



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1655 OF 2012**

**DAVID ONGERA NYANG'AU.....CLAIMANT**

**VERSUS**

**GILBERX ELECTRO SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 14<sup>th</sup> September 2012 seeking reliefs against the Respondent. He claimed that he worked for the Respondent earning Kshs. 25,000/- a month and was employed in 2004 till January 2012. He averred that the Respondent terminated his services without basis and he thus sought 3 months salary in lieu of notice, service for 8 years, unpaid leave for 8 years and unpaid overtime all totalling Kshs. 4,119,000/-. The Claimant also sought costs and interest.
2. The Respondent filed a Memorandum of Appearance on 17<sup>th</sup> October 2012. There is no Defence on record as none was filed.
3. The Claimant testified on 12<sup>th</sup> June 2014 and stated that he was employed by the Respondent and was not issued with a contract. He testified that he had a job card and the NSSF card which he produced as exhibits. He stated that he used to repair generators and was terminated by the Respondent after return from Tarangire National Park where he had gone to repair generators at Sopa Lodge. He testified that he never got a letter of termination and was merely told by the director of the Respondent not to go to work. He sought to recover notice pay 3 months, overtime for 8 years and unpaid leave. He stated that most of his work was overtime and he thus sought overtime. He produced a permit showing he had left Kenya for Tanzania as evidence of his work for the Respondent abroad.
4. In cross examination he testified that there was no contract in writing. He testified that he received Kshs. 25,000/- a month as salary and received the payment as an advance and payment at the end of the month. He denied being in employment of the Respondent and stated that he tried to return the job card but was chased away. He confirmed that NSSF and NHIF dues were paid for him by the company. He testified that he worked overtime. He stated that he did not leave the company on his own free will. He testified that he was chased by the security when he went back to the Respondent after the Tanzania visit.
5. In re examination he testified that the NSSF card was obtained for him by the Respondent in 2004. He stated that the Respondent designated him as a Technician. He testified that he did not go to Tanzania on his own but was sent by the company. He stated there was no document to show that he went for leave.
6. The Respondent called Robert Oino. He testified that he was an office messenger for the

Respondent and he knew the Claimant who previously was working for the Respondent. He testified that the Claimant was given tasks in Tanzania and it seems the work was not done properly and the Claimant was recalled. He stated that there was no contract and that the Claimant was paid 10,000/- a month. He testified leave was from 15<sup>th</sup> December till 22<sup>nd</sup> January and that working hours were from 8.00am to 5.00pm on weekdays and from 8.00am to 1.00pm on Saturdays. He testified that there was a familial connection between the Claimant and the Respondent's directors wife.

7. In cross-examination he testified that he was employed by the Respondent from 2009. He did not have his document of identification to prove he worked for the Respondent. He testified that he takes invoices, NHIF and NSSF dues and he never prepared a muster roll. He stated that he never prepared the NHIF records. He testified that the Claimant stopped work in Tanzania and did not return. He testified the Claimant's colleague went back but the Claimant did not. He testified that the Claimant had gone to Tanzania to service a generator. He could not say how the work abroad was paid for. He admitted that one cannot go to Tanzania and return the same day. He conceded that the extra time worked was overtime. He testified that the wife of the director – Pamela – fought with her husband and not the Claimant. He testified that Gilbert is there but was not around at the time.

8. It was clear from the testimony of the Claimant and the Respondent's witness that the Claimant was an employee of the Respondent and even worked in Tanzania for the Respondent. The Claimant testified that he was paid Kshs. 25,000/- a month while the Respondent's witness said it was 10,000/-. As regards NSSF and NHIF dues the parties were in agreement that these were paid. The Claimant demanded overtime while the Respondent's witness said there was no overtime as working hours were 8.00am to 5.00pm on weekdays and 8.00am to 1.00pm on weekends. In cross-examination he conceded that there was no way one could work in Tanzania and return the same day after a days work. He let out that the Claimant is related to the wife of the Director and that if they were given a chance they would talk and resolve the issue.

9. The Claimant filed written submissions on 2<sup>nd</sup> December 2014 and the Respondent filed submissions on 4<sup>th</sup> December 2014. In their respective submissions the parties reiterated the evidence adduced by their witnesses and submitted on the strengths of their case. The Claimant asserted that he had proved his case and was entitled to the relief sought. He relied on the case of **Leodip Lemuse v Wadia Construction Company [2014] eKLR**.

10. The Respondent in its submissions stated that the Claimant had not proved his case as he had not discharged the evidential burden under Section 109 of the Evidence Act. It was submitted that the Claimant was a casual employee in terms of the Employment Act Section 2 and that the Claimant left work on his own accord. It was submitted that the Claimant went on leave like other employees of the Respondent and was not entitled to claim on leave. On overtime it was submitted that none was payable as the working hours were as stated by the Respondent's witness.

11. The Claimant's statements show that on aggregate a sum of 24,600/- was deposited each month vide cheques. It is clear there was some payment made periodically at certain times in the month. The Respondent is the employer and was bound to keep records. From the documents before me it is my finding that the Claimant was a technician in the employ of the Respondent and earned a salary of 24,600 or thereabout. The Claimant was working in Tanzania from time to time as indicated by the Temporary Permit the work sheet and gate pass from Tarangire National Park. His permit shows many entries and exits via the Namanga Border point. It would suggest that in 2011 a lot of work was done in Tanzania at Tarangire National Park as stated by the Claimant in his testimony. The Respondent's witness even confirmed this saying there was work done in Tanzania which was not properly executed and the Claimant's colleague went back but the Claimant did not.

12. In the Employment Act, where a casual contract of service is executed for a period in the aggregate that exceeds a month the contract is converted to a monthly contract. In this case, the Claimant who is alleged to be a casual was given a job card with the title technician. I do not buy into the argument by the Respondent that the Claimant was a casual employee. The Respondent was not candid in submissions as the witness for the Respondent readily admitted that the Claimant was employed by the Respondent

before his arrival at the company.

13. The Employment Act makes provision for the process in termination. If indeed the Claimant was terminated for poor execution of work in Tanzania then he was entitled to the procedural fairness under Section 41. He was dismissed and by account of the Claimant casually and told not to come to work. He is therefore entitled to recover compensation for this gross violation of his employee rights.

14. The Claimant thus succeeds to the following extent:

- a. Notice pay – one month salary Kshs. 24,600/-
- b. 6 months compensation for unlawful termination Kshs. 147,600/-
- c. Overtime Kshs.  $26*12*1*1500=$  Kshs. 468,000/-
- d. Costs of the suit
- e. Interest on the sums in a), b) c) and d) above at Court rates from date of judgment till payment in full

Orders accordingly.

**Dated and delivered at Nairobi this 10<sup>th</sup> day of February 2015**

**Nzioki wa Makau**

**JUDGE**