

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 9 OF 2015

RICHARD STANLEY GATHUKU KINUTHIA.....CLAIMANT

VERSUS

THE KENYA RED CROSS SOCIETY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 13th May, 2016)

JUDGMENT

The claimant filed the statement of claim on 23.01.2015 through J.N. Mbuthia & Company Advocates. The claimant prayed for judgment against the respondent for a sum of Kshs. 738, 297.85 a month's pay in lieu of termination notice Kshs. 10, 116.15, accrued leave for 5 years Kshs. 40, 853.70, 270 rest days due but not taken Kshs. 105, 052.30, 59 public holidays worked Kshs.22, 955.85, underpayment of salary Kshs. 325, 452.05, home allowance Kshs. 81,292.40, severance pay Kshs.29, 181.20, and 12 months' salaries compensation for unfair termination Kshs. 121, 393.80. The claimant also prayed for costs of the claim and interest.

The respondent filed on 19.03.2015 the memorandum of response through Obura Mbeche and Company Advocates. The respondent prayed that the claim be dismissed with a finding that the respondent does not owe the claimant any money, and for costs and interest.

The claimant's testimony was that he was employed by the respondent as a watchman effective 15.09.2008. His monthly salary rose from Kshs. 2,000.00 to Kshs. 2,050.00 to Kshs. 3,500.00 at the time of termination. The claimant testified that he was attacked by some thugs on a date he did not recall and he was treated at the Kenyatta National Hospital in view of the serious injuries he suffered during the attack.

The claimant testified that upon recovery he went to his home and the respondent did not give the claimant any letter about his employment. He testified that he had been employed by the respondent's committee at Murang'a whose chairman was one Julius Maina Wachira and James Irungu was the Treasurer. The claimant stated that the committee convened and decided to employ the claimant and the claimant was paid on a monthly basis by any of the committee members. After the discharge from hospital, the claimant testified that he did not go back to ask for his job because it was his view that he could not perform the duties of a night guard. He never resumed duties in view of his health status. He said during cross-examination that he wished to rest and to recover fully. Further, he stated that there was an agreement that he would be paid the monthly pay as was done at the monthly rate. He served from 15.09.2000 to sometimes in 2013 when he was attacked and taken to hospital. It was the claimant's case that he was not a volunteer but he worked for money to support his family. The claimant in cross examination stated that he worked at Wagitheru shop in Murang'a town during the day and retired in the evening to the respondent's premises where he was given housing accommodation by the Chairman Maina; who was sympathetic to the claimant because his home was far and he stayed at the premises from September 2008 to 2013 when he voluntarily left due to his health concerns.

The court has considered the evidence, the pleadings and the submissions and makes findings as follows:

1. There is no doubt that the claimant was employed at Wagitheru shop during the day. The respondent's chairman at Murang'a was sympathetic and upon the claimant's voluntary offer, the claimant was given housing accommodation at the respondent's premises (then under

construction). The claimant was also paid some monthly stipend in view of his watching over the premises as he enjoyed the housing accommodation during the night. The court has carefully reviewed the claimant's evidence and all that turns out is that the relationship between the claimant and the respondent was within the respondent's engagement of a volunteer. The respondent's volunteer policy 2012 paragraph 3.1 states that volunteerism is the group of activities carried out by individuals, associations or legal entities, for common good by free choice and without the intention of financial gain, outside the framework of any employment or civil service relationship. The evidence is that the claimant enjoyed the milk of volunteerism through the housing accommodation and voluntarily gave himself to report any mischief on the respondent's premises where stayed for the nights. He was not a typical night guard but a person housed on the respondent's premises with an understanding that while present on the premises he would report any abnormal occurrence that happened. That the claimant was to benefit in kind, namely through the housing and not a wage, the court finds that the claimant was not an **"employee"** within section 2 of the Employment Act, 2007 where **"employee"** means a person employed for wages or a salary and includes an apprentice and indentured learner. The claimant was engaged for his own benefit of housing accommodation at the respondent's Murang'a premises. As submitted for the respondent the monthly pay was a volunteer allowance and the claimant's evidence is that the amount was mutually agreed upon and at no time during the relationship was it said that there was a dispute about that payment. To answer the **1st issue** for determination the court returns that there was no employment relationship between the parties.

2. Even if there was employment relationship between the parties, the court returns that the claimant of his own voluntary decision decided to end his relationship with the respondent in view of his failing health as allegations of unfair termination would be unfounded. The court has found that there was no contract of employment and to answer the **2nd issue** for determination the court returns that the claim that the claimant was unfairly terminated from employment was misconceived and unfounded.
3. In view of the foregoing findings the court returns that the claimant is not entitled to any of the remedies as prayed for. The court has taken into account all the circumstances of this case including the spirit of volunteerism that brought the parties together and the omission on the part of the respondent to make clear documentation as per its policies that the claimant was serving on volunteerism and not employment as we know it under the Employment Act, 2007. In the circumstances, each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant and the claimant's case is hereby dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 13th May, 2016.**

BYRAM ONGAYA

JUDGE