



**REPUBLIC OF KENYA**

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

**CAUSE NO 160 OF 2016**

**JOHA MAGONGO KANGO.....1<sup>ST</sup> CLAIMANT**

**GWEDA NYANJE GWEDA.....2<sup>ND</sup> CLAIMANT**

**VS**

**CREST SECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This case was initially heard by my brother, **Makau J.** Upon his transfer from this station, the parties agreed that I proceed with the matter from where my brother Judge had stopped. The Claimants’ claim is contained in a Memorandum of Claim dated 24<sup>th</sup> February 2016 and filed in court on 25<sup>th</sup> February 2016. The Respondent filed a Memorandum of Reply on 17<sup>th</sup> March 2016.

2. At the hearing, the Claimants testified on their own behalf and the Respondent called its General Manager, Musa Katsutsu. Both parties also filed written submissions.

**The Claimants’ Case**

3. The 1<sup>st</sup> Claimant states that he was employed by the Respondent as a security guard at a monthly salary of Kshs. 11,000 effective 6<sup>th</sup> May 2014. The 2<sup>nd</sup> Claimant states that he was employed in the same position at a monthly salary of Kshs. 12,500 from 30<sup>th</sup> March 2012.

4. The Claimants were assigned to guard Transpares (K) Limited. On 2<sup>nd</sup> June 2015 they were arrested while on duty. The Claimants were subsequently charged and prosecuted for theft in Mariakani Criminal Case No 218 of 2015. They were acquitted under Section 215 of the Criminal Procedure Code.

5. The Claimants allege that their arrest and prosecution was baseless and malicious. They therefore claim the following:

1<sup>st</sup> Claimant: Joha Magongo Kango

- a) One month’s salary in lieu of notice.....Kshs. 11,000
- b) Legal costs for Criminal Case No 281/2016.....100,000
- c) Leave pay for 1 year.....8,884
- d) Prorata leave for 6 months.....2,220
- e) Years of service.....6,345
- f) Compensation for unlawful termination.....132,000
- g) Pension contribution
- h) General damages for breach of contract, malicious prosecution

and wrongful dismissal

i) General damages for false imprisonment and/or malicious prosecution

2<sup>nd</sup> Claimant: Gwede Nyanje Gwede

a) One month's salary in lieu of notice.....Kshs. 12,500

b) Legal costs for Criminal Case No 281/2016.....100,000

c) Leave pay for 4 years.....40,384

d) Years of service.....28,800

e) Compensation for unlawful termination.....150,000

f) Pension contribution

g) General damages for breach of contract, malicious prosecution and wrongful dismissal

h) General damages for false imprisonment and/or malicious prosecution

6. The Claimants also ask for costs and interest.

**The Respondent's Case**

7. In its Memorandum of Reply dated 15<sup>th</sup> March 2016 and filed in court on 17<sup>th</sup> March 2016, the Respondent states that it was not a party to the criminal case in which the Claimants were charged. The Respondent was not the complainant nor was it called as a witness in Mariakani Criminal Case No 281 of 2015.

8. The Respondent further states that it was not privy to the proceedings in the said criminal case. The Respondent adds that it learnt about conclusion of the case vide these proceedings as the Claimants never reported back to duty after conclusion of the criminal case.

9. The Respondent avers that the Claimants were still in possession of company uniforms and they could therefore not purport to have been dismissed. The Respondent puts the Claimants to strict proof of the claims for malicious prosecution, breach of contract and wrongful dismissal.

**Findings and Determination**

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

a) Whether the Claimants have made out a case for unlawful termination of employment;

b) Whether the Claimants are entitled to the remedies sought.

**Unlawful Termination?**

11. In their Memorandum of Claim dated 24<sup>th</sup> February 2016 as well as in their witness statements dated 24<sup>th</sup> February 2016, the Claimants narrate events leading to their arrest, prosecution and acquittal in Mariakani Criminal Case No 281 of 2015. They make no mention of what transpired after their acquittal.

12. When they appeared before the Court however, the Claimants stated that after their acquittal, they reported back to work but were locked out. The Claimants did not bother to explain why this crucial detail was missing from their pleadings and their witness statements. In the circumstances, the Court reached the conclusion that it was an afterthought generated at the witness stand. This is more so because the Claimants could not recall the exact date they showed up at the Respondent's premises after their acquittal in the criminal case.

13. Ultimately, the Court finds and holds that the Claimants have failed to prove a case of unlawful termination and the claim thereon is dismissed. The same fate meets the claim for one month's salary in lieu of notice.

**Other Claims**

14. The Respondent did not produce any leave records to counter the claim for leave pay which therefore succeeds and is allowed.

15. The claim for costs in the criminal case in the sum of Kshs. 100,000 which is in the nature of special damages was not proved and is dismissed. Having been contributing members of the National Social Security Fund (NSSF), the Claimants are not entitled to service pay. No

basis was laid for the claims for pension contribution and general damages which also fail and are dismissed.

16. In the end, I enter judgment in favour of the Claimants as follows:

**1<sup>st</sup> Claimant: Joha Magongo Kango**

a) Leave pay for 1 year (11,000/30x21).....7,700

**2<sup>nd</sup> Claimant: Gwede Nyanje Gwede**

a) Leave pay for 3 years (12,500/30x21x3).....26,250

b) Prorata leave for 2 months (12,500/30x1.75x2).....1,458

**Total.....27,708**

17. The respective awards will attract interest at court rates from the date of judgment until payment in full.

18. As the Claimants' claim succeeds only in part, I direct that each party will bear their own costs.

19. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Wandera for the Claimants

Miss Chala for the Respondent