



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 7 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOHN RIOBA MAUGO .....CLAIMANT**

**-Versus-**

**RILEY FALCON SECURITY SERVICES LIMITED .....RESPONDENT**

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

The Claimant was employed by the Respondent on 18th May, 2006 as a security guard. He worked with the Respondent until 16th September, 2010 when he was dismissed for failing to resume duty after taking his annual leave. The Claimant apologised and explained his absence and on 20th November, 2010 the Respondent addressed him a letter reviewing the dismissal and offering him fresh employment with effect from 17th November, 2010. The Claimant worked until 24th April 2014 when he was again dismissed, this time on grounds of being drunk while on duty.

The Claimant alleges the dismissal was unfair. He further alleges that he was underpaid. He seeks the following remedies:-

(a) One month's pay in lieu of notice [basic (Kshs.10,911.70) + house allowance (10,911.70 15%=1636.755)]=**Kshs.12,548.45/=**

(b) Accrued leave days with respect to years 2007, 2008, 2011, 2012, and 2013 (6,665.40 + 6,665.40 + 9,732.45 + 11,007.40 + 12,548.455) =**Kshs.46,619.10/-**

(c) Damages for wrongful dismissal under section 49(c) of the Employment Act (12,548.40 x 12) =**Kshs.150,580.80/=**

(d) Severance pay at the rate of 15 days for every year worked (15/30 x 12,548.40 x 8 years) =**Kshs.50,193.60/=**

(e) **Underpayments**

(i) For the period May 2006 to April 2009 ({15% x 5,796) + 5,796 = 6,665.40cts [gross basic minimum wage] - 4,074.20cts [actually paid as salary] x 36 months) = **Kshs.93,283.20cts/=** [underpayment];

(ii) For the period May 2009 to April 2010 ({15% x 6,839) + 6,839 = 7,864.85cts [gross basic minimum wage] - 6192.10cts [actually paid as salary] x 12 months) =[1,672.75cts underpayments x 12 months] = **Kshs.20,073/=**;

(iii) For the period May 2010 to April 2011 ( $\{15\% \times 7,523=1128.45\} + 7,523 = 8651.45\text{cts}$  [gross basic minimum wage] - 6192.10cts [actually paid as salary] x 12 months) = [2,459.35cts underpayments x 12 months] = **Kshs.29,512.20cts**;

(iv) For the period May 2011 to April 2012 ( $\{15\% \times 8,463 =1269.45\} + 8,463= 9732.45\text{cts}$  [gross basic minimum wage] - 6811.30cts [actually paid as gross basic salary]=2621.15cts x 12 months) = **Kshs.35,053.80 cts** underpayment;

(v) For the period May 2012 to April 2013 ( $\{15\% \times 9,571.65 =1435.75\} + 9,571.65=11007.40\text{cts}$  [gross basic minimum wage] - 8,464cts[actually paid as gross basic salary] = 2543.40cts x 12 months)=**Kshs.30,520.77cts** underpayment;

(vi) For the period May 2013 to April 2014 ( $15\% \times 10911.70 =1636.76\}$  + 10,911.70 = 12548.46cts [gross basic minimum wage] - 8,464cts[actually paid as gross basic salary] = 4084.46cts x 12 months) =**Kshs.49,013.52cts** underpayment;

**(f) Unpaid Rest Days**

(i) Between the period May 2006 and April 2009 (192 days @ the rate of 6,665.40/- for every 14 days worked) = **Kshs.91,411.20/-**;

(ii) Between the period May 2009 and April 2010 (48 days @ the rate of 7,864.85 for every 14 days worked) =**Kshs.26,965.20/=**;

(iii) Between the period May 2010 and April 2011 (48 days @ the rate of 8,651.45 for every 14 days worked) =**Kshs.29,662.11/=**;

(iv) Between the period May 2011 and April 2012 (48 days @ the rate of 9732.45 for every 14 days worked) = **Kshs.33,368.40/=**;

(v) Between the period May 2012 and April 2013 (48 days @ the rate of 11007.3975 for every 14 days worked) =**Kshs.37,739.65/=**;

(vi) Between the period May 2013 and April 2014 (48 days @ the rate of 12,548.455 for every 14 days worked) =**Kshs.43,023.27/=**

(a) Interest on the total.

(b) Certificate of Service.

(c) Costs of the Cause.

(d) Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.

The Respondent filed a Response to the Memorandum of Claim denying the allegations in the claim and putting the claimant to strict proof of the allegations.

At the hearing of the case the Claimant testified on his behalf while the Respondent called two witnesses; Charles Amolo Macrege, its Assistant Operations Manager (RW1) and Michael Odero Othieno, a driver, (RW2). The parties thereafter filed and exchanged written submissions.

**Claimants Case**

It is the Claimant's case that he worked for the Respondent from 2006 to 24th April 2014 when he was summarily dismissed, that the dismissal was unfair as he was not given reasons for dismissal and the

show cause letter did not disclose any wrong on his part. He further alleges that no investigations were carried out. He avers that he was not given an opportunity to defend himself.

### **Respondents Case**

The Respondent's position is that the Claimant was dismissed on 16th September, 2010 and re-engaged on a 17th November, 2010. That between the date of re-engagement and dismissal on 24th April, 2014 the Claimant was involved in several disciplinary cases. On 26th October, 2013 he was charged with negligence of duty leading to damage of a company vehicle which earned him a warning and surcharge.

The Respondent avers that on 22nd April, 2014 the claimant was found to be unstable and rowdy while on duty. The Respondent took disciplinary action by issuing a show cause notice to the Claimant. The Claimant responded to the show cause notice by his statement of 23rd April 2014. A disciplinary hearing was held on the same day during which the Claimant admitted liability. He was dismissed on account of gross misconduct on 24th April, 2014 and was paid his final dues on 24th May, 2014.

### **Issues for Determination**

The issues that arise for determination from the pleadings and evidence adduced in this case are first, the date of commencement of the Claimant's employment, second, whether the dismissal of the Claimant was fair and lastly, if the Claimant is entitled to the remedies sought.

### **Date of Claimant's employment**

The claimant argues that his employment on 18th May, 2006 was terminated by summary dismissal on 16th September, 2010 when he was dismissed for desertion. He however states that the dismissal was revoked and that for purposes of this suit his employment commenced on 18th May, 2006. The Respondent on the other hand states that following the dismissal of the Claimant on 16th September, 2010 he was re-engaged on a new contract in November 2010 and therefore the commencement date of his employment is 17th November, 2010. The Respondent has referred to the letter of re-engagement which also assigned the Claimant a new employment number.

I have looked at the letter of re-engagement dated 20th November 2010 and must agree with the Respondent. The letter is titled "RE-EMPLOYMENT." The letter leaves no room for doubt as to its intentions. The letter reads as follows:-

*20th November, 2010*

*John Rioba Mugo*

*C/o. Rilley Falcon Security Services Limited*

*P O Box 876-40123*

**KISUMU**

*Dear John,*

**RE: RE-EMPLOYMENT**

*Reference is made to our letter of September 16th 2010 (Summary Dismissal) and your letter of 10th November, 2010, on the above subject matter.*

*This is to inform you that your apology has been considered on humanitarian grounds and the earlier verdict against you reviewed and offered fresh employment on permanent basis, as **a security guard** under new terms and conditions.*

*Your appointment takes effect from 17th November, 2010. You are however, reminded that your performance will be closely monitored by the Management and any deviant behaviour and/or default severely punished.*

*Take note that this re-consideration is purely on humanitarian grounds.*

*Your new number will be 717.*

*Yours faithfully*

***RILEY FALCON SECURITY SERVICES LTD***

*(signed)*

*T. O. SEE*

***DIRECTOR***

The Claimant has not testified that he raised any objections to the letter after it was served upon him. By the time of his summary dismissal he had been working under the terms of the letter for more than three years. The only conclusion that can be drawn from his conduct is that he had no objection to the contents of the letter.

I find that the Claimant's employment commenced on 17th November, 2010 according to the letter of re-employment dated 20th November, 2010.

#### **Whether the summary Dismissal of the Claimant's Employment was Fair**

It was submitted for the Claimant that his dismissal was procedurally unfair because the Respondent did not comply with section 41(2) of the Employment Act as the Claimant was never given adequate opportunity to prepare for the hearing.

It was further submitted for the claimant that RW2 testified that he never saw the Claimant drinking alcohol from 4pm to 10 pm when they were together and that Mr. Simpson Otieno, the in-charge of control room who reportedly "smelled" the claimant and determined that he was drunk was not called to testify. It is submitted further that the evidence of RW1 on the claimant's drunkenness was merely hearsay as he was not present at the time the claimant is alleged to have been drunk. It was further submitted for the Claimant that the Respondent did not produce any scientific proof from a medical doctor to prove the Claimant's drunkenness.

The complainant relied on the case of **David Gichana Omuya v Mombasa Maize Millers Limited [2014]eKLR** in which the judge held as follows:-

***"20 Section 41 of the Employment Act requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representation which the employee may make before taking the decision to terminate an employee.***

***21. During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative.***

***22. The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness." [Emphasis added]***

The Claimant further relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013]eKLR** in which it was held that;

*"60. Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.*

*61. An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representation by the employee.*

*62. The law was very harsh on employees. I believe this could have been one of the factors which led to incorporating what has long been referred to in administrative law as the rules of natural justice and embodied in the Latin maxim audi alteram partem rule into the employment contract. Whatever the reasons, the Employment Act, 2007 has fundamentally changed the employment relationship in Kenya.*

*63. And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.*

*64. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.*

*65. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.*

*66. Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.*

The Claimant submitted that section 44(2) prohibits dismissal without notice or with less notice. The section provides as follows;

*(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.*

The Claimant relied on the case of **Nicholas Otinyu Muruka v Equity Bank Limited [2013]eKLR** where the court stated that;

*"...disputes of summary dismissal will always be subjected to the test of section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct."*

On burden of proof the Claimant relied on section 47(5) of Employment Act which provides that;

*(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

It was submitted that the Claimant had discharged his burden of proof.

The Respondent on the other hand argues that it observed the law as it gave the claimant a fair chance and an opportunity to defend himself. That the Claimant was also notified of his right to appeal but did not prefer any appeal. It was the Respondent's position that if the Claimant was aggrieved by the dismissal he should have appealed or filed suit immediately.

It was further the Respondent's argument that although RW2 testified that he did not see the Claimant taking alcohol, he was present and heard the claimant acknowledging that he had taken alcohol while the claimant was being questioned by the controller.

It was further the Respondent's argument that it had demonstrated that the claimant had time and again had disciplinary issues and had been pardoned and warned before.

Drunkenness is a very shaky ground to found liability for purposes of summary dismissal. First, drinking alone or smelling alcohol *par se* is not a ground for summary dismissal. Section 44(4) (b) specifically provides that the employee is liable for dismissal if;

*"during working hours, by becoming intoxicated, an employee renders himself unwilling or incapable to perform his work properly."*

(Emphasis added)

The employer therefore has the burden not only of proving intoxication, but also the **unwillingness or incapability** of the employee to perform his work due to such intoxication. I however do not agree with the Claimant's argument about scientific proof of drunkenness. It is inconceivable that the employer would be required to bundle an employee into a vehicle and transport him to a medical facility then make agree to extraction of his blood to be used in the test for the level of alcohol in his blood. Even if this were possible, there is no legally set limit for drunkenness for all types of engagements. Again people react differently to alcohol. Some people become intoxicated by very low doses of alcohol while other can consume large volumes without showing any signs of intoxication. Not all people would render themselves unwilling or incapable of performing their duties at the same level of intoxication. There is therefore no generic scientific measure of intoxication. For instance the level at which a pilot would be considered incapable of performing his duties is quite different from that at which say a teacher would be considered so.

That is not to say that intoxication cannot be a ground for summary dismissal. Section 44(4)(e) provides that it is a ground for summary dismissal. In my opinion what an employer ought to do is come up with a policy of determining intoxication making an employee unwilling or incapable of performing his work. This can include observation of the employee's response to certain questions or commands, asking the employee to perform simple tasks such as standing on one leg, writing a specific sentence and or any other function that an intoxicated person cannot perform. These can then be recorded in the presence of at least two witnesses. Physical observation is in my opinion the best way to determine if an employee is so intoxicated as to be incapable or unwilling to perform his work. In this day and age of smart phones, all these can be audio-recorded.

In the present case RW2 who was with the Claimant testified that he did not see the Claimant drinking while at work and that when they reported for work the claimant was sober.

As pointed out in the Claimant's submissions, the controller who is alleged to have come to the conclusion that the Claimant was intoxicated did not testify.

More importantly, it was not proved that the claimant was **incapable** or **unwilling** to perform his work.

For these reasons, I find that the Respondent failed to establish grounds for the dismissal.

On fair procedure, I again must agree with the Claimants submissions that he was not afforded a fair hearing or opportunity to prepare and present his defence as envisioned in section 41 of the Employment Act.

Radido J. captured the principles in section 41 in the case of **Mkala** (supra) when he stated as follows;

*And what does section 41 of the Act require? The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.*

*The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.*

*Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.*

*Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.*

The speed with which the disciplinary process for the claimant was carried out could not have permitted him to prepare or adequately defend himself. He was issued with a show cause letter on 23rd April, 2014 and was expected to respond to it on the same day. The letter inviting him for a disciplinary hearing was issued to him on the very same day and the disciplinary hearing was held the same day. No minutes of the disciplinary hearing were produced to the court to enable the Court determine if the hearing was fair.

It would appear that the Respondent merely wanted to pay lip service to the provisions of section 41 by cosmetic compliance. It is obvious that the claimant was not informed of his right to be accompanied by a colleague or a union official to the hearing. Nothing was mentioned about what the Claimant stated in his defence at the said hearing.

I find that the Respondent failed to follow the procedure in the Act. The summary dismissal was therefore also procedurally unfair.

## **Remedies**

Having found that the dismissal of the Claimant was unfair, he is entitled to one months' salary in lieu of notice. The Claimant is also entitled to compensation for unfair dismissal which I award him at 6 months gross salary taking into account all the circumstances of his case.

The Respondent did not deny that there was underpayment of the claimant's salary, only arguing that the prayer was time barred. The Claimant is entitled to underpayments for the 3 year period immediately before his dismissal. I have confirmed from the claimant's payslips attached to the Memorandum of claim that there were underpayments based on statutory minimum rates of pay for the relevant years in contravention of section 26 of Employment Act and section 48 of Labour Institutions Act. I award the claimant underpayments from May, 2011.

RW1 testified that the Claimant worked 12 hours a day which amounts to 72 hours in 6 days as opposed to 52 hours as provided in Rule 6 of the Regulation of Wages (Protective Security Services) Order. The Claimant is therefore entitled to overtime of 20 hours per week for 52 (12 months) weeks as provided in section 90 of the Employment Act for continuing wrongs.

I have also noted from the payslips and Final Dues Form in the Respondent's bundle of documents that for Public Holidays and rest days the claimant was paid one day when the Protective Security Services Order provides for double the hourly rate. For each public holiday worked the claimant is entitled to payment of 12 x 2 hours, that is, 24 hours pay in addition to his normal pay as provided in Rule 6, 7 and 9 which provide as follows:-

*6. The normal working week of all employees including day and night guards shall be fifty-two hours of work spread over six days of the week.*

*7(1) An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked at the following rates-*

*(a) one-and-a half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and*

*(b) twice the normal rate of wages per hour in respect of any time worked on a rest day.*

*(2) For the purpose of calculating payment for overtime in accordance with sub paragraph (1), the basic hourly rate shall, where the employee is not employed by the hour, be deemed to be one-two hundred and twenty-fifth of the employee's basic monthly wage.*

*9. (1) The days specified in the Second Schedule including any other day that may subsequently be gazetted as a public holiday shall be holidays with full pay.*

*(2) Where an employee is required to work on a day which by virtue of subparagraph (1) is a holiday with full pay, the employee shall be paid, in respect of any time so worked, at double the normal rate of wages per hour in addition to the payment the employee would have received had he not been required to work on that particular day.*

Rule 10 of the order provides for annual leave of 26 working days and not 21 as submitted by the Respondent. The regulations further provide for Leave Travelling allowance of Kshs.800 which was however not prayed for.

The consolidated minimum wage for night watchman for 2013 (basic pay plus 15% house allowance) which was applicable to the claimant at the time of his dismissal was Kshs. 12,548.50 which I will use for tabulation of his terminal benefits.

## **Conclusion**

In summary I award the claimant the following on each of the items claimed:-

1. One months' salary in lieu of notice Kshs. 12,548.50
2. Accrued leave at 26 days for 41 months from 17th November 2010 to 24th April 2014 at 26 days per year Kshs. 37,157.40
3. Overtime at 20 hours per week for 52 weeks at one and a half times the normal hourly rate (20x52x12548.50/225x1.5) Kshs. 87002.90
4. Rest days: the claimant was paid overtime for rest days at 1x1 instead of double the hourly rate. he is entitled to the balance of 1x1 based on 12xthe hourly rate (12,548.50/225x12x52) Kshs. 34,901.00
5. Underpayments

The claimant was paid Kshs. 8,392.00 instead of Kshs. 12,548.50, an underpayment of Kshs.

4156.50 per month for 12 months he is entitled to  $(12,548.50 - 8,393 \times 12)$  Kshs. 49,878.00

6. Compensation at 6 months gross salary

$(12,548.50 \times 6)$  Kshs. 75291.00

7. Certificate of service

8. The respondent will also pay the claimant's costs and interest on decretal sum from date of judgment.

The claim for severance pay fails as it is only payable to an employee declared redundant and the claimant was not declared redundant.

**Judgement Dated, signed and delivered this 8th day of September, 2016**

**MAUREEN ONYANGO**

**JUDGE**