



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1977 OF 2014**

**JOHN KAHINGA GATHURA.....CLAIMANT**

**VS**

**SECUREX AGENCIES (K) LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by John Kahinga Gathura against his former employer, Securex Agencies (K) Limited. The claim is contained in a Memorandum of Claim dated 26<sup>th</sup> October 2014 and amended on 27<sup>th</sup> August 2018. The Respondent filed an amended Reply on 16<sup>th</sup> October 2018.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Assistant Human Resource Manager, Moses Muli Maithya.

**The Claimant's Case**

3. The Claimant was employed by the Respondent on 14<sup>th</sup> May 2008 as a security guard. On 20<sup>th</sup> January 2014, at around 2.00 am, thieves broke into the compound of Runda Drive Estate where the Claimant was assigned to guard one of the houses, No 155B. Upon reporting to work on 21<sup>st</sup> January 2014, the Claimant was arrested alongside 4 other security guards.

4. The Claimant and his colleagues were taken to Gigiri Police Station and later arraigned in court and charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code with the alternative charge of failing to prevent a felony contrary to Section 392 of the Penal Code.

5. The Claimant was released on a cash bail of Kshs. 100,000 and on 23<sup>rd</sup> January 2014, he went to the office but was told by his supervisor that he should first deal with the criminal case before resuming duty. On 9<sup>th</sup> June 2014, the Claimant was acquitted of the criminal charges under Section 210 of the Criminal Procedure Code.

6. The Claimant states that he was summarily dismissed by letter dated 3<sup>rd</sup> February 2014. He terms the dismissal as unlawful and unfair in that he was not afforded an opportunity to be heard.

7. The Claimant therefore claims the following:

- a) Salary for the month of January 2014.....Kshs. 10,911
- b) 1 month's salary in lieu of notice.....10,911
- c) Compensation for unlawful termination
- d) Costs plus interest

**The Respondent's Case**

8. In its amended Reply filed in court on 16<sup>th</sup> October 2018, the Respondent admits having employed the Claimant as a security guard on 14<sup>th</sup> May 2008.

9. The Respondent however denies that the Claimant earned a monthly salary of Kshs. 10,911 as pleaded in the Memorandum of Claim and states that the Claimant earned a daily rate of Kshs. 385.

10. The Respondent states that it is not aware that the Claimant was arrested on 20<sup>th</sup> January 2014 and later charged with the offence of attempted robbery. The Respondent denies any knowledge of a criminal case against the Claimant.

11. The Respondent further denies that the Claimant went to the office on 23<sup>rd</sup> January 2014, seeking to be assigned duties or that the Claimant was instructed by his supervisor to deal with his criminal case before resuming duty.

12. The Respondent admits that the Claimant was summarily dismissed on 3<sup>rd</sup> February 2014 on the ground of absconding duty. The Respondent adds that the Claimant's salary for January 2014 was deposited in his bank account and that the Claimant had refused to collect his terminal dues.

13. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

14. The Respondent produced a dismissal letter dated 3<sup>rd</sup> February 2014 addressed to the Claimant as follows:

*"Dear Sir,*

**RE: SUMMARY DISMISSAL**

*Following your arrest by the police on 20<sup>th</sup> January 2014 and subsequent detainment in police cells for more than 14 days you are hereby summarily dismissed from service as per section 44 part 4 (f) of the Employment Act, 2007 with effect from 20<sup>th</sup> January 2014.*

*In accordance with your contract you will be paid salary for days worked after surrendering company property in your possession and obtaining a clearance certificate less the cost of the damage.*

*If you have anything to say in regard to this letter you should do so before expiry of seven days from the date of this letter.*

*Yours faithfully,*

*FOR: Securex Agencies (K) Ltd*

*(Signed)*

**MOSES MAITHYA**

**ASSISTANT HUMAN RESOURCE MANAGER"**

15. The letter gives the reason for the Claimant's dismissal as his detention in custody for more than 14 days. The Claimant however told the Court that he was arrested on 21<sup>st</sup> January 2014, arraigned in court on 22<sup>nd</sup> January 2014 and released on bond two days later.

16. The Respondent's Assistant Human Resource Manager, Moses Muli Maithya told the Court that he was aware that the Claimant had taken his bond document to the Operations Department. Maithya was however not privy to the conversation between the Claimant and the Zone Manager, one Mr. Nderitu.

17. The Claimant testified that he was told by Nderitu to finalise with his criminal case before resuming duty. The Respondent did not call any evidence to counter the Claimant's testimony in this regard. At any rate, from the evidence on record, it is evident that the Claimant did not stay in custody for more than 14 days. The reason given for the Claimant's dismissal was therefore non-existent. This renders the Claimant's dismissal substantively and procedurally unfair.

### **Remedies**

18. Flowing from the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in effecting the dismissal.

19. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for January 2014.

20. I therefore enter judgment in favour of the Claimant as follows:

a) 10 months' salary in compensation.....Kshs. 109,110

b) 1 month's salary in lieu of notice.....10,911

c) Salary for January 2014.....10,911

**Total.....130,932**

21. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

22. The Claimant will have the costs of the case.

23. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 15<sup>TH</sup> DAY OF JANUARY 2019**

**LINNET NDOLO**

**JUDGE**

**DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Miss Mureithi for the Claimant

Mr. Nganga for the Respondent