



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 735 OF 2015**

**JONESMAS THOYA MUKAMBA.....CLAIMANT**

**VS**

**CREST SECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a case of premature termination of a fixed contract by the employer. The Claimant avers that the premature termination was wrongful and unfair because it was both substantially and procedurally unfair. Consequently she prays for damages amounting to Kshs. 670825 made up of one month salary in lieu of notice, salary for the unexpired period of the contract term, compensation for unfair termination, and 6 years leave, house allowance arrears, gratuity and salary underpayment.

2. The Respondent admits that she had employed the Claimant from 9.4.2008 on fixed term contract basis, and that she terminated the Claimant's last employment contract prematurely on 7.8.2015 for gross misconduct. It is the defence case that the said termination was fairly and lawfully done as the Claimant was accorded a fair hearing and was paid all her rightful dues. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 9.5.2016 and 27.7.2016 when the claimant testified as CW1 and the respondent called her General Manager Mr. Musa Katsutsu as the RW1. Thereafter both parties filed written submissions.

**Claimant's case**

4. Cw1 testified that he was employed by the respondent on 9.4.2008 as a Night Guard and worked till 5.8.2015 under renewable fixed term contracts earning a salary of Kshs. 11,000 per month. That on 6.8.2015, he left work in the morning after handing over to the day guards Mr. Benson Odera and Salim Kadege. That at 1 pm of the same day the Area Commander Mr. Gilbert Morara told him via phone to report to the office on 7.8.2015 morning. That when he went to the office on 7.8.2015, he was served with a dismissal letter by the Operations Manager Mr. Jeremiah Musembi.

5. The reason for dismissal was that on 5.8.2015, he left the workplace carrying a paper bag of which he refused to be searched. He admitted that he left the workplace carrying a paper bag but denied that he refused to be searched by the day guard. He contended that the termination was premature by 9 months and prayed for compensation and terminal dues as prayed in the suit.

6. On cross examination, CW1 admitted that he had previously been terminated for misconduct but the matters were resolved and he got reinstatement and warning; he had missed work for many days but with permission to attend treatment from medical doctor and witchdoctor for eye problems which started in 2009; he had also sought permission to attend to family matters including sick wife and father and also burial of his brother; and that on 6.8.2015 he went home carrying his uniform in a paper bag.

7. He however denied that the Operations manager Mr. Jeremiah Musembi came to the gate of his workplace on 5.8.2015 at 6 am; that he refused to be searched while leaving the gate at his workplace; that he was found asleep on the job on 28.4.2015 and apologized in writing; and that he insubordinated his boss on 6.8.2015.

### **Defence Case**

8. RW1 stated that CW1 was his nephew. He admitted that Cw1 was employed by the respondent on 9.4.2008 as a security guard earning a consolidated salary of kshs.11000 per month and that he was dismissed on 7.8.2015 for gross misconduct. He contended that on 6.8.2015 at 6 am, the operations manager Mr. Jeremiah Musembi met the claimant at the gate while leaving work and asked Cw1 to return for search but he refused. That instead cw1 quickly removed some things from the paper bag while complaining and went away with his paper bag. That when Mr. Musembi sent the Day guard to call the Cw1 back, the Cw1 refused and made rude gestures. That thereafter Mr. Musembi reported the matter to him and he suspended him and told him to attend a disciplinary hearing on 7.8.2015 and he complied.

9. Rw1 further explained that the hearing was done in the presence of the Operations Manager Mr Musembi, Administration manager Mrs. Manpal, Area Commander Mr. Morara and RW1 himself as the chair. That he asked the Mr. Musembi to explain his side of the story concerning the incidence that occurred on 6.8.2015 and thereafter he asked the claimant to defend himself. Instead the claimant became rude and uncooperative accusing Mr. Musembi of vendeta against him and contended that the paper bag was containing clothes for his wife which he had washed the previous night. After the hearing the claimant was summarily dismissed because he had previously been warned for other forms of misconduct. Rw1 maintained that the dismissal of the claimant was fair. He further explained that the claimant had on many occasions taken leave to attend to his eye problem and family matters.

10. On cross examination Rw1 stated that the day guard failed to search the claimant on the material date due to collusion with the claimant and as a result the claimant was dismissed and the Day Guard was given a warning. Rw1 confirmed that nothing was lost at the work place and was recovered from the claimant. He however could not produce the minutes of the disciplinary hearing on being challenged to do so.

### **Analysis and Determination**

11. After considering the pleadings, evidence and submissions, it is clear that the claimant was employed by the Respondent as a Night guard under a renewable one year fixed term contract starting 30.3.2015. It is not in dispute that her contract was terminated on 7.8. 2015 when there were still 9 months remaining before the lapse of the contract. There is further no dispute that the reason cited for the dismissal was gross misconduct. The issues for determination are whether the premature termination of the Claimant's contract was unfair, and whether the reliefs sought by the Claimant should be granted.

### **Unfair termination.**

12. Under section 45 (2) of the employment Act, termination of an employee's contract of employment is unfair if the employer fails to prove that the it was founded on a valid and fair reason and that it was done after following a fair procedure.

### **Reasons for the termination**

13. The claimant has denied that he refused to be searched by the day guard on his way home on 5.8.

2015 and further denied that Mr. Jeremiah Musembi came to the claimant's work place on that day and time. Mr. Musembi and the day guard have not given any evidence herein to support the allegations leveled against the claimant. Consequently the evidence by the Rw1 is mere hearsay because he never witnessed the alleged misconduct being committed by the claimant. I will therefore believe the uncontroverted evidence by the Cw1 that he was searched by the day guard Mr. Salim Kadenge before leaving the gate. Rw1 never denied that Mr. Salim Kadenge was one of the day guards who took over from the claimant on 6.8.2015 at 6am. In view of the foregoing observations, I find that the respondent has not proved on a balance of probability that the claimant insubordinated the operations manager on 5.8.2015.

### **Fair procedure**

14. The claimant contended that he was not accorded a fair hearing before termination but Rw1 contended that the claimant was heard on 7.8.2015. After considering the evidence adduced I find that the respondent has not proved on a balance of probability that she accorded a fair hearing to the claimant before termination because the alleged hearing was not in compliance with the mandatory provisions of section 41 of the Employment Act. Under the said provision, an employer is barred from dismissing his employee on ground of misconduct before first explaining to her, in a language she understands and in the presence of Shop Floor Union Representative or a fellow employee of her choice, the reason for the intended dismissal and the accord them a chance to air their views for consideration before the dismissal is decided. In this case the claimant was not heard in the presence of his chosen companion.

### **Reliefs**

15. In view of the finding above that the respondent did not prove valid and fair procedure, I make declaration as prayed that that the termination of the claimant's employment by the respondent was unfair and unjust.

### **Notice, compensation for unfair termination and salary for the remainder of the contract**

16. There is no dispute that the claimant's pay interval was one month, and therefore under section 35 (1) (c) and 49 (1) (a) of the Employment Act I award him one month salary in lieu of notice to the claimant, being kshs.12221 which was the minimum salary prescribed by the Wage Order for May 2015 as prayed. Further I award him kshs. 97,768 being eight months' salary as compensation for the unfair termination of his employment contract. In making the said award I have considered the fact that the claimant had had a reasonable expectation to work for the respondent for the remaining nine months of his fixed term contract. I have also considered fact that he may not secure another job due to his blindness.

### **Six years leave**

17. The claim for 6 years leave is dismissed for lack of particulars and evidence. According to the respondent the claimant took many days leave to attend to medication and other family matters and claimant has also confirmed that he last went for 13 days leave from 2.2.2015. The un answered query is how much leave was outstanding if any.

### **Gratuity**

18. The claimant has relied on Regulation 17 Regulation of Wages (protective security services) Order to claim gratuity at the rate of 15 days pay per year of service. The minimum length of service for one to qualify for the gratuity under Regulation 17 is 5 years. In this case, the claimant served over 6 years and he is therefore awarded kshs. 36,663.

### **Underpayment**

19. The claim for underpayment of salary is not statute barred as submitted by the defence and is therefore granted. Under section 90 of the Employment Act a claim founded on employment is not time

barred if filed within 12 months next after the cessation of a continuous breach or default. The section provides thus:

***”...no civil action or proceedings based or arising out of this Act or contract of service in general shall lie or be instituted unless it is commenced... or in the case of continuing injury or damage within twelve months next after the cessation thereof.”***

20. The claimant has demonstrated that from 2011 -2015 his salary was underpaid with respect to the Wage orders published under the Labour Institutions Act (LIA). The underpayment was continuous until 7.8.2015 when it ceased after the claimant was dismissed. Twelve months from the cessation of the breach was to expire on 6.8.2016 but suit was commenced on 25.9.2015 less than 2 months after the cessation of the breach.

21. The claimant was earning kshs.6700 between May 2011 and April 2015 while the minimum wage was kshs.8463 in May2011-April 2012, kshs.9571.65 in May 2012 – April 2013, kshs.10911 in May 2013-April 2015. From May 2015 his salary was increased to kshs. 11000 while the minimum wage was increased by the Wage order to kshs. 12,221. Considering the material placed before me in evidence and submissions, I allow the claim for salary underpayment as calculated in the memorandum of claim being kshs.143,499.

### **House allowance**

22. The evidence by the RW1 that the claimant’s salary was consolidated was not contested and as such the claim unpaid house allowance is dismissed.

### **Disposition**

23. For the reasons stated above judgment is entered for the Claimant declaring his termination unfair and by awarding him the sum of **Kshs. 290,151** plus costs and interest. He will also be issued with Certificate of Service.

**Signed, dated and delivered at Mombasa this 25th day of November 2016.**

**O.N. MAKAU**

**JUDGE**