



**REPUBLIC OF KENYA**

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

**CAUSE NO. 607 OF 2012**

**(Before Hon. Justice Hellen S. Wasilwa on 1<sup>st</sup> October, 2018)**

**KENNEDY BARASA WANELOBA.....CLAIMANT**

**VERSUS**

**BRINKS SECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit vide a Memorandum of Claim on 13<sup>th</sup> April, 2012, and later an Amended Claim on 8<sup>th</sup> December, 2016, through the firm of Julius Nyakiangana and Company Advocates seeking damages for unlawful termination. He avers that he was terminated by the Respondent on 30<sup>th</sup> April, 2007.
2. He states that he was employed by the Respondent on 15<sup>th</sup> March, 2001, where he worked diligently, committedly and with due honesty and that he was ready and willing to continue with service to the Respondent through his years of service.
3. He avers that sometime on 30<sup>th</sup> April, 2007, the Respondent without notice and/or any justifiable cause whatsoever terminated him summarily from employment. That the said termination was malicious and without due regard to the Claimant's welfare and rights accruing to him.
4. He contends that no reason at all was advanced by the Respondent to the Claimant as to why the Respondent have failed, neglected and/or refused to make good the Claimant dues owing from April, 2007, to date. He claims a total sum of Kshs. 354,088/= which is still outstanding from the Respondent.
5. The Respondent filed a response to the Memorandum of Claim on 24<sup>th</sup> May, 2012, wherein they deny the claim and state that the Claimant filed a claim with the District Labour Office Nairobi after the termination of his employment whereof a conciliatory meeting was held in July, 2007. Subsequently the Respondent paid the outstanding dues through the District Labour Office – Nairobi in 2008.
6. They aver that the claim of Kshs. 317,400 is without basis and is meant to intimidate the Respondent to paying an illegal claim. They pray for the Claim to be dismissed with costs.

**Evidence**

7. The Claimant led evidence to the effect that he worked for the Respondent as a Security Guard from 15<sup>th</sup> March, 2001 upto 30<sup>th</sup> April, 2007. That at the material time he wrote a letter asking to proceed on leave for the preceding year and payment in lieu of leave for another year, as he had not proceeded on any leave for the years 2005 and 2006. He states that he was paid for 1 year leave and the Respondent granted him 4 days off on 22<sup>nd</sup> April, 2007 to resume on 26<sup>th</sup> April, 2007.
8. That on 26<sup>th</sup> April, 2007, he reported to work as usual and he worked for 4 days. He was called to the supervisor's office where he found the Controller by the name of Caleb. Caleb informed him that his work was over. He asked to talk to the Director but he was not given an opportunity to do so. That he was told to go home and come back after 4 days to collect his terminal dues. He came back as instructed and he was paid 6,158/= in cash. That during the period of employment he would report to work at 6 and leave at 6 night or day duty.
9. The Claimant alleged that he was issued with a letter of dismissal dated 30<sup>th</sup> April, 2007 on 10<sup>th</sup> May, 2007. He stated that he was not issued with any notice whatsoever nor was he given a warning letter before the dismissal. Further that no disciplinary hearing was held prior to dismissal and as at the time of dismissal his salary was Ksh. 5,500/=.
10. He also stated that he reported the matter to the labour office with a view to resolving the matter but that notwithstanding the Respondent

did not settle his claim.

11. The Respondent put up one witness one Raymond Nzioka who works for the Respondent as a Human Resource Manager. The witness stated that he never worked with the Claimant but he had the privilege of seeing his records. He stated that the Claimant was summarily dismissed and was thus not entitled to pay in lieu of notice.

12. That the letter of dismissal dated 30<sup>th</sup> April, 2007, contained reasons for dismissal which were insubordination and disrespectful conduct. After dismissal the Claimant reported the matter to the labour office and the matter was concluded with an advice that the Claimant be paid Ksh. 10,635/= which was duly paid.

13. On the claim for service pay RW1 stated that it was not payable as the Respondent deducted and remitted the Claimant's NSSF contributions. That Claimant took all his leave and therefore the claim for leave allowance does not lie. They also aver that house allowance was consolidated in his salary and the travelling allowance is also not payable as any employee travelling would be provided with the means.

14. The Respondent aver that employees worked in 12 hour shifts and thus the claim for overtime should not be allowed. They claim that whenever an employee worked on a public holiday, he would be granted a day off to compensate. He however admitted Kshs. 2,100/= being salary due for the month of December, 2001 but denies owing the Claimant any arrears for subsequent years.

15. He stated that the termination of the Claimant was lawful and that he is not entitled to any compensation.

### **Submissions**

16. The Claimant submitted that he was unlawfully terminated contrary to Section 45 (1) and (2) of the Employment Act which provides that there must be a valid or fair reason for termination and that the termination must be in accordance with fair procedure. This was the position in the case of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR.**

17. That the Claimant was dismissed on grounds of misconduct which misconduct was not explained to him as required under Section 41 of the Employment Act. Counsel for the Claimant cites the case of **Alphonse Machanga Mwachanya vs Operation 680 Limited (2013) eKLR** where the Court held that the provisions of Section 41 must be adhered to when dismissing an employee on grounds of misconduct.

18. The Claimant urged the Court to find that he was unlawfully terminated as the law was not complied with during the termination. The Claimant prays for the damages as claimed.

19. The Respondent on the other hand submits that they were not malicious in terminating the Claimant as during the existence of the employment they had given a certificate of recognition to the Claimant for work well done proving that the Respondent was the kind of employer who would give credit where it is due. In equal measure the Respondent would also punish for misconduct as was the case herein.

20. It is further submitted that by the letter dated 2<sup>nd</sup> February, 2007, it is evident that the Claimant had been warned before against rudeness and defiance and that the Claimant was aware that disciplinary action would follow if such conduct recurred. That as such the summary dismissal of the Claimant was justified.

21. That the dues sought are not payable for the Claimant was terminated summarily and therefore notice pay is not payable. That the Respondent remitted the Claimant's NSSF deductions and thus service pay is also not payable. In Counsel's view leave allowance is not payable for the reason that the Claimant proceeded on paid leave for all the years he was in employment as evidence by the clearance certificate filed in Court.

22. The Respondent also submit that the Respondent submit that house allowance was consolidated in the basic salary and rely on the provisions of Section 31(2) (a) of the Employment Act.

23. The Respondent further submit that travelling allowance is not payable as means of travel was provided whenever the Claimant was required to travel.

24. As to public holidays and overtime it is submitted that the basic monthly salary was a gross salary which covered issues of overtime as the Claimant was aware that the security industry is based on a 12 hour system of work.

25. That the only salary arrears admitted by the Respondent is Kshs. 2,100/= being payment for December 2001. That the Claimant was paid Kshs. 10,635/= through the District Labour Office in the year 2012 as his final dues. The Respondent prays for the Claim to be dismissed with costs.

26. I have examined all evidence for both Parties. The Claimant was terminated in April 2007 and therefore the applicable law in determining this matter is the Employment Act (Repealed). Under the repealed law an employee was not obliged to give reason for termination so long as the requisite notice period was given.

27. In the case of the Claimant, reasons for dismissal given were insubordination. That notwithstanding the Claimant was entitled to due process under the general principles of nature justice, which he was never given.

28. It is my view that the Claimant was terminated without any notice as required by law and so his dismissal was unfair. The Respondent have also submitted that his salary of 6,158 was inclusive of house allowance but there is no letter to prove this as no appointment letter was

adduced in Court to prove the said averments.

29. The Claimant aver that the Respondent only paid him 10,635/= in 2012 after he filed this claim in Court.

30. The Respondent also submitted that Claimant was a member of NSSF which Claimant denied and no evidence to the contrary was produced.

31. I find that the Claimant was unfairly dismissed. I find for him and award him as follows:-

*1. 1 Month salary in lieu of notice = 5,500/=.*

*2. Service pay for 6 years =  $15/30 \times 5,500 \times 6 = 16,470/.$*

*3. House allowance =  $15\% \times 5,500 \times 72 = 72 \text{ months} = 59,400/=$*

*4. 12 months salary as compensation for unlawful termination =  $12 \times 5,500 = 66,000$*

*TOTAL = 147,370/=*

*less 10,635/= admitted as paid = 136,735/=*

*5. The Respondents will also pay costs of this suit plus interest.*

**Dated and delivered in open Court this 1<sup>st</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Nyakiangana for Claimant – Present

Moinga holding brief for Mutua for Respondent – Present