



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 156 OF 2015**

**NAYAI LEKONO.....CLAIMANT**

**VERSUS**

**SIMON PERE.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed his suit on 10<sup>th</sup> February 2015 and averred that he was employed by the Respondent on or about 2002 as a security guard earning a monthly salary of Kshs. 3,000/- which was at the point of exit Kshs. 10,000/- a month. He averred that there was no contract of employment and instead there was an oral contract. He averred that he had no documentation to support his claim but indicated that he had a witness Kanai ole Kipsun whom he would call. He averred that he served the Respondent with loyalty and diligence until 8<sup>th</sup> September 2014 when the Respondent unlawfully and wrongfully terminated his services and refused to pay the Claimant his terminal dues which included one month's salary in lieu of notice – Kshs. 10,000/-, annual leave for 11 years – Kshs. 76,999.99, service pay for 11 years – Kshs. 54,999.99 making a total of Kshs. 141,999.98. He also sought compensation for wrongful dismissal to a maximum 12 months wages and costs of the suit plus interest. He attached to his claim the demand letter dated 10<sup>th</sup> October 2014 addressed to the Respondent by Kituo Cha Sheria.

2. The Respondent filed a memorandum of defence on 27<sup>th</sup> February 2015. In the defence, the Respondent averred that the Claimant was not his employee and that he at times had engaged the Claimant among other individuals as a watchman on casual basis for various periods ranging from two nights to a couple of weeks either at his residence or business premises. He averred that the engagement has never been continuous and that the dispute him and the Claimant begun on 8<sup>th</sup> September 2014 when the Claimant returned from a long stay at his home in Samburu where the Claimant had gone in July 2014 after abandoning work at the Respondent's premises. He averred that the Claimant sought to be re-engaged but the Respondent could not do so as someone else had been engaged to do the work that the Claimant had been doing. The Respondent averred that it was then that he received a demand letter from Kituo Cha Sheria seeking damages for the Claimant's alleged wrongful termination. He averred that the relationship between him and the Claimant did not amount to employment on a continuous basis and that termination would not arise. He prayed that the suit against him be dismissed. He attached to the reply his statement and the statements of Ntontiin Lenatoyie and Joseph Muholo Mutobwa.

3. The Claimant filed a reply to the Respondent's response on 17<sup>th</sup> March 2015. In the reply to defence, the Claimant joined issue with the Respondent in as far as the response consisted of admissions. The Claimant averred that he worked from 2002 without a break and therefore it cannot be held that he was a casual labourer. He averred that he requested for 13 days to attend to an urgent matter at home and was

requested to look for someone to hold his brief while he was away. He averred that he brought someone else whose pay was to be deducted from his salary only to return and be told that his employment was over. He stated that he had witness to testify on his behalf.

4. The Claimant testified on 15<sup>th</sup> June 2016 and indicated before commencing his testimony that he had a witness in Court but would proceed without the witness as he had not filed a witness statement. He testified that he worked for the Respondent from December 2002 as a watchman and was dismissed in 2014. He stated that he had worked as watchman and had undertaken other tasks. He testified that he had gone on 25<sup>th</sup> August and returned on 7<sup>th</sup> September 2014 when the Respondent informed him that he had been dismissed. He stated that he had not taken any off or leave days prior to that and was informed that he was late so he could go to the chief or police. He testified that he went to Kituo Cha Sheria and sued the Respondent for his dues and the Respondent declined to pay.

5. In cross-exam by the Respondent's counsel Mr. Isindu, he testified that the he found Kanai, the witness for the Respondent and others such as Soeto, Maliwolo and many others working. He stated that even if he named them they are no longer there as some worked for a month, one year and left. He testified that he worked for the Respondent at his home and also herded livestock. He stated that he even worked as an agent for the Respondent's residential houses and was not paid for that work. He testified that he worked for 5 years in that capacity and no other person did the work. He stated that he was paid on the 15<sup>th</sup> of each month and at the end of the month. He admitted that he knew Mutobwa who used to work for the Respondent and herd livestock. He stated that the pay was low and that is why staff left. He testified that he went to Samburu and on return was told that there was no work. He stated that Kanai is his nephew and used to herd livestock for the Respondent. He testified that he is the one who had brought his nephew to herd livestock and had also brought Mutobwa and Ntotiin. He stated that he had a sick child back in Samburu and that is why he went home. He testified that he would always inform the Respondent when he is leaving and that he paid the relief person. He stated that he procured a Maasai guard to stand in and on return did not find the Maasai. He denied that the Respondent hired casuals and stated that the Respondent had day and night guards as well as herders. He stated that he at times went for 2 years without seeing his family and would pay the relief worker who stood in his place when he went away. He testified that it was not the Respondent who paid the relief worker.

6. The Respondent testified and stated that he was a pensioner formerly working with the Government. He stated that he had seen the Claimant who worked as a casual labourer. He testified that the Claimant only worked when there was work and that the Claimant never worked for him for more than a month. He stated that the Claimant left in July 2014 after seeking permission to go home and returned on 7<sup>th</sup> or 8<sup>th</sup> September. He stated that he hired someone to guard and paid Kshs. 200/- per day and that there was no day watchman unless there was tension and he felt a need for a day guard. He stated that he had many other casuals engaged to herd his livestock. He testified that he did not have the contacts for Ntotiin and that Mutobwa used to mow his lawn and was a casual too.

7. In cross-examination by the Claimant, he denied that he had hired the Claimant from 2002. He stated that he did not owe the Claimant any money.

8. The Respondent called Joseph Muholo Mutobwa who testified that he had recorded the witness statement filed in Court. He stated that he resided in Ongata Rongai and used to mow lawns and clear drainages. He testified that the Respondent hired casual staff to do various jobs. He stated that he knew Ntotiin who went by the name Kiraiko. He called him a hustler like himself and stated that Ntotiin would milk cows, herd livestock and do other casual jobs. He testified that he would at times meet the Claimant and that the Claimant was intermittent – present some times and absent at other times. He testified that the Claimant never worked for the Respondent as a watchman and that Richard and Evans worked as watchmen and later left due to harsh conditions and mosquitos. He stated that the rate was 200/- per day but one could negotiate depending on what the task was.

9. In cross-examination by the Claimant, he testified that he knew the Claimant as Laibon and that the Claimant used to work for the Respondent as a casual.

10. The Claimant opted not to file submissions and the Respondent opted to file submissions on 24<sup>th</sup> June 2016. In the submissions, the Respondent submitted that the Claimant worked for him intermittently on a casual basis and left voluntarily in mid July 2014 and returned in early September 2014 seeking employment. He submitted that the Claimant was notified that if there was an opportunity for work the Claimant would be called. The Respondent submitted that the Claimant had misled the Court by asserting there was continuous employment yet in his own testimony had indicated that he brought many people to work for the Respondent and that they always left due to low pay.

11. In matters employment, the Claimant has a duty to prove that the dismissal was unfair and the employer has a duty to show that the termination was for a good cause. The Claimant admits that he left voluntarily to attend to an issue in Samburu. The Respondent asserts that the Claimant was a casual employee. If the Claimant indeed had been engaged continuously, he should have called some of the people he had brought to the Respondent's premises to either fill in for him or work in other capacities. The Respondent's witness stated that the Claimant was never engaged on a full time basis and worked as a casual. He referred to the Claimant by his nickname 'Laibon' and clearly knew both the Claimant and the Respondent. The Claimant failed to prove that the employ he had with the Respondent was continuous and the only plausible outcome for the suit is dismissal. I will however order that each party bears their own costs.

Orders accordingly.

**Dated and delivered at Nairobi this 11<sup>th</sup> day of July 2016**

**Nzioki wa Makau**

**JUDGE**