



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF NAIROBI**  
**CAUSE NO. 1688 OF 2012**

**CHRISTINE ADOT LOPEYIO ..... CLAIMANT**

**VERSUS**

**WYCLIFFE MWATHI PERE ..... RESPONDENT**

**JUDGEMENT**

This is a claim dated 19<sup>th</sup> September 2012 by the claimant Christine Adot Lopeyio for unlawful, unprocedural and unfair termination by the respondent Wycliffe Mwathi Pere. The respondent filed his defence dated 2<sup>nd</sup> November 2012 and denied that the claimant was his employee and that he never terminated any employment with her but admitted that the claimant was his tenant in his house in Ongata Rongai. In evidence the claimant gave her sworn statement whereas the respondent gave his sworn evidence and called two witnesses Patience Kisiwani and Daniel Saningo Lepakuo.

In the claim it is stated that the claimant was the employee of the respondent for 9 years until 23<sup>rd</sup> July 2012 and that during her employment she was never paid a house allowance or given any reasons for termination and annual leave. That for the entire duration of her employment, the claimant not given any reason for termination nor was she given notice before her termination as required in law and claim 1 month salary in lieu of notice amounting to kshs.7, 500.00, withheld salary at Kshs.7, 500.00 and failure to be provided with house allowance who was within a walking distance to and from work and commuter allowance all amounting to Kshs.5, 000.00 per month and for the 9 years all dues being kshs.540, 000.00.

That for the entire duration of her employment, the claimant was never given annual leave which was an infringement of her rights and demand compensation at Kshs.7,500.00 per year and for the 9 years all amounting to Kshs.67,000.00. that the claimant had hoped to work until age 60 which was cut short by her termination and therefore for the remainder of her 20 years she now claims Kshs.7,500.00 per month all amounting to Kshs.1,800,000.00 and further claim compensation for unfair termination at kshs.90,000.00.

In evidence the claimant stated that she was employed by the respondent since 2003 as a Care Taker of his rental houses along Mayor Road in Ongata Rongai where she was also accommodated in one of the houses as a tenant with her husband and children. That she would assign houses to potential tenants, collect rents, clean the compound and attend to other duties as assigned by the respondent like collecting his newspapers, medicine and shopping as a messenger. That her salary was Kshs.7, 500.00 per month from which the respondent deducted Kshs.4, 500.00 for rent an income was thus kshs.3, 000.00.

That on 22<sup>nd</sup> July 2012 the respondent directed the claimant to lock Patience's house as one of the tenants who had arrears which she was unable to do since there were young children in the house and their mother was not there to which the claimant stated that the respondent became enraged for failure to

comply with his directions. That subsequent the house was locked but Patience went to the respondent and her house was opened and following this the claimant refused to attend to any other matter concerning this tenant to avoid getting in between her employer and the tenant. That the respondent then ordered her to pack her belongings and leave the respondent premises. That on 23<sup>rd</sup> July 2012, the respondent forcefully evicted the claimant from his house but the claimant refused since she had not been paid her salary after the termination and she was threatened with harm.

Following this the claimant stated that she went to the respondent house on 31<sup>st</sup> July to demand her salary which he refused to pay and thus went to the Labour officer to report the matter. On 2<sup>nd</sup> August 2012, the Chief gave her summons to vacate the respondent premises. She kept the records she had taken when she was taking rents.

She now claims for dues not paid to her upon termination, no NSSF and NHIF were paid and seek compensation. That she was also reported to the police but she was not arrested or charged and that the monthly salary she received was not a commission since she was an employee and not on commission basis. That she never carried out any business at the premises for sale of water or vegetable and her employment with eh respondent was her only occupation.

She further claimed that she was not given notice before the termination or paid for her service years or given reasons for her termination as her contract was not written. That due to eh termination, her children who were in school had to drop out as she could not afford their fees and she was adversely affected as she would have worked until age 60 and this was broken and demand pay for 20 years until she is 60 years.

In cross-examination, the claimant confirmed that she was working for the respondent as his tenant where she started in a single room and then moved to a bigger house. That she kept records for all collections of rent that she made but did not issue receipts to the paying tenants. She was married to Peter who was noted on the rent register. That she would work from 6a.m. to 10p.m. every day collecting rent, cleanliness of the compound and give security at the premises. That rent was paid by 7<sup>th</sup> of the month which was submitted to the respondent and also perform other duties.

That she was unfairly terminated and told to vacate the respondent premises but this was not outlined in the claim. The claimant also admitted that her husband was the one selling water at the premises, there was a kiosk at her door that was run by her daughter after discussing with the respondent. That she vacated the respondent premises after summons from the Chief.

The respondent on the other hand pleaded that he was a landlord in Ongata Rongai and that the claimant was his employee who occupied one of his houses but at no time was employed by him. That she became his agent collecting rent from other tenants as a commission that was noted into eh rent book. That in consideration the claimant occupied one of the houses but never paid rent as well as allowed her to operate a water business and a kiosk within the premises. That when the claimant reported the matter to the Labour officer in Nairobi and Kajiado, he presented himself before these officers but before conclusion, the claimant filed this matter in court.

In evidence the respondent stated that he is a business man and a landlord and since 2002 he has had close contact with claimant as he rented her a house an made her his agent where she would collect rent and received a commission, housing free and was allowed to run her private water and kiosk businesses at the premises without pay. That as his agent the claimant agreed to collect rent on behalf of the respondent and to keep the premises clean duties which would only be done at the end of the month. That over time there would be mistakes and they would seat and agree. That he undertook a water piping project and gave the business to the claimant to run but pay the dues owed to Nairobi City Council and all other proceeds would be her own. That this business was run by her whole family, the husband and children included. That she also had a kiosk business that was operated by Janet her daughter. That the respondent was not concerned with these business activities as the claimant was his care taker only to collect rent and to keep records as his agent.

The respondent further stated that on 23<sup>rd</sup> July 2012 the claimant reported that one tenant had failed to pay rent and that he should talk to this tenant and upon further enquiry he realised that there were 3 months' rent due and when he asked the tenant [Patience] she admitted and allowed the claimant and Patience to go and resolve the matter. That this made the claimant angry noting that the respondent had failed to resolve the issue and she then told the him she no longer wanted his job and in future she was going to refer all tenants to him.

The respondent then went to the Chief who summoned the claimant and refused to account for collected rent and demanded that her services be paid for as she was not keen on being his agent any more. The matter was also reported to the Labour officers in Nairobi and Kajiado.

That the respondent examined all his records and noted that there was rent missing and he reported the matter to the police to cause the claimant to pay his money but before this could be resolved, he was summoned in court.

That the claimant was an agent and cannot claim leave or the non-payment of salary since she was on commission and was given free housing. That notice or payment in lieu was not applicable in her case nor was the respondent responsible for her NSSF or NHIF dues. That since the claimant refused to be her agent and informed the Chief, the respondent had no other alternative that to ask her to vacate his house.

In witness the respondent called Patience Kisiwani a tenant at the respondent premises in Rongai who stated that she knew the claimant well as Mama Tony as she was allocated a house by her as the agent of the houses and was placed in Block C and paid her rent to the claimant. She was never given a receipt and did not see any rent book where her payments would be recorded. But she gave all her monthly payments to the claimant. That the claimant was also selling water at the premises, by herself, her husband of children. She also had a kiosk on the premises. That the claimant closed her house and told her to go and discuss with the respondent to have it opened. That she had arrears for several months, she went to the respondent with kshs.2000.00 and was told to go and see Mama Tony who was responsible for rent collections.

That when she asked the claimant to open her house, she got angry and said that she no longer wanted to do that kind of work anymore. That was the agent of the houses; the claimant felt that she was not able to decide whether to open or close the houses as the respondent was not decisive. That since 2010 when she became a tenant at the premises, she noted that the claimant was collecting rent of rate respondent but no other duties.

In cross-examination the witness could not confirm the nature of relationship as between the claimant and the respondent since she was not sure if she was an employee or was on contract. She however admitted that the claimant was selling water and running a kiosk at the premises as her private businesses.

Daniel Lepakuo Saningo also gave evidence that he was a resident of Rongai and a pastor there and was a tenant of the respondent. That he knew Mama Tony [the claimant] as the agent of the premises; she would allocate houses and would remove those who did not pay rent. He did not have a tenancy agreement but was recorded in a book by the claimant. That the claimant sold water and vegetables at the premises and would supervise these business that when being run by her husband Peter or daughter. That the claimant has since vacated the premises but the witness did not know the reasons.

Under Kenyan law, an employee has been defined under Section 2 of the Employment Act as;

***“Employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;***

An employer has also been defined under the same section to mean;

***“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman,***

***manager or factor of such person, public body, firm, corporation or company;***

Therefore, an employee and an employer may enter into a contract of service as;

***... an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;***

Therefore, under the law an employee is defined to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The section also defines employer to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

Equally, under the Employment Act, 2007 in Section 2 it defines a “**Contract of Service**” to mean an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of the Act applies.

These are important provisions for consideration in this matter as the relationship between the claimant and the respondent is in issue. And there are important questions here as to whether the relationship between parties’ amounted to a ***contract of service*** or ***contract for service***, and on this finding what the rights of the parties herein were and the basis of the claimant’s case.

The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact but also noting that most contracts for service are not written, the facts of each case are paramount and worth consideration as to the intentions of the parties to such a contract. This is more so due to the fact that in law a contract of service is well outlined with fundamental protections as this is clearly defined under the Employment Act, 2007 unlike the other contract for service. This is more so in view of the definitions of ***employee***, ***employer*** and ***contract of service*** under the Employment Act, 2007 and the Industrial Court Act, 2011.

This differentiation relate to very fundamental issues noting that under a contract of service it customarily relates to an employee who is ***subordinate*** or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner. Thus there is a constant thin line that is drawn between self-employed or independent contractors in a contract for service, and, employees in a contract of service. There is however no agreed-upon definition on the determinant factors that fundamentally set the differences between the two types of contracts but the fact of each case must be carefully looked at.

In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise ‘employment’ as against what constitutes ‘service’ in case of contracts of service as contrasted with contracts for service. They include the following:

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.
- b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
- c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
- d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages,

and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

These tests are however not to be seen exclusively by themselves as they only serve as a guide based on the facts of each case. They are however a good guide to the issues as in this case.

Under Section 2 of the Employment Act, 2007, ‘**contract of service**’ is a necessary ingredient in the definition of ‘**employer**’. As the court’s jurisdiction is open to employees and employers, its jurisdiction is available in both instances of contracts of service and contract for service. In this case, based on this definition and the outlined tests above I note the claimant was not solely under the control of the claimant as a Care Taker and or agent of his business in rent collection, cleaning of his premises or security.

As stated in evidence the claimant confirmed that since 2003 she has been collecting rent for the respondent but could not clearly outline how her daily duties were undertaken clearly an indication that she was not solely under the control of the respondent. This Court also takes note of the predominant practice among landlords and landladies where they take one tenant as their agent in utter disregard of the subsequent consequences of such undocumented relationships. Even where commission is payable, this must be clearly outlined for the avoidance of doubt. That as it may, I find that the claimant was not solely under the control of the claimant to claim that she was an employee as under a contract of service. Hers was simply a contract for a service that was occasional and she was fully compensated for her service to the respondent by free accommodation, and payment of a commission that is fully acknowledged. For her records, the claimant kept the rent book but in this rent book, her wages, salaries or allowance are not noted. This meaning that she was not salaries as an employee under a contract of service would as if this were so, she would have been vigilant to note and or record and make her claims for any outstanding dues well before her relationship with the respondent became sour.

On the other limb, the claimant was not subjected to any particular rules and procedures of the respondent. In her evidence she stated that she could clean the respondent premises occasionally, but she was not equally prevented from undertaking any other tasks that were personal or of her own choice noting the duties and or services she performed for the respondent.

It is also evident that the claimant was economically not dependent upon the respondent; her services were only part of her economic activities. Though contested, the claimant admitted that there was a water business that her husband Peter was running at the premises, there was a kiosk next to her door run by Janet her daughter and that she did run these activities or their activities were run with the knowledge of the respondent for the sole benefit of the claimant. No dues were remitted to the respondent as a principal on whose behalf the water or kiosk business were operated for. The claimant had her independence to operate or run her activities in exclusion of the specific services she rendered to the respondent.

On the mutuality of service, and noting the intentions of the parties herein, I note that the practice as between the claimant and the respondent is one of a tenant collecting rent for and on behalf of the landlord as an ‘agent’ is rife and is acknowledged. This however does not confer the same definition as outlined under section 2 of the Employment Act or the Industrial Court Act, as an employment or contract of service; rather it stands out as a contract for a service.

**Therefore, based on this analysis, I find the claimant does not fit into the definition of an employee as under the Employment Act or the Industrial Court Act, and is not entitled to the remedies sought.**

**Though the respondent stated that he was owed money by the claimant for unremitted rents collected, there was no counter-claim to the defence. I will not go into this.**

**I will therefore dismiss the claim herein and direct the claimant to pay the respondent 50% of his costs herein.**

Delivered in open Court this 10<sup>th</sup> day of July 2013.

**M. Mbaru**

**Judge**

In the presence of

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