



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO. 314 OF 2012**

**FREDERICK ONYANGO WAGA.....CLAIMANT**

**VERSUS**

**MAGNUM ENGINEERING AND GENERAL CONTRACTORS LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Claim seeking terminal dues for the termination of his contract with the Respondent. He claims to have been employed in September 2009 and worked until his termination in August 2011. His contract was to run from November 2009 to November 2013. He worked as a plumber/fitter. His supervisor was Valli. He states that one morning he went to work as usual and was referred to the Respondent's head office in Industrial Area and when he got there he was required to write a statement. He claims he did not know what he had done wrong. He was told his dues were 20,000/- and he was to take the money and leave. He sought explanation and none was forthcoming. He thus prayed that the Court establishes the cause of his termination and the amount due to him as terminal dues.
2. The Claimant in cross-examination stated that he was employed vide a contract dated 7<sup>th</sup> September 2009 and the terms were short term employment on casual terms. He insisted that he was not a casual but a plumber. He admitted signing the letter exhibited at page 10 of the Respondent's bundle. He testified that he worked under the Respondent continuously until the day he was told to leave in 2011. He was trained in safety at Kenya Breweries and even had a card. The rates of employment were changed but not the terms. His pay was raised to 85/- an hour on 16<sup>th</sup> April 2010 and he signed to that effect. Regarding the letter from the Respondent dated 7<sup>th</sup> June 2011 he stated that he went to a Mr. Gurmeet a Director and he spoke with the HR Department. The letter was not by private arrangement. Mr. Waweru the signatory had acted on instructions of Management.
3. He stated that he did not know to date why he was dismissed. He maintained that he had a badge from Kenya Breweries and the job there had not ended. When he went to Head Office he expected all his dues. He had not gone to Industrial Area to work there. He prayed for the dues inclusive of salary payable till 2013. He sought 580,000/-. He reiterated that he did not leave but was dismissed by the supervisor.
4. In re-examination the Claimant testified that he was paid a salary monthly and that he did not

leave employment but was dismissed from his employment.

5. The defence called Mr. Robinson Waweru Nduma the Administration/HR Manager of the Respondent since 2009. He confirmed that the Claimant was hired on 7<sup>th</sup> September 2009 at a rate of 50/- an hour for the hire. The Claimant was paid fortnightly for his work as a plumber and was engaged on contract terms. The Claimant did not serve the whole term. There was another contract where the Claimant was engaged on new terms from 50/- to 85/-. Regarding the letter referred to earlier, the witness testified that it was the Claimant who called him with a request for a letter to Equity Bank Kariobangi Branch where the Claimant wanted to get a loan. He insisted that the letter was not under instructions from anyone but was an arrangement between the witness and the Claimant.
6. He continued to testify that on 3<sup>rd</sup> August 2011 the supervisor on site a Mr. Nzomo called him and told him that the Claimant was being sent to the Workshop. He called back and was told by Nzomo that Frederick was given a job to take water temperatures and give a report but he did not because he was not on site. According to them he had left the site at around 11.00am. Waweru called the Senior Supervisor Mr. Lali Panesar and he told Waweru that they were sending the Claimant to the Workshop and Waweru confirmed the Claimant could work at the Workshop. The Workshop is located in Industrial Area. The Claimant went to the Workshop and the witness told the Claimant that he can work at the Workshop and he said that fare from his residence is too high and he cannot make it to the workshop. He said it is better of he is given his money so that he can go. The witness told the Claimant to put it in writing. That was around 16<sup>th</sup> August 2011. Waweru testified that he would not have forced the Claimant to work in the company because he was unwilling. Frederick wrote a letter on 16<sup>th</sup> August 2011 stating he could not make it to the Workshop and he sought his dues. The dues were calculated and amounted to 20,412/- after all the deductions had been made. He did not accept the payment. The witness stated he received the demand from Frederick's lawyer and replied to it on 17<sup>th</sup> October 2011 to Mr. Achach Advocate. According to the witness Frederick was responsible for leaving the employment of the Respondent. He thus sought the striking out of the Claim with costs.
7. In cross-examination he stated that he was the Administration Manager cum HR Manager and had studied up till Form 4 and he had in-house training. He did not deny the letter he wrote to the Bank. He stated he had authority to write the letter. Regarding the second para of the letter he said the statement was wrong. He stated he was not under duress when he wrote the letter and the Bank could contact him for more information. If the Bank had called he would have said "yes Frederick is employed on 4 year contract."
8. Parties filed submissions in which they reiterated their positions. The Claimant's submissions were that the letter penned by Mr. Waweru was a confirmation of the employment and was not for a loan as suggested by the witness for the Respondent. The Claimant urged the Court to disregard or treat the evidence of the Respondent's witness with caution. The submissions by Claimant on cited the decision of the Court of Appeal in **Stephen Viljoen & 2 Others v. Republic [2006] eKLR** where the Court of Appeal held that the complainants credulity was definitely questionable and his evidence ought to have been treated with caution.
9. The Respondent's submissions were that the Claimant's terms of service could not be determined from the letter Mr. Waweru authored. It was stated that the letter was a private arrangement between the Claimant and Mr. Waweru for the former to obtain a loan from Equity Bank. It was submitted that the Claimant absconded from work.
10. In the case before me, the Claimant testified that he was unlawfully terminated. The evidence he gave somewhat contradicted a document he authored where he stated he could not work at the Workshop. Indeed, in cross-exam he stated the Workshop was too far from his residence and he could therefore not bear the expenses on transport. The Respondent called Mr. Waweru the author of the letter to testify and in his testimony he stated that the letter he wrote was to assist the

Claimant get a loan from a bank. The witness was consistent in his replies regarding the letter. The contract of employment was exhibited and it made no provision for termination. The fall back is the Employment Act 2007 which makes provision on termination under Section 35 as follows:-

*35. (1) A contract of service not being a contract to perform specific work, without reference to time or to*

*undertake a journey shall, if made to be performed in Kenya, be deemed to be?*

*(a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;*

*(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or*

*(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.*

*(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.*

11. The contract provided for payment of wages fortnightly and thus the notice period would be a fortnight in terms of Section 35. The Claimant declined to take up his position at the Workshop which is constructive desertion. If he deserted his post, can he be said to have been terminated? The law is clear, in order to benefit from the reliefs provided in law, the termination must be by the employer.

12. In the premises, the Claimant has failed to prove the dismissal, if at all there can be said to be one, was unfair in terms of the law. I therefore dismiss the Claim but make no order as to costs. He is however entitled to the terminal dues that had been calculated for him at the time of his separation.

It is so ordered.

Dated and delivered at Nairobi this 8<sup>th</sup> day of November 2013

**Nzioki wa Makau**

**JUDGE**