



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO. 174 OF 2015**

**WILLIAM OBWOGO KARANI.....CLAIMANT**

**v**

**MODERN DISTRIBUTORS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant commenced legal proceedings against the Respondent on 16 June 2015 alleging breach of contract/unfair termination of employment.
2. The Respondent did not file a Response in time and on 6 July 2015 the Court granted it up to 17 July 2015 to file the Response, witness statements and documents to be relied on.
3. However, a Response was only filed on 23 March 2016, without obtaining further leave.
4. Despite appearances on 9 March 2016, 17 October 2016 and 21 February 2017, the Respondent did not bother to formalise the filing and admission of the Response (it did not attend Court in spite of service).
5. On 21 February 2017, the Court scheduled the Cause for hearing on 19 September 2017.
6. When the Cause was called out for hearing on the scheduled date, the Respondent sought an adjournment on the ground that its witness was not in Court (the Court declined the application and the Respondent closed its case without presenting a witness).
7. The Claimant filed written submissions on 29 September 2017 while the Respondent's submissions were not on file by this morning.
8. The failure to file the submissions and Response within the timelines ordered by the Court all show that the Respondent all through was not keen on having the Cause finalised as soon as was possible. It attended to the Cause casually.
9. Although the parties presented some 10 Issues as arising for determination, the same can be condensed into 6 being, *whether the Claimant was an employee of the Respondent, whether the termination of the Claimant's employment was unfair, whether the Claimant worked overtime without pay, whether the Claimant was underpaid, whether Claimant had pending leave at point of separation and appropriate remedies.*

**Employment relationship**

10. Although the Respondent denied that the Claimant was its employee, the Claimant produced a job identity card indicating that he was employed by the Respondent as a security guard.

11. It is an obligation placed upon the employer to issue a formal contract to an employee and in the present case, the Respondent did not issue any to the Claimant.

12. The Court can therefore, on the basis of secondary document (job identity card) conclude that the Claimant was engaged by the Respondent as a security guard.

### **Fairness of termination**

13. The Claimant's testimony which was not rebutted was that in September 2014 the wife of the Respondent's director directed him to leave (he was guarding the home and doing caretaker duties).

14. When he sought clarifications from the Respondent's offices he was told to remove his belongings from the quarters he had been given.

15. According to the Claimant, he was not issued with notice of termination of employment or afforded an opportunity to make representations at a hearing.

16. In terms of sections 35 and 41 of the Employment Act, 2007, the Respondent should have issued a notice of termination to the Claimant and also afforded him an opportunity to make representations if the termination was on account of *misconduct, poor performance or physical incapacity*.

17. The Court is therefore satisfied that the Claimant has demonstrated that there was unfair termination of employment.

18. Pursuant to sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of proving the reasons for terminating the employment of the Claimant and that the reasons were valid and fair.

19. By failing to present witnesses in Court, the Respondent failed to discharge that burden, and the Court concludes that the termination of the Claimant's employment was substantively unfair.

### **Overtime**

20. The Claimant was a night security guard. It is a notorious fact which the Court takes judicial notice of that guards in this country work in 2 shifts of 12 hours each.

21. The Claimant's testimony on the working hours is more probable and the Court can conclude that he worked overtime for which he was not remunerated.

22. However, the Claimant did not explain in testimony the formula he used to arrive at the sum of Kshs 1,287,637/- normal overtime, Kshs 654,038/- off duties and Kshs 144,125/- public holidays overtime (the number of off days and public holidays was not disclosed in testimony).

23. The Court would decline the head of relief.

### **Underpayments**

24. Underpayment of wages can be a consequence of payment of wages below the contractually agreed amount or payment below the prescribed minimum wages.

25. The Claimant anchored his claim on the prescribed minimum wages and mentioned Legal Notice No. 197 of 2013. He testified that he was earning Kshs 8,000/- instead of Kshs 9,024/- (exclusive of house allowance as he was provided with accommodation).

26. The Court accepts the contention by the Claimant that he was underpaid by a total of Kshs 16,386/40 during the period.

### **Leave**

27. The Claimant's testimony that he did not go on leave from 2000 to 2014 was not challenged or controverted by production of employment records which an employer is expected to keep (sections 10(3) and 74 of the Employment Act, 2007).

28. The Court will therefore allow the claim for overtime of Kshs 74,541/-.

### **Appropriate remedies**

#### ***Pay in lieu of notice***

29. The Claimant is entitled to 1 month pay in lieu of notice in terms of section 35 of the Employment Act, 2007. The minimum wage at the time of separation was Kshs 9,024/.

#### ***Underpayments***

30. The Court will find for the Claimant in the sum of Kshs 16,386/-.

#### ***Overtime (normal, off days and public holidays)***

31. These heads of relief are declined for the reasons stated in the body of the judgment.

#### ***Annual leave***

32. The relief is allowed in the sum of Kshs 74,541/- as claimed.

#### ***Compensation***

33. The Claimant served the Respondent for about 14 years and in consideration of the period, the Court would award the equivalent of maximum 12 months gross wages (multiplier Kshs 9,024/-).

### **Conclusion and Orders**

34. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

(i) 1 month pay in lieu of notice	Kshs 9,024/-
(ii) Underpayments	Kshs 16,386/40
(iii) Leave	Kshs 74,541/-
(iv) Compensation	Kshs 108,288/-
<b>TOTAL</b>	<b>Kshs 208,239/40</b>

35. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 1<sup>st</sup> day of December 2017**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant	Ms. Chepngetich instructed by Wambeyi Makomere & Co. Advocates
For Respondent	Ms. Moenga instructed by Mongeri & Co. Advocates
Court Assistants	Nixon/Martin