



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

**AT NAIROBI**

**CAUSE NO. 891 OF 2013**

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

**VINCENT AMUSALA MACHISU.....CLAIMANT**

**VERSUS**

**KENYA KAZI SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant seeks compensation for unlawful and unfair termination of employment and payment of terminal benefits to wit:-

(i) Salary for May 2013, Kshs.17,437.

(ii) One month salary in lieu of notice, Kshs.17,437.

(iii) Severance pay calculated at 15 days salary for each completed year of service for eight years and six months, Kshs.78,466.50.

**Facts of the Case**

2. The Claimant was employed by the Respondent on 5<sup>th</sup> November, 2004 as a security guard and was given a letter of appointment produced as exhibit 1 dated 8<sup>th</sup> January, 2013.

3. The Claimant was started with a salary of Kshs.9,572 and house allowance of Kshs.1,436.

4. He worked continuously until the 17<sup>th</sup> May, 2013. At this time his monthly salary was Kshs.17,437.

5. The Claimant became ill on or about 3<sup>rd</sup> May, 2013 and attended Kenyatta National Hospital (KNH) where he was attended to. He produced medical documents including hospital card, and receipts marked as exhibits iv, v, vi, vii and viii attached to the memorandum of claim.

6. The Claimant testified that when he went back to work on 17<sup>th</sup> May 2013, he was informed by the Respondent that he had not been taken ill, his documents were not authentic and was lying to the Respondent. This message was by the project manager Mr. Peter Kardovillis and operations manager Mr. Patrick Gitonga.

7. The Claimant also testified that the two supervisors told him that the company did not want to keep short and sick people who could not speak neither English nor Swahili and his employment was summarily terminated on 17<sup>th</sup> May, 2013. At the time, the Claimant was 54 years old.
8. The Claimant was not paid any terminal benefits upon termination, was not given notice, notice to show cause, nor attended a disciplinary hearing to defend himself against wrongful dismissal.
9. The Claimant seeks General damages for the unexpected loss of employment as a result of which he suffered loss and damage. He also seeks payment of the terminal benefits set out herein before.
10. Under cross examination the claimant insisted that he got permission from his supervisor to attend hospital and no documentation was required for that purpose. He told the court that his left hand was paralyzed at the time and the documentation from Kenyatta National Hospital which he produced before court was sufficient testimony that he had been taken ill and was lawfully away from work.
11. The Claimant denied that he had been called to a disciplinary hearing on 21<sup>st</sup> May, 2013. He denied having signed an attendance form on 21<sup>st</sup> May, 2013 stating that he had already been sacked on 17<sup>th</sup> May, 2013.
12. The Claimant also explained that the Respondent's salary month started on 15<sup>th</sup> and ended on 16<sup>th</sup> of every month. He was therefore entitled to a full salary for May, 2013.
13. He conceded that his salary as at the time of dismissal was Kshs.10,912 and that the payslips showing Kshs.17,437, produced before court included overtime.
14. The letter of demand was written on 22<sup>nd</sup> May, 2013 and same was not responded to. The Claimant was due to retire at 55 years, he was yet to serve one more year.

### **Defence**

15. The respondent filed a reply to the amended memorandum of claim in which it states that the Claimant was assigned to guard 10M MHAC premises along UN Crescent on 17<sup>th</sup> May, 2013. That on 10<sup>th</sup> May, 2013 the Claimant was absent from work and came back to the office later in the day with hospital documents stating that he was from Kenyatta National Hospital for treatment.
16. The claimant added that he had an appointment for further treatment, the coming week. The Claimant presented to the supervisor hand written document with wrong date of appointment, being 7<sup>th</sup> May, 2013.
17. The Claimant demanded his documents back and suddenly turned violent and pulled the documents away.
18. On 17<sup>th</sup> May 2013, the Claimant was absent from duty and claimed that he had attended KNH as per the appointment but did not produce documents to that effect.
19. On the same day the Claimant was issued a disciplinary hearing letter which he refused to sign.
20. That the Claimant attended a disciplinary hearing on 21/5/2013 upon which his employment was terminated for failure to furnish the office with genuine hospital documents and for his conduct towards senior staff member of the Respondent.
21. On 21<sup>st</sup> May, 2013 the Claimant did not turn up at the Respondent's office for his termination letter and clearance and as a consequence he was subsequently declared a deserter on 5<sup>th</sup> June, 2013.
22. The Respondent states that the employment of the Claimant was terminated for a lawful cause and the

suit be dismissed with costs.

23. The Respondent called DW1 Patrick Muriuki in its defence. He was a branch operations manager and was a supervisor of the Claimant. He told the court that he was aware of the circumstances leading to the termination of employment of the Claimant.

24. He admitted the particulars of employment of the Claimant. He told the court that the Claimant purported to be sick but did not produce genuine documents in that the documents were handwritten, had cancellations and had no KNH stamp. That the Claimant forcefully took back the documents when the disparities were pointed out to him by the administrator. That was on 10<sup>th</sup> May, 2015.

25. That on 17<sup>th</sup> May, 2013, the Claimant was absent again without permission. That if the Claimant was sick, he ought to have obtained authority to attend hospital from a supervisor. Treatment is done at the Respondent's clinic and if the sickness cannot be handled at the clinic, the employee is referred to an outside hospital. The Claimant did not follow this procedure and he did not make the Respondent aware of his health issues before his absence.

26. That the claimant was given notice to attend a disciplinary hearing on 21<sup>st</sup> May, 2013 but he did not attend. RW1 attended the hearing with other officers. A union official appeared at the hearing. He was charged for producing fake medical documents and forcefully retrieving the same from his supervisor.

27. The Claimant was given option for early retirement or else his employment would be terminated.

28. The disciplinary documents were produced. The Claimant did not clear with the company and was declared a deserter and a letter of desertion dated 5<sup>th</sup> June, 2013 was written.

29. RW1, confirmed that the Claimant's terminal benefits were not computed because he deserted work and did not clear with the company.

30. Under cross examination RW1 stated that he did not witness the forceful retrieval of documents. That he is not the one to who the alleged fake documents were given. He was uncommitted as to whether the Claimant attended hospital on 10<sup>th</sup> and 17<sup>th</sup> May 2017 as alleged by the Claimant.

31. RW1 confirmed that the documents produced by the Claimant marked v, vi, vii & viii, show that the Claimant attended KNH on 10<sup>th</sup> May, 2017 and 17<sup>th</sup> May, 2017 in the dermatology clinic for skin disease treatment.

32. RW1 was unable to confirm whether or not anybody gave evidence at the alleged disciplinary hearing in the absence of the Claimant. No minutes were produced except an unsigned disciplinary procedure form. RW1 was unable to testify on the alleged signature by the claimant but RW1 confirmed that documents before court show the claimant attended hospital on the stated dates.

### **Determination**

33. The issues for determination are –

**(i) Whether the Claimant's employment was terminated for valid reason (s) and in terms of a fair procedure.**

**(ii) Whether the Claimant is entitled to the reliefs sought.**

34. The parties filed their respective final submissions on 30<sup>th</sup> March, 2017 and 10<sup>th</sup> April, 2017. A careful analysis of the evidence before court led the court to the following conclusion of facts –

(i) The claimant has served the Respondent as a security guard for a continuous period of over eight

years.

(ii) The Claimant had no adverse record until the dispute regarding his attendance at KNH emerged on 10<sup>th</sup> May, 2013 and 17<sup>th</sup> May, 2013.

(iii) The documentation produced by the Claimant has contrary to the assertions by the Respondent demonstrated on a balance of probabilities that on the material dates the Claimant was taken ill at Kenyatta National Hospital and was treated. RW1 indeed admitted under cross examination that there was no evidence before court to demonstrate that the documents produced by the Claimant were fake as alleged or at all.

(iv) On the issue of the altercation between the Claimant and his supervisor, the court only has the testimony of the Claimant under oath. RW1 admitted that he was not privy to what happened other than what he was told. The court finds that the claimant has ably rebutted the allegations by the Respondent that he had grossly misconducted himself by firstly producing fake hospital documents and by secondly forcefully retrieving the same from his supervisor when the documents were put to question. RW1 confirmed that no evidence was adduced at the alleged disciplinary hearing.

35. To this extent, the Claimant has discharged the anus placed on him under section 47(5) that his employment was wrongfully terminated on a balance of probabilities, upon the failure by the Respondent to demonstrate any justifiable cause to terminate the employment.

36. The Claimant has also demonstrated that his employment was terminated on 17<sup>th</sup> May, 2013 without any notice to show cause or any disciplinary hearing preceding the termination. The court is satisfied that the form produced by the Respondent was an afterthought and was indeed not genuine.

37. The purported termination letter dated 5<sup>th</sup> June, 2013 for desertion was equally an afterthought and manufactured for the purpose of the trial.

38. Accordingly, the court finds that the Respondent terminated the employment of the Claimant unlawfully and unfairly contrary to sections 41, 43 and 45 of the Employment Act, 2007. The Claimant is entitled to compensation therefore in terms of section 49(1) (c) as read with section 49(4) of the Act.

39. In this respect, the court has considered that the Claimant had a good service record for a period of over eight years. The Claimant had only one year to retirement. At the time of termination the Claimant was not paid any terminal benefits upon his retirement. The Claimant had good reason to be upset when his employer surreptuously, doubted his sickness despite no past adverse record by the Claimant to point to this kind of tendencies. The Claimant wished to complete his term of service and retire honorably upon attainment of 55 years and the honour and decorum was denied him and this was an affront on his human dignity by the Respondent after he had served for many years.

40. Accordingly, the court considers this an appropriate case to award the maximum compensation equivalent to 12 months salary in the sum of Kshs.(10,912 x 12) 130,944.

### **Terminal Benefits**

41. The Respondent through RW1 admitted that the Claimant was not paid terminal benefits albeit on the basis that he was not available for clearance.

### **Gratuity**

42. Security guards are entitled in terms of the relevant wage order to gratuity calculated at the equivalent of 18 days salary for every completed year of service. The Claimant is therefore entitled to service pay, wrongfully described as (severance pay) in the sum of Kshs.78,466.50 as claimed.

### **Notice Pay**

43. Having found that the termination of employment was unlawful and unfair, and was summary in nature, the Claimant is entitled to payment of Kshs.10,912, in lieu of one month notice in terms of section 35 of the Employment Act, 2007 and the same is awarded.

**Salary for May, 2013**

44. From the testimony by RW1, the pay month of the Respondent started on 15<sup>th</sup> of each month and ended on 16<sup>th</sup> of the subsequent month. The Claimant has proved that he was not paid salary for the month of May 2013 in the sum of Kshs.10,912 and he is so awarded. The rest of the Claims are not merited and are dismissed.

45. In the final analysis judgement is entered in favour of the Claimant as against the Respondent as follows –

a) Equivalent of 12 months salary being compensation for unlawful and unfair termination of employment in the sum of Kshs.130,944.

b) Gratuity in the sum of Kshs.78,456.50.

c) Notice pay Kshs.10,912.

d) Arrear Salary for May 2013, Kshs.10,912.

Total award Kshs.231,224.50

e) The award in (a) above is payable with interest at court rates from date of Judgement until payment in full whereas the rest of the awards are payable with interest from date of filing suit till payment in full.

f) Respondent to pay costs of the suit.

**Dated and Signed in Kisumu this 19th day of December, 2017**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 19th day of January, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

M/s. Ndegwa for Claimant

Mr. Kamau & Co. Advocates for Respondent

Anne Njung'e – Court Clerk