



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

**AT MOMBASA**

**CAUSE NO. 294 OF 2014**

**MICHAEL ALOYO .....CLAIMANT**

**VERSUS**

**OWL ALARMS LIMITED .....RESPONDENT**

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

**INTRODUCTION**

1. This is a claim for ksh.624,343.10 being accrued dues plus compensation for unfair termination of the claimant's employment by the respondent on 19/4/2014. The basis of the suit is that the termination was not founded on any valid reasons and was done without affording the claimant a chance to defend himself. In addition the claimant avers that he was never served with any notice prior to his termination and no dues were paid upon the separation.
2. In response to the suit, the respondent has denied liability and averred that the termination of the employment was done by the claimant when he absconded from work effective 19/4/2014 and refused to return despite being called back to work. In the alternative, the respondent averred that the claimant was only engaged on causal basis and as such he was not entitled to any of the dues claimed in the suit.
3. The suit was heard on 8/10/2014 when the claimant testified as CW1 but the respondent called no witness to defend the suit. After the hearing both parties filed written submissions urging the court to find in their favour.

**CLAIMANT'S CASE**

4. CW1 was verbally employed by the respondent on 26/9/2012 as a night guard working between 6pm to 6am. He produced a letter dated 30/4/2014 to prove the alleged hours of service. He told the court that he was being paid a monthly salary of ksh.5000 which was below the minimum statutory wage for night guard of Ksh.10900. He was never paid any house allowance, never went for any leave and NSSF was never paid for him. He contended that he worked continuously.
5. CW1 explained that on 19/4/2014, he was verbally terminated via phone call by his supervisor acting on instructions from the respondents General Manager. CW1 denied that he left work voluntarily. He prayed for 3 months salary in lieu of notice being ksh.32735, arrears in house allowance being ksh.31098, accrued leave of 2 month being ksh.21,823, salary underpayment for 21 months being ksh.112,322.40, overtime of 4 hours per day being ksh.273,600, service pay at 15 days per year of service being ksh.21823, all totalling to ksh.624,343.10

**ANALYSIS AND DETERMINATION**

6. After careful consideration of the pleadings, evidence and the submissions filed by the parties, it is clear that there existed a contract of service between the parties herein. The court will treat the contract as having been oral because no written copy was produced by the respondent who was bound to produce it in these proceedings by Section 10 of the Employment Act. There is also no dispute that the contract of service was terminated without prior written notice to either party as required by Section 35 and 36 of the Employment Act. The issues for determination are therefore whether the termination of the contract of service was through absconding by the claimant or wrongful termination by the respondent and whether the reliefs sought should issue.

### **Absconding VS Wrongful termination**

7. The uncontested evidence on record support the claimants proposition that he was verbally dismissed via phone call on 19/4/2014. According to CW1, he was not given any prior notice. It is also not contested in evidence that CW1 worked continuously as a night guard from September 2012 to 19/4/2014. Indeed the respondent's letter dated 30/4/2014 clearly indicated that CW1 was employed on monthly basis and was earning a monthly salary. Consequently the court finds that he was protected from arbitrary termination of his employment by Section 35 and 36 of the Employment Act. Section 35 requires that a prior notice of at least 28 days in writing be served on the employee before termination of his services if his pay interval is one month and above. Section 36 on the other hand provides for payment of salary in lieu of the termination notice provided under Section 35 above.
8. Terminating the claimant's services without prior written notice and failing to pay salary in lieu of notice was therefore wrongful. The termination was however not unfair within the meaning of Section 45 of the Act because no reason was cited for the termination to warrant substantial and procedural fairness. In this court's view the employer only exercised her right to terminate the contract under Section 36 of the Act under which his obligation was limited to service of prior written notice or payment of salary in lieu of notice. This court has severally held that unless termination is due to redundancy, wrong doing incapacity or poor performance, employer needs only to serve notice or pay salary in lieu of notice.

### **RELIEFS**

9. In view of the foregoing finding that the termination of the claimant's employment was wrongful, the court awards him salary in lieu of notice. No evidence was adduced to prove that CW1 was entitled to 3 months notice. Consequently the court awards him only one month salary in lieu of notice being ksh.10911 which is the prescribed minimum pay as per the Statutory Wage Order. The said minimum wage is automatically incorporated into applicable contract of service like the present one according to Section 48 of the Labour Institutions Act. CW1 will also get pay in lieu of 32 leave days earned as at 19/4/2014 being ksh.11,638.4. He is also awarded salary arrears of ksh.5911 per month for the months served between May 2013 and April 2014 being Ksh.70,940.40 . He is finally awarded service pay for the one complete years served at the rate of 15 days being ksh.5 455.53. The claim for overtime is dismissed because the pay for night watchman as provided for under the Wage Order contemplates long hours of service. Likewise the claim for compensation for unfair termination is dismissed for the reasons stated above.

### **DISPOSITION**

For the reasons aforestated judgment is entered for the claimant in the sum of ksh.137,402.90 plus costs and interest

**Dated, signed and delivered this 13<sup>th</sup> February 2015.**

**O. N. Makau**

**Judge**