



**REPUBLIC OF KENYA**

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

**CAUSE NUMBER 183 OF 2016**

**BETWEEN**

**BENJAMIN OKOMBE MOKAYA.....CLAIMANT**

**VERSUS**

**FACTORY GUARDS MOMBASA LTD.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

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*Mburu, Nyamboye & Company Advocates for the Claimant*

*Wandai Matheka & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 9<sup>th</sup> March 2016. He states he was employed by the Respondent as a Security Guard, on 16<sup>th</sup> December 2007. The Respondent terminated Claimant's contract on 16<sup>th</sup> March 2015, without notice and valid reason. His last basic salary was Kshs. 13,611 monthly. He was not paid house allowance for the period worked of 8 years. He worked on public holidays without compensation. He prays for Judgment against the Respondent for:-

- a) House allowance at Kshs. 195,988.
- b) 1 month salary in lieu of notice at Kshs. 13,611.
- c) Annual leave at Kshs. 108,888.
- d) Public holidays at Kshs. 83,760.
- e) Gratuity at Kshs. 75,384.
- f) Compensation for unfair termination at Kshs. 163,332.
- g) Punitive damages.
- h) Any further suitable order.

2. The Respondent filed its Statement of Response on 28<sup>th</sup> October 2016. The Claimant's contract was terminated by the Respondent as a result of attempted theft which took place at Respondent's Client [Gapco - Tank Farm, Makande in Mombasa], on 20<sup>th</sup> February 2015. Criminals attempted to siphon fuel from the premises. The Claimant and another Guard named Jonathan Musau were suspended pending investigations. The Claimant was invited to a meeting on 11<sup>th</sup> March 2015. He was given a chance to be heard. He was found culpable of colluding with others to attempt theft of fuel. The Respondent subsequently terminated his contract on 16<sup>th</sup> March 2015. Termination was

fair. The Respondent urges the Court to dismiss the Claim with costs.

3. The Claimant gave evidence and closed his case, on 23<sup>rd</sup> November 2016. Mary Dzine Ezekiel Kambi, Human Resource Manager of the Respondent, gave evidence on 20<sup>th</sup> June 2017 and 14<sup>th</sup> November 2017 when hearing closed. The Cause was last mentioned on 22<sup>nd</sup> March 2019 when Parties confirmed filing of their Submissions.

4. The Claimant's evidence is that he worked for the Respondent for 8 years. On 20<sup>th</sup> February 2015, the Claimant signed the Guard Book. Moments later, he heard his fellow Guard, who was guarding the other side of the premises shout. The other Guard set alarm off. The Claimant rushed to the scene and found his Colleague had arrested a suspect. The suspect had attempted to siphon fuel. The Claimant and his Colleague handed the suspect over to Respondent's back-up team. The Claimant was suspended and subjected to a disciplinary hearing. The findings were that the Claimant was not negligent and should be served with a warning. Later, the Respondent terminated the Claimant's contract, alleging he was negligent.

5. In June 2015, he received Kshs. 150,000 from the Respondent through his bank. In July 2015, he received another Kshs. 138,611. In total he was paid Kshs. 288,611. He did not know what the amount represented. He did not receive house allowance, gratuity and overtime.

6. Cross-examined, the Claimant confirmed he was suspended to pave way for investigations. He was heard. The Disciplinary Committee made its determination. The Claimant was not culpable. He was never arrested. His contract was terminated after hearing. He cleared with the Respondent. Money was deposited in the Claimant's bank by the Respondent. He did not know what the details of payment were. Redirected, the Claimant restated that the Disciplinary Committee recommended he is warned. He received a Certificate of Service without the correct details.

7. Kambi confirmed the Claimant worked for the Respondent for about 7 years. There was attempted theft at the site the Claimant was assigned duty. A suspect attempted to steal fuel. The Claimant, Musau and a 3<sup>rd</sup> Guard named Onyango, were on duty. Onyango disappeared after the incident. The suspect was apprehended and forwarded to the Police. The Claimant and his Colleague were suspended to pave way for investigations. The Respondent suspected the Claimant and Musau of colluding with the suspect. The Claimant was heard in the company of his Union Representative. It was decided that he is given the benefit of doubt. Top Management made the final decision to dismiss the Claimant, after consulting the Client Gapco. The Claimant's contract was terminated; he was not summarily dismissed. The Respondent considered his long years of service. Terminal dues were computed and paid. The amount was paid in 2 installments. The Claimant was given his Certificate of Service. The Respondent considered the chapter closed.

8. Cross-examined, Kambi told the Court that the Claimant worked 7 complete years. She did not know if there were earlier complaints against the Claimant. The Disciplinary Committee considered the Claimant had worked for 8 years without warning. It was recommended he should be warned. Termination was not unfair. Notice pay was not included in his terminal dues. Annual leave was factored in. Public holidays were not, assuming the Claimant worked on Public Holidays. The Management had the final say on termination. Redirected, Kambi testified that the Claimant did not have disciplinary problems before March 2015.

#### **The Court Finds:-**

9. The Claimant was employed by the Respondent as a Security Guard, effective 16<sup>th</sup> February 2007 to 16<sup>th</sup> March 2015, when his contract was terminated. His last salary was Kshs. 13,611 monthly.

10. He was suspended on 23<sup>rd</sup> February 2015 to pave way for investigation of attempted theft of fuel, at Gapco premises where the Claimant had been assigned Guard duties. He worked there with 2 other Guards.

11. The Claimant was taken through a disciplinary hearing on 11<sup>th</sup> March 2015. There were 7 Shop Stewards accompanying the Claimant. From the minutes of the proceedings, the Court does not doubt that procedure at the Disciplinary Committee was largely fair and objective. However, certain aspects of the procedure are questionable..

13. The Disciplinary Committee found that the Claimant joined the Respondent in 2007. He had a very clean record. It was the finding of the Committee that the suspect gained entry to the premises through an area which was not guarded by the Claimant. The Claimant had worked for 8 years without warning. It was recommended that the Claimant is issued with a warning for negligence. It was the position of the Committee that the Claimant should have spotted the suspect from where he was guarding.

14. On 16<sup>th</sup> March 2015, the Claimant's contract was terminated over the incident. Kambi explained that this decision was made by Top Management, upon consultation with the Client, Gapco. The Top Management was not bound by the recommendation of the Disciplinary Committee.

15. The Court does not find any evidence to justify termination of the Claimant's contract, after the Disciplinary Committee had taken evidence, evaluated evidence and absolved the Claimant, saying attempted theft did not happen at the area where the Claimant was guarding. The disciplinary proceedings show the Claimant left his own guarding area, and went to his Colleague who had shouted after the suspect gained entry. The Claimant set off the alarm. The suspect was arrested and handed over the Respondent's backup team, before being handed over to the Police.

16. This evidence, and the evidence given by the Respondent before this Court, does not show in what way the Claimant could have been negligent in performance of his duty. It does not suggest there was collusion between the Guards and the suspect. Why would the Guards raise alarm if they were in collusion with the suspect? If the suspect gained entry through an area outside the Claimant's assigned area, how was the Claimant negligent?

17. The Disciplinary Committee seems to have sought the easy way out for themselves, having found the Claimant was innocent, and having at the same time, to satisfy the Top Management with a workplace conviction. A warning and equivocal statements on negligence provided an easy way out.

18. The recommendation would have introduced a warning letter in the Claimant's personnel file, but would not have resulted in loss of employment.

19. The decision to terminate was made by what Kambi called Top Management. There is no evidence of what Top Management comprised. There is no evidence of the process taken by Top Management, in reversing the recommendation of the Disciplinary Committee. The Court has not been shown any document such as a Disciplinary Code, Workplace Policy Manual or CBA giving discretion to Top Management, to reverse the outcome of a disciplinary process. There is no attempt made at all by the Respondent, to show the Court that Top Management had discretion to impose tougher penalty than what the Disciplinary Committee imposed, and that such discretion was exercised in a manner satisfying the standards of fairness under Section 41, 43 and 45 of the Employment Act. The Top Management just made a decision which does not indicate in what way, the decision of the Disciplinary Committee was unsatisfactory. The Disciplinary Committee made its findings and recommendations on 11<sup>th</sup> March 2015. Termination followed 5 days later, on 16<sup>th</sup> March 2015. There is no review of the work of the Disciplinary Committee, shown to have taken place in these 5 days, which would result in a different outcome. Where are the deliberations of Top Management to justify exercise of discretion to impose the ultimate sanction of loss of employment?

20. Termination decision made by Top Management was not preceded by fair procedure, and was not based on valid reason. The Respondent concedes the Claimant was an exemplary Guard, with about 8 years' experience. He did not have any warnings and is not shown to have colluded in any way, or to have acted negligently, in discharge of his guard duties. He was paid a net sum of Kshs. 288,610 upon termination. The record indicates this included basic salary, house allowance, leave and gratuity. The Claimant has no justification to reclaim what has been paid.

**21. *He is entitled to compensation for unfair termination, which the Court grants at equivalent of 9 months' salary, computed at Kshs. 122,499.***

**22. *He is allowed the prayer for notice pay at Kshs. 13,611.***

23. Other claims were part of the sum received and acknowledged by the Claimant.

24. There is no ground laid out for considering and allowing the prayer for punitive damages.

25. No prayer for costs and interest is pleaded.

IN SUM, IT IS ORDERED:-

***a) The Respondent shall pay to the Claimant 9 months' salary in compensation for unfair termination at Kshs. 122,499 and notice at Kshs. 13,611- total Kshs. 136,110.***

***b) No order on the costs.***

**Dated and delivered at Mombasa this 13<sup>th</sup> day of June 2019.**

**James Rika**

**Judge**