



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

**CAUSE NO.12 OF 2012**

**(Nairobi Cause No. 674 of 2011)**

**JOSPHAT NJUGUNA.....CLAIMANT**

**VERSUS**

**HIGH RISE SELF GROUP.....RESPONDENT**

**JUDGMENT**

1. The claimant in this suit avers that he was employed by the respondent as a night watchman with effect from 17th September, 2007 guarding homes within Maragua Township. According to him, he gave notice of termination of employment on 31st August, 2010 and left employment one month later to wit 31st September, 2010.
2. The claimant avers that on leaving his employment upon expiry of the notice he was not paid his terminal dues prompting him to report the issue to his union and eventually the Labour Office for conciliation. Whereas his union assessed his terminal dues at 140,488/50, the Labour office assessed them at Kshs.55,179. This difference he avers, arose because the Labour Office computed his dues based on 2 years of service while his union applied 3 years of service. It is his Union's computation which he contends is correct and seeks this court to award him.
3. The respondent on his part avers that employment of the claimant if any was on casual basis hence was not entitled to benefits claimed.
4. At the trial of the suit the claimant reiterated the averments in his memorandum of claim adding that he was never issued with any letter of appointment nor issued with monthly payslips upon payment of his monthly salary. He however stated that most of the time he was paid through his bank account. He produced his bank account to demonstrate this. Questioned about inconsistency and variation of his pay, he stated that this was due to fact that the Bank was charging him for every deposit made and that sometimes he was paid his salary in cash.
5. The respondent on its part called as witness Mr. Francis Ngugi who said he was the chairman of the respondent and knew the claimant. Accordingly they would occasionally hire the claimant as a night watchman when a member in one of the homestead had travelled. According to him the claimant would be paid based on the number of days worked. Mr. Ngugi testified that the claimant would mostly be hired during school holidays which is why in his bank statement for 2008 his payment was in the month of April while the next one was in August, 2008 and another in December 2008. According to Mr. Ngugi for the three years the claimant claimed he worked for the respondent he was only paid 9 times. The witness denied ever receiving the alleged resignation letter and said he only saw it for the first time at the labour office. In re-examination

he stated that the alleged resignation letter did not ask for any salary arrears.

6. Mr. Mbutia in his submissions before the court reiterated his clients averments and testimony and stated the claimant was employed for a period of over 24 hours at a time and was being paid monthly hence was not a casual worker. Counsel however conceded that his client's payments were periodical and seemed to suggest he was employed periodically however there was no rhyme in the payments. For instance there was no explanation about the payment of Kshs.1,800 on 8th September, 2008 which was not a school holiday period and Kshs.2,300 on 4th August, 2008.
7. Mr. Kirubi for the respondent on his part submitted that for the period between October, 2007 and August, 2010 when the claimant claimed he worked he received payment for only eight months totalling to Kshs.22,400 and that it was clear that the payment for the eight months were irregular. Counsel pondered why if there were any arrears of salary the claimant never brought forth such claim together with his claim for terminal benefits.
8. The court has reviewed the pleadings the evidence and the submissions by counsel in this suit and is of the opinion that the claimant was not a permanent employee of the respondent as claimed. The irregularity in his payment and omission to lodge any claim for arrears of salary as submitted by counsel for the respondent lends credence to the respondent's position that the claimant was a casual worker and his services would be sought on need basis and not as a regular worker.
9. Whereas section 2 of the Employment Act defines a casual employee as a person whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time, it does not mean that a casual employee who is not paid at the end of each day and who is hired for more than 24 hours automatically becomes a regular or what is mundanely called permanent employee. It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment can not be made at the end of the day or make the hiring be for more than 24 hours.
10. In my understanding, what the section provides is that where a casual employee works for a period whose aggregate is a month or more or where such employee performs work which cannot reasonably be expected to be completed within an aggregate period of three months, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
11. In other words, this section creates what I would call "a monthly casual worker" as an exception to the casual worker contemplated under section 2 of the employment Act. This casual worker "sui generis" therefore enjoys the protection accorded to regular or permanent employees by section 35(1)(c) of the Act.
12. That is to say they are entitled to not less than 28 days notice of termination of service or payment in lieu thereof and further that they shall be entitled to service pay for every year worked, the terms of which shall be fixed. The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates.
13. The foregoing having been said, the claimant in this suit having been found to have been a casual worker, his aggregate period of service was eight months hence he is entitled to the protection afforded by section 37(1) of the Employment Act.
14. The claimant however resigned from his employment by giving a months notice hence he is not

entitled to any compensation in this regard he is however entitled to service pay at the rate of 15 days pay for each year of completed service starting for September, 2007 to September, 2010 when he left employment. His monthly wage shall be assessed at the prevailing minimum wage at the time he left employment. The parties to this suit are hereby directed to appear before the Deputy Registrar of this Court for the purposes of such assessment. The claimant shall have the costs of the suit.

15.It is so ordered.

**Dated at Nyeri this 26th day of September, 2014.**

**ABUODHA N. J**

**JUDGE**

*Delivered in open Court in the presence of Mr. Mbuthia Advocate for the Claimant and in the presence of Mr. Ngunjiri h/b for Mr. Kirubi Advocate for the Respondent.*

**ABUODHA N. J**

**JUDGE**