



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2055 OF 2011**

*(Before D.K.N. Marete)*

**KENNETH KENYANI CHAVILA.....CLAIMANT**

Versus

**CHINA YOUNG TAI ENGINEERING CO. LTD.....RESPONDENT**

**JUDGEMENT**

The matter is in court courtesy of a memorandum of claim dated 28th November, 2011 and filed on 5th December, 2011. The issue in dispute is cited as;

“Wrongful and unfair termination of the claimant’s services and failure by the respondent to pay terminal benefits to the claimant.”

The respondent, vide the respondent’s memorandum of response dated 25th January, 2012 opposes the claim and deems the same an abuse of the process of court. She prays that the same be dismissed with costs.

The claimant’s case is that on or about March, 2011, the respondent employed the claimant as a guard at Kandara Road site at a monthly salary of Kshs.6,600.00. The claimant was not issued with an appointment letter as required by the law. The claimant partook employment and served the respondent with diligence until September, 2011 when he was wrongfully and unlawfully terminated from employment without notice or payment of terminal benefits which included;

a. <i>One month’s salary in lieu of notice</i>	<i>Kshs. 6,600.00</i>
b. <i>House allowance</i>	<i>Kshs. 5,940.00</i>
c. <i>Unpaid salary for 9 and 1/2 days</i>	<i>Kshs. 2,090.00</i>
d. <i>Service pay</i>	<i>Kshs. 1,650.00</i>

**TOTAL Kshs.16,280.00**

He therefore prays for;

- i. *The sum of **Kshs.16,280.00** as particularized in paragraph 5 of the claim*
- ii. *Cost of this suit*
- iii. *Interest in (i) and (ii) above*
- iv. *Any other relief as the court may deem just.*

The respondent admits the description of employment as expressed in paragraph 4 of the claim but insists that this employment was a temporary/casual basis and as and when his services were required. He denies that the claimant's services were terminated and posits that the claimant sought leave in August, 2011 thereby necessitating the respondent to hire someone else in replacement. On return he was informed that he would be redeployed to other duties in the company of which he refused and left the company. He thus has no claim against the respondent. She prays that the claim be dismissed with costs to herself.

The matter came for hearing on 26th June, 2013 when the claimant testified in his favour. He testified that he was employed between 22nd February, 2011 and 11th September, 2011 and worked for about six months. At this time, he requested for leave from the Site Manager to travel home as his wife was unwell. He was given five days and on return he was told that there was no work. He was later informed of redeployment on a weekly basis and when he enquired on the reasons as to why, he was told that if he did not like it, he could go away. He was later paid for service for four instead of six months and on enquiry, he was informed this was on account of absence. He testified that the unpayable days were the days he had been granted leave of absence. He subsequently did a demand letter and came to court through Kitui Cha Sheria. He reiterated his prayers as per the claim.

The respondent, through DW1 – Peter Magina testified that he works for the respondent as a licensed electrician and also does other works. He also deals with interpretation and other administrative issues. He further testified that the claimant was their guard at Gandano Springs and was employed around March and September, 2011. He further testified that the claimant was redeployed to do general duties.

On close of hearing on 27th June, 2013, the parties agreed to submit through written submissions and these were filed on 4th July, 2013 and 15th July, 2013 respectively for the claimant and respondent respectively. In his written submissions, the claimant reiterates his claim and prays for compensation as follows;

a. <i>One month's salary in lieu of notice</i>	<i>Kshs. 6,600.00</i>
b. <i>House allowance</i>	<i>Kshs. 5,940.00</i>
c. <i>Unpaid salary for 9 and 1/2 days</i>	<i>Kshs. 1,980.00</i>
d. <i>Compensation for unfair termination</i>	<i>Kshs.79,200.00</i>

*Total amount* *Kshs.93,720.00*

He also prays for costs and interest at court rates.

The respondent in her written submissions reiterates his case and denies the claim.

The issues for determination therefore are;

1. Was there a termination of the employment out of the claimant's employment?
2. Was the termination, if at all, wrongful, unjust and unlawful?
3. Is the claimant entitled to the relief sought
4. Who bears the costs of this claim?

The 1st issue for determination is whether there indeed was termination of the claimant's employment. The respondent in his response and written submission contends and submits that the claimant left employment in his own volition. On resumption from leave, he was deployed to do other duties but brought in an argument, refused to comply and left. He only came back to claim his duties and those were paid. The claimant partly agrees on this but again denies and submits that he was informed that there was no work for him on reporting back. He also testified on his redeployment but did not complete the story. Did he or did he not reject deployment to general duties?

The claimant and respondent's version on this are conflicting. This conflict also arises on the status of employment; temporary, casual or permanent. The court is called upon to employ the principle of balance of probabilities and or preponderance of evidence to come out clear on these issues. In the circumstances of this cause and the evidence adduced by the parties, I find that the probable scenario is that expressed by the respondent. The claimant leaves his testimony on the eventualities of his last day(s) of employment hanging. Perhaps this was not in favour of his case and version of the story.

There is no evidence of animosity or hostility on the part of the respondent, or at all. The only adverse evidence is that he did not issue a letter of employment and nonpayment of terminal dues. I find that there was no termination of employment in the instant case, the claimant having left employment on his own will and volition. The claimant accepts receipt of payment of terminal dues for four months. This is evidence of good faith and intentions by the respondent. The respondent's case and evidence, on a balance of probabilities takes the day.

I am therefore inclined to dismiss this cause with costs to the respondent.

Dated, delivered and signed this 13th day of March, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Kenneth Kenyani Chavila, claimant in person.
2. Mr. Wambugu instructed Lilian & Koech Associates for the respondent.