



REPUBLIC OF KENYA  
IN THE EMPLOYMENT & LABOUR RELATIONS COURT  
AT NAIROBI  
CAUSE NO. 206 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 21<sup>st</sup> May, 2020)

PATRICK MUTHINI MATENGE.....CLAIMANT

VERSUS

PEMWE SECURITY SERVICES.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a security guard and worked in that capacity until 18/2/2012.
2. The Respondent is a registered company incorporated in Kenya, which offers security services.
3. The Claimant instituted this claim to challenge the termination of his employment and seek payment of his terminal dues. In particular, he seeks the following reliefs-

**a. A claim of the sum of KShs. 372,731.00 being terminal dues, salary and wages for unfair termination of employment, tabulated as follows:-**

**i. One months' payment in lieu of notice of KShs. 8,463.00**

**ii. Unpaid salary of 18 days in February 2012, amounting to KShs. 5,078.00.**

**iii. Underpayment**

**2010 basic salary (KShs. 8,463 – KShs. 5000 x 24 months) totalling to KShs. 83,112.00.**

**iv. Unpaid house allowance for 24 months (15% x 8,463) amounting to KShs. 30,467.00**

**v. Unpaid overtime (7523x87 hours x 1.5)**

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**4,363 x 24 months totalling to KShs. 104,712.00.**

**vi. Unpaid leave of 2 years amounting to KShs. 16,926.00.**

**b. Costs and interest of this claim.**

**c. Any other order the court may deem fit to grant.**

4. The Respondent filed a Statement of Response on 12/3/2015, denying the allegations raised and urged that the claim be dismissed.

The Claimant's Case

5. It is averred that the Respondent was paying the Claimant a salary of KShs. 5,000.00 instead of the KShs. 8,463.00 set by the labour legal notice.
6. The Claimant avers that he was a diligent and honest employee. He avers that he worked from 6:00pm in the evening until 6:00am in the morning.
7. During trial, he adopted his witness statement filed on 5/11/2018 and his bundle of documents, as his evidence. The statement reiterates the averments contained in claim, which have been outlined hereinabove.
8. It was his testimony that in January 2012, he sought leave and was granted the same from 3/1/2012 to 19/1/2012, to enable him resolve a land dispute. However, when he resumed work, his employment was terminated on the ground that he had gone to look for alternative employment.
9. His efforts to explain himself proved futile. He informed his union who unsuccessfully tried to negotiate with the Respondent. Consequently, he reported the matter to the labour officer who declared the existence of a trade dispute on 21/11/2014, after several failed reconciliation attempts.
10. During cross examination, it was his testimony that he went to resolve the land dispute in February. He stated that he was on duty in January. The Claimant was not sure whether the time he took away from work in January amounted to going on leave.
11. Upon re-examination, he clarified that he took the 2 weeks leave in February 2012 and not January.

### **The Respondent's Case**

12. The Respondent avers that the Claimant absconded duty on 4/2/2012 and returned a month later. Upon his return, he informed the Respondent that he had been sick but could not produce any documents to explain his absence. As such, he was summarily dismissed.
13. As regards conciliation, the Respondent avers that negotiations broke down due to the Claimant's rudeness and failure to acknowledge that he had absconded duty.
14. During trial, John Mwendwa testified as RW1 and adopted his witness statement filed on 19/12/2018, as his evidence. It was his testimony that the Claimant's employment was never terminated because he absconded duty. However, he reported back to work in early March explaining that he had been absent from work because he had been unwell. He had no medical records to prove his claim.
15. Upon cross examination, he maintained that the Claimant was never given permission to go on leave on 4/2/2012. He denied the allegation that the Claimant went off duty in January 2012. He admitted to attending a conciliation meeting but averred that the parties disagreed.
16. During re-examination, he explained that the reason parties disagreed at the conciliation meeting was because the Claimant demanded notice pay.

### **The Claimant's Submissions**

17. In his submissions filed on 29/1/2020, the Claimant submits that no evidence was adduced to prove that he had absconded work.
18. The Claimant submits that he is entitled to payment in lieu notice having been summarily dismissed. He also submits that since he went on leave to solve his personal matters, he was to be paid salary for the 18 days he was on leave, which he was entitled to.
19. The Claimant submits that he is entitled to the difference in his salary underpayment, having been paid a salary below the amount set in basic minimum wages of 2010. He further submits that he is entitled to overtime pay having worked from 6:00 pm to 6:00 am, for 24 months.
20. It is his submissions that he is entitled to payment for the leave days not taken for the 2 years he had worked for the Respondent, save for the 14 days he had taken. It is further submitted that he is entitled to payment for working on holidays and off days, throughout the subsistence of his employment.
21. He submits that he is entitled to severance pay since the Respondent was not remitting NSSF contributions on his behalf.

### **The Respondent's Submissions**

22. In its submissions filed on 13/2/2020, the Respondent submits that the Claimant has failed to prove his case for unfair dismissal and contends that the Claimant absconded duty without a valid reason for his absence or communication to that effect. It is submitted that the attendance register indicated that the last time the Claimant reported to work was 3/1/2012.
23. The Respondent has cited the case of **Mwendwa Ndoor Maingi vs. Katrina Hotel Limited**; ELRC 1212 of 2015 where the Claimant absconded duty after realizing that there was a report and thereafter proceeded to claim that his employment had been terminated.

24. The Respondent submits that the claim for payment of overtime, leave and underpayment have not been proved.

25. I have examined all the evidence and submissions of both Parties.

26. From the evidence of the Claimant, he avers that he was unfairly terminated after he went home to attend to a land dispute and on coming back, he was sent away.

27. The Respondents on their part indicate that the Claimant absconded duty but there is no indication that the Respondent sought him out and issued a notice to him to show cause why he should not be terminated on account of absconding duty.

28. That notwithstanding, the Claimant admitted he had been away for some part of February to attend to a land dispute. There is no indication that he was on leave or he sought permission to be away from duty during the time of the absence. In that case, the issue of absence from duty without permission was a misconduct warranting dismissal.

29. In view of fact that the Respondent did not give him any due process before termination, then the termination was unfair and unjustified as provided for under Section 45 (2) of Employment Act 2007.

30. As for the remedies sought, the Claimant has averred that he was underpaid in salary being paid Kshs.5,000/= instead of 8,463/= in 2010. This he submitted was in contravention of the Wages Legal Notice in place at the time.

31. As per the June 2010 Wages Order, the salary payable was 6,743/= per month inclusive of house allowance. If he was paid 5,000/= per month, he was underpaid by 1,743/= per month from 2010 June to June 2011 when the amount increased to 7,586/= for day guard and 8,463/= for night guard. The underpayment then from June 2011 to February 2012 i.e. 8 months was 2,586/= x 8. Total underpayment was therefore  $1,743 \times 12 = 20,916 + 2,586 \times 6 = 20,688/=$ .

**TOTAL = 41,604/=**

32. Other than the underpayment, I find that the Claimant is also entitled to the following:-

- **I also award him salary not paid in February 2012 = 5,078/=**
- **As for the overtime pay, this is not established through evidence and nothing is awarded on this prayer.**
- **I also award him leave for 2 years = 7,586 + 6,743 = 14,329/=.**
- **In addition, I award Claimant 3 months' salary as compensation for unfair termination = 3 x 7,586 = 22,758/=.**

**TOTAL awarded = 83,769/=**

- **I also order Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

**Dated and delivered in Chambers via zoom this 21<sup>st</sup> day of May, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mungalo for Respondent – Present

Babu

for

Claimant

–

Absent