



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 2 OF 2016**

**BETWEEN**

**AMOS JUMA BARASA .....CLAIMANT**

**VERSUS**

**TEXAS ALARMS [K] LIMITED..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Chala & Company Advocates for the Claimant*

*Stephen Oddiaga & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 4<sup>th</sup> January 2016. He states he was employed by the Respondent as a Security Guard, on or around 14<sup>th</sup> June 2011. Respondent's Driver who drove Guard Dogs to various sites, instructed the Claimant to be reporting for duty at 5.30 p.m. while the normal reporting hour was 5.45 p.m. When the Claimant refused to do so, the Driver reported the refusal to the Claimant's Supervisor. The Supervisor demanded that the Claimant bribes him to retain his job. The Claimant refused to bribe. He was asked to leave. He returned on 6<sup>th</sup> December 2015 and found another Security Guard had been employed in his place. He consulted the Operations Manager, who advised the Claimant to go for a week of refresher training. The Claimant would cater for his own transport and subsistence and would not earn a salary over the period. When the Claimant sought the assistance of the Human Resource Manager, he was asked to surrender his Uniform and leave. He considered his contract to have been terminated. He states, termination was without notice and justification. He was not heard. There was no valid ground for the decision. His last salary was Kshs. 13,000 per month. He prays for Judgment against the Respondent in the following terms:-

- a) 2 months' salary in lieu of notice at Kshs. 42,000.
- b) Annual leave pay of 21 days for 5 years at Kshs. 105,000.
- c) Gratuity at 18 days' salary for every year completed in service at Kshs. 67,500.

- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 252,000.
- e) Severance pay at Kshs. 52,000.
- f) Underpayment at Kshs. 480,000.
- g) Unpaid house allowance at Kshs. 180,000.

Total...Kshs. 1,179,000

- h) Certificate of Service to issue.
- i) General Damages for loss of earnings.

2. The Respondent filed its Statement of Response on 21<sup>st</sup> January 2016. It concedes the Claimant was its Employee. He was paid Kshs. 320 daily, as he was a Casual Worker. He worked for 4 ½ years. A Client complained that the Claimant was falling asleep while on duty. The Supervisor reported the complaint to the Operations Manager. The complaint reached the Human Resource Manager. Before the Human Resource Manager could deal with the matter, the Claimant fled, and abandoned his work. The Claimant is still an Employee of the Respondent who deserted. His contract was not terminated by the Respondent.

3. The Respondent states further that the Respondent intended to change the Claimant from guarding a particular Client, because that Client was not satisfied with Claimant's work. Guards are taken through refresher training, to enhance productivity. The Claimant rejected the instructions issued by the Operations Manager, that he attends refresher training. He walked away never to be seen again. The Respondent prays the Claim is dismissed with costs to the Respondent.

4. Parties agreed on 18<sup>th</sup> October 2016 to have the Claim considered and determined on the strength of the record. They confirmed filing of their Closing Submissions on 8<sup>th</sup> December 2016, when Judgment was scheduled for delivery.

**The Court Finds:-**

5. The Claimant was employed by the Respondent as a Security Guard, on or around 14<sup>th</sup> June 2011. He left work on 6<sup>th</sup> December 2015. He worked 5 complete years.

6. He was not in casual employment as stated in the Statement of Response, earning a daily wage of Kshs. 320. There are pay slips exhibited by the Respondent showing the Claimant was on a monthly salary. His pay slip for November 2015 indicates his monthly basic salary was Kshs. 10,291, with a house rent allowance of Kshs. 1,654 – giving him a consolidated monthly salary of Kshs. 11,945. His gross salary hovered around Kshs. 13,000 monthly, but this included variables such as overtime, holiday and off duty pay.

7. The Claimant withdrew his prayer for severance pay through his Closing Submissions, explaining he did not leave employment through redundancy. ***The prayer is marked as withdrawn.***

8. The prayer for general damages for loss of earnings has no support in the Pleadings, Documents and Submissions filed by the Claimant, and is rejected.

9. Annual leave is claimed based on the 5 years the Claimant worked. The Respondent did not provide the Court with the Claimant's annual leave records. Instead, the Respondent seeks solace in the maxim that he who alleges must prove. Employers are the custodians of employment records. It was for the Respondent to discount the assertion by the Claimant that he was not granted annual leave throughout. The Respondent cannot, as the custodian of employment records, simply submit that he who alleges must prove. It should have disproved what the Claimant alleges to be an unfulfilled term of his contract. The

Claimant, as seen above, served 5 complete years, and is entitled to a maximum of 21 days x 5 = 105 days of annual leave.

10. Annual leave pay is granted based on a monthly salary of Kshs. 11,945 [Kshs. 11, 945 divide by 26 working days = daily rate Kshs. 459 .42 x 105 days =Kshs. 48,239]. ***The Claimant is allowed the prayer for annual leave pay at Kshs. 48,239.***

11. The Claimant did not support his Claim for gratuity. He did not show to the Court any wage instrument, contractual clause, or CBA, which allows him to have gratuity as claimed. The prayer is rejected.

12. The pay slips exhibited by the Parties contain basic pay and house rent allowance. There is no basis in the prayer for unpaid house allowance.

13. Underpayment is pleaded at Kshs. 8,000 x 12 x 5 amounting to Kshs. 480,000. The sum of Kshs. 8,000 per month, given in underpayment, is not contextualized within the various wage orders invoked by the Claimant. The Claimant states he was paid Kshs. 13,000 monthly salary, which as submitted by the Respondent, would be within the range payable to a Night Guard in Mombasa, under Legal Notice Number 117 of 2015. The prayer for underpayment [the Claimant does not specify in the Statement of Claim the nature of underpayment, the presumption being it is underpayment of salary], is rejected.

14. Did the Respondent terminate Claimant's contract of employment? Was termination based on valid reason? Was it carried out fairly? Is the Claimant entitled to notice pay and compensation?

15. The Respondent states it did not terminate the Claimant's contract; he walked away, after he was asked to attend a refresher training, to equip him better, after a Client had complained about the Claimant's work. The Claimant's position is that he was harassed by his Supervisor, who demanded the Claimant bribes him, to retain his job. He was asked to take a day off, and when he resumed, he found another Guard had taken over his duty. On further enquiry, he was asked by the Operations Manager to attend refresher training for a week. As indicated at paragraph 11 of his Witness Statement, the Claimant refused to go for the training as he had not been given an opportunity to express his sentiments.

16. It is not necessary for the Court to delve into the allegations made by the Claimant that he was victimized by his Supervisor, after he declined to bribe the Supervisor.

17. He was asked by the Operations Manager to attend a refresher course. It was within the Operations Manager's authority, to direct the Claimant attends refresher course, with or without complaints lodged against the Claimant by Respondent's Clients.

18. The Claimant states he declined the instructions of Management to attend training. He acknowledges he was insubordinate. He ought to have submitted to the instructions of the Respondent. He did not show the Court that he was required to pay for his own subsistence, and receive no salary, for the period in training. He ought to have obeyed the instructions of his Superior and pursued facilitation with Management, rather than just decline to attend training.

19. The Court believes the Claimant's position that he was, following the disagreement with the Respondent, asked to return the Uniform and leave work. The Respondent terminated his contract of employment, believing correctly, that the Claimant was insubordinate. There was valid ground justifying termination.

20. There was no hearing granted to the Claimant. The Claimant was merely asked to surrender his Uniform and vacate office. The Respondent did not observe Section 41 and 45 of the Employment Act 2007 on fair procedure.

21. ***The Claimant is granted the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 71,670.***

22. The Respondent as observed above simply told the Claimant to surrender his Uniform and leave. Another Guard was promptly recruited. There was no notice of termination. The Claimant is entitled to notice pay. He did not however, justify the 2 months' salary sought as notice pay. The Employment Act allows a minimum of 1 month salary. The Claimant has not directed the mind of the Court to a contractual clause, wage regulation, or workplace policy, granting him notice pay above the statutory minimum. Clause 24 of the Regulation of Wages [Protective Security Services] Order provides for a minimum notice of 1 month, or 1 month salary in lieu on notice. **He is granted 1 month notice pay at Kshs. 11,945.**

23. ***Certificate of Service to issue.***

24. No order on the costs.

25. ***Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a) Termination was at the instigation of the Respondent.***

***b) It was based on fair ground, but flawed procedure.***

***c) The Respondent shall pay to the Claimant: annual leave pay at Kshs. 48,239; equivalent of 6 months' salary in compensation for unfair termination at Kshs. 71,670; and 1 month salary in lieu of notice at Kshs. 11, 945, total – Kshs. 131,854.***

***d) Certificate of Service to issue.***

***e) Interest granted at 14% per annum from the date Judgment till payment is made in full.***

***f) No order on the costs.***

Dated and delivered at Mombasa this 30<sup>th</sup> day of June 2017

**James Rika**

**Judge**