



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 563 OF 2012

JOSEPHAT NZAI ODANYA CLAIMANT

VERSUS

CERAGEM EAST AFRICA LIMITED..... RESPONDENT

Mr. Onyony for the Claimant

Mr. Kihara for the Respondent

JUDGMENT

1. The Claimant vide a memorandum of claim dated 2nd April 2012 and filed on 3rd April 2012 seeks payment of:

- a. three months salary in lieu of notice in the sum of Kshs.90,000/=; and
- b. unpaid salaries for (nine) 9 months in the sum of Kshs.270,000/=; and
- c. NHIF deductions not remitted for three (3) months in the sum of Kshs.19,538/=;

Total Kshs.379,538/=.

Claimant's case

2. The Claimant states that he was employed by the Respondent on 1st October 2011 as a translator from Korean language to English and to conduct several oriental medicine clinics in the country for a period of one year.

That he is a trained acupuncturist and lived in South Korea for 13 years where he studied and practiced the medicine, using thermal machines to treat the body.

3. The Claimant was not given a written contract but initially was to be paid Kshs.30,000/= per month which was to be reviewed after 3 months.

He started working and was paid using a salary voucher which he signed. The employer deducted National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) from his salary.

The employer however never remitted the deductions. Claimant was registered with NSSF on 1st June 1993. With respect to NHIF only one remittance in the year 2011 is reflected.

The Claimant worked for three (3) months only and his employment was terminated on 17/12/2011.

The letter of termination is attached to the memorandum of Response filed on 13th May 2012.

4. In terms of the letter, the Claimant was employed on a three months contract that was due to expire on 31st December 2011.

The contract was however not produced before Court though it is stated in the Response that same commenced on 1st October 2011.

5. The Respondent avers that no notice of termination was required as the end of contract was anticipated by effluxion of time. However, the Respondent gave the Claimant a two weeks notice since the letter of termination was issued on 17th December 2011, but the effective date of termination was 31st December 2011.

A pay-slip showing the salary of Kshs.30,000/= and the NSSF and NHIF deductions was produced. NSSF and NHIF statements were also produced which show the non-remittance as claimed. The Respondent did not call any witness but filed written submissions in support of its pleadings.

6. **Issues in dispute**

- i. Whether the contract was for one (1) year or three (3) months?
- ii. Whether the Claimant is entitled to the relief sought.

Issue I

7. The only evidence before Court regarding the terms of employment between the Claimant and the Respondent is the various documents produced by the Claimant supported by his oral testimony.

8. The Respondent did not produce a written contract as is required under Section 9(1)(a) and (b) as read with Section 9(2) of the *Employment Act 2007* which reads:

“9(1) a contract of service –

- a. **for a period or a number of working days which amount in the aggregate to the equivalent of three months or more; or**
- b. **which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months; shall be in writing.**

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up.”

Furthermore the law under Section 10(7) provides:

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Sub-section (1) the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer.”

9. In *casu*, we have the oral evidence of the Claimant that he was employed on a one year contract but the Respondent failed to put it in writing.

That his employment was therefore unlawfully and prematurely terminated without any valid reason after serving for three (3) months.

The salary of Kshs.30,000/= per month is evidenced by the pay-slip produced.

10. The Court finds that the Claimant has discharged his onus on a balance of probability that his contract of employment was for one year. The Respondent on the other hand has failed to discharge its onus of rebuttal by failing to produce the written contract prescribed by the law.

Since it is common cause that no reason was assigned to the termination other than effluxion of time the Court finds that the termination was contrary to *Section 45(2)(a)* in that it was not for a valid reason and also the termination was not in terms of a valid procedure as no opportunity was accorded the Claimant to explain why his employment ought not to be terminated as provided under *Section 41* of the *Employment Act*.

11. The Claimant has also demonstrated that the Respondent deducted NSSF and NHIF dues but did not remit the same. This registration is further testimony that the employment contract was intended to be of longer period than three (3) months alleged by the Respondent.

The nature of work he was assigned to do could also not be completed in three (3) months. The Respondent's version as contained in the pleadings is therefore not credible. No wonder, the Respondent did not testify at all in support of its case.

12. The Court finds that Claimant's suit has been proved on a preponderance of evidence in its entirety and awards the Claimant as against the Respondent as follows;

- a. payment of three months statutory deductions not remitted in the sum of Kshs.19,538/= and/or file a statement with the Court indicating the payment;
- b. one month salary in lieu of notice in the sum of Kshs.30,000/= as provided in the Employment Act and;
- c. compensation for the unlawful and unfair premature termination of the one (1) year contract of service and the Court awards compensation equivalent to the unserved period of the fixed contract being 9 months gross salary in the sum of Kshs.270,000/=.
- d. Total award is Kshs.319,538/=
- e The Respondent is also to pay the costs of the suit.

Dated and Delivered at Nairobi this 25th day April, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE