

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.288 OF 2018

MAURICE WANYONYI MULUMA.....CLAIMANT

VERSUS

ALL TIME SECURITY SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 12.03.2018 in person. Despite service, the respondent failed to enter appearance and failed to file defence. A hearing notice was served but the respondent failed to attend on the hearing date. The claimant testified to support his case.

The claimant testified that the respondent employed him as a night guard effective 16.01.2018. He reported on duty as usual on 16.01.2018 and took over assigned duty from the day guard at 05.40pm. While he was on duty his supervisor arrived at 10.45pm and asked the claimant to be reassigned so that another guard would take over the assignment and the claimant be moved to another assignment. The claimant declined to move because he was in the middle of the assignment and it was at night. He told the supervisor that he would finish the assignment that night and report to the office the following day for official reassignment. The claimant remained on the assignment and at 01.00pm he heard stones hitting the gate. He checked out and saw a person taking cover in a nearby maize crop. He repulsed the person. Later at 02.05am he was attacked and he telephoned the director of the respondent who advised him to ask the supervisor to avail reinforcement. The reinforcement was brought at 02.45am at a time the attackers had left. The supervisor then assaulted the claimant and injured him. He testified that he went for treatment but the respondent gave no medical assistance. Instead he was told that he had been terminated. His last day at work was on 17.01.2018 and he was subsequently given a termination letter dated 31.01.2018. The termination letter stated that the claimant had been absenting himself from duty despite being given several warnings. It further stated that 16.01.2018 was his last day at work and he had been deemed to have deserted duty and the employment with the respondent terminated. He was to be paid his terminal dues less one month in lieu of notice.

Dissatisfied with the turn of events the claimant filed the memorandum of claim. He prayed for judgment against the respondent and the Court makes findings as follows:

- a) One month salary in lieu of notice **Kshs.6, 000.00**. The Court finds that the claimant is entitled as per section 35 of the Employment Act, 2007.
- b) Pay in lieu of annual leave for over 8 years served **Kshs. 33, 600.00**. The Court finds that the claimant is entitled as prayed and in line with section 28 of the Employment Act, 2007.
- c) The claimant is entitled to underpayment as computed in the demand letter and the memorandum of claim at **Kshs.575, 929.80** accruing over the entire period of service and in view of the minimum statutory wages.
- d) The claimant had served for over 8 years, he desired to continue in employment, and he did not contribute to his termination. It is clear that the respondent aggravated the situation when on the night of 16.01.2018 the supervisor assaulted and injured the claimant instead of providing support and reinforcement. Further, after the injury, the respondent did not provide to the respondent the necessary medicines and treatment as was possible and necessary. The claimant was terminated without due process of a notice and hearing as per section 41 of the Act. The respondent failed to attend Court to justify and establish that the reason for termination was genuine as per section 43 of the Act. The Court returns that the termination of the contract of employment was unfair in substance and procedure. The claimant is therefore awarded maximum compensation of 12 months' gross salaries making **Kshs. 72, 000.00** as prayed for.
- e) While making the awards the Court considers that the respondent received the demand letter by Kituo Cha Sheria and was served with the memorandum of claim but declined to respond and must be deemed not to have a defence and the claimant is found to have established his case on a balance of probabilities.
- f) The claimant has succeeded and he is awarded costs of the suit fixed at **Kshs. 25, 000.00**.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) Payment of **Kshs.736, 529.80** by 15.12.2018 failing interest at Court rates to be payable thereon from the date of this judgment till full payment.
- b) The respondent to deliver to the claimant the certificate of service by 01.11.2018.

Signed, dated and delivered in court at **Nairobi** this **Friday 26th October, 2018**.

BYRAM ONGAYA

JUDGE