



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

**CAUSE NO 2347 OF 2012**

**GEORGE KAMAU NDIRITU.....1ST CLAIMANT**

**JAMES MAINA MWANGI.....2ND CLAIMANT**

**VS**

**INTERCONTINENTAL HOTEL.....RESPONDENT**

**AWARD**

**Introduction**

1. This action is brought by George Kamau Ndiritu and James Maina Mwangi against Intercontinental Hotel. The Claimants' claim is contained in a Memorandum of Claim dated 20th November 2012 and the Respondent's defence is documented in a response dated 21st December 2012. The Claimants testified on their own behalf but the Respondent elected not to call any witnesses. Both parties filed written submissions.

**The Claimants' Case**

2. The 1st Claimant, George Kamau Ndiritu and the 2nd Claimant, James Maina Mwangi state that they were employed as cleaners by the Respondent Hotel on 20th February 1990. In February 2010, they were notified by the Respondent's Human Resource Manager that they would henceforth be treated as casual employees on daily rate pay. According to the Claimants, their daily rate was Kshs.900.00 paid at the end of every month.

3. On 4th July 2012, the Claimants were notified by the Assistant Engineer, Joseph Bosnei that their services were no longer required. They were paid their salary for June 2012. The Claimants claim that throughout their employment with the Respondent, they never went on leave. Their claims are as follows:

**For the 1st Claimant**

- a. 6 months pay in lieu of notice.....Kshs.145,800.00
- b. Severance pay @ 15 days for each year worked.....Kshs.297,000.00
- c. Unpaid leave for 22 years.....Kshs.534,600.00
- d. Certificate of service
- e. Costs and interest

**For the 2nd Claimant**

- a) 6 months pay in lieu of notice.....Kshs.145,800.00
- b) Severance pay @ 15 days for each year worked...Kshs.297,300.00
- c) Unpaid leave for 22 years.....Kshs.534,600.00
- d) Certificate of service
- e) Costs and interest

### **The Respondent's Case**

4. In its Response filed in Court on 8th January 2013, the Respondent admits having entered into a contract with the Claimants on 20th February 1990. The Respondent however denies that the Claimants continued in employment under the terms incorporated in the agreement dated 20th February 1990. The Respondent states that at the expiry of this agreement, the Claimants were engaged on casual basis as and when there was need.

5. The Respondent further states that in acknowledging that they had no contract of service with the Respondent, the Claimants formally applied for employment with the Respondent through two application forms dated 23rd and 24th December 2009.

6. The Respondent denies that it recognised the Claimants as permanent employees as there was no formal agreement in force. According to the Respondent, there was no contract of service to terminate and none was therefore terminated. The Respondent states that it is prepared to continue procuring the services of the Claimants as and when the need arises. The Claimants continue to be retained as engineering casuals.

### **Findings and Determination**

7. The issues calling for determination by the Court are as follows:

- a. Whether there was an employment relationship between the Claimants and the Respondent capable of enforcement by the Court;
- b. Whether the Claimants are entitled to the remedies sought.

#### **Was there an Employment Relationship?**

8. The Claimants maintain that they were employees of the Respondent and are therefore entitled to terminal dues under their respective contracts of service. The Respondent, on the other hand states that there was no employment contract between the Claimants and itself capable of enforcement by the Court.

9. Section 2 of the Employment Act, 2007 defines an employee as:

***“a person employed for wages or a salary and includes an apprentice and indentured learner”***

10. The same section defines an employer as:

***“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”***

11. A contract of service is defined as:

***“an agreement, whether oral or in writing, and whether expressed or implied, to employ***

***or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”.***

12. The question before the Court is whether there was a contract of service between the Claimants and the Respondent as defined in the Employment Act, 2007. In support of their case, the Claimants produced a letter dated 20th February 1990 addressed to them together with one Julius Irungu.

13. The letter states as follows:

*“Dear Sirs*

**RE:HOTEL INTERCONTINENTAL FIRE AND SAFETY PRECAUTIONS**

*Pursuant to the meeting between you and Mr. Varuna Fernando on behalf of the management on 30th January, 2010, we hereby enter into contract with you for a period of one year with effect from 23rd February 1990 to clean and degrease the following areas:*

- a. *Main kitchen hood*
- b. *Curry kitchen hood*
- c. *Pastry oven hood*
- d. *Pool terrace hood*
- e. *Kitchen exhaust fan*
- f. *All laundry ducts (inside)*
- g. *Laundry exhaust fan*

*Your fees will be Kshs.2,600.00 (Kshs.Two thousand Six hundred only each Kshs.866.65 per eight (8) days worked per month on production of an invoice.*

*Your presence shall be determined by the Regional Chief Engineer and shall inform of (sic) what dates of the month you are supposed to work. You will endeavour to ensure that the job assigned is accomplished to the satisfaction of the Chief Engineer or Senior Resident Engineer.*

*This contract can be terminated by either party by giving one month's notice in writing or payment in lieu.*

*Yours faithfully*

*F. KILEMBWA*

**EXECUTIVE ASST. MANAGER”**

14. In ***Mwalimu Kalimu Gamumu & 35 Others v Coastline Safaris Limited & 2 Others [2013] EKLJ Radido J*** restated the test of control of an employee by an employer as a determinant of the existence of an employment relationship. I think however, that this facet of law has grown beyond this and in this regard I agree with the holding of ***Kimondo J in Everret Aviation Limited Vs the Kenya Revenue Authority [2013]eKLJ*** that in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive.

15. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical. In the letter issued to the Claimants on 20th February 1990, which I have reproduced in full, the Claimants were required to work under the supervision of the Regional Chief Engineer. Further, the job assigned was an

integral part of the Respondent's core business.

16. Nevertheless, the Claimants were required to work for no more than eight (8) days per month and looking at the assigned job of cleaning and degreasing specific hoods, fans and ducts, this was a reasonable arrangement. Moreover, the Claimants were paid by voucher upon submission of an invoice. At any rate, if indeed the intention was to employ the Claimants, the Respondent would have issued individual employment contracts to each of them.

17. The Court therefore finds that the relationship between the Claimants and the Respondent was not one of employee/employer. Rather, the Claimants were Independent contractors and as held by **Maraga J** (as he then was) in John *Charo Vs Christoper Njao [2005] eKLR* an independent contractor is not entitled to benefits ordinarily available to employees. More significantly, this Court has no jurisdiction to entertain claims arising from an independent contractor's engagement.

18. In light of the foregoing, the Claimants' entire claim fails and is dismissed with no order for costs.

19. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JULY 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Miss Muhoro for the Claimant

Mr. Obunde for the Respondent