



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

**CAUSE NO. 446 OF 2015**

**(Consolidated with 447 of 2015 and 448 of 2015)**

**(Before Hon. Justice Hellen S. Wasilwa on 12<sup>th</sup> June, 2019)**

**1. NAIROBI ELRC CAUSE NO. 446 OF 2015**

**SYLVESTER KIPRONO KURGAT**

**2. NAIROBI ELRC CAUSE NO. 447 OF 2015**

**KENNEDY OKINYI OUMA**

**3. NAIROBI ELRC CAUSE NO. 448 OF 2015**

**MOSES JOEL ANGATIA**

**-VERSUS-**

**RIARA GROUP OF SCHOOLS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimants, Sylvester Kiprono Kurgat, Kennedy Okinyi Ouma and Moses Joel Angatia filed their respective Claims all dated 20/03/2015 seeking payment of final dues and compensation for wrongful termination of their employment against the Respondent, Riara Group of Schools Limited.

2. Sylvester avers that he was employed as a Security Guard by the Respondent on 08/05/2010 on a monthly salary of Kshs. 13,000/= and was later promoted to Security Supervisor Trainee on 01/10/2011 earning Kshs. 16,910/= per month, which was inclusive of a responsibility allowance of Kshs. 3,000/=.

3. That he worked continuously for 4 years and 6 months before the Respondent terminated his services vide a letter dated 27/11/2014. That by March 2012 his salary had risen to Kshs. 17,953/= by virtue of annual salary reviews and adjustments as shown in copies of his salary slips marked **SKK 3** and that this thereafter reduced to Kshs. 9,787/= so as to accommodate house allowance and overtime payments as shown in his annexure marked **SKK 4**.

4. Kennedy avers that he was employed as a Security Guard on 30/09/2009 earning a monthly salary of Kshs. 9,360/= and that he worked continuously for 5 years and 2 months before his services were terminated by the Respondent with effect from 27/11/2014.

5. That by May 2011 his basic salary had risen to Kshs. 11,954/= by virtue of annual salary reviews and adjustments as shown in his annexure marked **KOO 2** and by June 2013 while at Kshs. 15,791/=, it was reduced to Kshs. 10,473/= so as to accommodate the two new items as shown in his annexure marked **KOO 3**.

6. That the items are not based on any statutory percentage with the overtime payment being a flat amount of Kshs. 3,244/= whether one worked past or below that time and that the new figures were put so as to balance the salary slips with the new items.

7. Moses avers that that he was employed as a Security Guard on 09/07/2009 on a monthly salary of Kshs. 9,000/= and that he worked continuously for 5 years and 4 months before his services were terminated by the Respondent with effect from 04/12/2014. That his salary which by May 2013 was Kshs. 15,857/= was reduced to Kshs. 10,576/= so as to accommodate the new items as shown in his annexure **MJA 3**.

8. The Claimants aver that the Respondent's act of terminating their services was unwarranted, unfair, unlawful and contrary to fair labour practices since the allegations against them were based on rumours and fabrication of facts.

9. That they only received monthly basic salaries without receiving any other payment such as house allowance or accommodation as required by **Section 31(1) of the Employment Act**. That they each worked 12 hours per day instead of the statutory 8 hours and were never paid overtime for the 4 excess hours per day and that while they worked on public holidays and rest days, they were not paid the 8 public and rest days for the years that they served the Respondent.

10. That that the Respondent purported to pay them house allowance and overtime from May 2013, June 2013 and May 2013 respectively up to the time of terminating their services and that the two items were indicated on their pay slips without actually being paid as shown in their annexures marked **SKK4** and **KOO3**.

11. That while terminating their services, the Respondent failed/ refused to include the amounts it owed them in terms of house allowance, overtime and gratuity payments which they were legally entitled to. The Claimants pray for judgment against the Respondent as herein below:

**Sylvester:**

- a) *Gratuity at half salary (Kshs. 11,316 x 4years).....Kshs. 45,264*
- b) *Payment of house allowance (Kshs.3,394 x54 months)...Kshs. 183,276*
- c) *Payment for overtime hours worked on working days  
(4 hours x 26 days x Kshs.163 (rate per hour) x 54 months)..Kshs. 915,408*
- d) *Payment for overtime hours worked on Public holidays (8days x 12hours x Kshs. 218 (rate per hour) x 4.6years).....  
Kshs. 96,268*
- e) *Damages for wrongful termination of contract of service*

**Kennedy:**

- a) *Gratuity for 5 completed years (75 days x Kshs. 656).....Kshs. 49,200*
- b) *House allowance (Kshs. 2,558.7 x 62 months).....Kshs. 158,639*
- c) *Overtime hours worked on working days (4hours x 26days x Kshs.123 (rate per hour) x 62months).....Kshs.  
793,104*
- d) *Overtime hours worked on Public holidays (8days x 12hours x Kshs. 164 (rate per hour) x 5.2years).....Kshs.  
81,868*
- e) *Damages for wrongful termination of contract of service.*

**Moses:**

- a) *Gratuity at half salary (Kshs. 8,615 x 5years).....Kshs. 43,075*
- b) *Payment of house allowance (Kshs. 2,584.5 x 64 months).....Kshs. 165,408*
- c) *Payment for overtime hours worked on working days (4hours x 26days x Kshs.124 (rate per hour) x 64 months)..Kshs.  
825,344*
- d) *Payment for overtime hours worked on Public holidays (8days x 12hours x Kshs. 165.7 (rate per hour) x  
5.4years).....Kshs. 85,898*
- e) *Damages for wrongful termination of contract of service*

12. The Claimant also filed their Witness Statements dated 20/03/2015 stating that while the salary slips indicated the new items being house allowance and overtime payments, the total amount of money they received per month did not change. That what the Respondent did was to illegally reduce their basic salaries so as to accommodate the introduced items and that non-payment of the same including gratuity for completed years of service was contrary to the law.

13. The Respondent filed its Statements of Reply all dated 14/05/2015 admitting to have employed Sylvester and Moses but denying that it promoted Sylvester to Security Supervisor Trainee as alleged. It also denies employing Kennedy for 5 years and 2 months stating that his employment began on 09/03/2011.

14. It avers that the Claimants knowingly acted in a manner insulting to the Respondent and his seniors by failing to obey proper instructions issued to them and failing to collect and wear their guard uniforms. That they also incited other staff to boycott the said uniforms thus compromising security at the Respondent's business premises and causing unwarranted tension between staff and management.

15. It avers that the Claimants' services were fairly and lawfully terminated following their acts of insubordination, incitement and gross misconduct and that it followed proper procedure. That in following procedure, it convened a meeting to explain to each of them details of their alleged misconduct and proposed disciplinary action; allowed them to have another employee of their choice at the meeting; and heard and considered their explanations.

16. That Moses however failed, refused and/or neglected attending the said meeting and only sent an SMS to his supervisor indicating that would not attend the meeting which led to his dismissal. That the Respondent acted in accordance with the principles of justice and equity having properly investigated the boycott of staff uniforms and established the Claimants' roles in the incident.

17. That it at all times paid each of them in accordance with the statutory basic minimum wages in operation from time to time including house allowance at 15% of the basic minimum wage and that it shall be relying on their payslips. That at the time of dismissal of their employments, the Claimants earned as follows:-

**Sylvester:**

a) **Basic salary.....Kshs. 12,794/=**

b) **Housing allowance.....Kshs. 3,000/=**

c) **Responsibility allowance.....Kshs. 3,000/=**

**Kennedy:**

a) **Basic salary.....Kshs. 10,814/=**

b) **Housing allowance.....Kshs. 3,000/=**

**Moses:**

a) **Basic salary.....Kshs. 10,947/=**

b) **Housing allowance.....Kshs. 3,000/=**

18. That each of the Claimants worked 52 hours per week during the day and not more than 60 hours when they worked at night and that they also each took 1 rest day per week and public holidays. That where overtime was recorded, they were compensated at 1.5 times the normal hourly rate or 2 times the normal rate for working on normal rest days/public holidays.

19. That they were compensated with paid off-days where they worked on public holidays and that the Respondent relies on its overtime and leave records marked **RGS 1**. The Respondent denies that the Claimants are entitled to gratuity averring that they were members of NSSF and are thus not entitled to service or gratuity pay.

20. The Respondent avers that each of the Claimants signed a Declaration Form annexed and marked **RGS 2** confirming receipt of their final dues and with no further claim whatsoever against it. That Sylvester received a net pay of Kshs. 47,898/=, Kennedy received Kshs. 42,546/= while Moses received Kshs. 28,649/=.

21. That it also on its own volition paid each of them one month's salary in lieu of notice in the sums of Kshs. 22,632 to Sylvester, Kshs. 17,058/= to Kennedy and Kshs. 17,230/= to Moses, in addition to other benefits and allowances due to them up to the date of their dismissal.

**Evidence**

22. CW1, Sylvester Kiprono stated in court that he would wish to adopt his written statement as his evidence in court and testified that he never rejected any new uniform and that he was first to be given his uniform being in charge.

23. That he never rebelled or led a strike in Riara, was never called for any disciplinary action before the termination and that on 27/11/2014 he was called to the office at 10.30am and issued with a termination letter for reasons he did not know.

24. He stated in cross-examination that his basic salary was Kshs. 13,000/= and that he is the one who issued the uniforms. That he was not told he would work 12 hours and that he has no letter increasing his salary to Kshs. 21,000/=. That in all his subsequent payslips from 2013, there was provision for house allowance and overtime allowance.

25. CW2, Kennedy Okinyi stated that he would wish to have his statement adopted as evidence in this case and that it was not true he refused to pick his uniform. That he never participated in any strike or attend any meeting concerning any strike and that the item on house allowance was only included in their payslip after one of them sued Riara, with the basic amounts remaining the same.

26. On cross-examination he stated that he signed his employment letter on 05/01/2010 and that he received a letter on 29/05/2014 increasing his salary to Kshs. 17,058/=. That he was even wearing his uniform when he received his termination letter.
27. CW3, Moses Joel stated that he would like to rely on his statement as his evidence and also testified that he never refused to pick any uniform but picked it on 17/09/2014 and wore it from that day.
28. That he also never participated in any strike stating that on 14/11/2014, he was called by the Security Manager who told him he would send him fare for him to come back to Nairobi but never sent the said fare. That he later heard he had been sacked and that in 2013 his salary was Kshs. 17,000/=.
29. RW1, Stephen Kariuki a Senior HR Officer with the Respondent testified that initially, the Claimants' salaries did not show the overtime and house allowance but that it was inclusive of their basic pay. That the management always paid them above the minimum wage and that when they decided to do the best practice, they itemised those payments.
30. That in August 2014 the management bought uniforms for all the staff who did not respond when they were advised to pick them and that it emerged some were inciting others not to pick them alleging they were not consulted about the colour and that quality was not good.
31. That they met all staff except Moses and discussed the issue on 14/11/2014 and that Sylvester admitted to these things but feared confrontation with his juniors. That they computed their terminal dues and paid them and stated that he wished to produce his Witness Statement signed on 17/12/2018 and all documents as his evidence.
32. On cross-examination, he stated that he did not have minutes of the meeting held on 14/11/2014 or the text message sent by Moses or evidence that the Claimants called other staff telling them not to pick uniforms.

### **Claimants' Submissions**

33. The Claimants submit that their services were terminated by the Respondent without due procedure in that they were all denied the right to be heard and to defend themselves and that they were never called to be given an explanation on their alleged involvement in incitement.
34. That the Respondent failed to prove the said allegation in court and that absence of evidence of any disciplinary hearing by the Respondent shows that the allegation of incitement was an afterthought.
35. That signing of declaration forms is a strategy by employers to escape liability for their actions which violates the law and the rights of employees and that they the Claimants were under duress when they were signing for their final dues. They rely on the case of **Dennis Kipngetich Koech –v- MKPPA, Kenya Limited [2018] eKLR** where Mbaru J held that:-

*“This Court thus guided as under the constitution and statute is bound. Where an employee is made to sign a declaration, discharge or clause indicating that they have received final dues and cannot claim to any other payment and which payment of dues is an entitlement in law or provided for under the constitution, such discharge provisions cannot surpass the import of the constitution and the law in protecting the employee. Where there is a valid claim encapsulated in the constitution or the law, any declaration made to discharge liability is null and void to the extent of its application weighed against the import of the constitution and the law. This court thus guided finds the Declaration of Final Dues signed by the claimant does not in any manner, style or edict bar the claimant or this Court from addressing any claim(s) made and which have basis.”*

36. They submit that they are entitled to service pay as claimed in their Statements of Claim in tandem with **Section 35(5) of the Employment Act** where they are unfairly terminated as the case was. That they deserve the orders sought in their respective claims in tandem with the provisions of the **Regulation of Wages (Protective Security Services) Order, Legal Notice No. 64 Regulation of Wages (General Amendment) Order 2011 and Legal Notice No. 98 Regulation of Wages (Amendment) Order 2010**. That they further deserve one year pay in terms of **Section 49(1) of the Employment Act** on their gross monthly salary due to their employment being unfairly terminated.

### **Respondent's Submissions**

37. The Respondent submits that **Section 44(3) of the Employment Act** provides that an employer may summarily dismiss an employee when the employee by conduct breaches his obligations arising under the contract of service. That it was entitled to summarily dismiss the Claimants due to their actions and that it adhered to **Section 41 of the Employment Act** when it called for a meeting and allowed them to explain and defend themselves.
38. They submit that the Claimants' claim on unpaid housing allowance and overtime payments is unfounded and devoid of any merit and that their house allowances were fully and adequately paid all through.
39. That it is clear their payslips recorded the overtime paid out to them every month and they never at any point during their employment raise an issue regarding improper tabulation of overtime. That the Declaration signed by them is binding and of contractual and enforceable import and that their respective claims are an afterthought and lack merit and should be dismissed with costs.
40. I have examined all the evidence and submissions of the Parties. The issues for this Court's determination are as follows:-

#### ***1. Whether the Claimants were terminated for just reasons and through a fair process.***

## 2. Whether the Claimants are entitled to remedies sought.

### **Issue No. 1**

41. On this, the 1<sup>st</sup> Claimant Sylvester was employed vide a letter dated 6/5/2010 which indicated that he was a Security Guard and was expected to work extra hours. His salary inclusive of all allowances and benefits was 13,000/= and rose to gross of 20,953 as at August 2012.

42. Kennedy was also an employee of the Respondent as a Security Guard and his gross salary was 11,954/=. The salary rose to 15,791/= as at March 2012.

43. Moses on the other hand also served the Respondent and his initial salary was 9,000/= gross and the salary rose to 15,857/= gross as at March 2013.

44. The Claimants were terminated under similar circumstances. The termination letters indicate that the Claimants were inciting their colleagues to boycott uniforms, which were being issued by the company. Moses was also alleged to have refused to attend the meeting summoned by his supervisors and responded through SMS that he would not attend.

45. The Claimants denied committing the said offences. When the RW1 testified in Court he indicated that these issues concerning the Claimants were discussed by Management and the Claimants except Moses and the Claimants admitted the action but Sylvester indicated that he feared confrontation with his juniors.

46. In cross-examination, RW1 indicated that he did not have minutes of the alleged meeting held on 14/11/2014 nor text send to Moses. He also did not have the evidence that Claimants called staff and asked them not to pick their uniforms.

47. Section 43 of Employment Act 2007 states as follows:-

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

48. The Respondent who decided to terminate the Claimants’ services allegedly for incitement, need to prove this.

49. The Respondent have failed to prove the Claimants incited other staff not to pick their uniforms as alleged. There is also no indication that they took the Claimants through any disciplinary process with a view to proving these allegations. No minutes of the alleged disciplinary hearing were submitted before Court.

50. Section 41 of Employment Act 2007 states as follows:-

***1) “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.***

51. The Respondents failed to follow the above process and also failed to prove that they had valid reasons to terminate the services of the Claimants.

52. Section 45(2) of Employment Act 2007 states 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”.*

53. In the case of the Claimants, I find that Respondents had no valid reasons to terminate the Claimants and also failed to follow due process. I therefore find the dismissal of the Claimants unfair and unjustified.

54. As for remedies sought, the Claimants seek various remedies including gratuity, house allowance, overtime and damages for wrongful termination.

55. On gratuity, I note that the Claimants were members of NSSF and therefore gratuity is not payable as is provided for under Section 35(6(d) of Employment Act.

56. On overtime, the payslips produced by the Claimants show overtime was not paid until after 2013 when this was introduced. The Claimants worked beyond the 8 hours and this was even indicated in their appointment letters.

57. I therefore find for each Claimant and award them overtime pay for 3 years as follows:-

“**Kennedy:**

-  $4 \text{ hours per day} \times 6 \text{ days} \times 4 \times 12 = 4 \times 123 \text{ per hour} \times 6 \text{ days} \times 12 = 106,272/=$

**Sylvester:**

-  $4 \text{ hours per day} \times 6 \text{ days per week} \times 4 \text{ weeks} \times 12 \text{ months} \times 3 \text{ years} = 4 \text{ hours at rate of } 124/= \times 6 \text{ days} \times 12 \text{ months} = 35,712 \times 3 \text{ years} = 107,136/=$

58. On house allowance, the appointment letter indicated that the salary was inclusive all allowances and so this is not payable.

59. I also award Claimants 9 months' salary as compensation for unlawful and unfair termination.

60. I also award each Claimant 1 months' salary in lieu of notice. The totals are as follows:-

**1. Sylvester Kurgat**

1.  $16,910 \text{ notice pay}$

2.  $9 \text{ months compensation} = 16,910 \times 9 = 152,190/=$

3.  $Overtime \text{ pay} = 140,832/=$

**TOTAL = 309,932/= Less statutory deductions**

**2. Kennedy Okinyi**

1.  $1 \text{ month notice pay} = 15,791/=$

2.  $Overtime \text{ pay} = 106,272/=$

4.  $9 \text{ months compensation for unfair termination} = 9 \times 15,791 = 142,119/=$

**TOTAL = 264,182/= Less statutory deductions**

**3. Moses Angatiah**

1.  $1 \text{ month notice pay} = 15,857/=$

2.  $Overtime \text{ pay} = 107,136/=$

5.  $9 \text{ months compensation for unfair termination} = 9 \times 15,857 = 142,713/=$

**TOTAL = 265,706/= Less statutory deductions**

61. 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 12<sup>th</sup> day of June, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Angaya for Claimants – Present

Respondents – Absent