



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT NAIROBI**  
**CAUSE NUMBER 2404 OF 2016**

**BETWEEN**

**JOHN ILAYESA LIKHALAMI .....CLAIMANT**

**VERSUS**

**LAVINGTON SECURITY LIMITED .....RESPONDENT**

*Rika J*

*Court Assistant: Emmanuel Kiprono*

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*Waiganjo Wachira & Company Advocates for the Claimant*

*Kale Maina & Bundotich Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 24<sup>th</sup> November 2016.
2. He states, he was employed by the Respondent as a Guard, on or about 1<sup>st</sup> February 2003, at an initial monthly salary of Kshs. 3,000. The salary was reviewed subsequently to Kshs. 10,500 monthly.
3. He states, he was on annual leave between 14<sup>th</sup> September 2016 and 5<sup>th</sup> October 2016. During the period, the Respondent terminated the Claimant's contract, alleging that the Claimant, had refused to resume duty.
4. He states, there was no notice or justification. He was not paid terminal dues. He prays for Judgment against the Respondent for: -
  - a. Declaration that termination was unfair.
  - b. 1-month salary in lieu of notice at Kshs. 12,221.
  - c. Underpayment of wages at Kshs. 9,888 and Kshs. 27,536 respectively.
  - d. Annual leave at Kshs. 63,000.
  - e. House allowance at Kshs. 17,604, Kshs. 39,283 and Kshs. 29,330 respectively.
  - f. Overtime at Kshs. 68,068, Kshs. 151,895 and Kshs. 113,410 respectively.

- g. Unpaid holidays at Kshs. 12,803, Kshs. 25,606 and Kshs. 18,623 respectively.
- h. Uniform refund at Kshs. 5,000.
- i. Service pay at Kshs. 114,348.
- j. 12 months' salary in compensation for unfair termination at Kshs. 146,652.
- k. Punitive and aggravated damages.
- l. Costs.

5. The Respondent filed its Statement of Response on 28<sup>th</sup> February 2016. It is conceded that the Claimant was employed by the Respondent as a Night Guard, between 2003 and 2016. He was posted to International Rescue Committee site, Nairobi. He was summarily dismissed on 5<sup>th</sup> September 2016 following his participation in an unlawful strike and desertion of duty. He was asked to show cause why he should not be summarily dismissed. He ignored the letter. He was paid his annual leave in full. He was paid salary in accordance with the minimum wage guidelines. All Employees were subscribed to the N.S.S.F, and service pay is not payable.

6. The Respondent states further that the Claimant was dismissed on 7<sup>th</sup> September 2016, but due to an error in payroll system, received salary for October, November and December 2016, totalled at Kshs. 36,663. The Respondent counterclaims the sum of Kshs. 36,663, and prays the Court to dismiss the Claim with costs.

7. The Claimant filed his Response to the Counterclaim on 10<sup>th</sup> April 2017. He denies that he received salary for October, November and December 2016 erroneously.

8. The Claimant gave evidence, and rested his case, on 15<sup>th</sup> January 2021. Respondent's Supervisor Fred Esendi and Human Resource Officer Samuel Obada, both gave evidence on 15<sup>th</sup> January 2021 when the hearing closed. The matter was last mentioned in Court on 27<sup>th</sup> October 2021, when Parties confirmed filing of their Final Arguments.

9. The Claimant restated the contents of his Pleadings and Witness Statement, in his evidence. Cross-examined, he denied knowledge of any strike action which took place on 15<sup>th</sup> September 2016. He was away on leave. He left on 14<sup>th</sup> September 2016. He returned on 5<sup>th</sup> October 2016. He was not issued letter to show cause. He received dismissal letter on 5<sup>th</sup> October 2016. He was not aware of salary paid in October, November and December 2016. His bank account had money throughout. He had utilized annual leave from 2010. He retains his work uniform. He has not cleared. Redirected, he told the Court he was at home when the strike took place. He did not see the letter to show cause.

10. Fred Esendi adopted his Witness Statement and documents filed by the Respondent. The Claimant guarded IRC site at Runda, Nairobi. On 5<sup>th</sup> September 2016, Esendi was called and told Guards had gone on strike. The Claimant was among the strikers. Esendi was able to point him out, in photographs exhibited by the Respondent.

11. Cross-examined, Esendi conceded he was not at work, when the strike took place. Another Officer Ezekiel, was at work and briefed Esendi on the strike.

12. Obada told the Court that the Guards went on strike demanding wage increment. The Claimant was among the participants. The strike was illegal, with no notice and no grievances communicated to the Respondent by the strikers, before the action. The Claimant went on leave before the letter to show cause issued. He was issued the letter on resumption. He declined receipt. He was summarily dismissed. Salaries were consolidated. Unutilized leave was paid. He was paid salary for 3 months he did not work.

13. Obada was not at the site, when the strike took place. He got information from secondary sources. Letter to show cause required the Claimant to give his explanation by 7<sup>th</sup> September 2016. He was dismissed on 6<sup>th</sup> September 2016. His pay slip indicates what was paid was basic salary. Redirected, Obada stated that the letter to show cause is dated 5<sup>th</sup> September 2016, when the strike took place. The letters were not issued immediately. Reason for dismissal is that the Claimant refused to return to work. He deserted after his leave was over.

14. The issues are whether termination was fair on procedure and substance; and whether the Claimant merits the remedies pleaded. Secondly did he receive salary for October, November and December 2016 irregularly, and is the Respondent's Counterclaim merited?

**The Court Finds:** -

15. There is no dispute that the Claimant was employed by the Respondent as a Night Guard, between 2003 and 2016.

16. He was summarily dismissed though a letter dated 6<sup>th</sup> September 2016. The reason given is that the Claimant totally refused to resume duty, as directed.

17. The Court does not see any relevance in the strike action, in relation to the reason given in justifying termination, which was that the Claimant totally refused to resume duty, after going away on annual leave.

18. Did the Claimant totally refuse to resume duty?

19. The Claimant took annual leave beginning 14<sup>th</sup> September 2016, to 4<sup>th</sup> October 2016. He was to resume on 5<sup>th</sup> October 2016. This information is confirmed in the Leave Pass, exhibited by the Claimant.

20. The letter of dismissal is dated 6<sup>th</sup> September 2016. This was before the Claimant went on leave. It alleges that the Claimant had declined to resume duty, as advised. Would the Respondent be approving leave, if the Claimant was not on duty in the first place? Why would the Respondent approve leave on 14<sup>th</sup> September 2016, if the Claimant was required to be on duty on 6<sup>th</sup> September 2016 and had declined to resume duty on 6<sup>th</sup> September 2016? It does not make sense.

21. What seems to have happened, is that Guards went on strike on 5<sup>th</sup> September 2016. The Respondent then rushed to issue letters of dismissal the following date, 6<sup>th</sup> September 2016. It did not know what exactly to cite as the reason for dismissal in the case of the Claimant, because he went on leave after the strike action. He obviously did not fail to return from leave. He returned on 5<sup>th</sup> October 2016, in accordance with the terms of his leave approval. He was issued letters including the letter on dismissal, on resumption. He did not fail to resume duty after leave. If the Respondent meant to say that he failed to resume duty after the strike, again this cannot hold, because the Claimant was under no obligation to resume duty, while already on approved annual leave.

22. There is no truth whatsoever, in the allegation that the Claimant deserted. He went on leave and resumed duty, only to be dismissed ostensibly because he had participated in the strike. The Respondent found it convenient to give another reason in justifying its decision-failure to resume duty. This was irrational, because the record shows the Claimant resumed duty, and was issued letters of dismissal and to show cause.

23. When he availed himself on 5<sup>th</sup> October 2016, he was not accorded a hearing on either the allegation of participating in a wildcat strike, or desertion. The Respondent was intent on getting rid of those it perceived as having participated in the strike. It ignored Claimant's procedural and substantive rights, and hastened to get rid of him.

24. Termination was clearly flawed on procedure and justification. It was unfair under Sections 41, 43 and 45 of the Employment Act.

25. The Claimant pleads underpayment of wages. He has not exhibited the relevant Legal Notices, showing underpayment. It is not in his Pleadings or Submissions. The Court is not able to grant the prayer for underpayment of wages.

26. His prayer for annual leave, calculated back to 2004 is unpersuasive. He does not give any rational explanation why he did not go on leave prior to 2009. He did not claim the accumulated leave days, in his subsequent years. He took annual leave of 21 days in the period after the strike. He did not claim accumulated leave from 2004 -2009, at any time from 2010 to 2016. Why would he wait until he was dismissed, to claim a benefit he had slept over, for many years?

27. Equally unconvincing are the prayers for overtime, holiday pay and uniform refund. It is not established when the Claimant did excess hours. The holidays worked are not specified. He did not say when he worked, and by whom he was required to work, excess hours and during the public holidays. His evidence was that he retains the work uniform. Why does he wish to have the uniform refund while he opted to retain the uniform? The Regulation of Wages [Protective Security Services] Order, 1998 requires that all uniforms shall be surrendered by Employees on termination of employment.

28. The pay slips on record show that the amount of Kshs. 10,500 paid monthly to the Claimant, was basic pay. Regulation 5 of the Wage Order above, states that an Employee, who is not provided with free housing accommodation by his Employer, shall be entitled, in addition to his basic wage, to house allowance of Kshs. 1,050 per month, or 15% of the basic monthly wage, whichever is higher.

29. The Respondent did not pay house allowance to Claimant. ***The Claimant prays for arrears over a period of 40 months, which the Court allows at 15% x Kshs. 10,500 x 40 = Kshs. 63,000.***

30. Security Guards are entitled to gratuity under Regulation 17 of the Regulation of Wages [Protective Security Services] Order, 1998. This benefit is not affected by subscription to other social security benefits plans. The Regulation confers gratuity after 5 years' service, at the rate of 18 days' salary for every completed year of service. The Claimant worked from 2003 to 2016, a period of 13 years. ***He merits and is granted gratuity, at 18 days' salary for each of the 13 years, at Kshs. 96,075.***

31. He worked for 13 years. His record was not tainted. He is not shown to have contributed in the decision by the Respondent, to terminate his contract. He was permanent and pensionable. He was paid nothing on termination. ***He merits and is granted equivalent of his 12 months' gross salary at Kshs. 12,075 x 12 = 127,575, in compensation for unfair termination.***

32. ***He is granted a month's salary in lieu of notice at Kshs. 12,075.***

33. Dismissal was on 6<sup>th</sup> September 2016. The Claimant received salary for October, November and December 2016, 3 months after dismissal. He did not acknowledge receipt of illegal salary, but was content to tell the Court that his Equity Bank Account had money throughout. The Court is persuaded that the Claimant received illegal salary for 3 months, at Kshs. 36,663. The Counterclaim is allowed at Kshs. 36,663.

34. The prayer for punitive and aggravated damages has not been established.

35. ***No order on the costs.***

36. *Interest allowed at court rates, from the date of Judgment till payment is made in full.*

**IN SUM, IT IS ORDERED: -**

- a. *Termination was unfair.*
- b. *The Respondent shall pay to the Claimant: arrears of house allowance at Kshs. 63,000; gratuity at Kshs. 96,075; compensation at Kshs. 127,575; and notice at Kshs. 12,075 – total Kshs. 298,725.*
- c. *The Counterclaim is allowed at Kshs. 36,663.*
- d. *The Claim is offset against the Counterclaim, to be paid at a total of Kshs. 262,062.*
- e. *No order on the costs.*
- f. *Interest is allowed at court rates, 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 18TH DAY OF FEBRUARY 2022.**

**JAMES RIKA**

**JUDGE**