



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

**CAUSE NO. 412 OF 2012**

**JOHANA ODIGO APINDI .....CLAIMANT**

**VERSUS**

**PANESAR'S KENYA LIMITED .....RESPONDENT**

Mr. Nyawade for Claimant

Mr. Timothy Naeku for Respondent

**JUDGMENT**

1. The Claimant brought this suit vide a statement of claim dated 12<sup>th</sup> March 2012 seeking payment of:
  - a. Ksh.1,437,300/= under the employment contract dated 23<sup>rd</sup> September 2009;
  - b. interest on (a) above at Court rates from 18<sup>th</sup> February 2010 until Judgment and thereafter interest on the decretal amount from the date of judgment until payment in full;
  - c. damages for unfair termination;
  - d. costs of the suit.

2. **Basis of the Claim**

Per the Pleadings, it is alleged by the Claimant that on or about 23<sup>rd</sup> September 2009 the parties hereto signed an agreement whereby the Respondent contracted the services of the Claimant as its employee to travel to Maputo, Mozambique and do carpentry work at the Polana Serena Hotel in Maputo on behalf of the Respondent for a period of six (6) months.

That in terms of the contract, the Respondent was to remunerate the Claimant for the service for a total amount of Kshs.1,527,300/= as labour charge of which Kshs.100,000/= was to be paid to the Plaintiff's wife as down payment immediately.

3. A copy of that agreement is attached to the memorandum of claim marked 'A'.

The Claimant proceeded to Maputo as agreed on 27<sup>th</sup> September 2009 and commenced work as agreed and returned to Kenya on 18<sup>th</sup> February 2010, approximately 4 months and twenty one (21) days later.

The Claimant states that he worked diligently in terms of the contract particulars of which are in the possession of the Respondent. A copy of the work schedule is attached to the statement of claim and marked 'C'.

4. Upon his return on 18<sup>th</sup> February 2010, the Claimant realised that, the Respondent had only paid Kshs.90,000/= to his wife as opposed to Kshs.100,000/= in breach of their agreement dated 23<sup>rd</sup> September 2009.

5. The Claimant seeks from the Respondent Kshs.1,437,300/= due to him as of 18<sup>th</sup> February 2010.

The Claimant has demanded payment of the same on diverse dates in vain and due to this persistence to demand payment his employment was unlawfully and unfairly terminated by the Respondent by denying him access to the premises and no reasons were offered for the termination.

The Claimant claims damages for the unlawful and unfair termination.

#### 6. **Statement of Response**

The Respondent filed on 1<sup>st</sup> July 2012 a statement of Response and counter claim in the following terms;

- i. Respondent denies it made and/or entered into the alleged or any agreement or promise as alleged or at all under paragraph 4.
- ii. under paragraph 5, the Respondent avers that the purported agreement dated 23<sup>rd</sup> September, 2009 (Annex 'A') is a forgery and does not bear the common seal of the Respondent and the Respondent's representative signature appearing on the document is not witnessed and is in fact superimposed.
- iii. in particular under paragraph 6, the Respondent denies offering the Claimant Kshs.1,527,300/= as alleged in the said document annex 'A'.
- iv. under paragraph 9, however, the Respondent states as follows;

**“the Claimant was hired as a casual labourer at a monthly salary of Kenya shillings Twenty Thousand Only (Kshs.20,000/=) which was verbally negotiated and agreed between the parties. The Claimant's contractual engagement with the Respondent was to last for the duration of the project that the Respondent was undertaking at Polana Serena Hotel in Maputo, Mozambique.”**

- v. Furthermore, under paragraph 10, the Respondent avers that the Claimant negotiated, settled for and agreed the said remuneration of Kenya Shillings Twenty Thousand Only (Kshs.20,000/=) per month and instructed the Respondent to pay it monthly in two instalments of Kenya Shillings Ten Thousand (Kshs.10,000/=) each and which payments were to be made to the Claimant's wife who was resident in Nairobi.

7. From the foregoing, based on the admission by the Respondent under paragraphs 9 and 10 of the statement Response there was in place a contract of employment between the Claimant and the Respondent at a monthly payment.

The terms of payment in terms of the employment contract are in dispute the Claimant alleging that he was entitled to payment of Kshs.1,527,300/= for the six months contract out of which Kshs.100,000/= was to be paid to his wife in Kenya. Respondent on the other hand states that the said Kshs.20,000/= was payable on each 15<sup>th</sup> day of the month and on the last day of each month and payment was done on the due date by M-pesa transactions.

8. The Respondent further states that the employment contract was terminated due to the failure by the

Claimant “to meet the expectations of his assignment despite being given several opportunities to prove himself” and as a consequence, the Claimant was recalled from Maputo, Mozambique and replaced with another carpenter.

9. Under paragraph 15, the Respondent states that it fairly terminated the services of the Claimant for valid reason.

It is also stated in Respondent’s defence that the Claimant was in continuous employment for the Respondent for less than thirteen months immediately before the date of termination and therefore the provision of **Section 45(3)** could not avail him.

10. Under paragraph 21, the Respondent states that the Claimant was summarily dismissed from employment due to gross misconduct, which summary dismissal is justified as it was for a lawful cause.

Furthermore, as per paragraph 24, the Respondent explained to the Claimant in a language the Claimant understood the reason for which the Respondent was considering termination of the Claimant’s employment and the Claimant was afforded an opportunity to make his representations.

11. The statement of Response dated 24<sup>th</sup> July 2012 was filed by Bowry & Co. Advocates for the Respondent.

No further pleadings were filed in this matter save for;

1. a notice to produce by Lemmy Regau & Co. Advocates for the Claimant seeking to have the Respondent produce:
  - a. the original agreement between the parties hereto dated 23<sup>rd</sup> September 2009;
  - b. the original schedule of works undertaken by the Claimant in Mozambique;
  - c. the original receipts, statements or payment vouchers for payments allegedly made to the Claimant’s wife;

The notice is dated 17<sup>th</sup> September 2012.

12. On 27<sup>th</sup> November 2012 the Respondent filed additional list of documents which included petty cash vouchers of payments to the Claimant’s wife but the original agreement dated 23<sup>rd</sup> September 2009 was not produced, the Respondent insisting that the same was a forgery.

13. **Oral testimony**

The Claimant testified in support of his case and told the Court that he was a Carpenter since 1984, and the Respondent had employed him since 1984, until 1990.

He then started taking jobs as a private contractor and got jobs from the Respondent from time to time. He made doors and cupboards and frames for the Respondent to be taken to Maputo and he was paid for that job.

Then **Mr. Muhran Sigh Panesar** decided to send him to Maputo to fit the doors and curtain frames and walldrops at Polana Serena Hotel in Maputo.

14. The parties entered into a six months contract for the job and the Respondent facilitated his travel. The Claimant was to be paid Kshs.1,527,200/= . He produced the agreement dated 23<sup>rd</sup> September 2009 to that effect.

He said the original agreement was with the Respondent. It is signed by the Claimant and Mr. Mohan Singh. He produced a letter dated 23<sup>rd</sup> September 2009, directed to M/s Graca B. Jeque High Commissioner of the Republic of Mozambique at Nairobi enclosing all travel documents for the Claimant and one Onesmus Muya Mutua. The letter requested for business visas **“for two of our Carpenters who need to be in Polana to conduct work there for six months.”**

15. Upon his return, he demanded payment of his dues but the Respondent declined stating that they should conclude a different agreement. The Respondent then told the Claimant to leave and his services were terminated. He said he left Maputo earlier than scheduled because he finished his work earlier.

The Claimant withdrew the claim for unfair dismissal and seeks payment of the contract sum.

16. Under cross examination he told the Court that he trained as a Carpenter at the National Youth Service in 1976 to 1979. He made 90 doors and frames at the Company premises in Nairobi and was hired to fit them in Maputo.

He had a job load agreement for the fitting payable at the end of each month. The fitting fees was agreed in the agreement. They had agreed on monthly payments subject to taxation.

He fitted 18 doors per day and worked sometimes even on Sundays. He also prepared and fitted curtain boxes.

17. The agreement was done by Mr. Mohan Panesar. He saw him sign it and it is not a forgery. He too signed it as an employee. They were just the two of them.

18. The calculations attached to the statement marked ‘C’ was done by Mohan Panesar indicating total payment of Kshs.1,527,300/=. He did it by hand and it was then typed and he got a copy of it and the agreement.

The Claimant said that his employment was terminated when he insisted to be paid his dues upon return to Nairobi.

19. The Claimant withstood cross examination well. His evidence was candid and consistent. The narrative regarding about the conclusion of the agreement upon tabulation of the figures by Mr. Mohan Panesar appears credible and not inconsistent with the nature and load of work to be performed for a high end hotel in a foreign country for a period of six (6) months. It should be noted that he had prepared 90 pieces of doors for fitting at Maputo.

20. Mr. Mohan Singh Panesar testified for the Respondent. He told the Court that the Respondent seconded the Claimant to a job in Mozambique.

That no written agreement was entered into.

That the parties agreed the terms of remuneration in line with other Carpenters. He was paid about Kshs.20,000/= net per month.

21. The entire contract in Mozambique was for about 9 million and it was therefore not possible to pay one Carpenter Kshs.1,527,300/=. He says the agreement marked ‘A’ produced by the Claimant was a forgery as it has no stamp or seal of the company. It also does not show who drew it on behalf of the Respondent. However annex ‘B’ is a document from the Respondent and it is on a company letter head.

He denounced the tabulation of fees marked ‘C’ stating that the Claimant did not touch even one walldrop.

He told the Court that the parties had 6 months work contract but he served approximately 4 months when he was recalled for poor workmanship. His supervisor Mr. Singh Channa was not happy with his work.

22. **Counter claim**

The Respondent has not made any averments regarding the stated counterclaim against the Claimant nor was any evidence adduced in Court in support of the counter claim. The same is therefore dismissed.

The witness did not tell the Court how the Claimant was to survive in Maputo if his entire remuneration was payable to his wife in Kenya until he was asked under cross examination and he said he thought the Claimant was paid an allowance of about Kshs.700/= per day.

He alleged that the claimant broke a drill machine over and above other matters his supervisor complained about.

The witness said that he did not give him a warning letter but the supervisor dealt with him on a daily basis. He said **Mr. Channa**, the supervisor was from United Kingdom and was not available to testify.

23. **RW2** was **Mr. Michael Njeru**, an employee of the Respondent for 8 years as a Carpenter. He told the Court that the Claimant was his colleague and he worked with him at Polana Mozambique. He found the Claimant there. He had no written agreement but did mainly bathroom doors. He targeted 3 doors per day. He said that the Claimant could not meet this target. He did one door per day and his supervisor Mr. Channa complained regularly about the Claimant. He told the Court that the Claimant's workmanship was poor and he had to re-do his work.

His employment was terminated in his presence to due to many such errors. He was warned verbally on several occasions.

He said his salary was paid in Kenya as per agreement and he received about 250 meticals per day in Maputo.

24. Under cross-examination he said he knew the Claimant since 2006 as he worked for the Respondent in Kenya prior. He did not know the terms of Claimant's contract. The witness did not come across to be telling the truth. The Claimant having consistently worked for the Respondent since 1984, could not in the Court's view fit the picture the witness was painting.

25. **RW3**, was **Mr. Willy Musyoka**. He said he worked for the Respondent as a wood fitter and he knew the Claimant well as his colleague. He also worked with him in Maputo. He told the Court that the Claimant quarreled with the supervisor due to poor workmanship and he was dismissed. He had no written contract and his salary was sent to his wife via M-pesa. He had worked for the Respondent for 23 years. He did not know the terms of Service of the Claimant.

Again, this witness appeared to want to paint the Claimant in poor light, while acknowledging that he had worked with him for many years in Kenya prior to going to Maputo.

26. The Respondent knew the claimant well and it does not make sense to the Court why he would be the first to be picked to build a very high end hotel. It is also not in dispute that he had built 90 doors in Kenya which were sent to Maputo for fitting. This evidence is inconsistent with the allegations that he was unable to fit the same doors he had built in Kenya.

The Court doubts the veracity of the evidence by the three witnesses for the Respondent.

27. **Submissions**

The Claimant filed written submissions on 20<sup>th</sup> November 2013 and the Respondent filed on 10<sup>th</sup> December 2012.

The submissions by the Claimant largely supports his pleadings and adduced evidence.

28. On the other hand, the Respondent in its lengthy submissions takes a completely new path from that taken in its statement of Reply and the evidence of the three witnesses stating that the Claimant was not an employee of the Respondent even if the Court has to uphold the contract of service marked 'A'.

29. It is the Court's considered view that the question whether the Claimant was an employee or not is expressly answered by the admissions to that effect in the statement of reply and in the *viva voce* evidence by the three witnesses of the Respondent.

30. The matter in issue is whether the Agreement 'A' between the parties is the document that spelt out the terms of employment of the Claimant or not.

31. Upon a careful evaluation of the evidence before Court, the Court is of the view that the volume of work to be done by the Claimant, an employee of longstanding with the Respondent, and who admittedly was running his own business in Kenya and had to leave the business for a period of six months to work in a high end hotel for the Respondent, is consistent with the remuneration agreed upon by the parties on 23<sup>rd</sup> September 2009, in the sum of Kshs.1,527,300.=.

32. The agreement presented by the Claimant is on a letter head of the Respondent, which is exactly the same as the covering letter of the same date written to the Mozambique High Commission in Kenya for the purpose of getting travel visa for the Claimant and another.

The same is signed by the Claimant and a representative of the Respondent, who the Claimant states is RW1, Mohan Panesar Sigh.

33. The Court is satisfied with the truthfulness of the testimony by the Claimant vis a vis that of the Respondent and is inclined to uphold the agreement signed between the parties on 23<sup>rd</sup> September 2009.

It is important to note that the figures in the agreement are further supported by annex 'C' to the statement of claim which the Court is also satisfied was a computation of the remuneration due to the Claimant and was done by Mohan Panesar Sigh. The agreement was partly implemented by paying Kshs.90,000/= to the wife of the Claimant via M-pesa.

34. The allegation that the Claimant was not an employee of the Respondent is simply an afterthought not supported by the Pleadings and the evidence before Court. This is a further indication that the Respondent is economical with the truth in this matter in its attempt to refuse to pay the Claimant for service rendered in a very high class hotel in Maputo in a lesser time than had even been planned.

There is no doubt that he was a colleague of RW2 and RW3 and worked under supervision of Mr. Channa Sigh and was for all intent and purpose an employee of the Respondent.

35. The Claimant has on preponderance of evidence, and on a balance of probability proved that he rendered services to the Respondent under a contract of employment and is owed Kshs.1,437,300/= for work done in Maputo Serena Hotel. That the said amount is to be paid by the Respondent with interest at Court rates from 18<sup>th</sup> February 2010 until payment in full.

The Respondent is to pay the costs of the suit.

**Dated and Delivered at Nairobi this 9<sup>th</sup> day of May, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**