



**Iseme v Eveready Security Guards Co Limited (Cause 446 of 2017)
[2023] KEELRC 199 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 199 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 446 OF 2017
J RIKA, J
JANUARY 31, 2023**

BETWEEN

DANIEL OBWORA ISEME CLAIMANT

AND

EVEREADY SECURITY GUARDS CO LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this Claim through a Statement of Claim dated March 7, 2017.
2. He states that he was employed by the Respondent as Security Guard, between September 2011, until November 22, 2016.
3. His contract was terminated by the Respondent unilaterally on or about November 22, 2016, without justification or hearing. He was not given any charges. He was not given notice and was not paid terminal dues. His last salary was Kshs. 12,270.
4. He prays for Judgment against the Respondent as follows: -
 - a. 3 months' salary in lieu of notice at Kshs. 36,810.
 - b. Unpaid leave at Kshs. 61,350.
 - c. Service pay at Kshs. 4,400.
 - d. House allowance in arrears at 15% of the basic, over the period of service, at Kshs. 49,080.
 - e. General damages for wrongful termination, at Kshs. 147,240.
 - f. Overtime pay at Kshs. 122,700Total Kshs. 388,451



- g. Declaration that termination was unfair and unlawful.
 - h. Costs, interest and any other suitable relief.
5. The Respondent filed its Statement of Response on July 21, 2017. Its position is that it employed the Claimant as a Guard, sometime in 2012. On October 16, 2016, he was found drunk at Respondent's Client, Harshiv Auto Spares, where he had been assigned guard duty. He was assigned a new role on October 18, 2016. He absented himself from the new role, without reason. He next showed up at the Respondent's office, in November 2016. He was away for more than 7 days, compelling the Respondent to declare him a deserter. He was dismissed for valid reasons. He does not merit the remedies pleaded.
 6. The Claimant gave evidence, and closed his case, on March 24, 2022. The Respondent's Operations Manager Benson Wekesa gave evidence the same date, closing the hearing. The Claim was last mentioned on September 28, 2022, when the Parties confirmed filing and exchange of their Submissions.
 7. The Claimant adopted his Witness Statement and Documents [1-6] as his evidence-in chief. He was dismissed after he complained about inconsistent remittance by the Respondent, of his N.S.S.F contributions. He was not given notice, or heard, before termination. He was not paid terminal benefits.
 8. Cross-examined, he told the Court that he was employed in 2011. He was trained and appraised about the terms and conditions of employment. His relationship with the Respondent was cordial. He was not given to absenteeism and sleeping at work. He was not late for work. He was not issued warning letter. He did not complain to the Labour Office about termination. He did not receive warning letter, on sleeping at work. N.S.S.F contributions were not remitted consistently. N.S.S.F Statements show this. The Respondent had regulations styled "*Sberia za Kazi*". One would be dismissed for being absent from work for 7 days. He was not absent for 7 days and was not required to give an explanation. He was not assigned another workstation which he declined to report to. He was not dismissed for desertion. He was not drunk at Cabanas station, in October 2016. He has never taken alcohol. His contract provided for 30 days' notice of termination. He had an outstanding loan, which was to be offset against his terminal dues. He could not recall the amount.
 9. Benson Wekesa adopted his Witness Statement and Documents [1-11] filed by the Respondent. The Claimant was employed by the Respondent in 2012, after training. His last salary was Kshs. 12,270 monthly. He was found asleep at work, and warned. He signed the letter of warning. Respondent's Client called to report that the Claimant was drunk. The Supervisor visited the site and replaced the Claimant. He was posted to another site. He did not report there. He was called to office to explain his absence. He did not do so. He reported the Respondent to the Ministry of Labour. He was advised that he had negative Kshs. 46,000 as terminal dues. He did not avail himself at the Respondent's office, when he learnt that his terminal dues were in the negative.
 10. Cross-examined, Wekesa told the Court that Claimant's Supervisor was Daniel Mabinda. He was not a Witness in the proceedings. The Claimant absconded and could not be issued a letter of termination. He had given his next-of-kin details to the Respondent. The Respondent did not contact him through next-of-kin. The Respondent advised the Claimant that his terminal dues were ready for collection. His bank details were available to the Respondent. Redirected, the Respondent told the Court that the Respondent was calling the Claimant to office, to sign forms to enable the Respondent recover its dues from the Claimant. The loan has not been recovered to-date.



11. The issues are whether the Claimant's contract was terminated by the Respondent unfairly or at all; and whether he merits the remedies pleaded.

The Court Finds

12. The Claimant was employed by the Respondent as a Security Guard. The Respondent states it employed him from 2012, after training. The Claimant states he was employed from September 2011 to November 2016. The Court would think he was probably initially under training in late 2011, and commenced actual work, in 2012. The period of training would not bar him from being an Employee of the Respondent. It is safe to assume, in the absence of clear document on the date of employment from the Respondent, that the Claimant was Respondent's Employee from September 2011 to 2 November 2, 2016.
13. The Respondent did not issue the Claimant a letter of termination, but issued a letter referenced 'Deserter,' dated November 21, 2016. It is indicated that the Claimant had absented himself for 7 days, against the *Employment Act*, as a result of which he had been declared a deserter.
14. There was no hearing, no charges, no letter to show cause, just a letter declaring the Claimant to be a deserter. Even when the Claimant showed up at the Respondent's office, in November 2016, there were no charges of desertion, and the Claimant was not brought before a disciplinary forum. He was just declared a deserter and advised about his negative terminal benefits.
15. Desertion is an employment offence, and must be proved by the Employer, like all employment offences. It must be shown through a disciplinary hearing, to have taken place. There is nothing in the *Employment Act*, like termination by declaration of desertion.
16. The other allegations about sleeping on duty, drunkenness, lateness for duty, and absence from duty were generalized accusations, spanning over the Claimant's period of service. Some had been dealt with through warnings. None was the subject matter of the Respondent's decision to terminate. The declaration of desertion, dated 21st November 2016, which was in effect the letter of termination, did not allude to the generalized accusation. The Claimant was not charged with any of the generalized accusations and found culpable, to justify termination.
17. The Court is satisfied that the Claimant's contract was terminated by the Respondent; it was not terminated for valid reason and on fair procedure; and he merits compensation.
18. He worked for about 5 years. He was not a model Security Guard. He had some warnings over his work aptitude and ethics. It does not seem to the Court, that given his attitude, he would have been expected to work until retired. The axe was likely to fall on him sooner or later. He contributed to the circumstances that culminated in his dismissal. The Court would award him compensation for unfair termination, equivalent of 5 months' consolidated salary, at Kshs. 70, 550.
19. Regulation 24, of the *Regulation of Wages [Protective Security Services] Order*, 1998 provides for termination notice period of 30 days. It is not clear on what basis the Claimant seeks 3 months' salary in lieu of notice.
20. There are leave application forms exhibited by the Respondent. It is improbable that the Claimant did not go on annual leave, for the whole period of service.
21. Regulation 5, stipulates that an Employee who is not provided with free housing by the Employer, shall in addition to basic minimum wage, be paid housing allowance of Kshs. 1,000 per month or 15% of his basic monthly wage, whichever is higher. The Respondent did not give evidence to show that house allowance was paid, or was part of the amount of Kshs. 12,270 paid to the Claimant monthly. In



5 years, the arrears of house allowance, would be Kshs. 110,430. 15% of Kshs. 12,270 = Kshs. 1,840.50 monthly house allowance. The Claimant however pleads Kshs. 49,080 as arrears of house allowance. The Court would presume that he was paid some house allowance, which he excludes from the 5 years. He is awarded house allowance at Kshs. 49,080 as pleaded.

22. Regulation 17 of the *Wage Order* provides that where an Employee works for over 5 years, he is entitled to gratuity at 18 days' salary for every year completed in service. The Claimant worked from September 2011 to November 2016, about 5 complete years and 2 months. The Court allows him the prayer, based on a consolidated monthly salary of Kshs. 14,110, at Kshs. 48, 843.
23. There were no details supplied to the Court by the Claimant, on the prayer for overtime. There are days when the Claimant may have strayed, and not given every hour of work to the Respondent. He did not establish that he worked overtime over the whole period of service.
24. Costs to the Claimant.
25. Interest allowed at court rate, from the date of Judgment till payment in full.
26. It is ordered
 - a. It is declared that termination was unfair.
 - b. The Respondent shall pay to the Claimant: compensation for unfair termination equivalent of the Claimant's 5 months' consolidated salary at Kshs. 70,550; house allowance at Kshs. 49,080; and gratuity at Kshs. 48, 843 – total Kshs. 168,473.
 - c. Costs to the Claimant.
 - d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.

JAMES RIKA
JUDGE

