



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NAKURU**

**EMPLOYMENT AND LABOUR RELATIONS**

**CAUSE NO E288 OF 2024**

**ESTHER**

**KERUBO**

**BOSIRE.....CLAIMANT**

**VERSUS**

**HUNTERS GUARD SECURITY LTD.....RESPONDENT**

**JUDGEMENT**

1. The claimant has instituted the instant suit vide a statement of claim dated 03<sup>rd</sup> September, 2024 and through which she avers that she was verbally employed by the respondent with effect from 12<sup>th</sup> July, 2013 until 02<sup>nd</sup> January, 2024 when she was terminated via a text message and without a

notice on the ground that her services were no longer required. On this account, she has sought several reliefs as follows:

- a) A declaration that the claimant's termination was unfair and an order be made compelling the respondent to pay her for 12 months gross salary for compensation under section 49(1) (c) of the Employment Act.
  - b) A declaration that the claimant is entitled for notice pay.
  - c) A declaration that the claimant is entitled to underpayments.
  - d) A declaration that the claimant is entitled for payment of overtime.
  - e) A declaration that the claimant is entitled for payment for work done on public holidays.
  - f) A declaration that the claimant is entitled to leave pay.
  - g) A declaration that the claimant is entitled for service pay.
  - h) A declaration that the costs of this suit shall be borne by the respondent.
  - i) A declaration that the claimant is entitled for unpaid salary for November and December 2023.
2. The respondent neither entered appearance nor filed a response in answer to statement of claim. The claim was therefore undefended. The claimant

through his Advocate produced an Affidavit of Service deposed by the advocate, Mr. Kennedy N. Ochieng on 17<sup>th</sup> January, 2025, through which she states that she had effected service of the statement of claim and notice of summons to enter appearance upon the respondent. Annexed to the Affidavit of service is a copy of the copy of the Summons which bears the signature of Mrs. Jecinta Nduthu, the Respondent's manager.

3. In the premises, the court directed on 03<sup>rd</sup> April 2025 that the matter proceeds for formal proof hearing. Accordingly, and as directed by Court, the matter proceeded for formal proof hearing on 30<sup>th</sup> September, 2025 and the claimant testified in support of her claim.
4. At the commencement of the hearing, the claimant sought to rely on her witness statement which she asked the court to adopt as part of her evidence in chief. She also produced the list and bundle of documents filed together with her claim as exhibits before court.
5. A summary of facts as presented by the claimant is that, she was employed by the respondent, verbally, as a security guard on 12/07/2013. That she worked as a day guard until she was transferred to the office and assigned duties of a messenger and/or cleaner until she was terminated. That she was earning Kshs. 7,000/- per month from August 2013 to April 2015. That from May 2015,

she was earning Kshs. 8,000/- per month until her termination. That she was therefore underpaid by the respondents. That she was reporting to work at 6 am to 6 pm from 12/07/2013 to 30/11/2018 and was not paid for the overtime. That from December 2018 to January 2024, she was reporting to work at 8am to 5pm hence she worked overtime. That she was reporting to work during public holidays such as New Year, Good Friday, Easter Monday, Labour Day and Madaraka Day amongst others when she was a security guard and was not paid on a double rate. That he had served the respondent wholeheartedly for a period of 10 years and she was given only one annual leave, and was not paid for the rest leaves not taken. That she was not paid her salary for November and December 2023. That she was terminated from employment by the respondent verbally on 02/01/2024, without notice and was not paid in lieu of notice. That she received a text message from the respondent informing her not to report on duty that her services were no longer required. That the respondent stopped communicating to her from that time and no reasons were therefore availed to her. That the respondent was not making contributions towards her NSSF account and therefore she is praying to be awarded service pay. That she was not accorded a hearing before termination and her last date in employment was 02/01/2024. That she

has not been paid her terminal dues to date. That the court does find that her termination was unfair, unlawful and award her claims as filed in the statement claim.

### **Analysis and determination**

6. The issues arising from the pleadings on record as well as the evidence placed before court can be distilled as follows;

**a) Whether the claimant's termination was unfair and unlawful?**

**b) Is the claimant entitled to the reliefs sought?**

### **Whether the claimant's termination unfair and unlawful?**

7. The claimant has alleged that her termination was unfair, hence it is necessary to consider the facts and circumstances presented herein vis a vis the relevant provisions of the Employment Act. The starting point is **Section 43(1)** of the Employment Act (Act), which requires an employer to prove reasons for an employee's termination, failure to which such termination is deemed to be unfair. In addition, **Section 45 (2)** of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the

termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. Tied to this provision, is **Section 45 (2) (c)** of the Act, which requires an employer to prove that it complied with the requirements of fair process in undertaking the termination.

8. The specific requirements of fair hearing are espoused under **Section 41(1)** of the Act which mandates an employer to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
9. The foregoing is a summary of the legal threshold set under the Act and which an employer must comply with, for a termination to be deemed fair. The same can be split into two parts, with the first limb being the justification of reasons for termination while second limb constitutes the process applied in terminating the employment of the employee.
10. It is also instructive to note that the burden of proof, lies with the employer. The Court of Appeal in the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** held as much, thus; **'the burden on the employee is limited only**

**to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer.'**

11. On substantive justification, from the uncontroverted evidence adduced herein, the claimant was dismissed via a text message and no reason was availed. In terms of section 45 (2) of the Act, an employer is bound to prove that the reasons for an employee's termination are valid and fair. Logically, validity and fairness of the reasons can only be established upon analysis of the documentary and oral evidence presented by the employer during the trial process. It is only then, that the court can determine the validity and fairness of a termination from employment.

12. As stated herein, the respondent neither tendered a defence nor participated in the trial despite being served appropriately. Accordingly, there is no evidence from its end to justify the reasons for the claimant's dismissal. This was never done, hence the claimant's evidence as presented is not controverted. In light of the foregoing, the burden placed on the respondent by sections 43 (1) and 45(2) of the Act was not discharged at all.

13. As regards the second limb of fair hearing, I do find that there was no evidence adduced herein to prove that the claimant was issued with a show cause letter or any letter of dismissal spelling out the grounds. It is also notable that the

burden of proof rests on the employer. In this case, there is no such evidence on record as the respondent failed to tender a defence and participate in the trial process. Consequently, the burden of proof still remains undischarged. The total sum of the foregoing is that the termination of the respondent cannot be said to be lawful and fair in terms of sections 43(1) and 45(2) of the Act and I so find. Having found as such, what remedies then, avail to the claimant?

## **Reliefs**

14. Having found that the claimant's termination was unfair and unlawful, I do hereby issue the declaratory order to that effect as prayed for in prayer (a) and order that she be paid eight (8) month's gross salary as compensatory damages. This award is informed by the claimant's length of service with the respondent and the fact that the reasons for her dismissal from employment were not justified at all.

15. I further issue declarations as sought for in prayers (b), (c), (d), (e), (g) and (h). The declaration sought for in prayer (f) is however hereby dismissed for want of proof. The claimant did not prove that she applied for leave and was denied. These are however declaratory orders and not compensatory in

nature. Their primary purpose is to declare or confirm the existing legal rights, obligations, or status of the parties involved in this dispute, rather than to award damages or monetary compensation. The claimant is bound by her pleadings and prayers sought for herein. she prayed for declaratory orders and this court's hand is therefore tied to those orders.

## **Orders**

16. In the circumstances, I enter Judgment in favour of the claimant against the respondent as follows;

**(a) A declaration that the claimant's termination was unfair and an order that the respondent does pay her Kshs. 139,855.20 for compensation under section 49(1)(c) Of the Employment Act 2007.**

**(b) A declaration that the claimant is entitled to notice pay, underpayments, payment for overtime, payment for work done on public holidays, service pay and unpaid salary for November and December 2023 and as calculated in the Statement of Claim.**

**(e) The claimant shall have the costs of the suit.**

**DATED, SIGNED AND DELIVERED AT NAKURU THIS ...06<sup>TH</sup> .... DAY OF ...**

**NOVEMBER., 2025.**

.....

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

**Appearance:**

For the Claimant N/A

Claimant N/A