



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

**AT NAIROBI**

**CAUSE NO. 1232 OF 2012**

*(Before Hon. Justice Mathews N. Nduma)*

**KENYA NATIONAL PRIVATE**

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

**VERSUS**

**FISH PUB.....RESPONDENT**

**JUDGMENT**

1. The Claimant's case is that the grievant was employed by the Respondent as a Security Officer on 16<sup>th</sup> November, 2005. That he was paid Kshs.4,300 per month which was below the minimum wage of Kshs.7,463 in 2011. That he was not paid house allowance. On 1<sup>st</sup> March 2011, the grievant was called by the Respondent from home. When he reported he was paid for days worked and asked to go home and rest until he was recalled. That he was not given any reason for being sent home despite his request to be given reasons. He was not recalled and so he reported the matter to the union. The dispute was not resolved and he filed this suit.

2. The Claimant prays for payment of –

- (i) One month salary in lieu of notice.
- (ii) Five years annual leave.
- (iii) 52 rest days per year for 36 months.
- (iv) Overtime worked for 36 months.
- (v) Public holidays worked for 5 years.
- (vi) Under payment of house allowance for 36 months.
- (vii) Gratuity/ Service Gratuity for five years at 18 days salary for each completed year of service.

3. The Union vide Secretary General demanded payment of the above terminal benefits in a letter dated 29<sup>th</sup> November, 2011.

**Response**

4. The Respondent filed a Memorandum of Rely on 15<sup>th</sup> October, 2012. The Respondent denies it ever employed the grievant at all. The Respondent further denies having terminated the employment of the grievant.

5. The Respondent avers under paragraph 5 of the response that the grievant was a casual worker whose employment was on a day to day basis. That the grievant was paid at the end of each day for the work done.

6. That the grievant worked for several employers at the same time within the area and the obligation to pay his wages was shared among these people.

7. That the grievant was not serious at work and he engaged in prohibited acts.

8. The Respondent prays the suit be dismissed with costs. The Respondent called RW1. Susan Wanjiru Wanjau. She told the court that she was a bar attendant working for the Fish Pub Limited. That she managed the business and collected cash. RW1 stated that she knew the grievant well. That he was self-employed outside the Fish Pub. He had a kiosk from which he sold scratch cards and other phone accessories. That the grievant was not employed by the Respondent. She produced a photo showing the kiosk outside the Fish Pub. That the grievant paid rent to one Simon Kinuthia Mungai, the Land lord of the building where fish pub was located. The Respondent said that fish pub had no recognition agreement with the grievant union. That the grievant also sold water and escorted bar clients and they paid him directly.

9. RW1 denied the pleadings and states the grievant was a casual employee and was not serious in his work.

10. RW2, Simon Kinuthia Mungai, also testified under oath. He stated that he owned the building where the grievant was a tenant between the years 2009 to 2010. That the grievant rented a kiosk where he sold phone accessories outside the fish pub. That the grievant never worked for the fish pub.

11. Under cross examination RW2 insisted that the grievant was his tenant and that he did not know if he did any other work apart from running the kiosk.

### **Determination**

12. The issues for determination are –

(i) Whether the grievant was employed by the Respondent.

(ii) Whether the grievant is entitled to the reliefs sought.

### **Issue i**

13. The grievant in his pleadings and testimony under oath told the court that he was employed by the Respondent on 16<sup>th</sup> April, 2005 and worked continuously for the Respondent as a security officer until 1<sup>st</sup> March, 2011 when his employment was unceremoniously terminated without any reason. He was simply told to go home and that he would be recalled. The grievant reported the grievance to the union. The issue was reported to the Ministry of Labour. A conciliator was appointed but dispute was not resolved.

14. The Respondent in the Memorandum of Reply admits having employed the grievant but as a daily paid casual. This is however denied by RW1 and RW2 who told the court that the grievant was never at all employed by the Respondent. That he was a business man running a kiosk for Telephone accessories outside the fish pub.

15. A careful analysis of the pleadings and the testimony by the grievant and RW1 & RW2 shows that the testimony by the grievant is consistent with his pleadings, the letter of demand and the report of dispute to the Ministry of Labour. On the other hand, the testimony by RW1 & RW2 contradicts the Respondents own pleadings. The court finds the testimony by RW1 & RW 2 not credible at all. The court believes the testimony by the Claimant that he was indeed employed by the Respondent from the year 2005 to the year 2011, a period of about 5 years.

16. The grievant has proved his case on a balance of probabilities.

17. The court therefore finds that the Claimant worked for the Respondent for about five (5) years. That he earned Kshs.4,300 instead of Kshs.7,463 as at the time of termination in 2011. The Claimant did not tell the court how much he should have earned for the rest of the years since he started working.

18. The grievant did not tell court when, what time he reported to work and when he knocked off. He also did not tell the court how many days in a week he served the Respondent. The Public holidays worked were also not specified. No letters of demand were produced in respect of these claims whilst the grievant served the Respondent from 2005 to 2007.

19. Accordingly, the court finds that the grievant has failed to prove the Claims for payment of overtime, Rest Days, Public Holidays and Underpayments for the period 2005 to 2009. The under payment for the period July 2010 to March 2011 has been proved. Similarly, the grievant is entitled to payment of gratuity in terms of the Regulation of Wages, order for the security sector at 18 days salary for every completed year of service.

20. In the final analysis, judgment is entered in favour of the grievant as against the Respondent as follows:-

(i) One month salary in lieu of notice Kshs. 7,523

(ii) Underpayment for the period July 2010 to March 2011 at 3,223 per month in the sum of Kshs.29,007.

(iii) Service gratuity at 18 days salary for 5 years served Kshs.26,041.

(iv) Three months salary in lieu of three years leave Kshs.22,569.

**Total award Kshs.85,140.**

(v) The award is payable with interest at court rates from date of filing suit till payment in full.

(vi) Respondent to pay costs of the suit.

**Dated and Signed in Kisumu this 31st day of July, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 10<sup>th</sup> day of August, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

M/s Onyancha for Claimant

Mr. Lubulellah & Associates for Respondent

Anne Njuge – Court Clerk