



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 684 OF 2016**  
**BETWEEN**  
**GODFREY NYAMORI OMOKE.....CLAIMANT**  
**VERSUS**  
**CREST SECURITY SERVICES LIMITED.....RESPONDENT**

Rika J.

Court Assistant: Benjamin Kombe

Thabit Wampy & Kitonga Advocates for the Claimant

Chala & Company Advocates for the Respondent

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 16<sup>th</sup> September 2016. He states, he was employed by the Respondent as a Reliever Night Guard, on 28<sup>th</sup> January 2015. He was to work for 1 year, ending 31<sup>st</sup> January 2016.

2. His contract was terminated on 22<sup>nd</sup> February 2015. He earned a salary of Kshs. 10,500 monthly. He avers that termination was without notice. He prays the Court to find termination was unfair and unlawful, and grant him Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 10,500.
- b. Balance of the contract period at Kshs. 105,000.
- c. 2 months' uniform deductions at Kshs. 700.
- d. Damages for unfair termination at Kshs. 126,000.

**Total.....Kshs. 242,200.**

c. Certificate of Service to issue.

f. Cost and Interest.

3. The Respondent filed its Statement of Response on 24<sup>th</sup> November, 2016. It is conceded that the Claimant was employed by the Respondent as a Reliever. He was found deeply asleep by his Supervisor, with his boots loosened. He endangered the lives of those he was assigned duty to protect. He was heard by the Respondent on 27<sup>th</sup> February 2015. The Respondent terminated his contract on 4<sup>th</sup> March 2015. The Claimant agreed that he was found sleeping, and wrote an apology letter. The Respondent prays the Court to dismiss the Claim with costs.

4. The Claimant gave evidence, and rested his case, on 5<sup>th</sup> June 2018. Field Officer, Gilbert Morara Nyaburi, gave evidence for the

Respondent on 12<sup>th</sup> March 2019, closing the hearing.

5. The Claimant explained that he was hiding under a tree, when his Supervisor alleged he was sleeping at work. He was asked to report to the General Manager where the accusation was put to the Claimant. He denied that he was caught sleeping. The General Manager asked the Claimant to apologize. The Claimant left employment, but was never recalled as had been promised.

6. Cross-examined, the Claimant told the Court that he did not mention in his Statement of Claim, that he was found asleep. He admitted to the General Manager that he was found asleep. He apologized. He was not offered, and declined, the role of a Day Guard. He explained upon redirection, that he was told to apologize, to be allowed to continue working. He was not heard in a disciplinary forum.

7. Gilbert told the Court that the Claimant was found by his Supervisor deep asleep, on 26<sup>th</sup> February 2015. The Claimant was given a hearing on 27<sup>th</sup> February 2015. He explained that he slept because he had walked from a place called Mtwapa to Mombasa town. Gilbert offered to change Claimant's shift from night to day. The Claimant conceded he was on the wrong, apologized, then deserted.

8. Cross-examined, Gilbert told the Court that paragraph 10 of the Statement of Response states that the Claimant was dismissed by the Respondent. The Respondent did not ask the Claimant to write letter of apology.

**The Court Finds:-**

9. The Claimant was employed by the Respondent as a Reliever Night Guard on 28<sup>th</sup> January 2015.

10. He was to work for 1 year, ending 31<sup>st</sup> January 2016.

11. He worked for less than 1 month, having left employment on 22<sup>nd</sup> February 2015, as pleaded at paragraph 4 of his Statement of Claim.

12. His salary was Kshs. 10,500 per month.

13. He was found asleep by his Supervisor while on duty. The Claimant wrote a Statement on 27<sup>th</sup> February 2015 acknowledging this. He attributed his having fallen asleep, to tiredness, as he had cycled from Mtwapa to Mombasa. He apologized and asked the Respondent to give him 1 more chance.

14. While sleeping at work is a valid ground for dismissal, Gilbert Morara Nyaburi, who gave evidence for the Respondent, told the Court that the Claimant deserted.

15. At the same time, he conceded that the Statement of Response, paragraph 10, states it was the Respondent's decision to terminate the Claimant's contract.

16. Gilbert further stated that the reasons for termination were clearly spelt out in the letter of termination.

17. There is no letter of termination on record. The Claimant states he was never issued one.

18. It is the responsibility of the Employer under Section 43 of the Employment Act, to prove the reason or reasons, for termination.

19. The Respondent has not shown that the Claimant's contract was terminated on account of his being found asleep while on guarding duties, or on account of desertion.

20. There is similarly no evidence to establish that the Claimant was heard on the offence of sleeping on duty or desertion, as required under Sections 41 and 45 of the Employment Act.

21. Termination was unfair.

22. The Claimant had worked for little under 1 month. His contract was for 1 year. He has not established that he is entitled to salary for the balance of his contract period. His pay slip does not support his prayer for refund of uniform deduction. Having worked for less than 1 month, his prayer for equivalent of 12 months' salary in compensation for unfair termination is out of order.

23. He is granted equivalent of ½ month salary in compensation for unfair termination, at Kshs. 5,250.

24. He is granted 1 month salary in lieu of notice at Kshs. 10,500.

25. He is allowed the prayer for Certificate of Service.

26. No order on the costs and interest.

**IN SUM, IT IS ORDERED:-**

**a. Termination was unfair.**

**b. The Respondent shall pay to the Claimant equivalent of  $\frac{1}{2}$  month salary at Kshs. 5,250 in compensation for unfair termination and 1 month salary in lieu of notice at Kshs. 10,500 – total Kshs. 15,750.**

**c. Certificate of Service to issue.**

**d. No order on the costs and interest.**

**Dated and delivered at Mombasa this 29<sup>th</sup> day of July 2019.**

**James Rika**

**Judge**