



**REPUBLIC OF KENYA**

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

**CAUSE NO. 892 OF 2016**

**THOMAS MOMANYI MOKUA.....CLAIMANT**

**- VERSUS -**

**GOLD SECURITY COMPANY LIMITED...RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 15<sup>th</sup> March, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 17.05.2016 through Njogu, Omwanza & Nyasimi Advocates. The claimant prayed for judgment against the respondent for payment of:

- a) Underpayments due Kshs. 29, 805.69.
- b) Salary arrears Kshs.8, 252, 092.00.
- c) Notice pay Kshs.13, 029.62.
- d) Damages for wrongful termination Kshs.156, 355.44.
- e) Overtime pay Kshs.75, 585.60.
- f) Payment for service on public holidays Kshs.9, 556.80.
- g) Payment for annual leave Kshs.13, 092.62.

Despite service the respondent failed to enter appearance or to file a memorandum of response. The case was heard ex parte as the respondent failed to attend the hearing despite service of the hearing notice.

The claimant testified to support his case. The claimant testified that he was employed by the respondent as a security guard on 14.07.2014. He testified that he was not given a letter of appointment. He worked until 18.12.2015. The claimant noticed that the merchandise (motor bikes) he was assigned to guard was being moved by the respondent's customer who owned the motor bikes and upon inquiry he was advised that there was a problem with the landlord. The owner of the motor bikes advised him to get in touch with the respondent. The claimant informed his manager and reported at the respondent's office as summoned. He was instructed to hand in the uniform. He was reluctant to comply and he retained the uniform. He instructed his advocates and a demand letter was issued against the respondent but no reply was received.

To answer the **1<sup>st</sup> issue** for determination, the Court returns that the termination was wrongful because it was without due notice as per section 35 of the Employment Act, 2007. The Claimant is entitled to one month pay in lieu of the termination notice being **Kshs. 13, 029.62**, the last minimum due statutory monthly remuneration. It was submitted that the claimant is awarded 12 months' compensation for unfair termination and as envisaged in section 49 of the Employment Act, 2007. It is submitted that the respondent gave no reason for the termination. Nevertheless the claimant testified that the customer moved the merchandise he had been assigned to guard and therefore there was no work for him to perform. It was not the claimant's case that the agreement had been that he would be assigned to guard elsewhere if the customer as assigned did not need the guarding services. On a balance of probability, the Court returns that the tenure of the employment was specific to the customer who needed guarding services and the need having lapsed, the contract of service similarly lapsed accordingly. In the circumstances and on a balance of probability, the claimant knew that his contract of service lapsed when the guarding contract between the respondent and the customer who moved merchandise lapsed. The Court will therefore not award any compensation for the alleged unfair termination.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court finds as follows:

- a) The claimant has computed the underpayments in the memorandum of claim throughout the service as against the prevailing minimum payment in the applicable wage orders and the Court returns that he is entitled to **Kshs. 29, 805.69** as prayed for.
- b) The claimant has established that he is entitled to salary arrears of **Kshs.8, 252. 09** being for 18 days worked in December 2015 and not paid for.
- c) The claimant has exhibited the check in and checkout record and established that he is entitled to overtime pay **Kshs.75, 585.60** as prayed for.
- d) The claimant testified that he worked on public holidays and he is therefore entitled to payment for service on public holidays **Kshs.9, 556.80** as prayed for.
- e) The claimant testified that he was not given annual leave and he is entitled to payment for annual leave **Kshs.13, 092.62** as prayed for.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) Payment of a sum of **Kshs.149, 322.42** by 01.05.2019 failing interest to be payable thereon at court rates from the date of separation 18.12.2015 till full payment.
- b) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 15<sup>th</sup> March, 2019.**

**BYRAM ONGAYA**

**JUDGE**