



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1017 OF 2012

BETWEEN

WILLIAM OMONDI NYAHURU CLAIMANT

VERSUS

FURNITURE INTERNATIONAL LIMITEDRESPONDENT

Rika J

CC. Edward Kidemi

Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates for the Claimant

Mr. Mbabu instructed by T.K. Kariba Mbabu & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL
TERMINATION

AWARD

1. This Claim was initiated through a Statement of Claim, filed by the Claimant on 15th July 2012. He alleges to have been employed by the Respondent Furniture Company as a Carpenter on or about 25th January 2006. He earned a daily rate of Kshs. 438, paid at the end of every week. He was summarily dismissed on 17th December 2010. He claims the decision by the Respondent was unfair and unlawful, and seeks Orders for:-

- a. A declaration that his dismissal was wrongful;
- b. 1 month salary in lieu of notice at Kshs. 13,140;
- c. House rent allowance at 15% of the basic pay for the period worked at Kshs. 118,260;
- d. Service pay at 15 days' salary for every year completed in service at Kshs. 37,903;
- e. Annual leave pay for 5 years at Kshs. 53,065
- f. 12 months' gross salary in compensation for unfair termination, at Kshs 157,680; and
- g. The Respondent to release to the Claimant his Certificate of Service.

The monetary claims add up to Kshs. 498,308. The Claimant also seeks costs; interest; and such other orders as the Court may deem suitable.

2. The Respondent filed its Statement of Response on 23rd July 2012. It is the position of the Respondent that the Claimant was engaged on casual basis. He was given periodic contracts. The last such contract commenced 1st December 2010, and expired 17th December 2011. The Claimant did not seek extension, and was not engaged after 17th December 2011. He was paid all his dues under the expired contract. The amount of salary agreed between the Parties was all-inclusive. The Respondent urges the Court to dismiss the Claim, with costs to the Respondent.

3. The Claimant gave his evidence, and rested his case on 20th September 2013. Kirit Kumar Shah, the Respondent's Director, gave evidence for his Company on 14th March 2014 when the hearing closed. The dispute was last mentioned on 22nd July 2014, and Award reserved for 24th October 2014. The date for the delivery of the Award has been brought forward as the undersigned Trial Judge has been transferred to Mombasa.

4. Nyahuru testified he worked for the Respondent from 25th January 2006. The Respondent has a furniture factory and showrooms. He was engaged by Shah. There was no letter of appointment. He was initially paid Kshs. 301 per day, later improved to Kshs. 438. He was not paid house rent allowance, and was not provided with housing accommodation by his Employer. He worked from 7.30 to 5.00 p.m., Monday to Saturday, with Sunday reserved as the rest day. He was paid at the end of every week.

5. He was not given a pay statement. On 17th December 2010, he was informed by the Respondent he had been transferred to Insight Management. He was not to work for Furniture International Limited any more. He did not go on leave, or receive pay in lieu of leave. He worked continuously for 5 years and could not be described as a Casual Employee. He did not sign the contract of employment attached to the Response. He was paid Kshs. 18,510 on termination. Kshs. 9,760 was said to comprise service pay for 2010, and Kshs. 8,760 was the Claimant's own savings. He was paid for service every year, except the first year.

6. On cross-examination the Claimant testified he was employed in January of 2006, not 2005. He was not issued any document such as an employment card, on recruitment. There were witnesses who saw him work. He was registered with the N.S.S.F, but did not have his registration certificate in Court. He worked for another Company, Tea Pluckers Limited, from 1998 to 1999. It was not true that he worked for the Respondent from 2010.

7. He signed the voucher dated 17th December 2010, and received the payments indicated thereat. He received service pay annually, but argued he was still entitled to service pay, on termination. He wrote to Kirit Shah on 1st December 2010, applying for work. The Employees applied every month. He signed the document which the Respondent retained. It resembled the contract attached to the Response. He denied the signature on the document was his.

8. The document stated the rate paid included house rent allowance. It was to lapse 17th December 2010. He signed without reading. He was forced into periodic contractual work. His demand letter stated he was employed in 2005. The correct date was 2006. He did not know the minimum rate for Casual Employees. He was never paid a monthly rate of Kshs. 13,140. He did not have a problem with the Respondent's position that the contract lapsed on 17th December 2010. He was not paid for the tools. He did not reapply to the Respondent after 17th December 2010. Kirit Shah would know where Insight Management was based. He said it was together with the Respondent. The Claimant agreed he did not, in any case, apply to either of the Companies. Redirected, the Claimant stated he was directed to go to Insight Management, but was not told what this Company dealt in. He did not reapply. He was advised to reapply, or would not be allowed to continue working. He was not given a chance to read the documents prepared by the Respondent. He asks the Court to uphold his Claim.

9. Kirit Shah testified the Claimant was hired whenever his services were needed. He was a Trainee Carpenter. He worked for the Respondent 3 to 4 years. He would apply, and would be given 1 month contract. He would be paid annual leave and service pay if he completed 1 year in service. His last

contract was signed in December 2010, to run up to 17th December 2010. He applied for this contract on 1st December 2010. At the end of the contract, he was paid Kshs. 18,510 as service pay, which included savings he had made. There were other contracts preceding this.

10. At the close of the year 2010, Employees were invited to reapply for the New Year. He did not reapply. He was not dismissed. He worked under specific contracts. He was paid Kshs. 438 daily- all inclusive. The minimum wage for 2010 in his category of Trainee Carpenter was Kshs. 437.70. He was paid 20 days' salary for every completed year of service. For every completed month, he was paid 2 ½ days of leave. In December 2010, he was not entitled to leave. He was not dismissed, and was aware his contract had come to an end.

11. Kirit Shah confirmed on cross-examination, that Nyahuru was his Employee, engaged as and when the need arose. He assisted other skilled Carpenters. He was not qualified. He worked on and off for 5 years. He worked 5 days a week. If he worked on Saturdays, he was compensated through payment of overtime. He did not work continuously. Shah did not have all the Claimant's employment records. He did not have the very first contract.

12. Shah did not have any record to show the Claimant received pay in lieu of annual leave for all the 4 years. He did not work continuously. It was only in 2010 where it was indicated he was paid 2 ½ days for every month. He did not complete the last month. He would have demanded for arrears if any were due, on 17th December 2010. He was paid every year. Kshs. 438 included house rent allowance. Insight Management Limited was a Consultancy Firm, providing the Respondent with manpower from January 2011. It was not true the Respondent's Employees were required to be Employees of Insight Management Limited. It was not true that from 2011, the Respondent did not directly employ Carpenters and Trainee Carpenters. The Claimant was not issued with the Certificate of Service.

13. The Respondent received a demand letter from the Claimant. There was a response indicating the Claimant was on periodic contracts. He was paid some money- a total of Kshs. 18,510 in service pay and savings. Savings was part of his own money. He was paid daily. He was Casual. The Respondent was not aware the Claimant should have been casual for so long. Redirected, the Witness stated the Claimant had not claimed any salary for December 2010. The reply to the Claimant's letter was exactly what was contained in the Statement of Response. He did not work continuously; he worked periodically. The Claim is misplaced.

The Court Finds and Awards:-

14. The Claimant worked for the Respondent from 2006 as a Trainee Carpenter. He was offered on his own application, monthly contracts. The last contract ran from 1st December 2010 to 17th December 2010. The Claimant applied for this contract on 1st December 2010.

15. The Claimant was not a Casual Employee, after serving for 4 years. Under Section 37 of the Employment Act 2007, his terms would be deemed to have become regularized. He would be entitled to the full benefit of a regular Employee, due under the Employment Act 2007.

16. The contracts issued to the Claimant do not show that he was treated as a Casual Employee, the Respondent's evidence notwithstanding. He was a regular Employee, serving under fixed term contracts of 1 month at a time. He was availed service pay at the end of every year completed in service. He was similarly paid annual leave pay, the formula being 2 ½ days for every month worked. These are employment rights available to regular Employees, under the Employment Act 2007. The Claimant was not treated as a Casual Employee, but a regular Employee on fixed term contracts.

17. Labour is flexible and the nature of the work done by the Claimant, made such an arrangement between the Parties mutually convenient.

18. The Claimant's contract expired on 17th December 2010. He was paid Kshs. 18,510. Kshs. 9,750 was

his own savings, and Kshs. 8,760 service pay, for the year 2010, calculated at 20 days' salary. It was not proper for the Claimant to seek additional service pay for the aggregate period, having received such pay at the end of each year. The claim for service pay at Kshs. 37,903 is declined.

19. There is no notice of termination required to be given to an Employee on a fixed-term contract. The contract itself contains a date of termination, which is an inbuilt notification mechanism. The claim for notice pay is declined.

20. The amount of Kshs. 438 paid daily to the Claimant, included the housing element. This was made clear in the succession of contracts concluded between the Parties. The claim for arrears of house rent allowance at Kshs. 118,260 is not justified and is declined.

21. The prayer for compensation would seem to the Court likewise, to have no foundation. The fixed term contract lapsed on 17th December 2010. The Respondent had no obligation to hear the Claimant, or justify termination under Sections 41, 43 and 45 of the Employment Act 2007. It was shown by the Respondent that the Claimant had the option of applying for renewal. He had in the past reapplied, and been taken in. He did not exercise his option and his assertion that his contract was unfairly and unlawfully terminated, has no basis. The prayer for compensation is rejected. In sum:-

[a] The Claim is rejected in its entirety.

[b] No order on the Costs.

Dated and delivered at Nairobi this 18th day of September 2014

James Rika

Judge