



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT MOMBASA  
CAUSE NUMBER 12 OF 2015

**BETWEEN**

KENNEDY OUMA NDEDA ..... CLAIMANT

**VERSUS**

NJUCA CONSOLIDATED COMPANY LIMITED..... RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Odhiambo S.E. & Company Advocates for the Claimant*

*Chiuri & Chiuri Advocates for the Respondent*

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JUDGMENT

1. The Claimant filed his Statement of Claim, on the 23<sup>rd</sup> January 2013. The Statement was subsequently amended, and the amended version filed on the 14<sup>th</sup> September 2015. He states he was employed by the Respondent sometime in the year 2012, as a Night Guard. His contract was terminated by the Respondent on 6<sup>th</sup> December 2013, without notice or cause. His last salary was Kshs. 420 per day. He feels termination was unfair and unlawful and prays for the following orders against the Respondent:-

- a) Salary in lieu on notice at Kshs. 12,600.
- b) Compensation for unfair termination at Kshs. 141,200.
- c) 21 days of annual leave at Kshs. 9,882.
- d) 52 days of weekly rest days at Kshs. 24,471.
- e) Underpayment at Kshs. 18,216.

f) Weekday rest overtime at Kshs. 24,471.

g) Work days overtime at Kshs. 72,001.

h) Service pay at Kshs. 7,059.

Total .....Kshs. 309,900

The Claimant prays the Court to declare termination was unfair and grants costs and interest.

2. The Respondent filed its Statement of Response on 5<sup>th</sup> November 2015. It is without prejudice, denied that the Claimant was an Employee of the Respondent. If he was an Employee, he was summarily dismissed for gross misconduct. He is not entitled to the prayers sought.

3. The Claimant gave his evidence on the 24<sup>th</sup> June 2016. The Respondent did not call Witnesses and the Parties rested their respective cases on the 24<sup>th</sup> June 2016. They confirmed filing of their Closing Submissions on the 28<sup>th</sup> July 2016, and the Judgment reserved for delivery on the 18<sup>th</sup> November 2016.

4. The Claimant told the Court the Respondent is a construction firm. He was employed by the Respondent on 31<sup>st</sup> December 2012 as a Security Guard. He worked up to 6<sup>th</sup> December 2013. He earned Kshs. 420 per day; worked Monday to Sunday; and did not have leave or off days. He was not issued a letter of employment.

5. He was summoned to the office on 6<sup>th</sup> December 2013 by Respondent's Manager, and told his contract had been terminated. He was not given any reason for the decision. He sought to be heard, but was chased out by Management. He called after 2 weeks asking the Respondent to pay his dues. He was advised there would be no payment. He reported the grievance to the Labour Office. The Labour Office wrote several letters to the Respondent. The Respondent replied, stating the Claimant was found asleep thrice and warned. The Claimant denied ever being caught asleep.

6. The Respondent wrote to the Claimant on 17<sup>th</sup> September 2014, offering to re-engage the Claimant on fresh terms. The Claimant did not respond to the offer. He withdrew the complaint before the Labour Office and filed the Claim. He states termination was unfair. There was no warning. His record was clean. He worked every day, Monday to Friday. He merited Kshs. 470.60 per day, but was paid Kshs. 420. The documents on record are clear the Claimant was employed by the Respondent. He did not resign; his contract was terminated by the Respondent. He did not engage in any form of misconduct. He was not heard.

7. Cross-examined, he stated he was paid Kshs. 2,940 weekly. This was the same rate paid to other Employees. The Claimant agreed to be paid this. It was paid through the Bank. Initially, payment was in cash. He was alleged to have slept while on duty. He was compelled by the Respondent to write a letter of apology. He agreed sleeping while on duty amounts to gross misconduct. The Respondent wrote to the Claimant offering to re-engage the Claimant. The Claimant declined the offer. He wanted to be paid his terminal dues first. He at the time of giving evidence, worked with Zanaka Limited. He has been working as Casual Employee from the time he left employment. Redirected, the Claimant told the Court he was warned and told if found sleeping again, his contract would be terminated. He did not see any other warning.

8. The Claimant submits the documents produced by him; show he had an employment relationship with the Respondent. The Respondent wrote to the Labour Office on the dispute, and did not deny there was such a relationship. There was no evidence from the Respondent to back up its assertion that the Claimant was not its Employee. The Claimant worked for the Respondent for almost a year.

9. The Respondent did not call Witnesses as stated at the beginning of this Judgment. It is however submitted for the Respondent that the Claimant was employed by the Respondent as a 'watchman.' He

was found sleeping at work and dismissed. He is not entitled to compensation and notice pay. He had worked for less than 1 year and does not merit 12 months' salary in compensation. He was offered re-engagement, which offer he rejected. He was employed by another firm soon after he left the Respondent. He had not completed a year of service to warrant 21 days of annual leave and 52 days of weekly rest. The minimum wage under the Regulation of Wages [General] [Amendment] Order 2013 for a daytime Guard was Kshs. 9,780 per month and Kshs. 10,911 per month for night Guard. The Claimant was paid Kshs. 11,760 monthly, which was above the minimum wage. He agreed to the hours of work and the prayer for overtime has no merit. He was paid weekly. Service pay under Section 35 is for Employees who are paid monthly. The Respondent prays for dismissal of the Claim.

**The Court Finds:-**

10. There is evidence from both sides confirming the Claimant was an Employee of the Respondent. He was employed as a Night Guard. His Statement of Claim is not clear on the date of employment, indicating at paragraph 3 that this was sometime in 2012. The Claimant himself testified he worked from 31<sup>st</sup> December 2012 and left on 6<sup>th</sup> December 2013. He submits in his closing submissions that he worked for almost 1 year.

12. He did not work for 1 year, which in the view of the Court, means his prayer for 21 days of annual leave cannot be granted. He would have to have worked for 12 continuous months under Section 28 of the Employment Act, to qualify for annual leave.

13. The response to the prayer for underpayment of salary was satisfactory. The Claimant did not dispute the minimum wage cited by the Respondent, or show that the Claimant was paid less than the minimum wage. The prayer for underpayment is declined.

14. Service pay under Section 35 [5] is paid to an Employee whose contract falls under Section 35 [1] [c]. It applies to Employees whose wages or salaries are paid periodically at intervals of, or exceeding, 1 month. The Claimant was paid weekly. The Court has also read Section 35 [5] to mean service pay is only available to Employees after at the very least, a year of service. The wording is "shall be entitled to service pay for every year worked." If one has not worked for at least a year, how is he to claim service for every year worked? There are no provisions for pro-rata service pay. The law implies there is at least a year of service as a qualifying period. The Claimant was paid his salary weekly and did not have 1 year of service, to claim service pay. This item is rejected.

15. The Claimant did not express himself clearly on the prayer for 52 days weekly rest days claimed at Kshs. 24,471. He did not work for 52 weeks. There is a separate prayer for 'week day' overtime. Both are in the sum of Kshs. 27,471. If he worked on rest days, was he not paid the normal hourly rate? He should only claim overtime pay for rest days, not 2 separate items for the similar amount of Kshs. 27,471. It was not in dispute that he worked during rest days. ***He is granted overtime for work carried out on rest days at Kshs. 27,471.***

16. Overtime for normal working days is pleaded as work days' overtime at Kshs. 72,001. The Respondent did not dispute that the Claimant worked from 6.00 p.m. to 6.00 a.m. a period of 12 hours daily. Regulation 5 [2] of the Regulation of Wages [General] Order requires that normal working week of a Person employed on night work, shall consist of not more than 60 hours of work per week. The Claimant worked 12 hours x 7 = 84 hours. His claim for overtime on rest days has been considered. He did 72 hours for the rest of the week, which was in excess of 12 hours weekly. The Respondent does not dispute that the Claimant worked excess hours; the Respondent explained that the Claimant had agreed with his Employer on the hours of work, and agreed on a daily rate of Kshs. 420, regardless of the hours worked. This position has no support in fact and law and is rejected. ***The Claimant's computation of normal working days overtime at Kshs. 72,001 is not disputed and is allowed.***

17. The Respondent justified termination on the ground that the Claimant was found asleep on the job. While this would amount to a valid termination reason under Sections 43 and 45 of the Employment Act, and an employment offence under Section 44 [4] of the Employment Act, warranting summary dismissal,

the Respondent opted to issue a warning as shown in the letter of apology written by the Claimant on the 14<sup>th</sup> November 2013. There was no other warning, and no other sleeping episode is shown after the letter of 14<sup>th</sup> November 2013. It was indicated the Claimant was warned for sleeping; if found sleeping again, his services would be terminated. There is no evidence the Claimant was found sleeping again to justify termination. Termination was not substantively justifiable.

18. There was no hearing in any form, on any charges leading to termination. Sections 41 and 45 of the Employment Act on fairness of procedure were not observed.

19. Having worked for little under 12 months, the Claimant prays for too much, by his desire to have 12 months' salary in compensation. It is not lost on the Court that he was offered re-engagement with the Respondent, an offer which he rejected. He cannot therefore lay the entire blame on the Respondent for loss of employment, while it is clear the Respondent offered to re-engage. He has also found alternative employment. His economic injury, if any, was in part self-willed, and largely mitigated. ***He is allowed 2 months' gross salary in compensation for unfair termination at Kshs. 23,520.***

20. The prayer for notice pay is declined on the ground that the Respondent demonstrated its willingness to have the Claimant back, and the Claimant opted not to return and mend the relationship. Ultimately both Parties contributed in having the relationship terminated for good.

IN SUM, IT IS ORDERED:-

***a) Termination was unfair.***

***b) The Respondent shall pay to the Claimant overtime pay at Kshs. 99,472 and compensation for unfair termination at Kshs. 23,520- total Kshs. 123,002.***

***c) No order on the costs.***

***d) The full sum shall be paid within 30 days of the delivery of this Judgment.***

***e) Interest granted at 14% per annum if the sum remains unpaid after 30 days, computed from the end of those days.***

Dated and delivered at Mombasa this 18<sup>th</sup> day of November, 2016

James Rika

Judge