



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CASE NO. 90 OF 2014**

*(Before Hon. Justice Mathews N. Nduma)*

**SHABAN MUSILA LISYOLO.....CLAIMANT**

**VERSUS**

**BOARD OF GOVERNORS SIGALAGALA**

**TECHNICAL TRAINING INSTITUTE.....RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent as a security guard on 1<sup>st</sup> April 2008. He worked continuously until August 2011. He earned a gross salary of Kshs. 6,700 per month. Claimant testified that he did not get leave days and was not given one off day per week. That he worked 7 days a week from 6.00 am to 6.00 p.m.

2. The claimant was dismissed from employment without notice. He was told by the Principal Mr. Sawe that he would be recalled. The claimant did day and night shifts. He testified that he was not paid overtime and was not paid for public holidays worked. The claimant relied on the calculations set out under paragraph 20 of the statement of claim and produced exhibits '1' and '2' attached to the claim.

3. Under cross examination the claimant stated that initially he had no letter of appointment. That this came later when he was asked to sign 3 months contract on 1<sup>st</sup> April 2011 which expired on 30<sup>th</sup> June 2011. The contract was not renewed and he was told to go home.

4. Claimant denied that on 8<sup>th</sup> July 2011, he was found by one David carrying school milk. The claimant denied having written a letter asking to be given the milk he was carrying. Claimant said he could not read or write.

5. RW1 Evans Sande testified for the respondent that he was a clerical officer at the respondent's registry for 12 years. He relied on a witness statement filed on 5<sup>th</sup> March 2019. He produced exhibits '1' and '2'. RW1 said on 21<sup>st</sup> July 2011, he was the Human Resource Officer when the claimant was caught with two boxes of milk by one David. The claimant was suspended and his contract was not renewed since he had committed an offence. The termination was with effect from 1<sup>st</sup> October 2011 due to dishonesty. He was paid salary up to August 2011. That the claimant is not entitled to leave days, overtime and off duty because he was on contract which did not provide for that.

6. RW1 stated under cross examination that he started working for the respondent in the year 2007 and had found the claimant working for the respondent then as a security guard. That one Mr. David Ngolio was also a security guard and Mr. Khisa was in-charge of security. RW1 admitted that they had no document calling the claimant to a disciplinary hearing. There was no disciplinary proceedings in the matter. The claimant was simply suspended and his contract expired and was not renewed. Suspension was for an indefinite period. It was from the date of incident on 18<sup>th</sup> July 2011 up to the date the contract expired on 30<sup>th</sup> August 2011. That the claimant worked as a casual before. RW1 prays the suit be dismissed with costs.

**Determination**

7. The issues for determination are:

- (i) Whether the employment of the claimant was terminated for a valid reason and following a fair procedure.
- (ii) Whether the claimant is entitled to the reliefs sought.

## **Issue I**

8. It is not in dispute that the claimant worked as a security guard for the respondent from 1<sup>st</sup> April 2008 until 30<sup>th</sup> August 2011 a period of three (3) years. The claimant was treated as a casual by the respondent and did not therefore go on leave; he worked from 6.00 am to 6.00 pm daily for 7 days a week and was not paid overtime. The claimant was not given at least one day off per week and he even worked during public holidays. It is not in dispute that the claimant worked this way until he was placed on a three (3) months contract on 1<sup>st</sup> April 2011 which expired on 30<sup>th</sup> June 2011. RW1 under cross examination stated that this contract was not renewed.

9. It is alleged that on 18<sup>th</sup> July 2011, the claimant was caught with two boxes of stolen milk and was suspended from work. According to RW1, no disciplinary hearing was done in respect of the offence but the respondent awaited expiry of the three (3) months contract under which the claimant worked on 30<sup>th</sup> August 2011. The contract was then not renewed. RW1 stated that the claimant wrote a letter on 3<sup>rd</sup> August 2011 in which he admitted he stole the milk. The claimant on the other hand denied the admission stating that he could neither read nor write and therefore did not write the purported letter of admission.

10. The purported letter of admission was produced by the respondent. It is written in Kswahili. The letter states that the claimant was asked by his supervisor Mr. Mteshi to go and collect a sack at the kitchen at around 2 p.m. The following day, Mr. Khisa told him that there were two boxes of milk in that sack. Claimant states that he did not know what was in the sack. The claimant denied the admission.

11. The respondent did not produce the purported contract that expired on 30<sup>th</sup> August 2011. There is therefore no prove that the claimant worked under a fixed term contract at the time his employment was terminated.

12. The testimony by RW1 is that the claimant was placed on indefinite suspension. He was not charged with any disciplinary offence. He was not called to a disciplinary hearing but was simply told that his contract of employment had expired on 30<sup>th</sup> August 2011.

13. In the absence of any such fixed term contract the claimant has proved on a balance of probabilities that his employment was terminated without notice, notice to show cause, and was not given opportunity to explain himself at a disciplinary hearing.

14. The claimant also did not get a letter of termination giving reasons for the termination yet RW1 testified that the claimant's contract was not renewed for reasons of dishonesty.

15. The respondent has failed to rebut the evidence by the claimant and has failed to discharge the onus placed on the respondent under *Sections 36, 41, 43, 45, and 47(5) of the Employment Act, 2007*.

16. The termination of the employment of the claimant was wrongful and unfair. Reliance on an unexplained letter in Kiswahili, which was denounced by the claimant as evidence of dishonest conduct by the claimant did not suffice. The same is rejected by the court as insufficient proof of dishonesty on the part of the claimant.

17. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*. In this regard the claimant had served the respondent for a period of three years under very difficult circumstances because he worked for 12 hours a day for seven days including public holidays without being paid overtime. He was not given leave days because he was regarded a casual. He did not get at least one off day a week in terms of the law and regulations applicable to the security sector.

18. The claimant was on NSSF and NHIF to the year 2008 registered by the respondent. The claimant lost career prospects as a security guard unlawfully and unfairly. The claimant wished to continue serving the respondent. The claimant was not paid terminal benefits upon termination of employment. The claimant earned Kshs. 7,200 gross salary at the time of termination. He was not paid in lieu of notice.

## **Compensation**

19. The court awards the claimant the equivalent of three (3) months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs. 21,600.

## **Notice pay**

20. The court awards the claimant Kshs. 7,200 being one month salary in lieu of notice.

## **Normal overtime**

21. The court finds that the claimant has proved that he had worked overtime and was not paid as per the calculation set out under paragraph 20:2 of the statement of claim in the sum of Kshs. 99,692.30.

## **Off Duties**

22. The claimant was entitled to at least one off day per week but was not given and was not paid in lieu thereof. The court awards him Kshs. 40,307.70 as per the calculation under paragraph 20:3 of the statement of claim.

## **Public Holidays**

23. The claimant worked for three years and worked all the 11 public holidays each year without double pay. The court awards the claimant Kshs. 20,492.30 in respect of all the public holidays worked without payment of double salary as set out under paragraph 20:4 of the statement of claim.

**Leave Pay**

24. The claimant was entitled to at least 21 days annual leave per year and has proved that he was not given leave for the entire period. The court awards the claimant Kshs. 12,750 in lieu of leave days not taken for the period worked.

25. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- (a) 3 months compensation Kshs. 21,600.
- (b) One month notice pay Kshs. 7,200.
- (c) Unpaid normal overtime Kshs. 99,692.90.
- (d) Off duties not given and not paid for Kshs. 40,307.70.
- (e) Public holidays worked and not paid double pay Kshs. 20,492.30.
- (f) Unpaid leave days for 3 years Kshs. 12,750.

**Total award Kshs. 202,042.30.**

- (g) Interest at court rates from the date of filing suit till payment in full.
- (h) Costs of the suit.

**Judgment Dated, Signed and delivered this 16<sup>th</sup> day of September, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Karogo for Claimant.

Mr. Ojienda for Respondent

Chrispo – Court Clerk