



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1424 of 2011**

**DAVID MAINA NDEGWA.....**  
**CLAIMANT**

**VERSUS**  
**AMON NJATHI NJUGUNA.....**  
**.....RESPONDENT**

Mr. Mwaniki for the Respondent

**AWARD**

This claim for unresolved dispute was brought by way of a Memorandum of Claim dated 23<sup>rd</sup> August 2011 filed on 24<sup>th</sup> August 2011. The claim is for severance pay in the sum of Kshs.117,500 and payment in lieu of leave in the sum of Kshs.164,500.

The basis of the suit is that the Claimant was employed by the Respondent on 1<sup>st</sup> October 1962 and served the Respondent with loyalty and diligence until January 2009. That when he stopped working for the Respondent he was not paid any terminal benefits. That though he did not have a letter of appointment, he was paid a monthly salary of Kshs.60/= . He worked initially at Kiambia in Kiambu and was later transferred to a Tea farm in Gatundu. That he was provided with an appointment letter dated 4<sup>th</sup> January 1971. At the time he stopped working in 2009, he earned Kshs.5,000/= per month. His employment was terminated when he complained that he was being paid too little. He was a squatter in the Tea Farm and his children who are all adults work and live in the farm.

He told the court that when he stopped working he was not paid any severance pay and therefore, seeks payment of gratuity at the rate of 15 days salary for each completed year of service. He also told the court that he was never granted leave all the years he worked for the Respondent though he worked six days a week. He rested only on Sundays.

He said further that, he tilled the farm and picked tea. He had been promised payment of terminal benefits but he kept going to ask for it until he got tired.

He denied that he stopped working in 1975 as alleged by the Respondent insisting that he left his employment in 2009.

The Respondent filed a Statement of Response wherein he denies the claim for terminal benefits by the Claimant. He states that the claimant worked for him between 1962 upto 1975 when he left to work as a watchman elsewhere. He added that he paid the Claimant all his dues when he left in 1975.

The Respondent pleaded that the Employment Act of 2007 is not applicable to this case because his employment ended in 1975. Furthermore, the precursor to the Employment Act, 2007, Cap.226 of the Laws of Kenya came into force in 1976 after the employment of the claimant had ceased in 1975. The Respondent states also that he was never served with a notice of intention to sue and refutes the claim in its totality.

The claimant called one Rufus Mathe in support of his case. He told the court that he knows the claimant well and that he came to live at Mundolo as a worker in 1969. That he worked in a Tea Farm and later came to work at Mundolo Camp and in the Forest. He told the court that though he could not remember well, the last time he saw the claimant in the Tea Farm was in 1995. He did not know the owner of the Tea Farm.

The Claimant also called Morris Karanja Gatumbi. He said he met the claimant in 1975 at Mundolo Camp. That he lived there in a farm. That he did not work together with the Claimant but he stopped seeing him in 2008. That he was a friend of his son by name of Ndegwa. He told the court that the claimant worked for the Respondent all the time until he stopped seeing him in 2008. Under cross-examination, he said he used to visit the claimant's son at the Tea Farm and it was then when he used to see the Claimant regularly. He did not know when he left the farm.

The first witness for the Respondent was Mr. Amon Njathi, the son of the Respondent. He told the court that he knew the Claimant for a long time. He found him at his father's farm and does not remember when he was employed. His wife used to pay the Claimant. He told the court that the claimant was paid all his dues. No employment records for the claimant were produced.

The 2<sup>nd</sup> witness for the Respondent was Mr. Dominic Munyao. He told the court that he worked for the Respondent since 5<sup>th</sup> March 2002 in his home at Kiambu. He told the court that he never met the claimant though he regularly visited Mundolo Farm to deliver farm supplies and fertilizer. He added that he knew his children. He denied that the Claimant worked till 2009.

The other witness was Mr. Ndegwa Maina, who told the court that he was a brother of the claimant. He said that he has a personal problem with the claimant since he came to court as he does not support his case because the claim is false.

He told the court that he used to be at the Mundolo Farm with the claimant but in 1969, he went to Rift Valley and only came back in 1980 with his family. He told the court that he did not find the claimant at the farm then. He was at the time a watchman at Mundolo Camp. He lives at the Farm todate. He did not know if the claimant was fully paid but he visited regularly to be paid his terminal dues. Under cross-examination, he insisted that between 1985 to 1990 the claimant was a watchman at the Camp and that he left for Murang'a in 1993 and never came back.

### Analysis

It is common cause that the claimant was employed by the Respondent in 1962, but there is a dispute as to when he stopped working for the Respondent. The Respondent states that the claimant stopped in 1975, whereas the claimant asserts that he stopped working in 2009.

The significance of the date is important in two fold;

Firstly, if the court found that the claimant stopped working in 1975, it would mean that the claim is statute barred and the court lacks jurisdiction to entertain it. If on the other hand the court found that the claimant worked till 2009, it would mean that the claim filed on 24<sup>th</sup> August 2011 was filed within 3 years since the cause of action arose and the claim was therefore filed within time.

Neither party has produced any documentary evidence in support of the different versions told but there is a common thread that at some point, the claimant left the Respondent's farm and worked as a watchman at Mundolo Camp.

That he used to visit the farm to be paid his terminal dues until he eventually left for good to Murang'a. That this claim did not feature until the year 2011 when the claimant through Kituo Cha Sheria wrote a demand note to the Respondent on 19<sup>th</sup> April, 2011.

Until the Employment Act 2007 was enacted, there was no obligation on an employer to pay severance pay unless the same was provided in the contract of employment and/or if the employer declared the employee redundant in terms of Section 40 of Cap.226 (now repealed). This being the case, the Claimant would only be entitled to severance pay from 2007. According to his evidence, he stopped working in 2009 and therefore would be paid 15 days salary for three years in the sum of Kshs.7,500/=.

With respect to payment in lieu of leave, there is no explanation why this was not demanded for the many years the Claimant worked for the Respondent. It is upto the Claimant to prove that he had not taken leave days he was entitled to but the Respondent is obliged to keep records of the Claimant in this respect to disprove the claims made. No such records were produced mainly because the Respondent stated that the Claimant left employment in 1975, many years ago and that there was no claim made in respect of leave when he left.

Going by the version of the Claimant which the court finds more plausible, the court would restrict this claim to a maximum period of three years from the date the case was filed which period falls within the limitation period provided under Section 90 of the Employment Act, 2009.

Accordingly, the court finds that the claimant is entitled to payment of 21 days in lieu of leave for the year 2009 in the sum of Kshs. 5,000/=.

In the final analysis, the Respondent is to pay Kshs.12,500/= plus costs of the suit to the Claimant.

**It is so ordered.**

**Dated and Delivered** in Nairobi this 24<sup>th</sup> day of May, 2013.

Mathews N. Nduma  
**PRINCIPAL JUDGE**  
**INDUSTRIAL COURT**