



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 1328 OF 2013**

*(Before D.K.N. Marete)*

**KENYA NATIONAL PRIVATE SECURITY**

**WORKERS' UNION .....CLAIMANT**

Versus

**HOMELAND SECURITY SERVICES LIMITED.....RESPONDENT**

# **JUDGEMENT**

This matter comes to court vide a memorandum of claim dated 19th August, 2013. The issue in dispute is therein cited as;

*“Unfair termination of Frida Kerich & 9 Others”*

The matter is not defended, or at all. The respondent has not entered appearances or in any manner defended the suit despite service.

The claimants in their Facts of Claims, a component of the Memorandum of Claim state their case as being members of Kenya National Private Security Workers and were employed by the respondent as security guards on diverse dates between 2010 and 2012. Their initial salary was Ksh.8,000.00

The grievants further case is that on 18th February, 2013, when the balances of their salaries for January, 2013 had not been made, they assembled at the respondent's office to request for the same but this was turned down. The Managing Director promised payment after the General Election. They did not agree and reported the matter to the union. Attempts were made by the union officials to resolve this on 28th February, 2013 but the respondents frustrated the meeting. The matter was thereafter reported to the Ministry of Labour and a conciliator appointed. This also failed due to lack of cooperation by the respondent. The conciliator on 5th August, 2013 referred this matter to this court in accordance with Section 69, Labour Relations Act, 2007.

The claimants further case is that on 5<sup>th</sup> August, 2013, the conciliator referred the matter to the Industrial Court per S.69 of the Labour Relations Act, 2007 with a submission that the grievants were entitled to accrued wages and final terminal dues. The respondents did not respond, or at all.

The grievants submit that they served the respondent with diligence and commitment. That the respondents violated all labour laws and also refused to pay their employees. This delay occasioned

suffering and calls for a penalty of 10%. They pray for

1. *Salary for December and January*
2. *Underpayments of wages, standard overtime, House allowance, rest/off days, public holidays and annual leave.*
3. *Remedies for unfair termination as spelt out in the Employment Act Section 43, 45 and 49 [a] [b] [c]*
4. *12 months loss of earnings*
5. *Any other relief that the court may deem fit*
6. *Certificate of service*
7. *Cost of the suit*

The issues for determination herein are;

1. Was there indeed termination of the employment of the claimants/grievants?
2. Was the termination of the claimants/grievants unfair, wrongful, and unlawful?
3. Were the claimants/grievants entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for determination is whether indeed there was termination of the employment of the claimants. They have in their analysis and submissions set out a case of employment. They have also demonstrated a case for non continuity of their employment for various reasons. The respondents have not in any manner controverted this. This, to me, is termination and I find as such. A case for termination of employment is therefore established by the claimants.

The other issue for determination is whether the termination of the claimant was wrongful, unfair and unlawful. S.45 of the Employment Act, 2007 establishes a case for unlawful termination.

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason-*
  - i. *related to the employees conduct, capacity or compatibility; or*
  - ii. *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

- a. *the termination is for one of the reasons specified in section 46; or*
  - (b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*
- (5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*
  - a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*
  - (b) *the conduct and capability of the employee up to the date of termination;*
  - (c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*
  - d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
  - e. *the existence of any previous warning letters issued to the employee.*

The respondent has not come out of his way to demonstrate any grounds for termination or its relationship with the conduct and other issues per S.42 (2) of the Employment Act. S. 45(4) and (5) is also applicable.

The circumstances of termination of employment herein also go against the grain of S.43 of the Employment Act, 2007 which calls for proof of reason for termination.

*Section 43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

I therefore find a case for unfair, wrongful and unlawful termination of employment and hold as such.

Having established a case for unfair employment, it becomes easy to determine the 3rd issue for determination. The claimants are entitled to the relief sought and I hold as such. I award relief as follows;

- i. Salary for December, 2013 and January 2014 – Ksh.16,000.00 each
- i. Seven months compensation for unlawful termination of employment Ksh.54,000 each.
- ii. The respondent be and is hereby ordered to issue the Claimants with individual certificates of service within 30 days of these orders of court.
- iii. The costs of this suit shall be borne by the respondent.
- iv. Items (I) (ii) and even (iii) of this award shall go to each of the Claimants individually.

I note that prayers 2 and 3 of the claim were pleaded but not effectively canvassed, substantiated or proven in evidence. I decline to award the same, except for the interlocking prayer under Section 49 (1) (c) which also comes out as prayer no.4 in the pleadings.

The costs of this claim shall be as hereto for borne by the respondent. This resonates the well established principle that costs follow the event.

In the penultimate and conclusively, at the risk of repetition, this court is inclined to order relief as

follows;

- ii. Salary for December, 2013 and January 2014 – Ksh.16,000.00
- v. Seven months compensation for unlawful termination of employment Ksh.54,000.
- vi. The respondent be and is hereby ordered to issue the Claimants with individual certificates of service within 30 days of these orders of court.
- vii. The costs of this suit shall be borne by the Respondent.
- viii. Items (I) (ii) and even (iii) of this award shall go to each of the Claimants individually.

Dated and signed this 20<sup>th</sup> day of February, 2015.

**D.K. Njagi Marete**

**JUDGE**

Delivered, dated and signed in open court this 25<sup>th</sup> day of February 2015.

**Monica W. Mbaru**

**JUDGE**

Appearances

1. Miss. Onyancha for the Union.
2. No appearance for the Respondents.