



REPUBLIC OF KENYA  
 IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 666 [N] OF 2009

**BETWEEN**

KENYA BUILDING, CONSTRUCTION, TIMBER,  
 FURNITURE AND ALLIED INDUSTRIES EMPLOYEES

UNION.....  
 ..... CLAIMANT

**VERSUS**

1. CHIRAG BUILDERS  
 LTD.....RESPONDENTS

2. FREDRICK MUNYUA NJOROGE [added by order of the  
 Court]

*Rika J*

CC. Leah Muthaka

*Mr. Gikunju Industrial Relations Officer instructed by the Claimant*

*Ms. Wachanga Advocate instructed by J.M.Njenga & Company Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant Union initiated the proceedings through a Memorandum of Claim filed on 6<sup>th</sup> November 2009. The Claim is brought on behalf of three Claimant Union Members, Messrs. Kennedy Akidiva Ghona; Charles Makau Maingi; and Peter Nyangau [Grievants]. The 1<sup>st</sup> Respondent filed its Statement of Response on 5<sup>th</sup> March 2010. Mr. Gikunju proceeded by way or oral submissions, adopting the pleadings filed by the Claimant, and closed the Claimant’s case on 30<sup>th</sup> June 2010. The Parties then made several attempts to settle the dispute out of Court, but as of 13<sup>th</sup> March 2012 had not reached settlement, and the

1<sup>st</sup> Respondent opened hearing of its case. Fredrick Munyua Njoroge testified for the Respondents, with the hearing closing on 13<sup>th</sup> March 2012. The dispute was last mentioned on 11<sup>th</sup> June 2013, when the Parties were advised Award would be delivered on notice.

2. The Claimant states **Ghona** was employed by the 1<sup>st</sup> Respondent on 27<sup>th</sup> August 2007 as a Labourer. He was paid Kshs. 200 per day. His contract was terminated by the 1<sup>st</sup> Respondent on 29<sup>th</sup> August 2008. **Maingi** was employed as a Labourer on 10<sup>th</sup> November 2007. He too earned Kshs. 200 per day. His contract was terminated by the 1<sup>st</sup> Respondent on 8<sup>th</sup> May 2008. **Nyangau** was employed as a Steel Fixer on 26<sup>th</sup> March 2007. He was paid Kshs. 250 per day, and left employment upon termination by the 1<sup>st</sup> Respondent of his contract of employment, on 28<sup>th</sup> May 2008. Termination was on account of the completion of the Project undertaken by the 1<sup>st</sup> Respondent, in which the Grievants were recruited to work for. The Grievants' contracts were terminated without regard to Section 40 of the Employment Act 2007. They considered their contracts to have been terminated on account of redundancy. The Claimant submits its three Members were entitled to notice pay, any pending annual leave entitlement and severance pay for those who had served for one year, under Section 15 of the Regulation of Wages, Building and Construction Industry Order Legal Notice Number 94 of 2004.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Grievants were entitled to consolidated wage of Kshs. 275 per day under the Order. They were paid Kshs. 200, which was 75 less daily. The 3<sup>rd</sup> Grievant was paid Kshs. 250, instead of Kshs. 363 daily as regulated under the Order. He was underpaid by Kshs. 113 daily. The Claimant prays the Court for an Order for payment of the arrears occasioned by these underpayments. The Claimant reported the dispute to the Minister on 4<sup>th</sup> June 2008 and a Conciliator was appointed. The 1<sup>st</sup> Respondent refused to attend all conciliation meetings, and the dispute was referred to the Court for adjudication.

4. The Claimant seeks:-

**Ghona**

- One month notice pay at Kshs. 275 x 26 = 7,150.
- Pro-rata leave of 8 months at Kshs. 4,950.
- Underpayment of wages at Kshs. 15,600.
- Public holidays worked [4] at Kshs. 1,100.
- 4 months' salary in compensation for unfair termination at Kshs. 28, 600

	Total	.....	<u>Kshs.</u>
<u>57,400</u>			

**Maingi**

- One month notice pay at Kshs. 275 x 26 = Kshs. 7,150
- Pro-rata leave of 6 months at Kshs. 3,713.
- Underpayment of wages at Kshs. 13,000.
- Public holidays worked [4] at Kshs 1,100
- Four months' salary compensation at Kshs. 28,600

Total ..... Kshs. 52,263

**Nyangau**

- One month notice pay at Kshs. 363 x 26 days = Kshs. 9,438.
- Annual leave pay of 13 months at Kshs. 10,617.
- Service pay at 15 days' pay for the 1 year completed in service.
- Underpayment of wages at Kshs. 38,194.

- Public holidays [11] worked at Kshs. 3,993.
- 6 months' salary in compensation at Kshs. 56,628

Total ..... Kshs. 124,315

5. Fredrick Munyua Njoroge testified he is a Sub-contractor. He was contracted by the 1<sup>st</sup> Respondent. He in turn employed the three Grievants. He was responsible for their employment. He paid them every weekend. Nyangau was doing steel fixing and bar-bending and was paid Kshs. 400 per day. Ghona and Maingi were helpers and were paid Kshs. 200 daily. The 1<sup>st</sup> Respondent had no role in the employment of the Grievants. Nyangau worked for about three months; Ghona for about two months; and Maingi for about 2 ½ months. Njoroge did not terminate their contracts; they left and went back to the site accompanied by a Labour Officer Mr. Malombe. The Labour Officer declined to engage with Njoroge, insisting he would only talk to the 1<sup>st</sup> Respondent Chirag Builders.

6. On cross-examination, Njoroge denied that he was a mere foreman employed by Chirag Builders. He was the proper employer of the three Grievants. Njoroge runs a company called Fredivia Construction. He is registered as a Subcontractor. He had the records of the Grievants. He testified he only had the muster roll. He was aware he ought to have the full employment records as an employer. There are technical qualifications in the Industry. The Witness testified he was trained on the field as a Builder. He was not a mere foreman, at the beck and call of Chirag Builders, brought to Court to undermine workers. The main contractor had no role in management of labour. Njoroge emphasized on redirection that he was not an employee of the 1<sup>st</sup> Respondent, but subcontracted to work piece-rate. The agreement was that he would recruit and pay the workers. Chirag Builders did not pay even a single employee. Njoroge is a mason and understands building. He told the Court the Claim should be directed to him, and not Chirag Builders. The Respondents urge the Court to dismiss the Claim.

*The Court Finds and Orders-*

7. Mr. Fredrick Munyua Njoroge did not persuade the Court that he is a qualified professional in the Building and Construction Industry. He came out across as a journeyman, dispatched to the Court by Chirag Builders, to scuttle the claims made by the Grievants. He did not appear at ease with the technical aspects of the industry under cross-examination from Mr. Gikunju. He claims to have attained technical skills from on-the-field training. On cross-examination he gave his technical credentials to comprise subcontracting. Redirected, he clarified that he was a qualified Mason. This Witness moved through his evidence haltingly, was completely unconvincing, and seems to have been presented to the Court with the intention of muddying the Claim. He claims to have employed the Grievants, but did not have their employment records.

8. The Court is in any event satisfied that under Section 2 of the Employment Act 2007, both Njoroge and Chirag Builders fit the definition of the term 'employer,' in relation to the three Grievants, going by the evidence of Njoroge. Njoroge and Chirag Builders would be co-employers. It is noteworthy that Chirag Builders did not send its own Officers to Court to buttress the allegations made by Njoroge. Why has Chirag Builders avoided both Conciliation and Adjudication? In the view of the Court, the role of Njoroge and his evidence in Court was to obstruct the Grievants in their pursuit of industrial justice, by creation of a counterfeit triangular relationship.

9. The Grievants were employed by Chirag Builders on the terms and conditions stated in their Memorandum of Claim. They worked for the respective periods shown in their pleadings, and were underpaid. The relevant Wage Order in the Building Industry was availed by the Claimant to the Court. All the claims are well grounded in law and fact and are allowed as prayed. And as Fredrick Njoroge Munyua testified the claims should have been directed to him, and considering that he gave adequate evidence to explain his relationship with the Grievants, the Court is inclined to order that he is added to the Claim as a Co-Respondent. It is Ordered:-

***[a] Fredrick Munyua Njoroge is added to the Claim as a Co-Respondent.***

***[b] Award is entered in favour of the Claimant in the following terms-***

- I. Kennedy Akidivia Ghona- shall be paid by the two Respondents, Kshs. 57,400 as particularized above.***
- II. Charles Makau Maingi- shall be paid Kshs. 52,263.***
- III. Peter Nyangau- shall be paid Kshs. 124,315.***

***[c] The total sum of Kshs. 233,978 shall be paid by the Respondents to the Grievants through the Claimant, within 30 days of the delivery of this Award.***

***[d] In default execution to proceed against both Respondents.***

Dated and delivered at Nairobi this 16<sup>th</sup> day of January 2014

James Rika

Judge