



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NO. 44 OF 2015**

**BETWEEN**

- 1. NYANGENYA HEZRON NYAKEREMBA**
- 2. SITUMA ELVIN**
- 3. ONTIRI JAMES ..... CLAIMANTS**

**VERSUS**

**XFOR SECURITY SOLUTIONS ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Otieno Asewe & Company Advocates for the Claimants*

*Miller & Company Advocates for the Respondents*

**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

[Rule 27 [1] ] [a] of the Industrial Court [Procedure] Rules 2010]

1. The 3 Claimants filed their Joint Statement of Claim, on the 4<sup>th</sup> February 2015. They state they were employed by the Respondent Company as Security Guards. They were employed in February, June and June 2012 respectively, and summarily dismissed by the Respondent on 31<sup>st</sup> August 2013. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants were Team Leaders, earning a salary of Kshs. 15,000 on exit. The 3<sup>rd</sup> Respondent earned Kshs. 12,000. They feel summary dismissal was unfair and unlawful. They seek the following orders against the Respondent: -

1<sup>st</sup> Claimant

- 1 month salary in lieu of notice at Kshs. 15,000.

- Annual leave pay at Kshs. 17,310.
- Service pay at Kshs. 12,117.
- Public Holidays at Kshs. 11,540.
- Uniform deductions at Kshs. 3,000.
- 12 months' salary in compensation for unfair termination at Kshs. 180,000.

## 2<sup>nd</sup> Claimant

- 1 month salary in lieu of notice at Kshs. 15,000.
- Annual leave pay at Kshs. 14,425.
- Service pay at Kshs. 10,386.
- Public Holidays at Kshs. 11,540.
- Uniform deductions at Kshs. 3,000.
- 12 months' salary in compensation for unfair termination at Kshs. 180,000.

## 3<sup>rd</sup> Claimant

- 1 month salary in lieu of notice at Kshs. 12,000.
- Annual leave pay at Kshs. 11,550.
- Service pay at Kshs. 8,316.
- Public Holidays at Kshs. 9,240.
- Uniform deductions at Kshs. 3,000.
- 12 months' salary in compensation for unfair termination at Kshs. 180,000

The total Claim stands at Kshs. 697,424. The 1<sup>st</sup> Claimant also prays for Certificate of Service to issue. The Claimants pray for costs, interest and any other suitable relief.

2. The Respondent filed its Statement of Response on the 20<sup>th</sup> February 2015. It is conceded the Claimants were employed by the Respondent on the terms stated in their Claim. They were found by the Respondent sleeping while on duty. Sleeping while on duty justified immediate termination. They apologized for the dereliction. They received their final dues. Annual leave pay was included in the monthly pay; Public Holidays were compensated in the month of their occurrence; the Respondent does not pay for years of service; and no uniform deductions were made. The 1<sup>st</sup> Claimant's Certificate of Service is ready for collection. The prayer for compensation is not merited, the Claimants having confirmed they slept while on duty.

3. The Claimants all gave evidence, and rested their case on the 18<sup>th</sup> June 2015. Mr. Lenus Mwakio, Respondent's Human Resource Manager, testified on the 3<sup>rd</sup> March 2016 when the hearing closed. The Cause was last mentioned in Court on 23<sup>rd</sup> June 2016 when Parties confirmed the filing of their Submissions, and the Award of the Court reserved for 23<sup>rd</sup> September 2016.

4. The Claimants testified they were employed on the dates specified in the Pleadings and all summarily dismissed on 31<sup>st</sup> August 2013. They earned the salaries shown in the Pleadings. They all served as Security Guards. 1<sup>st</sup> and 2<sup>nd</sup> Claimants were Team Leaders. The 3<sup>rd</sup> was a Commoner. Team Leaders earned Kshs. 15,000 in monthly salary as of the time of dismissal. They were alleged to have been asleep while on duty, on the 16<sup>th</sup> August 2013. They were asked to write apology letters, if they desired to continue working. They wrote letters of apology on the 17<sup>th</sup> August 2013. They were issued warning orders. They were nonetheless, subsequently served with letters of summary dismissal. They testified there was nothing done by them after the letters of apology, to justify dismissal. They were not heard. They never went on annual leave. They worked on Public Holidays. They were not issued notice of termination. They had Kshs. 3,000 deducted as uniform fees. The Claimants testified they did not sleep on duty, and were compelled to write the apology letters to retain their jobs. The 3<sup>rd</sup> Claimant denied that he was listening to music while on duty. Cross-examined, they all denied they slept while on duty. They were compelled to write letters of apology to retain employment. They were issued warning orders on the

17<sup>th</sup> August 2013. They did nothing wrong after the warning, to justify dismissal on the 31<sup>st</sup> August 2013.

5. Mwakio confirmed that the Claimants were employed by the Respondent on the terms stated in their evidence. The Director conducted a night patrol on 16<sup>th</sup> August 2013. The Claimants were found sleeping. They were heard. The 1<sup>st</sup> Claimant alleged he was sick. The other 2 did not have any excuses. All the Claimants wrote apology letters. They were issued warning orders on the 17<sup>th</sup> August 2013. The orders related to negligence of duty and were marked as final warnings. They came before the apology. A disciplinary committee convened by the Respondent determined the Claimants are summarily dismissed. Dismissal was fair. They were paid their terminal dues. Sleeping on duty is a serious offence within the security services industry. Guards are fully trained and advised on the nature of their work, before recruitment and deployment. Cross-examined, Mwakio stated the Respondent issued the Guards with warning orders after finding them asleep. These were final warnings. Reference was made to the offence of sleeping while on duty. They were found asleep at 3.00 p.m. on the night of 16<sup>th</sup>/ 17<sup>th</sup> August 2013. They were summoned to the Respondent's Office on the 17<sup>th</sup> August 2013 and given a hearing. Mwakio accepted he did not mention any hearing in his Witness Statement filed in Court. There were no minutes of the meeting. Operations Manager and Mwakio served as the disciplinary committee. The Claimants were not punished twice. There was no record showing annual leave was paid off every month. Mwakio closed his evidence on redirection with the emphasis that the Claimants were given the opportunity to be heard. None of them appealed the committee's decision.

**The Court Finds: -**

6. The Claimants were employed as Security Guards by the Respondent on diverse dates in the year 2012. They all left employment at the instance of the Respondent, through the summary dismissal route. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants were Team Leaders, in a supervisory role within the Respondent, earning a monthly salary of Kshs. 15,000. The 3<sup>rd</sup> Claimant was a common Guard, earning Kshs. 12,000 per month.

7. They were all dismissed for sleeping at work on the 16<sup>th</sup> August 2013. Although they serially denied in Court that they were caught sleeping on the job, they all appear to have acknowledged they were sleeping, in their letters of apology addressed to their Employer the following day, 17<sup>th</sup> August 2013. There was no evidence that they were compelled to write the letters of apology, which are in their own undisputed handwritings. They promised they would not repeat the offence.

8. After an employment offence is admitted, the Employer normally imposes a sanction or grants amnesty. In this case the Respondent through its Human Resources Manager Mr. Mwakio, told the Court it opted to issue the Claimants final warning letters. The letters are shown to issue in categories- verbal warning; first warning; severe written warning; and final written warning. The Respondent issued the severest of the warnings, which is at the top of the hierarchy. The warning is titled 'Warning Order.' Recommendation for the concerned Employees is stated thus: last warning, next misconduct will lead to dismissal with immediate effect. The Employees were made to sign the Warning Orders, acknowledging they understood the consequences of any further infringements. This was on 17<sup>th</sup> August 2013.

9. The Claimants went on working from 17<sup>th</sup> August 2013 to 30<sup>th</sup> August 2013, when they were summarily dismissed. The reason for the decision is stated to be this: on the night between 16<sup>th</sup> and 17<sup>th</sup> August 2013, you were found asleep on the site by the Directors. The offence, over which the Warning Orders issued, was revisited, and punishment imposed twice. There was no allegation by the Respondent that the Claimants were involved in further infringements. The summary dismissal was in consequence to what further infringements? The Respondent obviously did not have valid reason or reasons to summarily dismiss the Claimants the earlier infringements having been punished through the Warning Orders. The summary dismissal was not substantively justifiable as required under Section 43 and 45 of the Employment Act.

10. The procedure leading to the Warning Orders is not relevant for purposes of resolving this dispute. The Warning Orders issued and were accepted by the Claimants. It is therefore not necessary for the

Court to examine if the Claimants were granted the opportunity to be heard, before the Warning Orders issued.

11. The question is whether the decision made on the 30<sup>th</sup> August 2013, followed the minimum standards of fairness under Section 41 and 45 of the Employment Act? The letters of summary dismissal do not reveal that the Claimants were heard before the decision of 30<sup>th</sup> August 2013. The Respondent merely rehashes the allegation that the Claimants had been found asleep, and it had become difficult for the Respondent to assign them duties at any of the Respondent's Customers. These allegations did not constitute fresh infringements. If there were any infringements after the initial ones, these are not shown in the record. No hearing of any sort took place between 17<sup>th</sup> August 2013 and 30<sup>th</sup> August 2013.

**12. Termination was unfair for want of substantive justification, and procedural fairness. The Claimants are granted 9 months' gross salary each, as compensation for unfair termination.**

**13. They are each granted 1 month salary in lieu of notice.**

14. The Respondent did not avail to the Court any contractual or legal clauses, showing annual leave was paid monthly. There was no pay slip showing the payment of such an item, and the utilization of annual leave in such a mode. It is not denied that the Claimants did not go on annual leave. The explanation is that their days were bought off, and payment included in their monthly salary. The evidence of payment is missing. **The claim for annual leave pay is granted as prayed.**

15. The Claimants did not specify on which Public Holidays they were on duty. They did not support their computation of Public Holiday Pay on any wage instrument. The prayer is rejected.

16. There was no evidence offered by the Respondent, in form of documents, showing the Claimants were registered to the N.S.S.F. There were no Statements of Accounts, and no Pay Slips. The particulars of 'salary breakdown' given in the Statement of Response do not show any deductions on the Claimants' salaries with regard to N.S.S.F. The Court is persuaded the Claimants are entitled to service pay under Section 35 [5] of the Employment Act. **Service pay is granted as prayed.**

17. Equipment Issue Sheet attached to the Statement of Response shows Guards were supplied uniforms by the Respondent. It is not suggested in the form that the uniforms were to be issued subject any payment of fees by the Guards. The form suggests a Guard would be required to return the uniform on termination. Nothing is mentioned of uniform fee, deduction or refund. In the absence of any written record contradicting the arrangement shown in the form, the Court is not able to grant the prayer for uniform refund.

18. Certificate of Service shall be released to the 1<sup>st</sup> Claimant.

19. Costs to the Claimants.

IN SUM, IT IS ORDERED:-

**a) Termination was unfair.**

**b) The Respondent shall pay:-**

**1<sup>st</sup> Claimant**

**i. 9 months' salary in compensation for unfair termination at Kshs. 135,000.**

**ii. 1 month salary in notice pay at Kshs. 15,000.**

**iii. Annual leave pay at Kshs. 17,310.**

iv. Service pay at Kshs. 12,117

Total ..... Kshs. 179,427

2<sup>nd</sup> Claimant

i. 9 months' salary in compensation for unfair termination at Kshs. 135,000

ii. 1 month salary in notice pay at Kshs. 15,000.

iii. Annual leave pay at Kshs. 14,425.

iv. Service pay at Kshs. 10,386.

Total..... Kshs. 189,811

3<sup>rd</sup> Claimant

i. 9 months' salary in compensation for unfair termination at Kshs. 108,000.

ii. 1 month salary in notice pay at Kshs. 12,000.

iii. Annual leave pay at Kshs. 11,550.

iv. Service pay at Kshs. 8,316.

Total..... Kshs. 139,86

c] The Respondent shall pay to the Claimants a total sum of Kshs. 509,104 in terminal benefits and compensation.

d] Certificate of Service shall be released to the 1<sup>st</sup> Claimant.

e] Costs to the Claimants.

f] Interest granted to the Claimants at 14 % per annum from the date this Award is delivered.

Dated and delivered at Mombasa this 23<sup>rd</sup> day of September 2016.

James Rika

Judge