



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

**CAUSE NO.1566 OF 2013**

**MILTON MACHAMA MUSENA.....CLAIMANT**

**VERSUS**

**MARS SECURITY GUARDS LIMITED.....RESPONDENT**

**JUDGEMENT**

Issue in dispute – unfair and unlawful summary dismissal and non-payment of terminal dues.

The claimant was employed by the respondent as a Security Guard on 12<sup>th</sup> September, 2011. The last salary earned by the claimant was at Kshs.11, 000.00 per month.

On 8<sup>th</sup> July, 2013 the claimant was summarily dismissed by the respondent after making enquiries about the status of DOSH form delivered to the respondent regarding injuries sustained by the claimant while in employment on the 5<sup>th</sup> October, 2013. Such termination of employment was not justified.

Upon termination of employment, the respondent failed to pay the claimant his terminal dues of one month notice pay, the month salary due and severance benefits set out under the Employment Act.

The termination of employment was devoid of fair procedure and therefore unfair. Compensation is thus due. The claimant is seeking for orders for the payment of;

- a) Service pay Kshs.14,666.66
- b) Notice pay Kshs.11,000.00
- c) Compensation Kshs.132,000.00
- d) Salary for June and July Kshs.22,000.00
- e) Leave due Kshs.22,000.00
- f) Public holidays worked Kshs.12,320.00
- g) Overtime for Sunday work Kshs.45,760.00

The claimant is also seeking his costs.

In evidence the claimant testified in support of his claim.

The claimant testified that upon his employment on 12<sup>th</sup> September, 2011 the respondent terminated the same through summary dismissal on 9<sup>th</sup> July, 2013. The claimant had an injury while at work and was told he could not work as a result and should return his uniforms. This was done orally without notice, hearing or payment thereof. He was not paid for the 8 days he had worked in that month. That since he had sued the respondent due to the injury at work, he was dismissed.

The claimant had earned 2 days of leave for each month which was not paid for. He had overtime and work for public holidays and Sundays which the respondent failed to pay.

The claimant was paid Kshs.10,000.00 by the operations manager but when he went to the supermarket to buy goods he was told that the currency was not good. He made a report with the police. The respondent caused him to withdraw this complaint on the promise that he would be paid. He went to the County Labour Office and was paid Kshs.38, 000.00 but this was not his full terminal dues.

## **Defence**

In response, the respondent's case is that upon the claimant leaving their employment there was full compliance with regard to paying his terminal dues and in accordance with the law. This followed the claimant desertion of duty on 9<sup>th</sup> July, 2013 where efforts were made to contact him to no avail. The respondent then wrote to the Labour Office on 12<sup>th</sup> July, 2013 to notify the office of the desertion.

Due to the claimant's desertion of duty, he owes the respondent one month's pay in lieu of notice. Upon such desertion, the respondent had to replace him at great costs.

When the claimant filed a demand notice, the respondent replied on and proposed to have a meeting on 11 September, 2013 with the labour officer and it was agreed the respondent should pay Kshs.38, 630.00 to the claimant as an act of benevolence noting he had deserted duty. However, the claimant refused to collect such dues which were then deposited with the office of the labour officer.

The defence is also that the claimant maliciously made complaints with the police that he had been issued with fake currency notes and upon police investigations this was established to be false.

The claims as made are not justified and should be dismissed with costs.

In evidence, the respondent witness was Jackson Ochieng Orondo, the operations manager.

Mr Orondo testified that he worked the claimant until the termination of employment on 9<sup>th</sup> July, 2013. On 8<sup>th</sup> July, 2013 the claimant did not report on duty as assigned due to the late payment of the June, 2013 salary. The claimant went to the office seeking for his salary and the cashier paid him so that he could proceed on duty on the same date since the respondent was running two shifts for day and night. The claimant did not report to work. For four (4) days the claimant did not report to work as required. The respondent wrote to the County Labour Office that the claimant had absconded duty.

The witness also testified that on 21<sup>st</sup> August, 2013 the Labour Officer invited the parties to a reconciliation meeting and it was agreed that the claimant be paid Kshs.38,630.00 and he accepted. This payment was an act of benevolence by the respondent noting the claimant had absconded duty.

The witness also testified that the claimant was not directed to withdraw a criminal case on fake currency as alleged. Where this was done, the claimant acted voluntarily. There was no evidence to link the respondent on such a matter.

All the respondent's security guards get an alternate off day every two weeks and the other is paid for. No guard is required to work for 7 days. Leave days not taken are paid for. There was no termination of employment and the respondent made great effort to schedule the claimant's duties but he failed to report to duty.

At the close of the hearing, both parties filed written submissions.

I have taken into account the pleadings, the evidence of both parties and the written submissions.

The claimant's case is that upon employment by the respondent he was injured at work on 5<sup>th</sup> October, 2012 and when he went to ask for DOSH forms he was summarily dismissed on 9<sup>th</sup> July, 2013. As a result of the summary dismissal he was not paid terminal dues and the same was unfair.

The defence is that on 8<sup>th</sup> July, 2013 the claimant went to demand for his salary for June, 2013 and when he was paid, he absconded duty from 9<sup>th</sup> July, 2013. That despite a report to the Labour Office, the claimant failed to report to work and his terminal dues were computed and paid.

## **Employment is not denied.**

By letter dated 8<sup>th</sup> July, 2013 from the County Occupational Safety and Health Officer, the respondent is directed by this office to issue the claimant with DOSH forms following a work injury report. The claimant testified that when he took this letter and summons to the respondent, he was told that he could not work and was then dismissed from employment. That he was paid the salary due and for the 8 days worked in July, 2013. The claimant also testified that upon his dismissal, the parties went to the Labour Office and negotiated and he was paid Kshs.38, 630.00

The claimant did not attach any details with regard to his work injury and which necessitated him to report the matter to the office of County Occupational Health Officer. Section 30 of the Employment Act, 2007 requires an employee to submit a Certificate from a medical practitioner in the event of sickness or injury. The Provisions of the Occupational Safety and Health Act, 2007 put into account, in a claim

relating to termination of employment under the provisions of the Employment Act, 2007 such a Certificate to prove injury is required of the employee.

The parties attended negotiations with the Labour Officer and the claimant was paid for;

(a) 7 days worked;

(b) 49 off days;

(c) 37 leave days;

(d) Uniform refund.

Total being Kshs.38,010.00

The claimant has since acknowledged receipt of cheque Number 642939 for the sum of Kshs.38, 630.00.

The defence that the claimant absconded duty is premised on the evidence that when the claimant was paid his due salary for June, 2013 he did not report to duty as directed. That such absence from duty was reported to the Labour Office on 27<sup>th</sup> August, 2013. However despite such report to the Labour office in an unsigned letter of the respondent, I find no material evidence that the claimant was ever recalled back to work or issued with a notice to show cause following absence from duty.

Section 44(3) and (4) read with section 41(2) of the Employment Act, 2007 requires that where an employee has grossly misconducted himself by being absent from work or failing to undertake duties as directed, a notice must issue and the employee given a fair chance to a hearing before summary dismissal. Where the employer is unable to issue the requisite notices, the exceptional circumstances making it impossible to abide the provisions of the law must be demonstrated by the employer.

In this case, where the claimant failed to report to work after 9<sup>th</sup> July, 2013 no notice recalling him has been submitted. The report to the Labour Officer should follow after the employer has applied internal disciplinary procedures. The report cannot be made to replace such internal disciplinary proceedings.

The termination of the claimant's employment failed to abide the procedural requirements of the law. In putting this into account, section 45(5)(c) of the Employment Act, 2007 requires the court to put into account where the employer has complied with the law and made payment of terminal dues without putting the employee into undue disadvantage. In this case, terminal dues have since been paid with a month of termination of employment.

Save for the irregular termination procedures adopted, the claimant has acknowledged being paid for the due days worked, leave days not taken, off days and uniform refund. The claim for work on Sundays is not set out with clarity as to how many such days were worked during the tenure of employment and why the claim for Kshs.45760.00 is made. With the payment of off days and leave days due, this is taken into account.

On the claim for service pay, part of the negotiated pay package was a payment to NSSF and NSSF. With these statutory dues deducted, service pay claim is declined.

For the claim for notice pay and compensation for unfair termination, the claimant is awarded the sum of Kshs.11,000.00 as sufficient notice and compensation the terminal dues having been paid within a month.

**Accordingly, judgement is hereby entered for the claimant against the respondent for Kshs.11,000.00 notice pay and as appropriate compensation in the circumstances of his case. Costs to the claimant.**

**Delivered in open court at Nairobi this 18<sup>th</sup> day of May, 2018.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: .....

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