



**REPUBLIC OF KENYA**

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

**CAUSE NO 541 OF 2017**

**GEOFREY KHISA MUKANDA.....CLAIMANT**

**VERSUS**

**EL-BARI SECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This action is brought by Geoffrey Khisa Mukanda against his former employer, El-Bari Security Services Limited. The claim is as contained in a Memorandum of Claim dated 30<sup>th</sup> June 2017 and filed in court on 3<sup>rd</sup> July 2017. The Respondent filed a Response on 14<sup>th</sup> August 2017.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its two Managers, Jara Molu and Silvester Mwangolo Nguzo. Both parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was engaged verbally by the Respondent as a night security guard from 5<sup>th</sup> January 2012. He earned a monthly salary of Kshs. 6,000. On 31<sup>st</sup> October 2013, he was issued with a letter of appointment.

4. In June 2014, the Claimant asked for a pay rise and on 11<sup>th</sup> December 2015 he and his colleague wrote a letter of complaint to the County Labour Officer, Mombasa. In February 2016, the County Labour Officer visited the Respondent. None of these initiatives bore any fruit.

5. On 22<sup>nd</sup> March 2016, the Claimant wrote to the Respondent asking for annual leave but he got no response. By the Respondent’s letter dated 23<sup>rd</sup> March 2016, the Claimant was suspended for a period of two weeks. On 5<sup>th</sup> April 2016, he reported back to work but was informed that the Director was not available. He was advised to keep checking about the status of his employment. The Claimant kept going to the Respondent’s premises until September 2016, when he was notified by one of the Managers that his services were no longer required.

6. The Claimant avers that he was not paid house allowance and was not allowed to go on leave. He adds that he worked for twelve hours from 6.00 pm to 6.00 am without overtime compensation.

7. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 14,054.30
- b) Underpayment for 20 months.....146,027.25
- c) 23 days worked but not paid.....10,775.50
- d) Accrued leave for 36 months.....29,515.50
- e) Overtime compensation.....72,106.90
- f) 12 months’ salary in compensation.....168,651.60
- g) Certificate of service

h) Costs plus interest

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

8. In its Response dated 26<sup>th</sup> July 2017 and filed in court on 14<sup>th</sup> August 2017, the Respondent denies the Claimant's claim that he was terminated and states that it is the Claimant who absconded duty and refused to resume even after he was pardoned and allowed to return to work.

9. The Respondent accuses the Claimant of persistently absconding duty thus causing the Respondent to incur losses.

### **Findings and Determination**

10. There are two (2) issues or determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

11. The Claimant states that he was unfairly terminated and in response, the Respondent accuses the Claimant of absconding duty. On 23<sup>rd</sup> March 2016, the Respondent wrote to the Claimant as follows:

**“REF: SUSPENSION LETTER TO GEOFFREY KHISA MUKANDA ID NO. 7976331**

*The above matter refers on several verbal and written warning that lead (sic) us to transfer you from one assignment to another.*

*The same lead (sic) to termination of our contract in one of the assignments. Following your condition we noticed that you repeated the same mistake which made us take action on you due to:-*

- No respect towards clients
- Absconding duty

*Due to absconding duties from 7<sup>th</sup> March up to date the management has decided that you are suspended for two weeks from the day delivered due to penalization of the company by our clients because of your absence.*

*You are hereby reminded to report after the said time for further directives on assumption of your duties.*

*(Signed)*

*Yours*

*For and behalf (sic) of El-Bari security services limited”*

12. The Claimant testified that he was not allowed to resume duty after suspension. The Respondent's first witness, Jara Molu told the Court that further to the suspension letter, the Claimant was issued with a show cause letter dated 6<sup>th</sup> April 2016. The Claimant did not respond to the show cause letter but instead left and did not return. Molu further testified that in May 2016, he was summoned by the Kenya Human Rights Commission where he met the Claimant. The Claimant was asked to apologise and return to work but he failed to do so. The Claimant himself denied ever having attended a meeting at the Kenya Human Rights Commission.

13. The Respondent's pleadings, supporting documents and *viva voce* evidence all carry a common thread; that the Claimant was guilty of desertion of duty. It would appear however, that the Respondent did not summon the Claimant for a disciplinary hearing on this account. The accusations against the Claimant were therefore untested and unproved at the shop floor.

14. Additionally, from the evidence on record, the Respondent ordinarily communicated to the Claimant in writing. The Court was therefore unable to understand why the offer to resume work was not documented. The allegation that such an offer was ever made remains unsupported and is rejected.

15. In the end, the Court arrives at the conclusion that the Respondent indeed terminated the Claimant's employment without justifiable cause and in violation of due procedure.

### **Remedies**

16. Pursuant to the foregoing findings I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken

into account the Claimant's length of service as documented by the interim letters filed by the Respondent. I have further considered the Respondent's conduct in the termination transaction.

17. I also award the Claimant one (1) month's salary in lieu of notice as well as salary for 23 days in March 2016.

18. The Respondent concedes that the Claimant was not granted annual leave, ostensibly because he was a casual employee. The Respondent did not however produce any documents to prove its assertion that the Claimant was a casual employee. I therefore allow leave pay for the period between 1<sup>st</sup> November 2013 and 23<sup>rd</sup> March 2016.

19. The Claimant further claims underpayment and overtime compensation. He however did not adduce any evidence to support these claims. In the final submissions filed on behalf of the Respondent on 30<sup>th</sup> January 2019, reference was made to the decision in **Rogoli Ole Manadiagi v General Cargo Services Limited [2016] eKLR** where my brother, **Rika J** held that the burden of establishing extra hours worked rests with the employee.

20. Regarding the claim for underpayment, I have this to say; although the minimum wage payable to specific categories of employees is a matter of law, an employee alleging underpayment has the responsibility of establishing the actual level of underpayment based on the applicable minimum wage and the salary paid over a specific period. It is not enough for an employee to simply throw a Wages Order at the Court. This is what the Claimant did and his claim for underpayment was not proved.

21. Having dismissed the claim for underpayment, the Court adopts the figure of Kshs. 10,000 pleaded by the Respondent as the Claimant's monthly salary, for purposes of tabulating this claim.

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

a) 6 months' salary in compensation.....	Kshs. 60,000
b) 1 month's salary in lieu of notice.....	10,000
c) Salary for 23 days in March 2016 (10,000/30x23).....	7,667
d) Leave pay for 2 years (10,000/30x21x2).....	<u>14,000</u>
<b>Total.....</b>	<b>91,667</b>

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

24. The Claimant is also entitled to a certificate of service plus costs of the case.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF MARCH 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Katu for the Claimant

Mr. Chamwada for the Respondent