



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 242 OF 2014**

**AHMED ISAAK TUJA.....CLAIMANT**

**VERSUS**

**CLAIRE M. JETHWA.....RESPONDENT**

**JUDGMENT**

1. The claimant pleaded that he was employed by the respondent as a night guard at a salary of Kshs 7,000/= per month which was later increased to Kshs 13,500/= per month exclusive of house allowance. He claimed he worked for the respondent with due diligence and faithfulness until about 16<sup>th</sup> August, 2013 when the respondent terminated his services on allegations of lateness.

2. According to the claimant, his termination was without any notice or letter to show cause why his services should not be terminated. Further upon termination the respondent refused to pay him salary arrears and other dues.

3. The respondent refuted the claimant's allegations and averred that the claimant conducted himself in a condescending manner towards the respondent and refused to abide to lawful instructions including persistent lateness. The claimant was therefore not terminated on grounds of being late for one day for fifteen minutes. The respondent further averred that the claimant refused to adhere to the disciplinary mechanism initiated by the employer whereby he was required to respond to a show cause notice. The claimant absconded duty and failed to respond to a warning letter. According to the respondent the claimant's termination was therefore fair, procedural and in accordance with applicable provisions of the law.

5. In his oral evidence in court, the claimant reiterated the averments in his memorandum of claim and further stated that he was neither provided with housing nor housing allowance. In cross - examination he denied ever being rude to his employer. He however, conceded that he used to go on leave but denied going on 42 extra days of leave.

4. The respondent did not call any oral evidence but however filed submissions. In his closing submissions before court, counsel for the claimant submitted that the respondent failed to prove reasons for the termination of the claimant's contract as required by section 43(1) of the Employment Act. This therefore rendered the claimant's termination from employment unfair. Counsel further submitted that the claimant was not given a show cause letter and was not called to a disciplinary hearing to defend himself.

5. Concerning leads of compensation the counsel submitted that the claimant was entitled to one month's

salary in lieu of notice because his client was not given notice prior to the termination of his services. On house allowance counsel submitted that since the respondent did not offer accommodation the claimant was entitled to house allowance for the period worked. The Counsel also submitted that the claimant was entitled to compensation for days worked during public holidays and was never paid as well as gratuity and overtime. Counsel further sought that the court orders twelve months salary as compensation for unfair termination of services.

6. The respondents counsel on the other hand submitted that the claimant conceded that on 16<sup>th</sup> August 2013 he reported late to work and when the respondent reprimanded him the situation turned ugly resulting to the claimant being asked to go out of the compound. According to the respondent's counsel, the respondent averred on lateness contained in the memorandum of claim were not controverted by the claimant.

7. Counsel further submitted that the claimant was served with a one month's notice of termination dated 20<sup>th</sup> August, 2013. This notice was attached to claimant's bundles documents as appendix 2. Counsel further submitted that the claimant challenged authority by refusing to sign a warning letter. According to counsel, the respondent through her response and annexures 1 pages 4-8 demonstrated through the extracts of employment records, the salary earned and leave days taken by the claimant. The records showed the claimant used in excess of 42 leave days between 2011-2013. The claimant however only conceded to have utilized in excess of 17 days of his leave.

8. According to counsel, the failure by the claimant to acknowledge the notice to show cause and absconding prevents the claimant from turning around and demanding a hearing. The claimant defeated his own cause by not defending himself. The termination was effected after granting the claimant one month's notice. The notice letter explained the reasons in chronological manner which were never disputed by the claimant.

9. Concerning the remedies sought counsel submitted that the claimant was paid for 16 days worked and one month salary in lieu of notice. Concerning house allowance, counsel submitted that the respondent furnished extracts of payment records and it was clear from month to month employment that it was all inclusive. According to counsel the payment covered 15% house allowance. The prevailing Wages Order for 2011 provided that salary for night watchman was kshs 8,463 and inclusive of house allowance would be Kshs 9,732/45 as opposed Kshs 11,500 which the respondent was paying the claimant. The claim for house allowance therefore lacked merit.

10. Regarding claim for payment for public holidays, service gratuity and overtime counsel submitted that these were afterthought and lacked any legal basis. The claimant herein was issued with a notice of termination of employment dated 20<sup>th</sup> August, 2013 to take effect on 20<sup>th</sup> September, 2013. This letter was exhibited by both parties. The letter sets out the reasons for which the claimant's termination was being considered. The claimant being a union member referred this matter to his union which by an undated letter marked as appendix 2 did not dispute the notice and reasons offered for the intended termination. The union instead focused on the claimant's terminal dues and proceeded to commute the same at Kshs 236,885/=.

11. It is noteworthy that the respondent in the notice of termination had indicated her willingness to pay the claimant his lawful terminal dues. Whereas the Employment Act requires that before termination of employment an employee must be given an opportunity to react or respond to accusations for which termination is being considered where such employee expressly or by personal conduct or through his agent appears to have acquiesced or accepted without comment the accusations for which termination is being considered, a hearing or reaction to the accusations cannot be insisted upon.

12. In this particular case it would seem the claimant's only concern were his terminal dues as computed by his Union. He therefore cannot be heard to allege the unfairness of his termination at this stage. The court has reviewed and considered the computations presented on behalf of the claimant by his Union and became of the view that they represent what constitutes lawful dues payable to the claimant, the court therefore awards the claimant the sum of Kshs.236,885/= as computed in appendix 2 of the respondents

bundle of documents. The claimant shall further have costs of the suit.

13. It is so ordered.

Dated at Nairobi this 3<sup>rd</sup> day of February 2017

**Abuodha Jorum Nelson**

**Judge**

Delivered this 3<sup>rd</sup> day of February 2017

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for Claimant

.....for Respondent

**Abuodha Jorum Nelson**

**Judge**