



**REPUBLIC OF KENYA**

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

**CAUSE NO 656 OF 2017**

**WILKISTER KERUBO MAGETO.....1<sup>ST</sup> CLAIMANT**

**LENA BWARI ATUYA.....2<sup>ND</sup> CLAIMANT**

**FREDDIE NABISWA KASISI.....3<sup>RD</sup> CLAIMANT**

**VS**

**GYTO SUCCESS COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 14<sup>th</sup> August 2017 and filed in court on even date, the Claimants have sued the Respondent for unlawful and unfair termination of employment.
2. By the time the matter opened for trial on 26<sup>th</sup> February 2018, the Respondent had not filed a Reply. The Respondent subsequently filed a Reply on 4<sup>th</sup> May 2018 but did not participate in the hearing.

**The Claimants' Case**

3. The Claimants state that they were employed by the Respondent as security guards under unwritten contracts of service on diverse dates between 1<sup>st</sup> April 2015 and January 2016 as follows:

a. 1<sup>st</sup> Claimant, Wilkister Kerubo Mageto and 3<sup>rd</sup> Claimant, Freddie Nabiswa Kasisi on 1<sup>st</sup> April 2015;

b. 2<sup>nd</sup> Claimant, Lena Bwari Atuya on 23<sup>rd</sup> January 2016.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants state that on 1<sup>st</sup> May 2017, when they reported for duty at Bima Towers, they were informed by their supervisor, Stanley Masota that they should hand over their uniforms and return home. The 3<sup>rd</sup> Claimant states that his services were terminated when he reported for duty on 31<sup>st</sup> May 2017 at KCC residence in Ganjoni. He adds that he was told by his supervisor, Stanley Masota to return home and await communication on when to resume duty. Instead of being called back, Masota called the 3<sup>rd</sup> Claimant demanding that he returns his uniform to Bima Towers.

5. The Claimants state that they were not given notice nor reasonable explanation as why their services were terminated. They further state that the Respondent had no physical offices in Mombasa and hence it was not possible for them to inquire on the status of their employment.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants state that their positions as day guards in Bima Towers were taken over by other security officers of the Respondent Company.

7. The Claimants aver that at the time of their termination, they each earned a monthly salary of Kshs. 7,500 which they claim was below the minimum wage for security guards working within Mombasa County. They also claim that sometimes, they were not paid their full monthly salaries. Additionally, they were not registered with the National Hospital Insurance Fund (NHIF) or National Social Security Fund (NSSF).

8. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants further state that they worked between 6.00 am and 6.00 pm from Monday to Saturday without any overtime compensation. All the Claimants claim that they were not allowed to proceed on annual leave.

9. The Claimants' claims are as follows:

**1<sup>st</sup> Claimant: Wilkister Kerubo Mageto**

a. Accrued leave.....	Kshs. 4,893
b. Uniform refund.....	3,000
c. Service pay @ ½ x7,500x 2 years.....	7,500
d. Notice.....	7,500
e. Underpayment.....	79,942
f. House allowance.....	27,000
g. 12 months' salary in compensation.....	90,000
h. Public holidays.....	6,000
i. Salary arrears.....	7,500

**2<sup>nd</sup> Claimant: Lena Bwari Atuya**

a. Accrued leave.....	Kshs. 4,893
b. Uniform refund.....	2,800
c. Service pay @ ½ x7,500x 1 year.....	3,750
d. Notice.....	7,500
e. Underpayment.....	55,262
f. House allowance.....	18,000
g. 12 months' salary in compensation.....	90,000
h. Public holidays.....	3,000
i. Salary arrears.....	7,500

**3<sup>rd</sup> Claimant: Freddie Nabiswa Kasisi**

a. Accrued leave.....	Kshs. 4,893
b. Uniform refund.....	3,000
c. Service pay @ ½ x7,500x 2 years.....	7,500
d. Notice.....	7,500
e. Underpayment.....	108,583
f. House allowance.....	27,000
g. 12 months' salary in compensation.....	90,000
h. Public holidays.....	6,000
i. Salary arrears.....	7,500

10. The Claimants also claim overtime compensation for the entire period of employment during which they worked for 12 hours daily. They

further ask for certificates of service, costs plus interest.

### **The Respondent's Case**

11. In its Reply dated 3<sup>rd</sup> April 2018 and filed in court on 4<sup>th</sup> May 2018, the Respondent denies the Claimants' claims and states that if there was a contract with any of the Claimants, the contract was for temporary employment. The Claimants are therefore not eligible for the benefits claimed as all their dues during the contractual period were paid as they fell due.

12. The Respondent states that it was under contractual obligation with its client to provide services and there was therefore need to replace the Claimants.

### **Findings and Determination**

13. 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?**

14. In its Reply dated 3<sup>rd</sup> April 2018, the Respondent submits that the Claimants were hired on temporary basis up until the time their services were terminated due to desertion of duty as well as redundancy at work. The Respondent did not however produce any employment records or call any evidence to support this submission. The submission being unsupported by evidence, carries no probative value and is rejected. The result is that the Claimants' testimony regarding their employment record was uncontroverted and the Court had reason not to believe them.

15. In its Reply, the Respondent admits that the Claimants were instructed to hand in their company uniforms but adds that they were paid all their terminal dues before being dismissed. The issue of the Claimants' termination is therefore not in contest. It is clear to me therefore that the Respondent terminated the Claimants' employment without establishing a valid reason as required under Section 43 of the Employment Act and in violation of the procedural fairness requirements of Section 41 of the Act.

### **Remedies**

16. In light of the foregoing findings I award each of the Claimants four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service, coupled with the Respondent's conduct in the termination transaction. I further award the Claimants one (1) month's salary in lieu of notice.

17. The Claimants also claim house allowance. Section 31(1) and (2) of the Employment Act as follows:

**31(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.**

**2. This section shall not apply to an employee whose contract of service-**

**a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or**

**(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).**

18. There was no evidence that the salaries paid to the Claimants were inclusive of house allowance. I therefore allow the Claimants' claims for house allowance at the rate of 15% of their basic salaries and adopt the resultant gross figures as their monthly salaries for purposes of this claim.

19. Similarly, there was no evidence that the Claimants were contributing members of the National Social Security Fund (NSSF) nor did they go on leave. The claims for service pay and leave pay therefore succeed and are allowed. The claim for salary arrears also succeeds and is allowed.

20. The claims for uniform refund, underpayment and public holidays were not proved and are dismissed.

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

**1<sup>st</sup> Claimant: Wilkister Kerubo Mageto**

a. 4 months' salary in compensation.....	Kshs. 34,500
b. 1 month's salary in lieu of notice.....	8,625
c. House allowance for 24 months.....	27,000
d. Service pay for 2 years (8,625/30x15x2).....	8,625
e. Leave pay for 2 years (8,625/30x21x2).....	12,075
f. Salary arrears.....	<u>8,625</u>
<b>Total.....</b>	<b>99,450</b>

**2<sup>nd</sup>Claimant: Lena Bwari Atuya**

a. 4 months' salary in compensation.....	Kshs. 34,500
b. 1 months' salary in lieu of notice.....	8,625
c. House allowance for 16 months.....	18,000
d. Service pay for 1 year (8,625/30x15x1).....	4,313
e. Leave pay for 1 year (8,625/30x21x1).....	6,038
f. Prorata leave for 4 months (8,625/30x1.75x4).....	2,013
g. Salary arrears.....	<u>8,625</u>
<b>Total.....</b>	<b>82,114</b>

**3<sup>rd</sup>Claimant: Freddie Nabiswa Kasisi**

a. 4 months' salary in compensation.....	Kshs. 34,500
b. 1 month's salary in lieu of notice.....	8,625
c. House allowance for 24 months.....	27,000
d. Service pay for 2 years (8,625/30x15x2).....	8,625
e. Leave pay for 2 years (8,625/30x21x2).....	12,075
f. Salary arrears.....	<u>8,625</u>
<b>Total.....</b>	<b>99,450</b>

22. These amounts will attract interest at court rates from the date of judgment until payment in full.

23. The Claimants will have the costs of the case.

24. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY OF NOVEMBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mbogoh for the Claimants

No appearance for the Respondent