



**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 206 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> September, 2014)

BENTA ADHIAMBO OCHORO ..... 1ST CLAIMANT

MATHEW KINYURU NDEGWA ..... 2ND CLAIMANT

**-VERSUS-**

CHARLES LUTTA KASAMANI

t/a KASAMANI & CO. ADVOCATES ..... RESPONDENT

**JUDGMENT**

The claimants Benta Adhiambo Ochoro and Mathew Kinyuru Ndegwa filed their memo of claim on 16.7.2013 through the firm of Mochama & Co. Advocates. Their claim is for salary arrears amounting to Ksh 99,000/= and 321,130/= respectively.

The 1st claimant avers that she worked for respondent as a secretary from 23.5.2011 having been introduced to the firm by the respondent's wife. The agreed salary was Kshs 12,000/= per month with no other benefits or deductions. The 1st claimant worked for respondent but continued to receive her salary piece meal and by the time she left at the end of June 2013, the respondent was owing her Kshs 99,000/=, as per the schedule drawn under paragraph 4 of the claim.

The 2nd claimant on the other hand told court that he was employed by the respondent as Legal Assistant at a salary of Ksh 25,000/= per month. Like the 1st claimant, the 2nd claimant avers that his salary was paid irregularly and in bits and pieces and at the end of June 2013, the respondent owed him Ksh 321,130/= as unpaid salary as per para 6 of the plaint.

The claimants aver that the respondent is in the habit of not paying his staff as seen from other previous staff. Despite demand, the claimant avers that the respondent had failed to pay them their dues.

The respondent on the other hand filed their response on 16.8.2013 through the firm of Kasamani & Co. Advocates. It is their defence that the claimants lacked qualifications to be employed as alleged but that the 1st claimant was employed as a copy typist. The respondent denies employing the 2nd claimant as alleged.

The respondent avers that he owes the 1st claimant nothing and that he paid her all salaries that accumulated. The respondent further avers that the 2nd claimant was attached to his office but never did work as expected and carried out his side business and run the office in an unprofessional manner which caused the office to be run down.

Upon hearing the parties herein, the issues for determination are as follows:-

1. **Whether the respondent employed the claimants as alleged.**
2. **Whether the respondent owes claimants salary arrears as alleged.**

On 1st issue, the respondent admitted employing 1st claimant as a copy typist. No employment letter was given to her as expected under S. 9(2) of the Employment Act 2007 which states that:-

**“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).”**

A contract in excess of 3 months shall be in writing. The 1st claimant served the respondent for over 3 months and it was the duty of respondent to draw up an employment contract. The respondent cannot therefore allege that the 1st claimant didn't prove her employment as she didn't produce an employment contract.

I therefore find that indeed 1st claimant served respondent as alleged and the respondent failed on his part by not drawing up a contract of service between them.

On issue of 2nd claimant the respondent also admits in his pleadings that he was on attachment at his law firm. At para 10 of the defence states as follows:-

**“In the alternative, the defendant states that while attached to his office, the plaintiff carried on their side business, diverted the defendant's clients to other firms, drafted pleadings privately for persons seeking legal services, reported to work at their convenience, gossiped and run the office in such unprofessional manner that they caused it to run down. Any claim for payment is unconscionable and unenforceable.”**

This paragraph is definitely an admission of a relationship between the claimants and respondent in whichever capacity the claimants served. The respondent cannot allege that 2nd claimant was on attachment at his office as the 2nd claimant is an Advocate of the High Court of Kenya having proved that he was admitted as such advocate in 1973. Despite lacking a practicing certificate at the time, it cannot be said that he was merely on “attachment”. He served respondent and did some work during this attachment, the nature of which the respondent should have reduced in writing again as envisaged under S. 9(2) of the Employment Act 2007.

The next issue relates to payment of salary arrears as alleged by claimants. The respondent avers that he owes claimants nothing. He alleges he paid 1st claimant all accrued salary. The respondent again is the one responsible for proving the payments alleged. This court expected him to adduce by exhibit salary vouchers, M-pesa statements e.t.c as proof that he paid the 1st claimant as alleged. He failed to do this and the claim by 1st claimant stands unchallenged. I therefore find for 1st claimant and enter judgment for her for **Kshs 99,000/= plus costs and interest.**

As to 2nd claimant, there is also no contract in writing from which this court would have deduced the nature and content of the contract. This is in contravention of S. 10(7) of Employment Act 2007 which states that:-

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

Whatever terms they were between 2nd claimant and respondent can only be proved by respondent and since the respondent produced no written contract, the court relies solely on evidence of 2nd claimant and finds that he was indeed owed Kshs 321,130/= as alleged and there is no proof of payment. I therefore enter judgment for 2nd claimant for **Kshs 321,130/= plus costs and interest.**

**HELLEN S. WASILWA**

**JUDGE**

**18/9/2014**

**Appearances:-**

Ondego for claimants present

Mumalasi h/b Kasamani for respondent present

CC. Wamache