



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 649 OF 2014**

**JOHN NYANGENA.....CLAIMANT**

**VERSUS**

**OKOTH JAMALI**

**T/A ALFA BRIDGE SECURITY SERVICES.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed this suit on 22.4.2014 alleging that the respondent had unlawfully terminated his employment without prior notice or payment of salary in lieu of notice. He therefore prayed for payment of his terminal dues plus compensation for unlawful termination of his employment.

2. The Respondent filed defence on 28.3.2019 after obtaining leave of the court to do so out of time. In brief, the respondent denied any employment relationship between him and the claimant and averred that he was only a resident of the Alfa Bridge Estate which had engaged the claimant and his group of young men called Alfa bridge Security services to do informal patrols in the estate at stipend of Kshs. 4000 per month. He admitted that he never gave the claimant leave or remitted NSSF contribution for him contending that he was not his employee. He averred that he was the chairman of the committee established by the residents' welfare Association to look into the security issue for the estate and that each household was to contribute kshs.500 per month towards payment of the stipend to the said young men. He further averred that in January 2014, many households failed to pay their contributions and as such the plan to hire the young men for security patrols was shelved. He therefore denied the alleged unfair dismissal and prayed for the suit to be dismissed with costs.

3. The suit was heard on 22.1.2020 when the claimant testified as Cw1 but the respondent did not attend the hearing to prosecute his defence. Likewise after the hearing the claimant filed written submissions but the respondent did not.

**Claimant's Case**

4. Cw1 testified that he was employed as a Night Watchman by the respondent in August 2012 and worked until January 2014. His salary was Kshs.7,000 per month but he was never issued with any payslip. The only evidence to prove the said employment relationship was a certified copy of Daily Attendance Register from the respondent. He contended that he never went for any annual leave and the employer never paid any NSSF contributions for him during his employment.

5. Cw1 testified that in January 2014 he requested for his annual leave and in response, the respondent unlawfully terminated his employment. He therefore prayed for the reliefs sought by his suit.

**Analysis and Determination**

6. The issues for determination arising from the pleadings evidence and submissions are:

- (a) Whether the claimant was employed by the respondent.
- (b) Whether the termination of claimant's employment contract was lawful
- (c) Whether the reliefs sought should be granted.

### **Employment relationship**

7. The claimant stated that he was employed by the respondent in August 2012 as a Night Watchman earning Kshs. 7,000 per month and his services were terminated in January 2014. He produced no written evidence of the said employment but contended that he was employed verbally. He also did not call any witness to support his verbal allegation. However, he produced a copy of the attendance register as proof of employment.

8. The respondent pleaded that the claimant was not his employee but one among a group of young men who were engaged by the Alfa Bridge Estate Welfare Association to patrol the estate after cases of insecurity increased. He further contended that the young men were paid monthly stipend of kshs. 4000 from Kshs.500 monthly from each household. He admitted that he was the chairman of the committee of the Estate which was appointed by the residents to address security issues.

9. As earlier observed herein above, the respondent did not tender any evidence and as such the defence filed was not prosecuted. I therefore hold that the evidence by the claimant that he was employed by the respondent as a night watchman for a salary of Kshs7000 per month has not been rebutted. In fact, the employment relationship was corroborated by the respondent's averments in the defence that the claimant and his colleagues were engaged for a monthly stipend of kshs. 4000 to provide security services.

### **Unlawful termination**

10. Section 45(1) of the Employment Act, bars employers from terminating their employees' contract of service unfairly. Under subsection (2), termination of employees' contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. In this case, the reason for termination was that the claimant requested for annual leave and as such it is unfair within the meaning of section 46 of the Act. The said section provides:

*“46. The following do not constitute a fair reason for dismissal or imposition of a disciplinary penalty –*

*(b) the going on leave of an employee, or the proposal of an employee to take any leave to which he was entitled under the law or a contract.”*

11. In view of the foregoing matters, I am satisfied that the claimant has discharged his burden of proof under section 47(5) of the Act of proving on a balance of probability that he was unfairly and unlawfully dismissed from employment.

### **Reliefs**

12. Under section 49 of the Act I award the claimant Kshs.7,000 being one month salary in lieu of notice plus Kshs.42,000 being 6 months salary compensation for unlawful and unfair termination. In granting the above award, I have considered not only the fact that the claimant had served for less than 2 years but also the fact that he did not contribute to his termination through misconduct.

13. He will also get Kshs.3,500 being service pay for the one complete year served at the conventional rate of 15 days salary per year. However, the claim for leave is dismissed for lack of particulars and evidence.

### **Disposition**

14. I enter Judgment for the claimant in the sum of Kshs.52,500 plus costs and interest from the date hereof till payment in full. The said award will be subject to the relevant statutory deductions.

**Dated, Signed and Delivered at Nairobi this 2<sup>nd</sup> day of July, 2020**

**ONESMUS MAKAU**

**JUDGE**