



**REPUBLIC OF KENYA**

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

**CAUSE NO.79 OF 2014**

**CHARLES MAINA NYARUAI.....CLAIMANT**

**-VERSUS-**

**KIENI CONSTITUENCY DEVELOPMENT FUND COMMITTEE.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> December, 2014)

**JUDGMENT**

The claimant's memorandum of claim was filed on 19.06.2014 through P.M. Kahiga & Company Advocates. The claimant prayed for judgment against the respondent for:

1. The respondent to pay the claimant benefits amounting to Kshs. 578, 684.00.
2. Costs of the suit.
3. Interest.

The respondent filed the statement of defence on 15.08.2014 through Nderi & Kiingati Advocates. The respondent prayed that the claimant's case be dismissed with costs.

The claimant is an accountant by profession. He was employed by the respondent on 1.07. 2011 as an accounts clerk on a fixed term contract of one year renewable at Kshs. 15, 000.00 per month. He worked for 2 years one month up to end of July, 2013. His services were terminated by the letter dated 22.07.2013 which he received on 1.08.2013. The letter addressed to the claimant stated as follows:

**“Re: Termination of Employment**

**The Constituency Development Fund Board is in the process of streamlining Human Resource Management at the Constituency level. In so doing it seeks to ensure uniformity and efficiency in recruitment, management, compensation and retention of motivated CDFC staff for smooth management of the Fund.**

**Kieni CDFC has decided to recruit Constituency Development Fund Committee staff competitively in accordance with the guidelines on recruitment of CDFC staff contained in a circular Ref: CDF Board/Circulars/Vol.1.1/166.**

**Consequently, your services as an Accounts Clerk have therefore been terminated with effect from 31.07.2013.**

**You will therefore be paid your salary for the months of June and July, 2013 and one month's salary in lieu of notice. You can collect your dues on Thursday, 8<sup>th</sup> August, 2013.**

**The CDFC wishes you well in your future endeavours and notes that you are at liberty to apply afresh for any post you deem fit once the available vacancies are advertised.**

**Yours sincerely**

**Signed**

**Peter Thang'wa Njenga**

**CDFC Chairman**

At termination of the employment, the claimant testified that there were two months' salary arrears. Thus, as per the termination letter, he was paid salary for the two months and one month in lieu of notice being Kshs.45, 000.00. The claimant urged that he was entitled to gratuity at 31% for the 2 years and one month served. The claimant relied on the Constituencies Development Fund circular dated 24.06.2013 which prescribed gratuity at 31% of salary over the period served. Further the claimant urged that the contract had been automatically renewed and he was entitled to be paid for the remainder of the 11months of the 3<sup>rd</sup> year of service. The claimant further testified that he was underpaid because under the circular he was entitled to enter at a salary of Kshs. 19, 323.00 per month, for 2<sup>nd</sup> year to earn Kshs. 21, 304.00 per month, and Kshs. 21, 304.00 per month for the 3<sup>rd</sup> year. He urged the court to award him Kshs. 578, 684.00 for the underpayment, gratuity and 11 months not paid. He also prayed for the costs of the suit.

The respondent's witness was Samuel Wanderi (RW), the respondent's Fund Manager. RW testified that the claimant worked in Kieni for 2 years and one month. RW stated that the circular in issue was implemented in the middle of June, 2013 and it was to apply to future cases, at the discretion of the CDF Committee, and not to past cases like that of the claimant. RW testified that the claimant's employment was governed by the letter he had signed and not the circular.

The court has considered the pleadings, the evidence and the submissions and makes findings on the issues for determination as follows:

1. The **1<sup>st</sup> issue** for determination is whether the circular dated 24.06.2013 applied to the claimant's service. The court finds that the circular was issued long after the claimant's employment by the letter dated 30.06.2011. At termination of the claimant's employment, the court finds that the provisions of the circular had not been incorporated into the claimant's contract of service. The court finds that the circular did not apply retroactively and the same did not affect the claimant's service. Accordingly, the court finds that the prayers for gratuity and underpayment based on the circular will fail.
2. The **2<sup>nd</sup> issue** for determination is whether the claimant's contract automatically renewed into the 3<sup>rd</sup> year of service. The letter of appointment stated that the appointment was for one year renewable contract. In absence of any other material before the court, the court finds that the contract automatically renewed into the 3<sup>rd</sup> year of service by conduct of the parties.
3. The **3<sup>rd</sup> issue** for determination is whether the claimant is entitled to be paid the 11 months not served in the 3<sup>rd</sup> year and due to the respondent's premature termination of the claimant's employment. The claimant relied on the judgment by Onesmus Makau J. in **Mwanajuma Juma Kunde –Versus- Kaps Municipal Parking Services Limited [2013]eKLR** where the claimant was awarded salary for the unexpired period of the fixed term contract. The court follows that decision and awards the claimant **Kshs. 165, 000.00** at **Kshs.15, 000.00** per month. While making that finding, the court further finds that the termination of the claimant's employment

was unfair because it was premature and in breach of the agreed term of service.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The respondent to pay the claimant **Kshs. 165, 000.00** by 1.2.2015 in default, interest at court rates to be payable until full payment.
2. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 19<sup>th</sup> December, 2014.**

**BYRAM ONGAYA**

**JUDGE**