



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 890 OF 2011

CHARLES JUMA OLENG CLAIMANT

VERSUS

THE M/S AUTO GARAGE LTD 1ST RESPONDENT

MR ANUAR SHAH 2ND RESPONDENT

JUDGEMENT

1. The dispute herein relate to the unfair dismissal of employment of the claimant by the respondent, failure to pay terminal dues, underpayments, failure to grant annual leave and non-payment of house allowance. The claimant is against the respondents the 1st respondent being a company engaged in the business of motor engineering garage and the 1st respondent is the managing director and proprietor of the 1st respondent. The claim is dated 7th June 2011 and the defence was filed on 29th June 2011.

Claimant's case

2. The claimant was verbally employed by the respondent as a spray painter on 7th August 2005 at a monthly salary of Kshs.7,000.00 per month, this was increased to kshs.8,100.00 and in 2009 the government raised the minimum wage and when the claimant realised this he asked the respondent for adjustment which was only done in January 2011. The wage was again reviewed in 2010 making the wage for the claimant to kshs.9, 101.00 per month but was never reviewed by the respondent. The claimant was not paid his house allowance and remittances to NSSF and other statutory deductions were not effected. On 18th April 2011 the claimant was dismissed without notice. The claimant is therefore seeking;

- a. *One month's wages in lieu of notice at kshs.10, 466.15*
- b. *Unpaid arrear from May 2009 to April 2009 at Kshs.2, 088.00*
- c. *Underpayment arrears from May 2010 to December 2010 at Kshs.404.00*
- d. *Annual leave of 21 days for each year's being 119 days at Kshs.36, 100.00*
- e. *Housing allowances;*
 - i. *April 2008 to April 2009 at kshs.12,621.60*
 - ii. *May 2009 to April 2010 at kshs.14,893.20*
 - iii. *May 2010 to April 2011 at kshs.22,752.50*
- f. *Service gratuity at 15 days each year at Kshs.22, 752.50*
- g. *12 months wages as compensation at kshs.125, 593.80*
- h. *TOTAL DUES Kshs.247, 944.50*
- i. *Certificate of service*

3. In evidence the claimant stated that he was employed through a verbal contract. There was no house allowance and when he asked for leave he was told that there was a lot of work and was not paid for not going on leave. He was not employed as an independent contractor as he was paid on a monthly basis. Upon termination the respondent took kshs.19, 000.00 to the labour officer as an indication that the claimant was a permanent employee. The reason for termination was that when the claimant went to the respondent seeking more pay he was told to go away. The respondent paid kshs.19, 000.00 at the labour office but when the claimant reported back to work he was told to go away. He is therefore seeking for his outlined claims for underpayments, arrears, annual leave, compensation and gratuity.

Respondent's case

4. The respondent stated that they engaged the claimant as an independent contractor for tasks that arose on a needs basis and was paid as agreed. There was no minimum wage for such tasks and was not entitled to house allowance or NSSF deductions and remittances to any statutory body. The claimant was not dismissed only the engagement lapsed and payments made to the claimant as determined by the labour officer in a conciliation meeting held on 3rd May 2011. There is therefore no cause of action as the matter has been settled.

5. In evidence the respondent called Abraham Matheka who works for the respondents and stated that he is the one who came up with the issue to engage the claimant and got a contract for painting and was given piece work and he was to decide on how to do it. Once there was a job to be done, the claimant determined how and who was to join him to finish the task. The payment was done in piecemeal once the respondent got a job the claimant was called and once the task ended his role also ended. He was permanently situate at the respondent premises but he could choose the people to work with. It was his role to complete a task as he was not under the control of the respondent. Apart from the contracted sum, the claimant was not getting any other benefit. His payments differed as there were no standard amounts and there was no contract. The records in payment were not kept.

6. It is now an accepted best practice in labour relations to reduce all forms of work contracts into writing. This is to help parties outline their relationship, terms and conditions of engagement be it for a contract of service or for a contract for services.

7. The Employment Act, 2007 in Section 2 defines a “**Contract of Service**” to mean an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of the Act applies.

8. These are important provisions for consideration in this matter as the relationship between the claimant and the respondent is in issue. And there are important questions here as to whether the relationship between parties’ amounted to a **contract of service** or **contract for service**, and on this finding what the rights of the parties herein were and the basis of the claimant’s case.

9. The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact but also noting that most contracts for service are not written, the facts of each case are paramount and worth consideration as to the intentions of the parties to such a contract. This is more so due to the fact that in law a contract of service is well outlined with fundamental protections as this is clearly defined under the Employment Act, 2007 unlike the other contract for service. This is more so in view of the definitions of **employee**, **employer** and **contract of service** under the Employment Act, 2007 and the Industrial Court Act, 2011.

10. This differentiation relate to very fundamental issues noting that under a contract of service it customarily relates to an employee who is **subordinate** or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner. Thus there is a constant thin line that is drawn between self-employed or independent contractors in a contract for service, and, employees in a contract of service. There is however no agreed-upon definition on the

determinant factors that fundamentally set the differences between the two types of contracts but the fact of each case must be carefully looked at.

11. In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise 'employment' as against what constitutes 'service' in case of contracts of service as contrasted with contracts for service. They include the following:

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.
- b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
- c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
- d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

12. These tests are however not to be seen exclusively by themselves as they only serve as a guide based on the facts of each case. They are however a good guide to the issues as in this case.

13. Under Section 2 of the Employment Act, 2007, '**contract of service**' is a necessary ingredient in the definition of '**employer**'. As the court's jurisdiction is open to employees and employers, its jurisdiction is available in both instances of contracts of service and contract for service. In this case, based on this definition and the outlined tests above I note the claimant was not solely under the control of the claimant as a Care Taker and or agent of his business in rent collection, cleaning of his premises or security.

14. As confirmed in evidence, the claimant had his salaries increased over the years and when a dispute arose, he went to the labour officer and his dues were paid. It is not stated as to how the amounts of Kshs.19, 000.00 received by the claimant entailed. The records of conciliation by the labour officer have also not been attached by the respondent who relied on such evidence.

15. The duty to issue a contract, whether a contract for service of a contract for services was on the respondent as the entity and person allocating the claimant work. In the absence of such a document to see what terms were agreed between the parties, the evidence of the claimant will be taken in good faith. The claimant has admitted that the received part of his dues from the labour officer. This will be put into account.

15. It was the claimant's evidence that he was terminated when he went to seek for an increase to his salary. He was told to go away and even efforts by the labour officer to have him resume duty, the respondent failed to comply. There was no notice to terminate the claimant's employment. This procedurally is unfair and the court will award compensation equivalent to one' month's wages. The claimant earned kshs.9, 000.00 at the time of termination. Noting the underpayment the claimant is awarded Kshs.10, 466.15 as the minimum wage payable at the time of termination.

16. Regulation of Wages (General) (Amendment) Order, 2010 Legal Notice No. 98 of 18 June 2010 was applicable to the claimant as of law and at the time of termination. The claimant will be awarded the underpayments due in 2009 and 2010 all being Kshs.4, 500.00 and the due house allowances all at Kshs.42, 530.30.

17. The respondent does not claim to have issued notice in this case. One months' notice pay will

be awarded as under section 35 of the Employment Act. He is awarded Kshs. 10, 466.15

18. In case where an employer fails to remit statutory dues, an employee is awarded service pay at 15 days salary for each full year worked. The claimant was employed in May 2005 to April 2011, this being 5 full years of service. The claimant is awarded the sum of Kshs.22, 500.00.

19. There was no demand notice attached indicating that the respondents were notified of the claim and they failed to pay. In any event there were payments made through the Labour office which will be deducted herein from the total award. Costs will be declined.

Judgement is herein entered for the claimant as against the respondents jointly and severally in the following terms;

- a. **The claimant was unfairly terminated**
 - i. **Compensation awarded at Kshs. 10, 466.15;**
 - ii. **Notice pay at Kshs. 10, 466.15;**
 - iii. **Salary arrears in underpayment at kshs.4, 500.00**
 - iv. **House allowances at Kshs. 42,530.30;**
 - v. **Service pay at kshs.22, 500.00;**

- b. **Total dues will be less kshs.19, 000.00 already paid through the Labour office.**

Delivered in open Court at Nairobi and dated this 18th Day of June 2014.

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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