



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

**CAUSE NUMBER 1725 OF 2014**

**MAINA NG'ANG'A.....CLAIMANT**

**VERSUS**

**PEMA HOLDINGS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimants herein averred they were employed by the respondent as security guards on diverse dates. Mr Maina Ng'ang'a was employed in March 2005 at a salary of Kshs 150 per day and worked until 13<sup>th</sup> July, 2004 when he was asked by his supervisor Mr Jacob Mungai to see the manager the following day. When he reported the next day the manager Mr Boniface Njoroge asked him to leave work premises until when he would be called back.

2. No reason or explanation was given to him. According to him he has never been called back to duty nor paid his benefits. The claimant further averred that the respondents refusal to reinstate him or inordinate delay in recalling him back amounted to constructive dismissal.

3. The second claimant Mr Jacob Mungai on his part averred that from 1<sup>st</sup> April, 2008 he was also employed as a security guard at a daily wage of Kshs 195 per day and worked continuously until 14<sup>th</sup> July, 2011 when he was informed by the respondent's manager that his services had been terminated with immediate effect. According to him, no explanation was given for the decision. He therefore averred that the respondent's actions of dismissing him were unfair, inhuman and contrary to the basic tenets of good labour practice. The claimant further averred that his salary was below the recommended minimum wage.

4. The respondent on its part denied that the claimant was in continuous employment as alleged and further stated that the claimants were not in continuous employment as alleged and they were employed as casual employees from March 2005 as guards until 14<sup>th</sup> July, 2011 when they left employment. The respondent further denied that the daily wage paid to the claimants was below the minimum wage during the time. According to the respondent, the remuneration was as set out in the regulation of wages (agricultural industry) order as amended from time to time.

5. The respondent further denied that the claimants were unlawfully or wrongfully terminated and further averred that the claimants did not report to work on 15<sup>th</sup> July, 2011 or any day thereafter. The claimants in effect absconded duty and did not inform the respondent of any reason for failure to show up for work. According to the respondent, the reasons for the claimant's dismissal were justifiable under the provisions of section 44(4) of the employment Act.

6. According to the respondent at the time of termination, the claimants did not have any outstanding leave days. The claim for payment in lieu of leave for a period of 3 years was therefore without basis. In his evidence in chief the 1<sup>st</sup> claimant stated in addition to the averments in the statement of claim that they were not issued with any termination notice and that they were just told there was no more work. They reported the issue to their union and the labour office but the respondent refused to resolve the matter.

7. According to the claimant during the period they worked they never went on leave and were registered with NSSF and NHIF. He further stated that they used to work from 6 am to 6 pm and were never paid overtime. He further stated that they were never paid housing allowance. In cross-examination he stated that the respondent was based in Muranga and that his work place was not far from his home hence he used to operate from home.

8. The respondent's witness Ms Jane Mwaniki stated that she was based at the respondent's head office and that she used to be responsible

for payment of wages as per the wage schedules submitted by the respondent's managers. According to her, the claimants were paid 175/= per day. The claimants received the money and acknowledged receipt by thumb printing. From 14<sup>th</sup> July, 2011 the respondent had no payment record as the claimants were not at work.

9. She further stated that the respondent used to pay NSSF for casuals. It was further his evidence that the claimants were given off days and that the payments were within the law and that there was no underpayment. In cross-examination she stated that she never interacted with the claimants. It was further her evidence that the farm was vast and that she did not have confirmation on how houses were allocated. According to her the offs were as per the master roll.

10. It is not disputed that the claimants were employees of the respondent. It is further not in dispute that they left the respondent's employment around July 2004. However, whereas the claimants claim they were dismissed with notice and due process; the respondent claimed that it was the claimant who absconded duties hence the respondent was justified in terminating their services.

11. In a claim for unfair termination of service, the onus of proof that unfair termination took place is on the claimant while the onus of proving the reasons for termination is on the employer. The claimant averred that they were not issued with any notice of termination of service and that the respondent did not take them through the required disciplinary process before terminating their services.

12. The respondent did not produce any evidence to the contrary leaving the claimant's position uncontroverted. Further where a termination of service is claimed to be on account of absconding duties, the employer must demonstrate by way of evidence that reasonable steps were taken to contact the employee and his attention drawn to the fact that his or her absence was disproved and a termination would be considered if such employee does not resume duties forthwith. No such evidence was produced in this case.

13. The court therefore agrees with the claimants that their services were unfairly terminated. The other heads of claim such as under payment, untaken leave, gratuity, overtime and off days are disallowed as the documents exhibited by the respondent reasonably proves that these heads of claim do not have merit.

14. The court therefore enters judgement in favour of the claimants is follows:

- a. One month's salary in lieu of notice
- b. Eight months salary as compensation for unfair termination of service.

15. For Maina Ng'ang'a his monthly wage is Kshs 4,500 and for Jacob Mungai his monthly wage is 5,850. The claimants shall further have the costs of the suit.

16. It is so ordered.

**Dated at Nairobi on this 23<sup>rd</sup> day of February 2018**

**Abuodha J. N.**

**Judge**

**Delivered at Nairobi on this 23<sup>rd</sup> day of February 2018**

**In the presence of:-**

..... for the claimant

..... for the Respondent

**Abuodha J. N.**

**Judge**