



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 207 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> June, 2019)**

**VALENTINE ODONGO.....CLAIMANT**

**-VERSUS-**

**BOERA MAIN SECURITY**

**SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Valentine Odongo, filed a Memorandum of Claim dated 16/02/2015 on 18/02/2015 for unlawful termination and seeking payment of terminal dues against the Respondent, Boera Main Security Services Limited.
2. He avers that he was employed by the Respondent as a Security Guard from 14/10/2013 until 28/10/2014 when he was called and told to report at the Respondent's office where he was ordered not to report on duty the following day and to wait for deployment to another assignment.
3. That he was terminated from employment without notice and without being paid for the 28 days he worked in October 2014 and that he was attached at Eritrea Orthodox Church as on 22/02/2014 until the date of termination.
4. He avers that he had continuously and diligently served the Respondent for over one year without receiving any warnings or being late at work and that he obeyed all orders of the Respondent. That the Respondent replied to his demand notice through a letter dated 17/12/2014 and denied that it held any salary due to him and has refused to pay the same to date.
5. That the Respondent refused to give him any appointment letter as required by law and that he had joined its Saving Sacco (Boera Savings & Credit Co-operative Society Ltd) wherein he had contributed Kshs. 7,000/=.
6. That the Respondent or its Sacco has refused to refund him the said amount and that at all material times he was paid a salary of Kshs. 7,000/= per month instead of the statutory salary of Kshs. 10,912/= per month. That he was therefore paid less Kshs. 3,912/= every month for 12 months which he now claims and that while he worked from 6pm to 7am, he was never paid for the 4 hours of overtime per day.
7. He further particularises his claim as follows:-
  - a. *Payment in lieu of notice.....Kshs. 10,912/=*
  - b. *Salary for one month unpaid.....Kshs. 10,912/=*
  - c. *One year annual leave unpaid.....Kshs. 10,912/=*
  - d. *Travelling allowance one year unpaid.....Kshs. 1,500/=*
  - e. *Underpayment of Kshs. 3,912 x 12 months.....Kshs. 46,944/=*
  - f. *Unpaid house allowance at 15%*

(Kshs. 16,368 x 12months).....Kshs. 19,642/=

*g. Failure to pay 1 rest day per week,4 days per month*

48 x 420 per day.....Kshs. 20,160/=

*h. Failure to pay 4 public days worked*

in 2014 (4 x Kshs.420).....Kshs. 1,680/=

*i. Failure to pay overtime worked 12 months*

Rate x salary x hrs worked = 1.5 x 10912 x 1344

195 hours 195 hours .....Kshs. 112,813/=

*j. Failure to refund uniform deductions.....Kshs. 3,000/=*

*k. Failure to refund Boera Sacco Society deduction Kshs. 7,000/=*

*l. Compensation of 12 months for unfair*

*labour practice and termination.....Kshs. 130,944/=*

*Total Sum.....Kshs. 376,419/=*

8. The Claimant prays for an award to be entered against the Respondent for a sum of Kshs. 376,419/= being salary, terminal dues and full compensation for unlawful termination and victimization for unfair labour practice and also prays for costs and interests.

9. He also filed his Witness Statement dated 09/09/2016 stating that he used to work for the Respondent as a night guard and that he seeks damages for unlawful and unfair termination from employment.

10. The Respondent filed its Defence dated 24/01/2017 denying that it terminated the Claimant's services and stated that inside the 12 months, the Claimant was on probation for 3 months meaning he had worked for 9 months.

11. That he is not entitled to the claim for leave because he left before attaining the mandatory requirements of leave and that the Claimant deserted/absconded duty and never reported until the Respondent was served with the pleadings in this case.

12. That the salary for October 2014 was sent to the Claimant's bank account and that it shall be seeking leave to produce the bank statement showing the said payment. That the Claimant has never demanded the Sacco money which lies with the Sacco and not with it and that he always worked for 8 hours a day, he was off duty during the said public holidays and has not returned the uniform to be entitled to a refund of the same. The Respondent prays for dismissal of the Claim with costs.

13. The Respondent filed its List of Documents together with the Statement of Hyrine Kerubo, its Operations Manager who states that the Claimant was employed on 15/10/2014 and that when he deserted duty, they were not able to find him. That as per documents in their possession, the Claimant was paid overtime and offs and that money for his uniform together with his October salary were sent to his bank account. She also stated that the company does not owe the Claimant any money.

14. The Claimant then filed his Reply to the Defence dated 23/03/2018 denying that he was on probation and stated that he had completed a year and was therefore entitled to annual leave which was not paid on termination.

15. That he was terminated without any reason and denies that he deserted duty averring that he tried several times to see the managing director who refused and sent him packing without a hearing. He prays for the dismissal of the Respondent's Defence with costs.

#### **Evidence**

16. The Claimant, CW1 testified in court that he wished to rely on his Statement as his evidence and that as per Appendix 5, a night guard was being paid Kshs. 10,911.70. That he worked on Mashujaa Day, New Year Day, Easter Monday and Good Friday, Idd Fitr, worked 7 days a week without any rest and that he was also not given any transport and that he paid for his uniform at Kshs. 300 per month.

17. On cross-examination, he stated that he had not brought his bank statement to court and confirmed he had not written to the Sacco to claim his savings with them. He also stated that he seeks to be paid for the 10 holidays.

18. RW1, Kerubo stated in court that she would like the court to adopt her Statement and filed documents as her evidence and stated that the Claimant was paid all his salary as per page 20 of their documents. That the Claimant absconded duty on 26/10/2014 and they considered him a deserter and that they do not deny underpaying him and are willing to pay him Kshs. 46,944/=.

19. That they are also ready to pay him house allowance that they did not pay him and that they used to give him 4 days off per month as per page 17 of their documents. That they paid him when he did not go on off and that he qualified to be paid during public holidays for which they are ready to pay.

20. That they did not pay him overtime but paid him Kshs. 1400/= for his uniform sent to his bank as shown on page 20 of their documents. On cross-examination, she confirmed they were ready to pay him part of the claim and that the 2<sup>nd</sup> salary vouchers are not signed by the Claimant. She also confirmed that she has not filed their bank statement in court to show they paid him.

### **Claimant's Submissions**

21. The Claimant submits that when RW1 presented a voucher of payment of his October 2014 salary which he had not signed and when she was challenged to provide evidence through a bank statement, she failed to do the same. That it was the Respondent's evidence that it was ready and willing to pay him unpaid salary; notice pay, 12 months' salary underpayment, house allowance at 15%, annual leave at one month, overtime as pleaded and uniform deductions (they did not accept this). That the Respondent was opposed to paying him 1 rest day per week, Sacco deductions and public holidays worked.

22. That the master roll produced in Court shows he was present each day from 1<sup>st</sup> to 30<sup>th</sup> of each month and that there is no absenteeism in the said roll. That the roll also shows that in no single month was he given 4 days rest and that as for the Sacco deductions, it is the director who authorizes payment release of the money once a guard is cleared.

23. That since he was chased away by the Managing Director, he was unable to get clearance and could not therefore get the Sacco money and that this Court should order the Managing Director to order for the payment as claimed together with any other claims as it may deem fit to grant.

### **Respondent's Submissions**

24. The Respondent submits that the payroll master shows the Claimant received his October 2014 salary through his bank account which was his last salary as he had deserted duty. That the Claimant refused to produce his bank statement from October 2013 to October 2014 to prove that he did not receive his salary or refund for his uniform deductions and that the Evidence Act is clear that he who alleges a fact must prove it in the Court of law. That it did its part by producing a master roll in court showing that it paid the Claimant the said salary and that the Claimant wanting to be paid twice is against labour practice and urges the Court to reject this particular prayer.

25. That since the Claimant deserted duty he is not entitled to notice pay as he was not dismissed abruptly and that it is he who is supposed to pay the Respondent one month's salary for terminating his services without informing it.

26. That since he worked for only 9 months, he is also not entitled to salary in lieu of leave and has not proved in Court that he worked overtime and that without such proof he is not entitled in that limb because it always paid him overtime whenever he worked for it. It relies on **Cause No. 1576 of 2014, Monica Wanjiru Kahungu –v- Boniface Kamau & another (unreported)** where the Court held:-

***“Although testifying that she worked 12 hours per day instead of 8 hours, the claimant did not draw the attention of the court to which particular regulation of wages order applied to the sector the Respondents operated in or the prescribed working hours beyond which overtime would be payable.”***

27. The Respondent further submits that if it is forced to pay the Claimant the Sacco money, he will again demand from the Sacco where the Respondent has no role. That the Claimant should not be compensated for unfair termination or unfair labour practice because he is the one who deserted duty and did not produce any document from the Respondent dismissing him from duty. It urges the Court to dismiss the Claimant's claim with costs to it.

28. I have examined all the evidence and submissions of the Parties. The Respondent have alleged that the Claimant absconded duty. The Claimant on the other hand aver that he was verbally terminated from duty on 28/10/2014.

29. On 12/11/2014 – 2 weeks after the termination, the Claimant wrote a demand letter to the Respondents through the Claimant's Counsel and the reply was that the Claimant had absconded duty.

30. There is no indication that in the 2 weeks when Claimant was away, the Respondent tried reaching him yet they had his contact details having admitted that he was their employee.

31. There is also no evidence that the Respondent attempted to summon The Claimant for disciplinary hearing for absconding duty. In the absence of any such evidence, the contention by the Respondent that the Claimant absconded duty is false.

32. The Claimant was also not subjected to any disciplinary hearing as expected under Section 41 of Employment Act.

33. Section 45(2) of Employment Act 2007 state as follows:-

**(2) “A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

*(b) that the reason for the termination is a fair reason:-*

*(i) related to the employee's conduct, capacity or compatibility; or*

*(ii) based on the operational requirements of the employer; and*

*(c) that the employment was terminated in accordance with fair procedure”.*

34. From the provision of the law, the Respondent can only terminate if they have valid reasons and after taking their employee through a proper disciplinary process. The Respondent in this case failed on both accounts and I therefore find the dismissal of the Claimant unfair and unjustified.

35. In terms of remedies, the Respondent have admitted that they are willing to pay the Claimant certain remedies including 46,944/= underpayment dues and house allowance. I will therefore enter judgement for Claimant on the admitted prayers for:-

**1. 46,944/= underpayment of Kshs.3912 x 12 months**

**2. Unpaid house allowance at Kshs.15/100 x 10912 x 12 = 19,642/=**

I also award Claimant as follows:-

**3. 1 months salary in lieu of notice = 10,912/=**

**4. Unpaid salary for October 2014 = 10,912/=**

**5. 8 months salary as compensation for unfair termination = 8 x 10,912 = 87,296/=**

**TOTAL = 175,706**

**6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

**Dated and delivered in open Court this 17<sup>th</sup> day of June, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Wachira holding brief Muindi for Respondent – Present

Claimant – Present in person