



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 1218 OF 2012**

**MUMO MASWILI.....CLAIMANT**

**VS**

**PATRIOTIC GUARDS LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. Mumo Maswili was employed by Patriotic Guards Limited from March 2002 until 4th April 2010. He brought this claim by way of Statement of Claim dated 18th July 2012 and filed in Court on even date. The Respondent filed a Memorandum of Response on 10th October 2012. At the hearing, the Claimant testified on his own behalf but the Respondent did not call any witnesses.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a security guard in March 2002 at a monthly salary of Kshs. 7,000. He states that on 4th August 2010, his employment was terminated without a justifiable cause and without notice. He was not paid his terminal dues.

3. The Claimant's claim is as follows:

- a. Unpaid salary for November 2009.....Kshs. 7,000
- b. Unpaid salary for December 2009.....2,500
- c. Unpaid salary for April 2010.....7,000
- d. Unpaid salary for May 2010.....7,000
- e. Unpaid salary for June 2010.....7,000
- f. Unpaid salary for July 2010.....7,000
- g. Unpaid salary for 19 days.....4,433
- h. Unpaid leave for 2007-2010.....28,000
- i. Service pay for 8 years.....56,000
- j. Money deducted for uniform.....2,000
- k. One month's salary in lieu of notice.....7,000
- l. Certificate of service
- m. Costs plus interest

**The Respondent's Case**

4. In its Memorandum of Response filed on 10th October 2012, the Respondent admits having employed the Claimant but denies unlawfully terminating him. The Respondent avers that the Claimant absconded

duty at the end of June 2010 and when he resumed on 4th August 2010, he purported to resign but his resignation was not accepted.

5. The Respondent admits owing the Claimant salary for the months of April, May and June 2010 as well as Kshs. 2,000 for uniform. All the other claims are denied.

### **Findings and Determination**

6. There are two issues for determination in this case:

- a. Whether the Claimant deserted duty or was unlawfully terminated;
- b. Whether the Claimant is entitled to the remedies sought.

### **Desertion or Unlawful Termination**

7. The Claimant told the Court that he was terminated on allegations of going on strike. On its part, the Respondent states that the Claimant deserted duty. Desertion of duty is a serious offence that exposes an employee to summary dismissal. However, like all forms of misconduct, it must be proved. At the very least, an employer who claims that an employee has deserted duty must have issued a show cause notice to the deserting employee. There was no evidence of the Respondent having issued such a notice to the Claimant and the desertion claim was therefore not proved.

8. That settled, the next question is whether the Claimant was unlawfully terminated. Looking at the Claimant's pleadings and supporting documents, it appears that there is in fact no claim for unlawful termination. First, there is no specific prayer on this account in the Statement of Claim; second, the Claimant was equivocal on the date of termination.

9. While in his Statement of Claim he cites 4th August 2010 as the termination date, he testified in Court that he was terminated on 20th August 2010. Further still, a demand letter issued by the Claimant's Advocates on 16th August 2010 states that the Claimant '*terminated his services*' on 4th August 2010. In the absence of any explanation on these obvious inconsistencies, the Court finds that the Claimant failed to establish any claim for unlawful termination of employment.

### **Remedies**

10. In light of the Claimant's failure to establish a claim for unlawful termination, the claim for one month's salary in lieu of notice must also fail. The claims for unpaid salaries for the months of November 2009, December 2009 and 19 days in August 2010 were not proved and are dismissed. The Claimant was a contributing member of the National Social Security Fund (NSSF) and is therefore not entitled to service pay.

11. With regard to the claim for leave pay, the Respondent did not produce any leave records to counter the Claimant's testimony. This claim therefore succeeds and is allowed. The Claimant is also entitled to his salary for the month of July 2010 as well as salary for 4 days in August 2010. The claims for salary arrears for the months of April, May and June 2010 as well as Kshs. 2,000 for uniform deductions are admitted and payable.

12. Finally, I make an award in favour of the Claimant in the following terms:

- a) Leave pay for 3 years and 7 months

( $7,000/30 \times 21 \times 3 + 7,000/30 \times 1.75 \times 7$ ).....Kshs.17,558

- b) Salary arrears for April, May, June and July 2010.....28,000

- c) Salary for 4 days in August 2010 ( $7,000/30 \times 4$ ).....933

c) Uniform deductions.....2,000

**Total.....48,491**

13. I further direct the Respondent to issue the Claimant with a certificate of service. The Claimant will have the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

14. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF APRIL 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Miss Wambua for the Claimant

Miss Ndirangu for the Respondent