



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 2092 OF 2011**

**PATRICK ADUKA AHITI ..... CLAIMANT**

**VERSUS**

**GOVINDA & SONS (K) LTD. .... RESPONDENT**

**Mr. Wathome for claimant**

**M/S. Kagimbi for respondent**

**JUDGMENT**

**1.** The suit was brought vide a memorandum of claim on 13<sup>th</sup> December 2011 seeking compensation for unlawful and unfair termination of employment and various terminal benefits to wit;

i. one month's salary in lieu of notice Kshs.13,500;

ii. payment in lieu of untaken leave days for three (3) years in the sum of Kshs.40,500;

iii. service gratuity calculated at eighteen (18) days salary for the three (3) years served Kshs.24,300.

**2.** The suit is opposed by a statement of defence filed on 23<sup>rd</sup> March 2012.

**3.** The nub of the defence is that the respondent does not employ casuals directly including the claimant but are hired by independent contractors. The claimant was therefore an employee of the independent contractors and ought to claim from them. The termination of employment was by the contractors. The suit should be dismissed with costs for the respondent.

**4.** The claimant maintained his version of the claim as set out in the statement of claim and was candid and consistent. The claimant stated that he was granted leave by Mr. Nalan, his supervisor. The claimant was told upon his return that Mr. Lamesh did not wish to have the claimant continue with his work. The claimant was not told if he had made any mistake. The claimant was given a certificate of service which gives him good work credentials.

**5.** The claimant had not obtained work up to the time of hearing. He was involved, however, in 'juakali' work. He testified that he did not take leave for three (3) years except the days he was given from 16<sup>th</sup> March 2011 to 4<sup>th</sup> April 2011. He was not paid in lieu of notice and was not paid service gratuity upon

termination yet he was not registered with NSSF nor with any other pension scheme.

6. The respondent called RW1 Douglas Aswan Lunile the operations manager of the respondent. He told court that the respondent employs a site engineer and the respondent gives sub-contract for works going on at the site. The company had sub-contracted electrical works, steelworks and masonry work.

7. The contractors employ their own team from the gate. The site engineer only verifies that there is enough labour on site. That the sub-contractor for masonry work was Mr. George Odeny. That George Odeny was the employer of the claimant and he is the one who terminated the employment of the claimant since the masonry work was over at the Embakasi site where the works were going on. That in terms of the contract, the sub-contractor had to pay the terminal benefits.

8. RW1 produced the contract for masonry work at Embakasi and Taj Mall where George Odeny was the employer. That one Mr. Kitheka kept the records of employees and payments made to them at the site.

9. RW1 denied that the claimant was on leave between 25<sup>th</sup> March 2011 to 3<sup>rd</sup> April 2011. The records show that the claimant was present at work.

10. Under cross examination by Mr. Wathome for the claimant, RW1 conceded that the record produced does not show Mr. George Odeny was a sub-contractor but the record shows that he was assistant supervisor.

11. The claimant however states that at all material times from 4<sup>th</sup> February 2008 to 4<sup>th</sup> April 2011, the claimant was continuously employed by the respondent as a mason at the respondent's premises. His last salary was computed at a daily rate of Kshs.450.

12. That on or about 16<sup>th</sup> March 2011, the claimant sought and obtained leave from the respondent's company to attend his uncle's funeral. The leave was to run up to the 4<sup>th</sup> April 2011 when the claimant was required to report back to work.

13. That the claimant reported back to work on the said 4<sup>th</sup> April 2011 but the claimant was informed by his supervisor that his services were no longer required and that his employment had been terminated.

14. The termination was without notice, without any opportunity to explain himself and was done verbally in violation of the Employment Act 2007 and rules of natural justice. There was no valid reason to terminate his employment. The claimant was not paid terminal benefits upon termination of employment. The claimant prays that the suit be allowed with costs and interest.

15. The claimant testified under oath in support of his case and was closely cross-examined by M/S Kagimbi counsel for the respondent.

16. RW1 however, insisted that George was the employer of the claimant and it was not the respondent's business to know the terms of employment between George and the claimant.

17. RW1 conceded that Nalan was an employee of the respondent, whereas, Halish was a sub-contractor for granite finishes and Mr. Owiti was an employee of respondent.

18. RW1 was in difficulty to explain why Mr. Owiti who was the project manager and an employee of the respondent wrote the certificate of service for the claimant, if it is true as alleged by the respondent that the claimant was an employee of the respondent.

## **Determination**

19. The issues for determination are;

- i. Whether the claimant was an employee of the respondent or that of a sub-contractor named George Odeny;
- ii. If the answer to (i) above is in the affirmative, whether the respondent terminated the employment of the claimant for a valid reason and in terms of a fair procedure;
- iii. Whether the claimant is entitled to the reliefs sought.

#### **Issue i**

20. From an analysis of the competing evidence from the claimant and the respondent, it is clear that one George Odeny was recorded as an assistant supervisor of the respondent and the claimant worked under his supervision. There is no documentary evidence to support the narrative by RW1 that Mr. George Odeny was a sub-contractor and the employer of the claimant.

21. The claimant did not have a letter of appointment nor did he get a letter of termination. However the certificate of service given to the claimant acknowledging the service he had rendered to the respondent for a period of three (3) years was given by Mr. Owiti, the project manager of the respondent.

22. The claimant has established on a balance of probability therefore that he was an employee of the respondent for a continuous period of three (3) years as a mason earning a daily wage of Kshs.450. The question is answered in the affirmative therefore.

#### **Issue ii**

23. With regard as to whether the termination of employment of the claimant was for a valid reason, the narrative by the claimant that he was granted leave by his supervisor Mr. Nalan, an employee of the respondent from 16<sup>th</sup> March 2011 up to 4<sup>th</sup> April 2011 and when he came back, the said Mr. Nalan told him that, Mr. Halish had instructed him to convey to the claimant that his services were no longer required. The termination of the claimant's employment was verbal, without notice and without any adverse charges made against him. The claimant therefore lost his employment without knowing why the employment was summarily terminated. It is the court's considered view that no valid reason existed to terminate the employment of the claimant and the respondent did not follow a fair procedure in terminating the employment of the claimant.

24. Following the decision in the Industrial Court of Kenya at **Nairobi, Cause No. 312 of 2010 Fred A. Odhiambo vs. The Hon. Attorney General & another [2013] eKLR,**

*“no employer shall terminate the employment of an employee unfairly” as provided under section 45 (1) of the Employment Act No. 11 of 2007. Further ..... the Judge states;*

*“Convention No. 158, has been duly ratified by Kenya and is now part of our national law by dint of Article 2 (6) of the Constitution of Kenya 2010 which provides;*

*“any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”*

25. Article 4 of the Convention provides;

*“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”*

26. The court notes that these words were expressly adopted in section 45 (2) (a) and (b) of the Employment Act. For these reasons, the termination of the claimant was unlawful for lack of a valid reason.

27. With regard to procedural fairness, this is governed by section 41 (1) of the employment Act.

The section reads;

*“subject to section 42 (1) an employer shall before terminating the employment of an employee on grounds of misconduct, poor work performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop-floor union representative of his choice present during this explanation.”*

28. The respondent did not follow this requirement at all and the termination was also unfair for failure to follow a fair procedure as provided under section 45 (2) (c) of the employment Act.

### **Issue iii – terminal benefits**

29. The claimant has proved on a balance of probability that he is entitled to notice pay, payment in lieu of leave days and payment of service gratuity as prayed and the court awards him accordingly.

30. In terms of section 49 (1) (c) as read with section 49 (4) the claimant is entitled to compensation for the unlawful and unfair termination of employment. He lost the job without notice, without payment of terminal benefits, for no mistake of his own and suffered loss and damage. He has not obtained alternative employment to date except ‘*jua kali*’ work from time to time.

31. The court awards the claimant ten (10) months salary as compensation for the unlawful and unfair termination of his employment.

32. **The court enters judgment in favour of the claimant as follows;**

**a) compensation for unlawful and unfair termination of employment Kshs.(13 x 500 x 10) Kshs.135,000;**

**b) payment in lieu of one month notice Kshs.13,500;**

**c) payment in lieu of untaken leave (13,500 x 2) Kshs.27,000;**

**d) service gratuity at eighteen (18) days salary for each completed year of service Kshs.24,300.**

**e) total award Kshs.199,800.**

**f) interest at court rates from date of filing suit till payment in full.**

**g) costs of the suit.**

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of December 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**