



**REPUBLIC OF KENYA**

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

**CAUSE NO 2078 OF 2014**

**NOAH MASINDE.....CLAIMANT**

**VS**

**JAMES CHEGE KINYUA.....1<sup>ST</sup> RESPONDENT**

**JOYCE NJERI KINYUA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Statement of Claim dated 3<sup>rd</sup> November 2014 and filed in court on 20<sup>th</sup> November 2014, the Claimant has sued the Respondents for wrongful dismissal and failure to pay terminal dues. The Respondents filed a Reply on 5<sup>th</sup> February 2015.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the 2<sup>nd</sup> Respondent testified on her own behalf and on behalf of the 1<sup>st</sup> Respondent.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondents as a security guard on 21<sup>st</sup> December 2013. He was not issued with a written contract of service but earned a monthly salary of Kshs. 12,000. The Claimant avers that his duties included cleaning the compound, cleaning vehicles and feeding 5 dogs. He claims to have worked from 5.30 pm until 11.30 am, 6 days a week without any overtime compensation. He further claims that he was neither housed nor paid house allowance. He adds that he was not paid salary for 6 days worked in October 2014.
4. On 6<sup>th</sup> October 2014, the Respondents called the Claimant asking him not to report to work that day. He was told to wait for his payment via M-pesa.
5. It is the Claimant’s case that he was dismissed verbally by phone, without being given any reason for the dismissal or an opportunity to be heard. He was not paid his dues. He now claims the following:

- a) Notice pay.....Kshs. 12,000
- b) October 2014 salary.....3,000
- c) Leave.....12,000
- d) House allowance.....18,000
- e) Overtime.....14,000
- f) 12 months’ salary in compensation.....144,000
- g) Costs

**The Respondents’ Case**

6. In their Reply dated 3<sup>rd</sup> February 2015 and filed in court on 5<sup>th</sup> February 2015, the Respondents admit having engaged the Claimant as a security guard in December 2013. They however deny that the Claimant's salary was Kshs. 12,000 and state that the Claimant was paid an all-inclusive monthly salary of Kshs. 8,500.

7. The Respondents admit that the Claimant's duties were as pleaded in the Statement of Claim but deny that he worked overtime. They state that the Claimant's working hours were from 6.00 pm to 6.00 am.

8. Regarding the Claimant's conduct, the Respondents state that he was insubordinate, dishonest and had a poor attitude towards carrying out his assigned duties.

9. In response to the claim for house allowance, the Respondents state that they were not under any obligation to house the Claimant nor to pay him house allowance.

10. The Respondents admit having called the Claimant on 6<sup>th</sup> October 2014, informing him not to report to work on that day. The Respondents add that the reason for this was the Claimant's insubordination, poor attitude towards assigned duties and dishonesty.

11. The Respondents aver that the Claimant was paid salary for the days worked in October 2014 via M-pesa.

### **Findings and Determination**

12. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

13. In their Reply to Memorandum of Claim, the Respondents admit calling the Claimant on 6<sup>th</sup> October 2014 and telling him not to report to work. They state that this decision was caused by the Claimant's insubordination, poor attitude towards assigned duties and dishonesty. This would fall under what is generally known as misconduct. There was however no evidence of the Claimant being given notice of any particular instances of misconduct to which he was required to respond.

14. In the circumstances, the Court finds that the Respondents failed to establish a valid reason for terminating the Claimant's employment as contemplated under Section 43 of the Employment Act, 2007. The Respondents also failed the procedural fairness test set by Section 41 of the Act.

### **Remedies**

15. In light of the foregoing, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondents' conduct in the termination transaction. I also award the Claimant one (1) month's salary in lieu of notice.

16. The Respondent did not produce any documentary evidence to confirm having paid the Claimant his salary for days worked in October 2014. This claim therefore succeeds and is allowed. Similarly, in the absence of any leave records to counter the claim for leave pay, the claim thereon must succeed.

17. The Claimant further claims house allowance. Section 31(1)and(2) of the Employment Act provides the following:

***(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service-***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation;***  
***or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).***

18. By their own admission, the Respondents did not pay the Claimant house allowance. They went further to suggest that the Claimant was not entitled to this benefit. They were wrong as the law is clear that an employee is entitled to either housing accommodation or an allowance in lieu. The consequence is that the claim for house allowance succeeds and is allowed.

19. The claim for overtime compensation was not proved and is dismissed.

20. Before making the final award in this matter, I need to determine the preliminary issue of the Claimant's salary. The Claimant told the Court that he and the Respondents had agreed on a salary of Kshs. 12,000 which was subsequently reduced to Kshs. 8,500 by a unilateral decision by the Respondents. On their part, the Respondents simply state that the Claimant was paid an all-inclusive monthly salary of Kshs. 8,500.

21. The law places the responsibility to document the employment relationship on the employer. In this case, the Respondents did not produce a single document evidencing the Claimant's salary. I therefore invoke Section 10(7) of the Employment Act and admit the figure of Kshs. 12,000 pleaded by the Claimant, as his basic monthly salary. To this sum, I will add house allowance at 15% and adopt the resultant figure of Kshs. 13,800 as the Claimant's salary for purposes of this claim.

22. Ultimately, I enter judgment in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation.....Kshs. 41,400
  - b) 1 month's salary in lieu of notice.....13,800
  - c) Salary for 6 days in October 2014 (13,800/30x6).....2,760
  - d) Leave pay for 9 months (13,800/30x1.75x9).....7,245
  - e) House allowance for 9 months (1,800x9).....16,200
- Total.....81,405**

23. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

24. The Claimants will have the costs of the case.

25. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 5<sup>TH</sup> DAY OF APRIL 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 13<sup>TH</sup> DAY OF APRIL ,2018**

**ONESMUS MAKAU**

**JUDGE**

Appearance:

Mr. Khalwale for the Claimant

Miss Kemunto for the Respondent