



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 928 of 2010**

**KENYA UNION OF COMMERCIAL FOOD**

**AND ALLIED WORKERS .....CLAIMANT**

**VS**

**MWANA BLACK SMITH LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

By an undated Memorandum of Claim filed in Court on 17th August 2010 and a Supplementary Memorandum dated 30th September 2011, the Claimant sued the Respondent on behalf of Kenneth Ouma Obonyo (hereinafter called the grievant) for unfair termination and failure to pay terminal dues.

The Respondent filed a Memorandum of Defence on 21st September 2011 and the matter proceeded for hearing on 29th October 2012. Mr. Egesa instructed by the Kenya Union of Commercial Food and Allied Workers Union appeared for the Claimant while Mr. Mbichire instructed by Mbichire & Co Advocates appeared for the Respondent. The Claimant and Charles Asiaba on behalf of the Respondent gave sworn evidence and both parties filed written submissions. Charles Asiaba clarified that Mwana Blacksmith is not a company but a business name under which he runs a shop.

**The Claimant's Case**

The grievant, Kenneth Ouma Obonyo, testified that he was employed by the Respondent as a night guard at a monthly salary of Kshs. 3,000 effective 16th January 2001 until 3rd March 2009 when he resigned, by written notice which was not produced in Court. The grievant's salary was paid by voucher. The grievant left the Respondent's employment because the Respondent failed to raise his salary. It was the grievant's evidence that he used to work for seven days in a week and he never took leave.

The Claimant therefore claimed the following on behalf of the grievant:

- a) Salary for 3 days worked in March 2009.....Kshs. 728.30
- b) Gratuity for 8 years @ 18 days for each completed year of service.....37,326.20
- c) Leave traveling allowance (850x8 years).....6,800.00
- d) 384 off days.....234,404.20
- e) 33 public holidays.....20,401.90

f) Salary underpayment.....268,416.00

### **The Respondent's Case**

In its Memorandum of Defence the Respondent denied any employment relationship with the grievant. According to the Respondent, its business is situated in premises owned by the Kiruga family (known as Kiruga Complex) and the landlord had contracted a private security firm to provide security for the Complex.

Charles Asiaba told the Court that the grievant used to wash motor vehicles at a fee for many persons around the Complex. For all the time that Asiaba knew the grievant from 2005 when he opened his shop the grievant was not employed by any particular person. He would wash motor vehicles for many people, including Asiaba, at a fee.

The Respondent further denied meeting union officials or any conciliator over this case.

### **Findings and Determination**

The major issue for determination in this case is whether there existed an employment relationship between the grievant and the Respondent.

Section 2 of the Employment Act, 2007 defines an employee as:

***a person employed for wages or a salary and includes an apprentice and indentured learner***

The same section defines an employer as:

***any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual***

A contract of service is defined as:

***an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership***

The question then is whether the grievant was an employee of the Respondent as defined in the Employment Act, 2007. Before dealing with this issue, I need to dispense with the identity and description of the Respondent. In his sworn evidence, Charles Asiaba told the Court that Mwana Blacksmith is not a company but a business name. In law, a business name is not a legal entity capable of suing or being sued. However, no preliminary objection was taken on this issue and the Court therefore deemed Charles Asiaba trading as Mwana Blacksmith as the Respondent in this case.

That settled, I will now deal with the status of the Claimant vis a vis Charles Asiaba. The Claimant did not produce a single document to prove an employment relationship between the grievant and the Respondent, not even the letter of resignation which the grievant claimed to have written to the Respondent.

An employment relationship has serious implications on the parties. The Court must therefore be fully satisfied that it actually exists. A Claimant claiming employment rights must prove the existence of an employment relationship.

In the case of **Mary Mmbone Mbayi Vs Chandubhai Patel & Another (Industrial Cause No. 761 of 2011)** this Court stated that:

***Even in cases where there may be no documentary proof of an employment relationship or termination thereof, the Claimant retains the burden of proving their case through viva voce evidence.***

The Claimant did not adduce any evidence to prove the existence of an employment relationship between the grievant and the Respondent. The Claimant's entire claim therefore fails and is hereby dismissed.

The Claimant Union will pay the costs of this case.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF FEBRUARY 2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**