



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1483 OF 2013**

**GEORGE HANNGTON WACHIRA.....CLAIMANT**

**VERSUS**

**CAPRICON BUILDERS/ALLIED LTD.....RESPONDENT**

**JUDGMENT**

1. The claimant seeks an order for compensation for unfair termination of services totaling to Kshs.124,000/=.
2. He claims that on or about February, 2010 he was employed by the respondent as a plumber at a weekly salary of 3,600 but was not given a written contract of employment.
3. The claimant complained that on 7<sup>th</sup> September, 2013 the respondent's director one Mr. Gathua orally informed him to go home as the respondent no longer needed his services.
4. The respondent on its part stated through its memorandum of claim that the claimant was employed as a casual plumber and engaged on a daily basis as at when opportunities arose.
5. The respondent further stated that by the end of 2010, 2011, 2012 and beginning of 2013 the claimant was not engaged in any work due to his poor health and only resumed in mid 2013 and worked at the respondent's site in Ruiru until 7<sup>th</sup> September, 2013 when the project was completed and the site shut down.
6. At the trial the claimant repeated his averments in the memorandum of claim and stated that he came to Court because after 3 months one is supposed to be hired on permanent basis.
7. In cross examination he stated that plumbing would depend on the way the contract was awarded and that at Ruiru they finished the plumbing works. It was his evidence that he was not sent away on account of misconduct. It was further his evidence that every end of year he was told to go home as then there would be no work.
8. The respondent through a Mr. Kamau informed the Court that the claimant was one of the respondent's plumbers and would be occasionally hired when there was work. It was his evidence that the nature of the respondent's work was that it was seasonal hence they could not retain workers.

9. Concerning the claimant's health he stated that the claimant was of ill-health and from time to time, the respondent paid his medical bills.

10. For the purposes of determining the mode of bringing to an end, an employment relationship, section 35(1) of the Employment Act provides as follows:-

35 (1) A contract of service not being contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be:-

(a) Where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice.

(b) Where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

(c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

11. Regarding casual workers and other short period employees section 37(1) of the Act provides as follows:-

37 (1) Notwithstanding any provisions of this Act, where a casual employee –

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which can 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 or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35, (1) shall apply to that contract of service.

12. Part VI where the foregoing provisions fall is titled "termination and dismissal." This means the deeming provisions of sections 35 and 37 were never meant to force employees on an employer but rather were meant to assist the Court in determining exit arrangements in situations where a person initially engaged as a casual employee has worked for an aggregate period exceeding one month but still does not enjoy the protection accorded to other regular employees by part VI of the Act upon termination of their services.

13. In the case before me there seems to be no dispute that the claimant was not a regular employee but he had worked for the respondent for an aggregate period exceeding one month. This therefore brought his relationship with the respondent within the purview of part VI of the Employment Act for purposes of determining his entitlements upon termination of his relationship with the respondent.

14. To this extent, the respondent ought to have given the claimant one month's notice of termination of his services and service pay for every year worked.

15. The Court therefore awards the claimant as follows:-

**Kshs.**

(a) One month's salary in lieu of notice.....14,400.00

(b) Service pay at 15 days' pay for each completed year of service.....	14,400.00
(c) Two month's salary for unfair termination of employment.....	<u>28,800.00</u>
	<u>57,600.00</u>

16. The respondent shall further issue the claimant with certificate of service.
17. The claimant is awarded cost of the suit.
18. It is so ordered.

Dated at Nairobi this 27<sup>th</sup> day of February 2015

Abuodha J. N.

Judge

Delivered this 27<sup>th</sup> day of February 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent

Abuodha J. N.

Judge