



## REPUBLIC OF KENYA

### IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF

#### KENYA AT NAIROBI

#### CAUSE NO. 1907 2011

MICAH J. MUTAVI.....CLAIMANT/APPLICANT

VERSUS

SECURITY SEVEN LTD.....RESPONDENT

#### JUDGMENT

##### **Introduction**

1. This is a Claim for terminal benefits totaling to Kshs.563,000 plus compensation for unlawful termination of his contract of service by the respondent in March, 2010. The respondent has denied ever terminating the Claimant's employment and averred that it is the Claimant who terminated his employment by deserting duty without prior notice. She however admitted the Claim for 63 leave days equaling to Kshs.9,450 less one month's salary in lieu of notice (**Kshs.4,500**).

2. The suit was heard on 23.10.2018 when the claimant testified as CW1 Mbuthia testified as RW1. Thereafter both parties filed written submissions which I have carefully considered together with the evidence tendered.

##### **Claimant's Case**

3. C.W.1 testified that he was employed by the respondent in January, 2004 as a Security Guard. He started with a salary of Kshs.3,900 per month but later it was increased to Kshs.4,500 per month. He was assigned to guard Ladha Flats along Parklands Avenue.

4. In March, 2010 he reported to work as usual but he was verbally dismissed by the respondent's operations Manager M/s Wangare by telling him to go home because his services were no longer required. He contended that before the termination he had not received any warning or termination notice. He denied ever resigning or terminating the contract of service as alleged by the defence and stated that had he done so a Show Cause letter could have been served on him. He further contended that despite having worked for over 6 years the respondent never paid him any terminal dues. He contended that he never went for annual leave or paid any cash in lieu. He further contended that he used to work from 6 pm to 6am and he was not paid overtime. He therefore prayed for reliefs sought in his claim plus costs and interest.

6. On cross-examination, C.W.1 admitted that he was contributing to the National Social Security Fund. He further admitted that he never reported the termination to the Labour office but went to his lawyer directly. He also contended that his right to House allowance was provided under the law even if it was not indicated in his letter of appointment.

##### **Defence Case**

7. R.W.1 confirmed that the Claimant was employed by the respondent as a night guard until 23.3.2010 when he left the company. He stated that the Claimant deserted work without any notice to the respondent, who came to learn of the desertion when the client called to report his absence. As a result, R.W.1 stated that another guard was deployed to guard the premises where the Claimant was assigned to guard.

8. R.W.1 admitted that the Claimant was earning Kshs.4,500 as his consolidated pay. He also admitted that the Claimant worked

for years and he was working from 6pm to 6am. He however denied the computation of the Claimant's dues and prayed for the suit to be dismissed with costs.

9. On cross-examination, R.W.1 admitted that he joined the company after the Claimant had left but explained that he learned about him from the Human Resource records. He however did not produce the alleged employment records for the Claimant. He admitted the claim for leave but maintained that it should be paid less one month's salary in lieu of notice because the Claimant deserted work without securing prior notice. He further admitted that the Claimant should be paid overtime because he was working 4 extra hours daily.

### **Analysis and Determination**

10. There is no dispute that the Claimant was employed by the respondent as a night guard until March, 2010 when his contract of service was terminated. The issues for determination are:-

(a) *Whether the Claimant was unfairly dismissed or he is the one who deserted.*

(b) *Whether the reliefs sought should be granted.*

### **Desertion and unfair termination**

11. The Claimant contended that he was verbally dismissed. That he first reported to work in March, 2010, but he was told to go back home. Thereafter he reported to work again and the operations Manager Ms Wangare dismissed him by telling him that his services were no longer required. On the other hand R.W.1 contended that the Claimant deserted work without notice and the respondent came to learn about it after the client, where the Claimant was guarding, reported that he was absent from work.

12. The respondent has not denied that she had employed an Operations Manager by the name Wangare in March, 2010. The said M/s Wangare has also not been called to deny the allegation that she dismissed the Claimant verbally. The defence also never called her officer who received the alleged call from the client or even the said client to prove that indeed the Claimant deserted work in March, 2010 as alleged.

Consequently, I find that the respondent has not proved on a balance of probability that it is the Claimant who terminated his job through desertion. However, I find that the Claimant has proved on a balance of probability that he was unfairly dismissed. That his dismissal was verbally done by the respondent's Operations Manager.

13. Under Section 45 of the Employment Act, termination of employment contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A valid and fair reason is one that relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements.

14. Fair procedure on the Act refer on the other hand refers to pre and post termination fairness. Pre- termination fairness relates to explaining to the employee the reason for the intended termination and according him a chance to defend himself as required by Section 41 of the Act. Post termination fairness relates to the employee's right to an appeal and payment of his separation dues and issuance of Certificate of Service.

15. In this case RW1 never attempted to prove and justify the reason for dismissing the Claimant nor did he adduce any evidence to prove that the Claimant was accorded a fair hearing before the dismissal. Consequently, I return that the termination of the Claimant's contract of service by the respondent's Operations Manager was unfair and unlawful within the meaning of Section 45 of the Act.

### **Reliefs**

16. Flowing from the foregoing findings, I award the claimant one month's salary plus 6 months' salary as compensation for unfair termination under Section 49(1) of the Act. In awarding the said compensation, I have considered the Claimant's service of 6 years and the fact that he did not contribute to his termination through misconduct.

17. The claim for 63 leave days was admitted and I therefore allow it. I also allow the claim for gratuity at the rate of 18 days pay per year of service under Regulation 17(2) of the Protective Security Services Order. He worked for 6 years which was above the minimum required service of 5 years.

18. The claim for House Allowance is dismissed because the payslip produced by the Claimant indicated that the salary was gross and in any case the Claimant never alleged that the said gross pay was an underpayment. In addition the claim for public holidays worked and off days not given is also dismissed for lack of particulars and evidence. Likewise, the claim for travelling allowance is dismissed because it is not grounded in the written contract produced as exhibit by the Claimant. In any case, the Claimant never went for any leave and as such the said leave travelling allowance does not arise.

19. The Claim for overtime is however allowed at the rate of 4 hours per day. R.W.1 admitted the said claim. Based on the salary of Kshs.4500 per month his hourly rate was Kshs.18.75. Assessed at 1 ½ rate, his hourly overtime was Kshs.28.125 equalling to Kshs.112.50 per day and Kshs.3,375 per month. For the 6 years period served I award him Kshs.243,000 for the overtime worked.

**Conclusion and disposition**

20. I have found that the Claimant never deserted work but he was dismissed unfairly by the respondent's Operations Manager M/s Wangare.

I therefore enter judgment for him in the following terms:-

(a) Notice .....4,500/=

(b)

(c) Compensation ..... 27,000/=

Accrued leave Kshs.4500 x 21/26 x 6 ..... 21,807.70/=

(d) Gratuity 18/26 x 4500 x 6 .....18,692.30/=

(e) Overtime..... 243,000/=

**Total: 315,000/=**

The claimant will also have costs plus interest from the date hereof. The decretal sum will be paid subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018**

**ONESMUS N. MAKAU**

**JUDGE**