



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 539 OF 2012**

**TAILORS AND TEXTILES WORKERS UNION ..... CLAIMANT**

**VERSUS**

**STITCH MASTERS LIMITED ..... RESPONDENT**

**Grievant in person**

**Mr. Paul Muinda for Respondent**

**JUDGMENT**

**CLAIM**

1. The Dispute concerns alleged wrongful dismissal of Mr. Evans Achimba and the refusal by the employer to pay his terminal benefits.
2. The Claimant reported the dispute to the Ministry of Labour and alleges in the statement of claim that the efforts by the parties to resolve the matter amicably failed.
3. Mr. R. Ngugi Labour Officer was appointed a conciliator. Parties made oral and written submissions and the conciliator made his recommendations attached to the statement of claim as appendix 2.
4. The Grievant testified under oath and stated that he was employed on 3<sup>rd</sup> May 2007 as a tailor earning an average salary of Kshs.5,000/= per month. He testified that he did piece work and was paid every Tuesday of the week.
5. He further testified that he worked six (6) days a week from 8.30 to 5.30 p.m. with a 30 minute lunch break. He worked continuously until the 1<sup>st</sup> October 2009 when he alleges his employment was terminated upon leading his colleagues to join a union.
6. That he was paid Kshs.400 for work done and told to go away since the Respondent did not want a union at the work place.
7. He claims that the termination was wrongful and unfair.
8. The Claimant states that the minimum wage for a tailor was Kshs.10,405/= and was therefore underpaid for two years.

9. He also claims house allowance in terms of the general wage order and service gratuity since he was not registered with NSSF.

10. The Claimant also said he was owed leave days for two (2) years and nine (9) months he worked.

He prays for payment of;

1. One month salary in lieu of notice in the sum of Kshs.10,405/=;
2. Kshs.20,810/= in lieu of leave days not taken;
3. Kshs.51,504 being 15% of the basic salary as house allowance;
4. Service gratuity in the sum of Kshs.10,405/= at the rate of 15 days salary for each completed year of service.
5. Underpayment for the period May 2007 to October 2009 at the rate of Kshs.5,405/= per month in the sum of Kshs.162,150/=; and
6. Seeks certificate of service from the Respondent.

### **RESPONSE**

11. The Respondent filed a statement of Response on 24<sup>th</sup> July 2013 with annexures.

12. The Respondent avers that this dispute was resolved pursuant to the report of the conciliator on 30<sup>th</sup> May 2012 and the Grievant was paid Kshs.16,800/= via cheque, No. 4445 of Kenya Commercial Bank.

13. The Respondent has annexed to the memorandum of Response the Report of Mr. Robert Ngugi the conciliator. The conciliator found that the Grievant was employed as a stitcher and worked on piece rate.

14. The Respondent added that the Claimant was paid per completed pieces of clothe on a weekly basis.

15. That the Claimant was not under control or supervision of the Respondent and would report to work as and when there was work to be done.

16. That the Claimant had a disagreement with the Quality Controller and his work was terminated.

17. The conciliator recommended that the Claimant be paid in lieu of two years leave and any arrear wages.

18. On 30<sup>th</sup> May 2012, the employer wrote a letter marked appendix '5' to the Memorandum of Response in which it admitted owing the Claimant payment of 42 days salary in lieu of leave at Kshs.400 per day in the sum of Kshs.16,800/=.

19. The letter was written to the District Labour Officer and copied to the Claimant union.

20. The cheque drawn in the name of the Grievant is attached to the Response and marked Appendix 8.

21. The Respondent has annexed a letter dated 31<sup>st</sup> May 2012 written to the Registrar of the Industrial Court by the Secretary General of the union purporting to withdraw this suit from the Court.

22. The said letter does not bear a Court stamp.

23. Also annexed as Appendix 7 to the response is a consent agreement adopting the conciliator's recommendations in settlement of this matter. The agreement is dated 21<sup>st</sup> September 2012.

24. The alleged consent was not adopted as an order of the Court and it does not bear a Court Stamp.

25. **Determination**

From the pleadings by both parties, it is common cause that the Grievant worked as a tailor and was paid per week depending on pieces of clothes that were completed.

26. Contracts of service entered into under which a task or piece work is to be performed by an employee are provided for under **Section 18(1)(a)** and **(b)** of the **Employment Act 2007**.

27. This is a lawful arrangement under the law. However, where the performance of the specified work could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, then such a contract ought to be in writing.

28. In this case, no such agreement was availed by the employer who has the responsibility of causing the contract to be drawn up in terms of **Section 9(2)** of the Act.

30. In terms of **Section 9(7)** “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.”

31. In the matter in *casu*, the Claimant has made a *prima facie* case that he provided piece work services to the Respondent for a continuous period of two (2) years and nine (9) months.

32. The burden of rebutting this evidence fell on the Respondent by producing the relevant contract and other documentation.

33. In the circumstances of the case, the Court finds that the Claimant having been continuously engaged by the Respondent was entitled to terminal benefits upon termination of service.

34. The Respondent has already paid the Claimant in lieu of two (2) years and nine (9) months leave.

35. The Court finds that the Claimant is entitled to and awards;

- i. the minimum wage that appertained in the period of Kshs.10,405 per month and awards Kshs.162,150 for the 30 months period from May 2007 to October 2009. Where an employee proves that the work done was continuous as in this case, employer cannot escape the statutory minimum wage merely because he provided continuous piece work.
- ii. payment of one month salary in lieu of notice in the sum of Kshs.10,405/=;
- iii. fifteen per cent (15%) house allowance for two (2) years and nine (9) months in the sum of Kshs.51,504/=; and
- iv. service gratuity in terms of **Section 35(5)** as read with **Section 35(6)(d)** in that he was not registered with NSSF or any other gratuity scheme in the sum of Kshs.10,405/= calculated at fifteen (15) days salary for each completed year of service.
- v. certificate of service to be provided to the Claimant within fourteen (14) days from the date of this judgment.

36. The Claimant has failed to show that his employment was unlawfully and unfairly terminated, it being common cause that he worked provided there was piece work to be done within the meaning of **Section 18** as read with **Section 9** of the Act.

Total award to the Claimant is Kshs.234,464/=.

The award to be paid with interest at Court rates from date of this judgment to payment in full.

The Respondent to pay the costs of the suit.

**Dated and Delivered at Nairobi this 21<sup>st</sup> day of November 2014**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**