



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2188 OF 2012**

**JACKSON NDERITU WACHIRA .....CLAIMANT**

**-VERSUS-**

**MAJI MAZURI CENTRE INTERNATIONAL .....RESPONDENT**

Mr. Wanjohi for Claimant.

Mr. Githinji for Respondent.

**JUDGMENT**

The Claimant was employed by the Respondent vide a contract of employment dated 23<sup>rd</sup> June, 2011.

The Claimant commenced work on 26<sup>th</sup> June, 2011 and worked continuously up to 9<sup>th</sup> August, 2012 when he was issued with a letter of termination.

The Claimant alleges that the termination was wrongful and unfair and claims terminal dues in the sum of Kshs.150,000/= comprising of three months gross salary being severance pay and compensation for the unlawful and unfair termination.

The Claimant also seeks Certificate of service, interest on the award at court rates and costs of the suit.

The contract of employment titled “*Terms of Reference for Long term Engagement of Mr. Jackson Nderitu Wachira*” was produced by the Claimant and a close perusal of the same reveals the following pertinent features:

The Claimant is referred to therein as a “consultant” responsible for overall management including; setting technical directions; partner relations; compliance and fiduciary management; and reporting. The consultant also had principal responsibility for assuring that all project goals and objectives are met in a timely fashion. The specific tasks to achieve the above responsibilities are set out fully under clause 3. Under clause 5 it is provided;

*“Considering this is not a full time position in Maji Mazuri and you will be engaged for at least two (2) days in a week, Maji Mazuri is willing to offer you the sum of Kenya Shillings fifty thousand (Kshs.50,000/=) per month.”*

Timeline of the contract was said to be long term engagement under clause 6. The document is signed by both parties on 23<sup>rd</sup> June, 2011.

The Claimant testified in support of his case and the totality of the evidence was in support of the particulars of claim basically stating that, though the Respondent referred to him as a "Consultant" the nature of the employment, the responsibilities, the manner the work was carried out and the length of service is indicative of a permanent employment and not a consultancy. The claimant prays the court to find that he was a permanent employee and his employment could not be terminated casually like the Respondent did to him.

That he received a monthly salary like other employees and his pay was not based on a number of consulting days but for a month's work. That he reported to work three (3) to four (4) days a week and operated more or less like the General Manager of the Respondent.

That the termination was a result of financial difficulties the Respondent experienced at the time and he had been promised reinstatement as soon as the financial situation of the Respondent improved. That he was not paid any terminal benefits upon termination and was not consulted prior to the termination.

Under cross examination the Claimant told the court that prior to being engaged on long term basis he had served the Respondent for three months as a consultant.

That the Respondent had a rehabilitation centre for physically and mentally challenged children, and also had fees paying children therefore though it was a non-governmental organisation funded by donors, it generated its own income.

The Claimant states that the termination of his employment was unlawful and unfair because he had expectation to work for a long period for the Respondent and had children in school for whom he paid school fees.

That he was not given a hearing prior to the termination and was embarrassed by the sudden termination.

That he was still unemployed. He denied that his performance was poor stating that the issue was never raised with him at all while he was working but was only an afterthought by the Respondent in the course of this case. He told the court that he added value to the Respondent by setting up systems and providing advisory services to the Board and country Director. In the letter of termination, the Country Director, appreciated his input. He was not given a Certificate of service.

The Claimant called **Ms. Wachera Kagunda** in support of his case. She was employed by the Respondent for six (6) years. That by an email dated 8<sup>th</sup> September, 2011, the Respondent requested her to write a report on the work carried out by the Claimant. That she made the report which rated the Claimant's work as good. The report was specifically given to **Mr. Ndugire**. She stated that the Claimant was employed as a consultant on a long term basis.

The Respondent in its Statement of Response filed on 6<sup>th</sup> December, 2012 denies the claims by the Claimant in *toto* stating that the Claimant was at all material times contracted to work as a part time consultant working for at least two (2) days a week.

That the Claimant failed to deliver even after several notices by the Board to the Claimant requesting him to provide his work progress report to the Board.

That the Respondent therefore terminated his services in terms of the law

by the letter dated 7<sup>th</sup> August, 2012 wherein the reason given for the termination is financial constraints. The letter does not indicate at all that the termination was for failure to perform his duties to the required

standards as is now alleged in the Statement of Response.

In his testimony before court **Mr. Nafali J.M Ndugire** told the court he was the secretary to the Board of the Respondent and later became its Chairperson. He told the court further, that the Claimant was contracted as a consultant with specific deliverables. That he worked for at least two (2) days a week and his services were terminated due to financial constraints.

That the Board did not get progress reports from the Claimant inspite of various requests until it assigned Ms. Wacera to provide one. He concluded that termination was not for non-performance though it was an issue.

Upon a careful analysis of the evidence before court, the court has concluded that the Claimant was engaged for an indefinite period at a monthly salary of Kshs.50,000/=. The contract of engagement has no termination clause and it defines the nature of services to be rendered by the Claimant. The work to be done was continuous and indefinite and it entailed day to day management of the institutions and projects owned by the Respondent.

The Concise Oxford English Dictionary, 12<sup>th</sup> Edition defines Consultancy as “*a professional practice giving expert advice in a particular field.*” It also defines consultant as “*a person who provides advice professionally.*”

The **Employment Act No. 11 of 2007** defines an employee under **Section 2** as;

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

From the definition of a consultancy and that of an employee aforesaid, it is clear that;

1. The Respondent had contracted the services of the Claimant for a salary; and
2. The Claimant was not only engaged to provide expert advice but was actively involved in the day to day management of the Respondent.

The Claimant was therefore an employee of the Respondent and not a consultant. The Claimant was contracted for an indefinite period and therefore in terms of the Employment Act, he was entitled to the protection of the law and his employment could only be terminated for a valid reason and with the requisite notice of not less than one month or payment in lieu thereof.

The Claimant was not registered with National Social Security Fund (NSSF) nor was he under any pension scheme and therefore was entitled to severance pay upon termination.

Furthermore, the Claimant’s employment was terminated for financial reasons and the termination fell within the provisions of **Section 40** of the Employment Act, as it amounted to a declaration of redundancy.

This being so, the Claimant was entitled to payment of one month’s salary in lieu of notice in the sum of Kshs.50,000/= and was entitled to at least fifteen (15) days salary for each completed year of service.

The Claimant had served from 23<sup>rd</sup> June, 2011 until the 7<sup>th</sup> August, 2012 when his employment was terminated. This entitled him to fifteen (15) days salary as severance pay in the sum of Kshs.25,000/=.

The claim for payment of three months salary as severance pay is without foundation. The Claimant does not dispute that the Respondent was undergoing financial difficulties but told the court that he had been promised that he would be recalled when the financial situation improved.

It was dishonest for the Respondent to impute poor work performance on the part of the Claimant when

that issue did not feature at all in any correspondence before court or in the letter of termination itself.

The claim for unlawful and unfair termination has not been proved on a preponderance of evidence and the court finds that this was a case of retrenchment, even though the Labour Office was not notified according to **Section 40** of the Employment Act.

Accordingly, the court awards the Claimant Kenya Shillings 75,000/= being terminal benefits described herein before. The Respondent is to meet the costs of the suit.

***Dated and delivered at Nairobi this 11th day of February, 2014.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**