



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 297 OF 2014**

**BETWEEN**

**ANDREW TUNE KIRINGI.....CLAIMANT**

**VERSUS**

**NICOLA RADICHI..... RESPONDENT**

**RIKA J**

**COURT ASSISTANT: BENJAMIN KOMBE**

**MR. KILONZO INSTRUCTED BY WAMBUA KILONZO & COMPANY ADVOCATES FOR THE  
CLAIMANT**

**NO APPEARANCE FOR THE RESPONDENT**

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

**[ Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]**

1. This Claim is undefended. There are two Affidavits of Service filed by Mr. Samson Nyandika Nyangena, a Licensed Court Process Server. The first was sworn on 7th July 2014. It shows the Respondent was served with the Notice of Summons and the Statement of Claim, on 5th July 2014. The Respondent neither entered appearance, nor filed any Response. The second Affidavit was sworn on 1st October 2014, indicating the Respondent was served with the Hearing Notice, on the 1st October 2014. Hearing was scheduled for 3rd November 2014. The Respondent did not attend Court for the hearing, and the Claimant prosecuted his case in the absence of the Respondent.

2. The Claimant relies on his Statement of Claim, and the attached employment documents. He was employed by the Respondent as a Security Officer, on the 1st June 2006, at a gross salary of Kshs. 6,000 per month. This rate was later reviewed to Kshs. 8,000 per month. His contract was terminated by the Respondent, in circumstances he feels were unfair and unlawful, in November 2013. He seeks an Award against the Respondent, for:-

[a] A declaration that the termination was unlawful and falls under the redundancy provisions;

[b] Salary for November, December, January and February at Kshs. 32,000;

[c] 3 months' salary in lieu of notice at Kshs.24,000;

[d] Unlawful termination of employment at Kshs 96,000;

[e] Leaves equivalent to 3 months at Kshs. 24,000

[f] Underpayments Kshs. 672,000;

[g] Benefits/ Severance pay Kshs. 250,000;

Total..... Kshs. 1,098,000

[h] Interest on [a], [b], [c], [d], [e] and [f]

3. He states that he worked for 7 years and 7 months. He attached a contract of employment signed by the Parties. He carried out his duties diligently. He did not have a record of misconduct of any kind during service. The decision by the Respondent violated the tenets of natural justice and was discriminatory and malicious. He worked for 45 hours in a week.

4. In his submissions, he states his contract was terminated in November 2013, in violation of the Labour Act No. 12 of 2007 and the terms of employment. His contract entitled him to have off days, annual leave, N.S.S.F and N.H.I.F membership, all which he was denied by the Respondent. He rested his submission with the Claim that the Respondent's action was in gross violation of the Claimant's constitutional rights and natural justice.

*The Court Finds and Awards:-*

5. The Claimant's pleadings and evidence are most wanting. The prayers are not clear. His testimony clarified nothing, and the closing submissions did not illuminate anything. It is unfortunate that the Claimant did not put a little more effort, in assisting the Court to assist him.

6. He submits on infringement of the Labour Act No 12 of 2007. There is no such law in Kenya. If it was meant the Labour Institutions Act No 12 of 2007, the provisions relevant to unfair termination, were no longer in force at the time the Claimant left employment in November 2013.

7. The Claimant states under paragraph [c] of the Particulars of Unlawful Termination that he is entitled to, " *and claims the following terminal benefits under redundancy..*" His pleadings do not contain any shred of a redundancy situation, and his evidence revealed not the slightest hint of such a situation.

8. He claims salary for "Nov, Dec, Jan, and Feb" He does not say in his pleadings, evidence or submissions during which year these salaries were not paid. The description of the months, is completely inconsistent with the language of the Court.

9. He claims 3 months' notice. The claim again is not made out in plain and understandable language. 3 months' notice of what or for what? If the Claimant meant to claim 3 months' salary in lieu of notice, there is no support for such claim from his contract of employment which only allowed either Party to give the other 1 month notice of termination, or pay 1 month salary in lieu of notice.

10. The Claimant goes on to claim for "leaves equivalent to 3 months" He does not say whether these "leaves the equivalent to 3 months" is a claim for annual leave pay, and which years out of the 7 years and 7 months he did not go on leave and was un-compensated. His contract does not show how many days of annual leave he was entitled to.

11. Under paragraph 2 [e] of the Statement of Claim, the Claimant asserts he worked for 45 hours a

week. The Regulation of Wages [ Protective Security Services] Order, Clause 6, provides the normal working week, of all Employees in the industry, including day and night guards, "*shall be 52 hours spread over 6 days of the week.*" The Claimant worked less days than given as the normal working week.

12. He does not even claim overtime pay, so that his assertion to have worked 45 hours in a week, does not fall in place.

13. He claims the staggering amount of Kshs. 672,000 as underpayment. He does not direct the mind of the Court to specific years during his 7 years and 7 months of employment, when he was underpaid. He does not cite the relevant Minimum Wage, under the relevant Wage Regulation Order applicable in any specific year, against what was underpaid to him. The amount of Kshs. 672,000 has just been thrown at the Court, without any legal or factual support.

14. The Industrial Court is slow in dismissing employment claims out of hand. Employees must be assisted, because they do not have sufficient bargaining strength. They must however, particularly where coming to Court through the intercession of their Trade Unions or Advocates, assist the Court to be able to assist them. Representation must aim at effective communication with the Court. Section 3[3] of the Industrial Court Act 2011, requires Parties and their Representatives to assist the Court in facilitation of a just, expeditious, and proportionate resolution of disputes. Parties and their Representatives in this dispute did not assist the Court as expected under this law.

15. Respondent stayed away. The Claimant did not apply himself fully and with professionalism. If the Claimant applied himself fully in pursuing his Claim, the Court perhaps would have found it easier to offer him greater assistance. Unfortunately he did not pursue his Claim with vigour and alacrity. It would not be out of order to reject the Claim in its entirety, even in the absence of any word from the Respondent.

16. The Claimant seeks "*unlawfully termination of employment at Kshs. 96,000.*" The Court assumes he seeks 12 months' salary in compensation for unfair termination under this head. In the absence of any evidence from the Respondent, the Court is ready to find the Claimant demonstrated his contract was unfairly terminated, and the Respondent has failed to justify termination under Sections 43, 45 and 47 of the Employment Act 2007. ***The Court grants the Claimant 6 months' salary at the rate of Kshs. 8,000 per month, total Kshs. 48,000, in compensation for unfair termination.***

17. In the same vein and relying on the contract of employment, ***the Claimant is granted 1 month salary in lieu of notice at Kshs. 8,000.***

18. The Regulation of Wages [Protective Security Services] Order in place at the time of the Claimant's departure, allowed Security Guards gratuity, after 5 years of service, calculated at 18 days' salary for every completed year of service. This is different from severance pay on redundancy under the Order, and payable to Guards who exit on regular termination. Ineligible cases are where the Employee is summarily dismissed, or terminates his contract for any reason other than certified ill- health, or retirement age. In the circumstances of the Claimant, he would be entitled to, and is granted ***gratuity of 18 days' salary for every of the 7 years completed in service, at Kshs.8,000 divide by 26 working days = Kshs. 307.69 x 18 days = Kshs. 5,538.46 x 7 = Kshs. 38,769.20.***

19. The Claimant did not present his Claim effectively, and the Respondent stayed away altogether. The Parties shall meet their own costs of the Claim.

IT IS ORDERED:-

***[a] Termination of the Claimant's contract of employment was unfair.***

***[b] The Respondent shall pay to him 6 months' salary in compensation for unfair termination at Kshs. 48,000; 1 month salary in lieu of notice at Kshs. 8,000; and gratuity of Kshs. 38,769.20 - total Kshs. 94,769.20***

*[c] No order on the costs and interest.*

**Dated and delivered at Mombasa this 6th day of February 2015**

**James Rika**

**Judge**