



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

**CAUSE NO. 22 OF 2012**

**(Nairobi Cause No. 1139 of 2011)**

**PATRICK NGUTHIRU GICHUKI ..... CLAIMANT**

**VERSUS**

**DAVID DENNY ..... RESPONDENT**

**J U D G M E N T**

This matter proceeded ex parte on 20th February, 2013 after the court became satisfied that the defendant despite every effort being made to get him involved in this suit neither filed any response to the claim nor attended court to defend the same.

The claimant by his memo of claim filed in court on 13th July, 2011 avers that he was an employee of the respondent the latter having retained him to do maintenance in water systems, electrical services, painting, joinery and all other services connected with general maintenance at a daily wage of Kshs.500 per day from November, 2005 to January 2008. The claimant annexed payment vouchers (PNG-2(a), (b) and (c) ) to vouch for this.

However in paragraph 1.5 of the memorandum of claim the claimant avers that from December, 2004 to December, 2005, while working for a company called Electrical Services the company was assigned masonry, carpentry, joinery and electrical works for the house the company was building for the respondent. It is therefore unclear under what circumstances the respondent retained the claimant. It is not clear whether the claimant stayed back as an employee of the claimant or an agent of Electrical Services Company. The matter having proceeded ex parte, the court is obviously in difficulty regarding this aspect.

According to the claimant, he commenced duties from 7.30 a.m till 5.30 p.m with a lunch break of 30 minutes between 12.30 p.m and 1 p.m Monday to Saturday. He worked for similar hours during public holidays.

The claimant further averred that his daily wage was reduced from Kshs.500 to Kshs.350 between February, 2007 and January, 2008 without assigning any reason and that his services were terminated thereafter under circumstances he described as unjustifiable.

As a consequence the claimant seeks the court's intervention to order the respondent to pay his terminal dues which include leave days, unremitted NSSF dues, unpaid salary for 4 months, tools allowance, one month's pay in lieu of notice and maximum compensation for unlawful/wrongful dismissal.

At the hearing, the claimant testified that he currently works at the Red Court Hotel as a carpenter but

prior to that he worked in Nyeri as a carpenter and joinery and painting works artisan with the Electrical Company which he testified was a construction company working at Mount Kenya Safari Club Nanyuki.

It was his evidence that the respondent asked the Electrical Company to construct a house for him at Mount Kenya Safari Club. When the house was complete the respondent requested for a maintenance person and he offered himself for the job and was given.

He stated that his daily pay was Kshs.500 but later reduced to Kshs.350 from February 2007 to January 2008.

The claimant stated that he never went on leave during his employment by the respondent.

In order to determine this dispute the court would have to resolve three fundamental questions. First, was the claimant an employee of the respondent or the Electrical Services that seconded him to work for the respondent? If the claimant was an employee of the respondent, was he a casual/daily wage employee or a month to month employee and finally were the circumstances of his termination unfair or unlawful in accordance with the Employment Act.

With regard to the claimant's employer, the claimant himself testified that while in employment of the Electrical Services Company, the Company was contracted to undertake masonry, carpentry, joinery and electrical works for a house it was constructing for the respondent. It was upon the completion of the house that the claimant states he was asked by the respondent if he could provide maintenance services for the newly constructed house.

The claimant did not produce any letter of appointment showing he was a former employee of Electrical Services neither did he produce any certificate of service to that effect. One curious fact the court noted was that the claimant left a monthly wage of Kshs.24,000 that he was being paid by the Electrical Service Company to settle for a mere Kshs.10,500 per month pay calculated at a daily rate. This issue remains unclear but this is solely attributed to the fact that the matter proceeded undefended.

If it may be assumed that the claimant was an employee of the respondent, was he a casual employee or a month to month employee? The claimant in his pleadings and evidence in court testified that on completion of the house, the respondent retained him on a daily wage of Kshs.500 per day. To support this, the claimant attached payment vouchers marked "PNG-2(a), (b) and (c)" (Apparently (c) was missing).

The two petty cash vouchers were both dated 22nd October, 2007 purporting to pay the claimant salary for November and December, 2007.

Salaries are usually paid in arrears and not in advance hence it should be curious that the claimant's was being paid two month's salary in advance without any special reason. Besides whereas the claimant claims he was on a daily wage of Kshs.500 nothing has been exhibited to vouch for this.

It is a settled rule of evidence that a person who seeks from any court or tribunal a determination in his or her favour must provide that court with sufficient evidence to persuade such court or tribunal that whatever is being claimed more probably took place than not. It does not have to be proof beyond reasonable doubt as in criminal cases but it ought to be such proof that any reasonable person listening to the testimony or reviewing the evidence will be more inclined to reach the conclusion that the event being alleged indeed took place.

Whereas this case proceeded as undefended cause, it did not imply that the burden of proof incumbent on the claimant was lowered. It still remained his responsibility to bring before the court sufficient evidence to prove his case against the claimant.

Having reviewed the facts and the evidence as above the court reaches the conclusion that the evidence and testimony before it was below the required threshold. It may well be true that the claimant's claim is

merited but the court becomes of little help where evidence in support of the claim is either weak or insufficient. In the circumstances the court reaches the conclusion that the claimant has failed to prove his claim to warrant granting the reliefs sought and the same is hereby dismissed with costs.

It is so ordered.

Dated at Nyeri this 10th day of April, 2013.

**Abuodha J. N.**

**Judge**

Delivered this 10th day of April 2013.

**Abuodha J. N.**

**Judge**

**Delivered in open Court in the presence of Kubai for the Claimant and Absent for the Respondent.**

**Abuodha J. N.**

**Judge**