



**REPUBLIC OF KENYA**

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

**CAUSE NO. 244 OF 2011**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 18<sup>th</sup> January 2018)**

**KENYA NATIONAL PRIVATE**

**SECURITY WORKERS UNION.....CLAIMANT**

**VERSUS**

**ROBERT NELSON NGETHE.....1<sup>ST</sup> RESPONDENT**

**ANTONY NGETHE.....2<sup>ND</sup> RESPONDENT**

**MUTHAIGA SHOIPPING CENTRE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Memorandum of Claim on 24<sup>th</sup> February 2011 and later an Amended Memorandum of Claim on 10<sup>th</sup> July 2012.
2. The Respondents were served and filed a Notice of Appointment of Advocates dated 1<sup>st</sup> March 2011 on 2013 by A. N. Ndambiri & Company Advocates.
3. The Claimant in his evidence in Court told Court that he was employed by the Respondent on 23<sup>rd</sup> November 1998 and worked for 11 years and 5 months. He was employed as a Guard at a salary of 6,300/=. He avers that he was never paid any house allowance and used to go on unpaid leave. His salary was paid by voucher.
4. He stated that on 25<sup>th</sup> May 2010 he was off duty and on coming back to work, his supervisor told him to go and see the manager. The manager never told him anything. He was not allowed back to work. He informed his union who now proceeded to help him file this case. He seeks Court's help to be paid his dues.
5. The 2<sup>nd</sup> Grievant CW2 also told Court that he was employed by the Respondent on 20<sup>th</sup> February 2006 and worked for 5 years as a Guard earning a salary of 4,940/=. He was never paid any house allowance. He stated that he used to go on leave.
6. He avers that CW1 is his brother and that after the CW1 sued the Respondent, the Respondent decided to sack him on 17<sup>th</sup> March 2011. He was never given any notice nor taken through any disciplinary hearing before dismissal. He contracted his union who proceeded to file this case for him. He wants to be paid for his services for 5 years, overtime, house allowance, travel allowance and NSSF dues deducted from 2006 but never remitted.
7. The Respondents on their part filed the Reply to Amended Memorandum of Claim on 10<sup>th</sup> June 2014 through the firm of A.N. Ndambiri & Company Advocates.
8. The Respondents' statement is that the Grievants were their employees earning Kshs.6,350 and 4,950 respectively inclusive of house allowance. They aver that the Grievants were also given rest days/off days and annual leave which were duly paid for in full.
9. They deny terminating the 1<sup>st</sup> Grievant on account of joining a union but aver that they terminated the 1<sup>st</sup> Grievant after he willfully and/or carelessly and improperly failed and/or neglected to perform his work as a Parking Attendant. They therefore aver that the Grievant was not entitled to notice having been summarily dismissed.

10. They also admit terminating the 2<sup>nd</sup> Grievant on 17<sup>th</sup> March 2011 after he failed to attend duty for 11 days without any reason or authorization. They deny employing the 2<sup>nd</sup> Grievant as a Guard but he was a Parking Attendant.

11. The Respondents therefore submit that the Grievants were properly terminated having been employed as Park Attendants and Cleaners respectively and not as Security Guards and hence were not eligible to join the Claimant's union. They deny that the Grievants are entitled to prayers sought.

12. I have examined all evidence on record from both parties. I note that though the Respondents state that they employed the Grievants as Parking Attendant and Cleaner respectively. Appendix 12 – Claimants' document show that 1<sup>st</sup> Claimant was a Guard. His leave form reads – Askari. Same to Appendix 10 and 11. Appendix 8 in respect of 2<sup>nd</sup> Grievant also show he was a guard.

13. There are however other documents showing that 2<sup>nd</sup> Grievant was a Parking Attendant (See Appendix 7). Appendix 5 refer to 2<sup>nd</sup> Grievant as a Parking Attendant/Cleaner.

14. The Respondents did not produce any documents to the contrary. What transpired is that the Grievants were employees of the Respondents. They were not issued with any appointment letter and therefore terms of their engagement was not known.

15. The 2<sup>nd</sup> Grievant is said to have been terminated after absconding duty for 11 days but the 1<sup>st</sup> Grievant is not indicated how and why he was terminated because he was not issued with any dismissal letter.

16. I have examined the evidence and the submissions herein. The issues for determine are:-

**1. Whether there were valid reasons to terminate/dismiss the Grievants.**

**2. Whether due process was followed.**

**3. What remedies to grant in the circumstances.**

17. On the 1<sup>st</sup> issue, as indicated above the 1<sup>st</sup> Grievant was dismissed without any dismissal letter. The reasons are not known. As for the 2<sup>nd</sup> Grievant, it is alleged he absconded duty and was dismissed on 17<sup>th</sup> March 2011. There is however, no indication that this is true because there are no documents showing his attendance/absence which documents should be in the Respondent's custody.

18. In this case I find that there are no valid reasons that warranted the dismissal/termination of the Grievants as envisaged under Section 43 of Employment Act which 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".**

19. On the 2<sup>nd</sup> issue, there is also no indication that the Grievants were given any chance to defend themselves against the allegations leveled against them. This is as provided for under Section 41 of Employment Act which 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".**

20. In the circumstances, I find the dismissal and termination of Grievants unfair and unjustified as per Section 45(2) of Employment Act 2007 which 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.

21. I therefore find for Grievants and award them as follows:-

**1. 1 month salary as notice:-**

-1<sup>st</sup> Grievant = 6,300/=

-2<sup>nd</sup> Grievant = 4,940/=

**2. 12 months salary as damages for unlawful termination:-**

-1<sup>st</sup> Grievant =  $12 \times 6,300 = 75,600/=$

-2<sup>nd</sup> Grievant =  $12 \times 4,940 = 59,280/=$

**3. House allowance = 15% x 6300 x 60 months:-**

- For 1<sup>st</sup> Grievant = 56,700/=

- 15% x 4950 x 60 months for 2<sup>nd</sup> Grievant = 44,550/=

**Totals:- 1<sup>st</sup> Grievant = 138,600 /=**

**2<sup>nd</sup> Grievant = 108,770/=**

**4. Plus costs and interest.**

**5. The service pay is not payable because the Grievants were members of NSSF and the overtime is also not proved. The same applies to the underpayment because the Grievants have not exhibited any pro of to the same. Those are the orders of the Court.**

Dated and delivered in open Court this 18<sup>th</sup> day of January, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Claimant

No Appearance for the Respondent