



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1013 OF 2010

SAMUEL NALIANYA ANZIYA CLAIMANT

-VERSUS-

CHUMATECH COMPANYRESPONDENT

Mr. Ashiruma for the Claimant.

Mr. Wagalla for the Respondent.

JUDGMENT

This suit was filed on 3rd September, 2010 by way of Memorandum of claim dated 30th August, 2010.

The Claimant seeks compensation for unlawful and unfair termination and in addition payment of terminal benefits to wit;

- a. *Service gratuity at the rate of 30 days pay per every year worked for 11 years in the sum of Kshs.121,000/;*
- b. *One month salary in lieu of notice in the sum of Kshs.11,000/=;*
- c. *Payment in lieu of leave for 5 years in the sum of Kshs.55,000/=; and*
- d. *Interest on the award and costs of the suit.*

The suit is premised on the following factual assertions by the Claimant;

That he was employed by the Respondent in March, 1999 as a Gas Technician with a starting salary of Kshs.8000/= per month which was subsequently increased to Kshs.11,000/= per month.

That the Claimant's work involved installation and maintenance of gas tanks for institutions and organisations which was the core work of the Respondent Company.

That his employment was on a permanent basis though the Respondent did not provide him with a letter of appointment.

The Claimant produced a letter dated 22nd April, 2006 which he states confirms his status with the Respondent. The letter reads;

“To whom it may concern”

This is to advise that Mr. Samwel N. Anziya I.D No. [Particulars Withheld] currently works at above company.

For further information contact the undersigned. Please note that this letter is for identification purpose only”

The letter is on the letter head of the Respondent and the name of the

Respondent is printed on top as “**Chumatech Company**”. It is signed by one N. A. Owuor.

The Claimant states that he used to travel around the country in the course of his duties to install and service gas tanks for the Respondent’s clients. He presented appendix 2 to the Memorandum of claim, a bundle of complementary slips issued to him by the Respondent with a view to introduce him to the various institutions he visited for defined works.

The slips are dated 18th December, 2006; 10th September, 2009; and 10th November, 2007. The work he was to carry out and the identity of the customers to receive his services are disclosed in the said slips. It is apparent from the slips that the work to be carried out was with respect to gas tanks and for companies dealing with supply of liquid gas.

The Claimant’s employment came to an end on 24th December, 2009. The manner in which it came to an end is the subject of this dispute, the Claimant alleging that, his employment was verbally terminated by Mr. N.A. Owuor, the owner of the company whereas the Respondent alleges that the Claimant was given Christmas leave on the said 24th December, 2009 and did not return to work again hence he absconded from duty.

The Claimant asserts that the termination of his employment was unlawful and unfair.

That this followed his persistent request to be paid the salary for October and November, 2009 which was still in arrears.

That he was paid a sum of Kshs.8,000/- via Mpesa as part payment of the arrear salary and when he reported to work, he was told that he would be informed when to return but that did not happen until he looked elsewhere for employment.

The Respondent filed a Statement of defence on 12th May, 2011. The Respondent alleges that the Claimant was employed from time to time on casual basis as a general labourer.

That he was not a technician as such but performed various manual jobs including painting, laying of pipes, digging trenches and carrying equipment among others.

The Respondent called two witnesses who testified under oath. The first witness was **Mr. Nelson Atieno Owuor** who told the court that he was a sole proprietor trading in the name of the Respondent as a contractor.

That he was contracted to do various projects for different duration. That these were mainly by gas companies and institutions that used gas.

That he would employ the Claimant from time to time as a casual to work in these projects for periods of up to three (3) weeks or less. That he was not employed on a monthly basis and it was therefore not

necessary to give him a letter of appointment. That he was not entitled to leave days as he did not work continuously and is also not entitled to payment of gratuity as his work was not continuous.

He admitted that the Claimant started working for him in March, 1999. He also agreed that he initially paid the Claimant Kshs.8,000/= per month.

He also told the court that the Claimant reported to work in the morning and would go home at 5 o'clock in the evening. That he reported to a supervisor while working. That the work was on and off for a period of about six (6) years and not eleven (11) years as the Claimant alleges.

He admitted that he sent the claimant to various stations all over Kenya rather than recruit casuals locally because it was easier to do so, and since the clients had specific needs, it was necessary to have a reliable person.

He further stated that he paid the salary of the Claimant weekly depending on the length of time taken to work.

The Respondent added that he did not have any work registers as he destroyed them after every two years and that keeping registers was tedious yet he was a sole proprietor.

He admitted that he sent Kshs.8,000/= via Mpesa to the Claimant in December, 2009 but insisted this was transport from Kakamega to a work station in Kericho and was not for payment of salary arrears as alleged by the Claimant.

When pressed further, he denied this was advance payment stating that it was normal to send the Claimant transport expenses to travel back to work.

He denied that the Claimant was a technician insisting that he was a general labourer.

The 2nd witness was **Mr. Billy Okoth Okade**. He told the court that he was a mason and had previously done piece work jobs for the Respondent.

He said that in December, 2009 he worked for the Respondent at the airport in Nairobi and later in Kericho. That Mr. Nelson Owuor, himself and the Claimant went to Kericho in a self-driven pick-up vehicle.

At Kericho, the weather was bad as it was raining and Mr. Nelson Owuor gave them Christmas leave. He came back in January, 2010 but the Claimant did not return.

He completed the work with the assistance of casuals. He told the court that the Claimant's work was to paint and do plumbing work and he had first met him in Kericho in the year 2009.

That the Claimant had informed him that he was an employee of the Respondent but had a problem in getting his salary paid. This was at Finleys project.

The witness did not know if the Claimant worked on contractual basis as was the case with him. He said upon installing the gas tanks, the claimant would paint and do plumbing work from the generator to the tank.

The witness employed his casuals but the Claimant was employed directly by the Respondent.

Evaluation of Evidence.

It is clear that the Claimant and the Respondent had a long working relationship. The Claimant being an employee and the Respondent his employer.

Though the Respondent says that the Claimant was a general labourer, which is denied by the Claimant, both witnesses for the Respondent were in agreement that the Claimant mainly painted gas tanks and laid pipes between the gas generator and the gas tanks.

Clearly this is work of a technical nature consistent with the job title and description given by the Claimant.

The Claimant told the court that he had learnt the job of a gas technician through experience of eleven (11) years. That it was a very risky job as gas was very volatile and inflammatory and he was well qualified to do the job. The Claimant denied that he was employed to paint, and added that even before he joined the Respondent he worked for a company called **Nationwide** and its core work was plumbing and gas operations.

The Claimant insisted that he was sent home because he had asked to be paid his salary arrears.

Issues for determination.

1. Was the claimant a casual or permanent employee?
2. Was his employment unlawfully terminated or did he abscond from work?
3. What remedies if at all are applicable to the Claimant?

Issue I

First, **Section 9 (1)** of the Employment Act, 2007 provides

“**A contract of service –**

(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months;

Shall be in writing.”

From the evidence adduced, it is clear the Claimant worked for the Respondent for about eleven (11) years performing similar work contracted for by the Respondent. It matters not that the work was done for different clients. The bottom line is that the Respondent had consistently been contracted to install gas tanks which work required the services of the Claimant and others for a long period of time.

The Respondent did not find it necessary to provide the Claimant with a written contract. The Respondent violated the provisions of **Section 9 (b)** in this regard and in terms of **Section 10 (7)** the burden of proving or disproving an alleged term of employment stipulated in the contract lies with the Respondent.

The Claimant has alleged in a clear and consistent manner that he worked as a gas technician for the Respondent continuously from March, 1999 up to 24th December, 2009.

The Respondent has provided a feeble response to this evidence by the Claimant.

The Claimant has in the circumstances established on a balance of probabilities that he was in fact not a casual but a permanent employee for a period of eleven (11) years.

The Respondent has admitted that he did not grant the Claimant any leave during the entire period he worked for him. The Respondent has further admitted that it did not register the Claimant with the National Social Security Fund (NSSF) and the National Hospital Insurance Fund (NHIF) for the entire period.

Accordingly, the Respondent is liable to pay to the Claimant in lieu of twenty-one (21) days leave for each completed year of service. This is a mandatory requirement in terms of **Section 28 (1) (a)** of the Act which provides;

“An employee shall be entitled –

After every twelve consecutive months of service with his employer to no less than twenty-one working days of leave with full pay.”

Furthermore, Respondent is liable to pay to the Claimant service gratuity as provided under **Section 35 (5)** as read with **Section 35 (6) (d)** for not providing him with Social Security under NSSF.

The court shall determine this as guided under **Section 40** of the Act, which applies to retrenchment and find that the gratuity shall be calculated at the rate of fifteen (15) days salary for each completed year of service.

Issue 2.

From the evidence before court, the version told by the Claimant is mutually destructive to that told by the Respondent. However, certain pointers indicated that the version told by the Claimant is more credible than that told by the Respondent.

The court has firstly found that the Respondent was not candid on the nature of relationship if had with the Claimant. The Respondent was also less than truthful regarding the nature of work the Claimant did.

The court also found it difficult to believe that the Respondent was ready to send Kshs.8,000/=, allegedly as bus fare for the Claimant to travel from Kakamega to a site in Kericho, unless it had a permanent relationship with the Claimant.

The version by the Claimant that this was part-payment of arrear salary owed to him by the Respondent rings true and more believable.

This renders credibility to the assertion by the Claimant that he was sent home by the Respondent when he demanded payment of two (2) months arrears salary owed to him by the Respondent.

Accordingly, the court finds that the termination of the employment of the Claimant was not for a valid reason as provided under **Section 45 (2) (a)** of the Employment Act.

Furthermore, the Claimant was not given any notice or paid in lieu thereof when his employment was terminated and therefore the Claimant is entitled to payment of one month's salary in lieu of notice.

The manner of the termination was not done in accordance with a fair procedure. It was abrupt, without notice, without any justifiable reason and without any opportunity to show cause why the termination should not have been meted on the Claimant. Therefore, the procedure followed was not in accordance with **Section 45 (2) (c)** of the Employment Act.

In the final analysis the Respondent is liable to pay to the Claimant;

- a. service gratuity at the rate of 15 days salary per year for the 11 years in the sum of Kshs.82,500/=.
- b. one month salary in lieu of notice in the sum of Kshs.11,000/=;
- c. payment in lieu of leave for the 5 years claimed in the sum of Kshs.38,500; and
- d. compensation for unlawful and unfair termination at the rate of ten months salary in the sum of Kshs.110,000/=, taking into account the principles under **Section 49 (4)** of the Employment Act

and in particular, that the employee had specifically prayed for compensation; he had served the Respondent for a considerably lengthy period of eleven (11) years.

The employee had no adverse record during his tenure; he is a young man and would have served the Respondent for a long time but for the termination, the severance pay awarded him was not very large and had missed opportunity to accumulate social security benefits due to the omission by the Respondent to register him with NSSF and NHIF.

The claimant did not contribute to the termination as he was only asking for lawful dues resulting in the untimely termination and that he did not receive any payment upon termination other than Kshs.8,000/=, arrear salary.

Total award: Kshs.242,000/=.

The Respondent to provide the Claimant with a Certificate of Service for the eleven (11) years served and also pay costs of the suit.

Dated and delivered at Nairobi this 21st day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE