person. He claimed that the issue in dispute is his unlawful termination from employment and refusal by his employer to pay him his terminal dues.
2. It is the Claimant's case that on 15.3.2009, the Respondent offered him employment as a masonry at its company on a monthly salary of 15,000/= all inclusive.
3. The Claimant avers that he worked for the Respondent with due diligence and faithfulness until on or about 14<sup>th</sup> May 2011 when the Respondent without any colour of right terminated his employment and without any notice or show cause letter and also refused to pay his salary arrears and other dues.
4. The Claimant avers that there was no basis for his termination from employment and he prays that the Court makes a declaration that his dismissal from employment was unlawful and wrongful, and wants the Court to order he be paid his terminal dues as follows:

1. ***1 months salary in lieu of notice = 28,600/=***
2. ***Overtime = 27,216/=***
3. ***Annual leave for 2 years = 30,000/=***
4. ***Gratuity for 2 years = 30,000/=***
5. ***Off-duty for each completed year = 48,000/=***
6. ***Public holidays = 20,000/=***
7. ***12 months compensation = 180,000/=***

**TOTAL = 350,216/=**

8. ***Payment of costs and interest***

5. Other than the Claimant's averments above, he annexed his Equity Bank Statement (Appendix 1) showing his salary as 15,000/=. The contract was oral. He states that he was terminated on 14.2.2011 as he was on site at Kenya School of Monetary Studies (Appendix 2).
6. On 15.3.2012, the firm of Rakoro & Company Advocates came on record for the Claimant necessitating filing of an Amended Statement of Claim dated 10.4.2012 which captures the new additional Appendix 1 and Appendix 2.
7. The Respondents filed their Statement of Defence on 22.5.2012 through the firm of Mutunga and Muindi Advocates. They however deny employing the Claimant on monthly basis and put the Claimant to strict proof thereof.
8. It is their case that the Respondent always employed the Claimant temporarily on casual basis as a Mason at an agreed rate of Kshs.500/= per day and was duly paid all his work for the days worked every 2 weeks in full and for the piece work so far done.
9. The Respondents deny terminating the Claimant as alleged in paragraph 3 and 5 but state that the piece work the claimant was doing was finalized on 14.5.2011 and the Claimant was fully paid his dues. That what remained was work for specialized engineering in leveling/surveying and the Claimant did not have those academic qualifications.
10. The Claimant denies receiving any demand at all and wants this claim dismissed with costs.
11. The Respondent annexed payroll for February 2011 to April 2011 to show that the Claimant was usually paid 500/= per day for work done and he signed against those payments.
12. In cross examination, the Claimant stated that he worked every day and was paid 500/= per day but he denied signing any pay roll.
13. He says he was paid different amounts every week. He agrees he had not worked for a full year. He was not being paid house rent. He says he was terminated when he asked for protective clothings.
14. The RW1 when cross examined stated that he is a HR Practitioner for Respondent and states that Claimant missed work on 20.4.2011 and they have records to that effect. He states that claimant was not given an appointment letter.
15. At close of the evidence, the parties filed their respective submissions and the issues for determination are as follows:
  1. ***Whether the Claimant was an employee of Respondent and on which terms.***
  2. ***Whether Claimant was dismissed by Respondent and if there were valid reasons or whether he absconded duty.***
  3. ***If terminated, if due process was followed.***
  4. ***Whether Claimant is entitled to prayers sought.***
16. On 1<sup>st</sup> issue, the Claimant's claim is that he was employed in 2009 March. The Respondents deny that the relationship was a permanent nature but that the Claimant was engaged to do piece work and was paid accordingly for the same.
17. The Respondent produced salary vouchers for workers showing payment period of February to April 2011 which they allege was signed by the Claimant as proof of their case.

18.The Claimant denied signing those documents and the Respondents didn't call any evidence to prove that.

19.Indeed the payroll was signed by the Claimant. They also attached what they call Daily Attendance form signed by Claimant. The Claimant also denied the signature on the said forms. He who alleges must prove and it was the duty of the Respondents to prove that the signature on the forms was for the Claimant but this, they did not do.

20.The Claimant also told Court that he worked from 2009 to 2011, the period during which Claimant worker was not addressed by the Respondents. It would have been prudent for Respondents to produce their muster rolls for that period to ascertain that Claimant was not in their employment. That notwithstanding, the Employment Act Section 9 (1) and (2) states as follows:

**“(1) A contract of service:**

- a. ***for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or***
- b. ***which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.***

***(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).***

21.It was the duty of Respondent to put the terms and conditions of the engagement with the Claimant in writing.

22.In case where there is no written contract – 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”.***

23.In this case then the burden of proving or disproving any alleged term of employment lies on Respondent and they have not discharged this onus of disproving that the Claimant worked for them from 2009 to 2011.

24.It is therefore this Court's finding that the Claimant was an employee of Respondent from 2009 to 2011 as a Mason earning 500/= daily payable every 2 weeks and consolidated amount was 15,000/= as proved by his Appendix 1 being his bank statement. This was initially on casual basis understanding.

25.However, after 3 months of this continuous work, the Claimants terms changed to permanent unless there is any other evidence to the contrary.

26.In terms of issue Number 2, on dismissal, the Claimant alleges oral dismissal whereas Respondents aver that the work he was doing just ended. In any case, there is no written termination letter.

27.The Respondent also alleges the Claimant just absconded duty. This is also not followed up by the Respondent and no report of the abscondment was reported to the labour offices. I find there were no valid reasons to dismiss the Claimant as none is explained.

28. On issue number 3, it is apparent also from the evidence adduced that no due process as envisaged under Section 41 of Employment Act was followed.

29. This Court therefore finds that the Claimant's termination was unlawful and unfair and I find for Claimant and award him as follows:

5. *1 months' salary in lieu of notice = 15,000/=.*

6. *Leave for 2 years = 30,000/=*

7. *Service pay for 2 years =  $\frac{1}{2} \times 15,000 \times 2 = 15,000/=$*

8. *12 months compensation for unlawful termination*

*=  $15,000 \times 12 = 180,000/=$*

**TOTAL = 240,000/=**

9. *Claimant should also be issued with a Certificate of Service.*

**Respondent will pay costs of this suit.**

**Read in open Court this 14<sup>th</sup> day of March, 2016.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Respondent

No appearance for Claimant