



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 296 OF 2016**  
**JOHNSON NYAMBU IDI.....CLAIMANT**  
**VERSUS**  
**THORN RANCH SECURITY LIMITED.....RESPONDENT**  
**JUDGMENT**

**Introduction**

1. This is a claim for Kshs.233,871 being terminal benefits plus compensation for unfair termination of the Claimants employment contract by the Respondent on 22.1.2016. The Respondent has however denied the alleged unfair termination and averred that it was the Claimant who terminated the employment contract without prior notice. It is the defence case that the Claimant was suspended on 22.1.2016 for absenting himself from the place appointed for him to guard and failed to report back on 31.1.2016 as directed. The Respondent has therefore lodged a counterclaim against the Claimant for one month salary in lieu of notice.

2. The suit was heard on 27.7.2017 when the Claimant testified as CW1 and the Respondent called her Director Mr. Hassad Kashmir as RW1. Thereafter both parties filed written submissions which I have keenly considered herein.

**Claimant's Case**

3. CW1 testified that he was employed by the Respondent as a guard on 2.1.2013 earning Kshs.6,500 which was later increased to Kshs.8,000 per month. He was stationed near Serena Hotel. Due to the distance from the shops, CW1 used to carry his lunch at his workstation.

4. On 22.1.2016 at 11.30 a.m. CW1 went to fetch water from a nearby tap to prepare lunch but when he saw his boss's car coming to the gate, he ran back to open the gate. After opening the gate, the boss(RW1) asked him why he had left his place of work. Before explaining the reason the boss told him that his job was over and he called another guard to take over.

5. After the guard came, they went round the premises and confirmed that everything was intact. Thereafter the boss told him to collect his belongings and go away and later go to the office at Mtwapa the same day in the evening. CW1 tried to plead for his job but the boss refused alleging that he had left his place of assignment unguarded.

6. When CW1 went to the Respondent's office, which happens to be the residence for RW1, he was kept

waiting for 15 minutes even after alerting him that he had arrived. The RW1 never came out to meet him but instead sent his cook Mr. Hussein to pay him Kshs.1,600 and repossess his uniform. The Claimant handed over his uniform and signed book to acknowledge the said payment. He contended that the termination was unfair and prayed for Judgment in terms of the reliefs sought by the suit.

7. On cross-examination, CW1 denied that he was suspended and maintained that he was dismissed on the spot by RW1. He admitted that when the boss asked him why he had left his work place, he replied that he had gone to get water from the tap. He explained that the book he signed for the Kshs.1,600 went with the cook Mr. Hussein. He however admitted that he still has the company bicycle but contended that it is a damaged wreck.

8. As regards to the nature of his employment he admitted that he signed a 6 months contract with the Respondent starting 15.8.2015 and ending on 15.2.2016. He however contended that from 2.1.2013 till 15.8.2015 he worked continuously without any written contract. He denied that when they inspected the premises on 22.1.2016, Electronic Circuit Breaker was found missing.

### **Defence Case**

9. RW1 testified that on 22.1.2016 he passed by Palm Boutique at Shanzu which was under the watch of the Claimant. On reaching the gate, he hooted several times but no one appeared. He got off the car and pushed the gate and it opened because it was not locked. He went round the premises and saw a circuit breaker open and upon looking inside, he notice that it had been vandalized and the cuts on the wire looked fresh. He called the supervisor to trace the Claimant because he was nowhere in the premises.

10. The supervisor contacted the Claimant and said he was 5 kms away on the other side of Shanzu. He waited for 2 hours without seeing Claimant and he told the supervisor to send another guard to takeover. Just before the new guard arrived, the Claimant came riding the Company bicycle and carrying a big sack containing grass for making soft brooms. He was not in his official uniform but a T-shirt. He asked the Claimant where he was, but

it was obvious that he was from his own businesses.

11. He searched from the Claimant's possession to see if he had hidden the stolen breaker parts but there was non. He then told him to go home and report to his office in evening of the same day. RW1 denied the alleged termination and contended that he only suspended the Claimant in order for him to investigate whether he was the one who stole the breaker or another person. He further contended that by the time the Claimant went to see him in the evening he had not finished the investigation and he told him to come back at the end of the month. He further denied that the Claimant's official uniform was repossessed adding that to date he still has the company bicycle. However, 3 days after the suspension, he received demand letter from the Claimant's lawyer alleging that the Claimant had been dismissed unfairly but he responded through his lawyer on 2.2.2016 refuting the allegations and telling him that the Claimant was required at the police station.

12. On cross-examination, RW1 maintained that he personally met the Claimant at his home on 22.1.2016 in the evening and he verbally suspended him till end of the month. He contended that even if there was no water at the workplace the Claimant should have asked for the same to be brought but not to leave the premises unguarded. He maintained that the Claimant was wrong to leave the premises without permission. He however confirmed that he had employed the Claimant for 2 years broken into 6 months fixed term contracts. He clarified that the contract in force at the time of suspension was running from 15.8.2015 to 15.2.2016.

### **Analysis and determination**

13. There is no dispute that the Claimant was employed by the Respondent for 2 years up to 22.1.2016. The issues for determination are:

- (a) Whether the Claimant deserted the employment or he was unfairly dismissed;
- (b) Whether the reliefs sought should be granted;
- (c) Whether the counterclaim should be allowed.

### **Desertion or unfair termination**

14. The Claimant has denied the alleged desertion and cited the cook for RW1 as the person who confirmed his dismissal by paying him Kshs.1,600 and repossessing the official uniform from the Claimant. The said cook Mr. Hussein has not been called by the defence to deny the allegations by the Claimant. The Respondent has also not called the guard who took over from the Claimant to confirm that the Claimant was only suspended and not dismissed. Consequently, I find that the Respondent has failed to prove on a balance of probability that the Claimant deserted work after being suspended for misconduct. Flowing from the foregoing finding, it is hereby held that the Claimant was dismissed by the Respondent.

15. Under section 45(2) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

### **Reasons for the termination**

16. The reasons for dismissing the Claimant was that he absented himself from the place he was assigned to work and theft of Circuit Breakers. The alleged theft has not been proved on a balance of probability. However the offence of absencing himself from work on 22.1.2016 at 11.30 has been admitted by the Claimant. He admitted that on the material date, he left his place of work and went to fetch water from a nearby tap. He did not seek permission from his supervisor or RW1 before leaving the premises he was assigned unguarded.4) of the Employment Act provides that the following matters amount to gross misconduct that justify summary dismissal of an employee:

*“(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.”*

17. Although one would be entitled to think that fetching water was a lawful cause the RW1 denied that CW1 had water problem noting that there were containers of water at the premises. He further stated that, even if water was a problem, the same could have been supplied the Claimant had called to request for the same. However, the Claimant was said to have been away to harvest grass for making soft brooms for his own business. Consequently, I find and hold that the Respondent has proved on a balance that there was a valid and fair reason for dismissing the Claimant.

### **Procedure followed**

19. There is no dispute that after the Claimant was found absent from his work place, he was told to go home and directed that he should go to the office at Mtwapa the same day in the evening. According to the Claimant, he thought he was going to be given a new assignment to continue with his job of guarding. However, RW1 never came out to meet him but send his cook Mr. Hussein to pay him Kshs.1,600 and repossess his official uniform “because he had been dismissed.”

20. There is no dispute that the procedure followed to terminate the Claimant’s services was not fair because it violated the mandatory provision of section 41 of the Act. The said section provides that before the service of an employee on ground of misconduct, poor performance or physical incapacity, the employer shall first explain to the employee, in a language he understands and in the presence of another employee of his choice, the reason upon which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations for consideration before the termination is decided. Failure to comply with the said mandatory procedure rendered the termination of the Claimant

services unfair within the meaning of section 45 of the Act.

### **Reliefs**

21. Under section 49 of the Act, I award the Claimant one month salary in lieu of notice plus one month salary as compensation for unfair termination. In making the foregoing award I have considered the fact that the Claimant's fixed term of contract was to lapse in a month's time and that he contributed to its premature termination through misconduct. He will therefore get a total of Kshs.16,000 based on the pleaded salary of Kshs.8,000 per month.

22. The Claim for service pay is also granted at the rate of 15 days pay per year of service. The Claimant worked for 3 years continuously and as such he is awarded Kshs.12,000.

23. The claim for underpayment is also allowed from 1.5.2013 to 30.4.2015, the minimum basic pay for a day watchman like the Claimant was Kshs.9,780.95. The Claimant was receiving Kshs.8,000 being underpaid by Kshs.1,780.95 per month for 24 months equaling to Kshs.42,742.80. In addition, for 9 months from 1.5.2015 to January 2016 the minimum basic pay for day watchman was Kshs.10,954.70 representing underpayment of Kshs.2,954.70 per month equaling to Kshs.26,592.30 for the 9 months. The total underpayment proved for the 3 years worked is Kshs.69,335.10

24. The claim for House Allowance for 36 month at the rate of 15% of Kshs.8,000 is allowed as prayed. The said figure is however much less than if it were to be assessed based on the gazette minimum basic pay;

Hence  $15\% \times 8000 \times 36 = \text{Kshs.}43,200$ .

### **Disposition**

25. For the reason then the Claimant was unfairly dismissed, I enter Judgment for him in the sum of Kshs.140,535.10 less Kshs.1,600 paid = Kshs.138,935.10 plus costs and interest from the date hereof. The said award will be subjected to statutory deductions.

**Dated and signed at Nairobi this 15th day of March, 2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 12th day of April, 2018**

**LINNET NDOLO**

**JUDGE**