



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1108 OF 2013**

**DAVID MICHAEL BILASIO ..... CLAIMANT**

*VERSUS*

**CHRISTOPHER KITUTU ..... RESPONDENT**

Claimant in person

M/S Onyango for Respondent

**JUDGMENT**

1. The Claimant was employed by the Respondent in 1989 as a domestic servant at a monthly salary of Kshs.7,000. The Claimant worked continuously until March 2012 when the Respondent terminated his services.
2. The Claimant alleges that the termination was unlawful as it was not for a valid reason and the same was effected without following proper procedure.
3. The Claimant seeks payment of:
  - i. one month's salary in lieu of notice in the sum of Kshs.7,000;
  - ii. Service pay for 23 years at the rate of 15 days salary for each completed year of service in the sum of Kshs.80,500;
  - iii. annual leave not granted for twenty three (23) years in the sum of Kshs.112,700;
  - iv. Compensation for the unlawful termination of employment.
4. The Claimant relies on the statement of claim dated 25<sup>th</sup> June 2013 and filed on 16<sup>th</sup> July 2013 and viva voce testimony the Claimant gave under oath.
5. The Claimant had no letter of appointment nor did he have a payslip. The Claimant told the Court that he worked three (3) days a week, on Monday, Wednesday and Friday from 6 a.m. in the morning until 5 p.m.
6. That he was doing all domestic work until when the Respondent got married. He had started working for him as a young man.
7. In March 2012, he reported for work as usual one morning and the Respondent informed him that there was less work and he should now go home and rest. The Claimant paid him Kshs.20,000 as terminal benefits. The Claimant was not registered with NSSF and NHIF. The Claimant was not told in respect of what the Kshs.20,000 was paid.

8. The Claimant seeks to be paid as claimed.

9. Under cross examination the Claimant said his starting salary in 1989 was Kshs.700 and that at the time the Claimant was a young man living in a servant quarter.

10. That he washed clothes and ironed and did not work for four (4) days in a week. The salary was paid at the end of the month. That during the days he was not at Claimant's house he worked for other people. That when the Claimant married they moved to a bigger house in Imara Daima. The Claimant worked for three (3) days a week and was now paid by the wife. The wife recruited a maid upon getting children. That he was the senior employee until he left. He cleaned the bedrooms and washed dishes and the maid cooked.

11. The Claimant denied he was sacked for a while in 2011 and that he was given prior notice in October 2011. He said he left in May 2012 and not March 2012 as alleged by the Respondent.

12. The Claimant admitted he was paid Kshs.40,000 upon termination and not Kshs.20,000 as he had said in-chief. He agreed the money was to help him set up a business upon leaving work. The Claimant insisted he was entitled to leave though he served three (3) days a week. He denied that he disrespected the Respondent's wife. He also denied that he abused his co-workers.

### **Defence**

13. RWI was the Respondent in person and his evidence may be summarized as follows;

He relied on the memorandum of response filed on 13<sup>th</sup> August 2013. The Respondent admitted having employed the Claimant as a house help when he was a young man living in a servant quarter. The Respondent told the Court that the Claimant worked for two (2) to three (3) days a week depending on the workload. At the time he lived in South lands. That the Claimant came on Mondays and Thursdays to clean the house and wash clothes and iron. That the Claimant did not cook for him and he paid him Kshs.150 per day then in 1989.

14. In 1996, the Respondent married and moved to Imara Daima. The Claimant continued working for two (2) to three (3) days. The Respondent's wife employed another house help who did most chores. That the Claimant left in 1998, when he disagreed with the Respondent's wife. At the time the Claimant was working one (1) day a week.

15. The Claimant was rude to the Respondent's wife and the other house help and would not take their instructions. In December 2011 the Claimant was given four (4) months notice to look for work elsewhere. The Claimant worked for Respondent's friend called Mutero. The Respondent referred the Claimant to him. Respondent says, he never employed the Claimant on monthly basis. At the time, the Claimant earned Kshs.500 per day and was paid Kshs.200 daily and Kshs.300 at the end of the month

16. The Respondent paid the Claimant Kshs.40,000 upon termination to help him start a Kiosk. The Claimant was his friend, and he just wanted to help him.

17. The Respondent said the Claimant was not entitled to leave as he only worked between two (2) – three (3) days a week. The rest of the days he worked elsewhere.

18. The Claimant does not deserve severance pay and compensation because he paid him Kshs.40,000 gratuity upon termination. The Respondent said he was shocked that a person who was his close friend and had helped him for a long time had decided to sue him.

19. The Respondent was fairly consistent while under cross examination.

### **Determination**

- i. Was the Claimant a permanent employee in terms of the Employment Act?
- ii. Was the termination of his employment for a valid reason and in terms of a fair procedure?
- iii. What remedy if at all is the Claimant entitled to?

### **Issue i**

20. It is common cause that the Claimant worked for not more than three (3) days in a week and that the days worked were not consecutive in any given week. The Claimant worked for other persons during the days he was not working for the Respondent or did not work at all.

21. It is clear, that the working pattern of the Claimant does not fit that which is contemplated under Section 37(1) (a) in that he did not serve continuous days. However, the work the Claimant performed was in the nature of piece work which entailed cleaning the house, washing and ironing clothes.

The Claimant was therefore not entitled to at least one rest day in every period of seven (7) days in terms of Section 27(2) because he did not work for at least four (4) days of every week for the Respondent.

The Claimant was not tied to any one employee in any given week and therefore, the basic, minimum conditions of employment provided in the Employment Act could not be apportioned to any of the persons the Claimant worked for in any period of seven (7) days or in any consecutive month of service in terms of Section 28(1) because, the Claimant did not have one specific employer.

It would appear that by choosing to serve different employers in the week, the Claimant forfeited the right to hold any one of the employers accountable for granting him the minimum terms of employment provided in the Act.

It is the Court's considered view that the Claimant would not be deemed a permanent employee for the purpose of Section 3(2) of the Employment Act, 2007. The answer to issue (i) is in the negative.

### **Issue ii**

26. Given the answer to issue (i) above, even though the Respondent gave the Claimant at least three (3) months notice before the Claimant's employment was curtailed, it is the Court's view, the Claimant being a person who did piece meal work for at least three (3) days a week, was not protected under part VI of the Act, titled "*Termination and dismissal.*"

27. It was sufficient for the Respondent or any of the other employers of the Claimant to simply inform him that the piece work he did was no longer there. This unfortunately is the price an employee who chooses to work for different employers pay for that luxury.

28. The termination of the Claimant was therefore not unlawful.

### **Issue iii**

29. Having made the finding in (i) and (ii) above, and it being common cause that the Respondent paid Kshs.40,000 gratuity to the Claimant upon termination of the partial working relationship he had kept with the Claimant, it is the Court's considered view that, the Claimant is not entitled to any of the remedies sought. The entire claim is therefore dismissed.

### **Costs**

30. The Respondent and the Claimant maintained a long friendly and partial employment relationship. The Respondent was good enough to pay Kshs.40,000 to the Claimant by way of gratuity to start a business which fact the Claimant acknowledged.

31. This is not an appropriate case to award costs to the losing party.

32. The Court therefore awards no costs to the Respondent as against the Claimant.

**Dated and Delivered at Nairobi this 20th day of November 2015**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**