



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

**CAUSE NO. 325 OF 2013**

*(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)*

**BENARD OSERO OTOCHI .....CLAIMANT**

**-VERSUS-**

**J.R.S. GROUP SECURITY LIMITED .....RESPONDENT**

**J U D G M E N T**

The Claim herein is filed by BENARD OSERO OTOCHI the Claimant alleging that he was employed by the Respondent as a security guard from 9th April, 2009 to 22nd January, 2013 when his employment was unfairly terminated. He prays for the following orders -

a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.

b) (a) 1 month pay in lieu of Notice

Basic + House Allowance

7915.9 + 1187 = Kshs. 9,102

(b) Leave dues

21 days x years worked x basic + House

allowance/26

21 days x 7 years x 9,102/26 Kshs .51,461

(c) Underpayment of Wages

Legal Notice No.71 of 1/5/2012

Basic + Hse allowance - current salary

9102 - 5555 = 3547 x 8 months (May to Dec 2012)

15 days x years worked x basic/30 days Kshs. 28,376

(d) Rest day

4 days p.m. x months worked x basic

+ house allowance/36 days

4 x 84 months x 9102/30 days Kshs.101,942

Salary for 21 days

30 days = 9,102

21 x 9102/30 Kshs. 6,371

(e) 12 months' salary as compensation for unfair termination

9102 x 2 Kshs.109,224

(f) Public holidays for 7 years

7 x 11 (P/H) x 9,102/30 Kshs. 46,723

(g) Service Gratuity for 7 years

7 years x 15,9102/30 Kshs. 31,857

(h) Overtime worked but not paid

(4 hrs per day)

12 hrs per day x 6 days = 72 hrs less 45 hrs

12 hrsOT x 4 weeks p.m x 12 months x 7yrs

9072hrs x 7915.9/1.5 Kshs.552.408

**TOTAL CLAIM Kshs.937,464/-**

c. Costs and Interests.

d. Any other relieve the Honourable may deem fit to grant.

The Respondent filed a Statement of Defence in which it denies terminating the Claimant's employment unfairly or owing the Claimant the monies claimed. The Respondent avers that this claim is brought by the Claimant in bad faith and is intended to embarrass the Respondent. The Respondent prays that the Claim be dismissed with costs.

The Claim was heard on 4th March, 2015 when the Claimant's testimony was taken and on 15th September, 2016 when the defence case was presented. The parties thereafter filed and exchanged written submissions.

### **Claimant's Case**

The Claimant testified that he worked with the Respondent from 19th April, 2009 to 22nd January, 2013 as a security guard. His starting salary was Shs.4,300. At the time of leaving employment his salary was shs.6,000. The Respondent did not pay him house allowance or any other allowance. He reported for

work at 5.45am to assess assignment and took over from the night guard at 6.00am. He worked up to 6pm. and worked on all days including off days and public holidays. He was never given annual leave or an off day. The only days he did not work were when he was sick. His duty station was at AAC Swan Centre, Kisumu City.

The Claimant testified that on 21st January, 2013 which was on a Sunday, his supervisor by the name Stanley went to his duty station and informed him that he was required at the office. The Claimant testified that he worked the whole day and went to the office in the evening where he found Mr. Rafiki, the owner of the company, Mr. Ombima, the operations Manager, Mr. Dismas Mukundo the Day Controller, and Mr. Were, the Spot Check Officer. Mr. Ombima then told the Claimant that he was indisciplined and his job was over. Mr. Ombima directed him to remove his uniforms and hand them over. The Claimant asked what he had done but was not told. The Claimant testified that he informed them he did not have underwear but he was ordered to hand over the uniform.

The Claimant testified that he had no option but to remove the uniform and remain with his underwear. He then walked to Central Police station where he reported what had happened. The matter was entered in the OB by an officer by the name Njuguna who promised to follow up the matter.

The Claimant testified that the following day he reported the matter to the Labour Office where he was given a letter to take to the Respondent. When he went to the office he was chased away with the letter. He went back to the Labour Office where he was given another letter to take to the office. When the people in the office saw him they closed the door. After that he decided to file this suit.

The Claimant stated that he was claiming Shs.937,464 as particularised in his claim.

Under Cross examination the Claimant stated that in his written statement filed in court he had made reference to his colleague Martin Obuya who had lost a phone but he was not told in the office that he had been summoned because of the lost phone. He stated that when he was employed he underwent a 3 day training during which he was instructed about guarding, handing over and taking over, and taking care of property that he was guarding. He denied that he removed his clothes in protest after being accused of stealing Martin's phone. He stated that the report he made to Central Police was that he had been dismissed, mistreated and stripped naked, and that it was not the right way to treat any person. He stated that he removed his clothes after being ordered to do so because the people who ordered him were many.

The Claimant denied that at the time he was informed that he was required at the office he was told about the lost phone. The Claimant further denied that he deserted work because he got an offer of a better paying job.

The Claimant called one witness JOSEPHAT AMACHIKA ODUOR CW2 who testified that he works with Kenya Union of Commercial Food and Allied Workers and had tabulated the Claimant's terminal benefits.

CW2 testified that he is a labour expert and based the tabulation of the claimant's terminal benefits on various Legal Notices particularly L.N. No.71 of 2012.

### **Respondent's Case**

DAVID MUTUKU MULWA (RW1) testified on behalf of the Respondent. He stated that he worked with the Respondent as a night Manager. He testified that on 22nd January, 2013 he reported to work in the evening and found that the Claimant had been summoned to the office on an issue of a phone that got lost at the Claimant's work station at Associated Auto Centre along Oginga Odinga Street in Kisumu. He testified that the Claimant was a day guard and when he arrived at the office it was evening and all the managers had gone home.

Mr. Mulwa testified that the Claimant was informed by the Manager on duty to hand over his uniform and come back to the office the following day. He testified that the Claimant went to the changing room,

removed his uniform and brought it to the office while naked with only a pair of shorts. Mr. Mulwa testified that he told the Claimant that he cannot leave the office like that, that he should go and wear the uniform and bring it in the morning but the claimant responded that he had been told to remove and hand over the uniform which he had done, and was leaving. He testified that the Claimant then left the office. He testified that the claimant was not dismissed or chased away, that he left on his own free will. He urged the court to dismiss the case.

Under cross examination Mr. Mulwa stated that he did not have a work identity card as the Respondent did not issue any. He stated he started working with the Respondent in 2001 and it is not true that in January 2013 he was not in the employment of the Respondent. He stated that he was working as Night Manager while the Claimant worked during the day and he therefore did not supervise the Claimant. He stated that there was a report of a lost phone that was made by the Claimant's colleague and that the claimant was not found with the lost phone. He stated that the Claimant's disciplinary case was not heard, that the claimant had been called to the office and arrived late and that is why he was directed to remove his uniform and report to the office the following day.

Mr. Mulwa stated that he was not present when the Claimant was directed to remove his uniform. He stated that he was not aware whether the Claimant was paid salary for that month, or if he was given annual leave. He further stated he was not aware whether the Claimant worked on weekends and public holidays.

Mr. Mulwa stated that when he arrived at the Office Mr. Ombima the overall manager was present but the day Manager Mr. Johnstone Were was not in the office. He stated that he was not aware if the Claimant reported to the police station or whether the Claimant went to work the following day. He further did not know if any letter was written to the Claimant for failure to report to work.

## **Determination**

I have considered the pleadings and evidence adduced in court as well as the written submissions filed on behalf of the parties. The issues for determination are the following-

1. Whether the Claimant was terminated by the Respondent or absconded duty,
2. If he was terminated, whether termination was unfair, and finally,
3. If he is entitled to the prayers sought.

On the first issue the claimant testified that on 21st January, 2013 he was summoned to appear in the office after work by the supervisor. When he arrived at the office he found 4 officers of the Respondent who directed him to hand over his uniforms. RW1 confirmed that the claimant was directed to hand over his uniforms. He was unable to explain why the claimant was required to hand in his uniforms. A security guard does not go to work in his personal clothes. Being asked to hand over uniforms means they are not required to go back to work as they cannot work without uniforms.

The Claimant further testified that he reported to the office the following day but he was shut out of the office. RW1 did not contest this fact. In any event he was the night manager and would not have been present at the time the Claimant states he was not allowed into the Respondents premises.

The Respondent averred in the statement of claim that the claimant absconded duty after being accused of stealing his colleague's mobile phone. Neither the theft of the phone nor the absconding of duty were documented by the Respondent as required by law.

From the evidence on record, it is clear that the intention of calling the Claimant to the office was to dismiss him. If it was intended to take any other action he would not have been asked to remove and hand over his uniform.

This is confirmed by the evidence of RW1 who stated that the Claimant was summoned to the office over the lost phone and that is why he was told to remove his uniform, go home and come back the following day.

Having failed to controvert the Claimant's evidence that he went back to the office the following day and was denied entry, I find that the Claimant was unfairly terminated as he was not subjected to the procedure set out in section 41 of the Employment Act. He was further not even informed in writing of the reasons for which he was called to the office on the day he was ordered to remove and hand over his uniform.

### **Remedies**

The Claimant prayed for several remedies as already set out elsewhere in this judgement.

He is entitled to payment of one month's salary in lieu of notice in the consolidated sum of Shs.9,866.80 based on statutory minimum wages for 2012.

The Claimant is also entitled to annual leave for the period he worked as there was no evidence adduced by the Respondent to prove that the Claimant took annual leave during the period he worked for the Respondent. Under the Regulation of Wages (Protective Security Industry) Order 2008, the claimant is entitled to 26 leave days per year. Having worked for 3 years and 9 months, he is entitled to 97.5 days leave translating to Shs.32,067.10 which I award him.

The Claimant is also entitled to underpayments of Shs.3,866.80 per month from May to December 2012 as he was paid Shs.6,000 consolidated salary per month instead of Shs.9,866.80. I therefore award him shs.30,934.40 for the 8 months underpayments.

The Claimant further prayed for rest days. He was entitled to 1 rest day per week. For the 84 months claimed he is entitled to Kshs.48,046.90 based on double hourly rate as provided in the Protective Security Industry Order. I award him the same.

The Claimant also prayed for 11 public holidays per year for the years worked. He worked for 3 years, 8 months. He is entitled to 40 days, calculated at double the hourly rate at Shs.22,879.50.

The Claimant is further entitled to 2 hours over time per day which I award him for 12 months only at 2 hours per day at Shs.39,145.00.

The Claimant having been unfairly terminated is entitled to compensation. Taking into account the length of service and all other relevant factors, I award him 4 months gross salary as compensation in the sum of Shs.39,467.20.

The Claimant is however not entitled to gratuity as he had not worked for the minimum qualifying period of 5 years provided for in the Protective Security Industry Order, and the prayer for gratuity is rejected. He was however not registered as a member of NSSF and is entitled to service pay at 15 days salary per completed year of service being shs.14,800.20.

The Respondent shall also pay Claimant's Costs for the Case.

**Dated, Signed and Delivered this 16th day of March, 2017**

**MAUREEN ONYANGO**

**JUDGE**