



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 429 OF 2014**

**BETWEEN**

**SAID ALI NYOKA ..... CLAIMANT**

**VERSUS**

**FACTORY GUARDS [MOMBASA] LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Ms. Maina Advocate instructed by Marende Birir & Company Advocates for the Claimant*

*No appearance for the Respondent*

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

**AWARD**

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

1. This Claim is undefended. The Statement of Claim was filed on 9<sup>th</sup> September 2014. This Statement, the Summons, the Verifying Affidavit, and attached Documents are shown to have been served upon the Respondent's Human Resource Manager Mary Munyika, through Court Process Server Michael Thoya M'bwana. The Affidavit of Service was filed on 10<sup>th</sup> October 2014. There was no Appearance or Statement of Response filed.

2. The Claimant attended Court for directions on 10<sup>th</sup> October 2014. Hearing was fixed for 24<sup>th</sup> November 2014, and an Order made for the Claimant to notify the absent Respondent, of this hearing date. The Hearing Notice was served through a different Process Server Peter Khainga, receipt acknowledged, and Affidavit of Service filed. There was no attendance on the part of the Respondent on 24<sup>th</sup> November 2014, when the Claimant testified, and closed his case, *ex parte*.

3. The Claimant states he was employed by the Respondent Private Security Firm, as a Guard, effective from 1<sup>st</sup> January 2010. He earned a monthly basic salary of Kshs. 9,424 on employment. He worked up to 11<sup>th</sup> February 2014. His last salary was Kshs. 14,622 per month.

4. He states he resigned voluntarily from the Respondent on 11<sup>th</sup> April 2014. He was not paid his terminal

dues, necessitating the filing of this Claim. He claims a total sum of Kshs. 616,406.40 made up as follows:-

- a. Leave pay at Kshs. 63,362;
- b. House rent allowance in arrears of Kshs. 75,870;
- c. Normal days' overtime pay at Kshs. 51,392;
- d. Overtime pay on Public Holidays at Kshs. 324,403;
- e. Severance pay at Kshs. 101,379.20.

5. The Claimant also by his Statement of Claim seeks general damages, costs, interest and any other suitable relief the Court may find fit to grant.

6. He withdrew the claim for damages at the hearing. This was the correct thing to do, as he left employment voluntarily, and the claim of unfair treatment or breach of his contract by the Respondent, appeared to the Court farfetched.

7. He reiterated the contents of his Statement of Claim in his testimony: he was employed as Guard by the Respondent from 1<sup>st</sup> January 2010 to 11<sup>th</sup> February 2014; he resigned voluntarily; the Respondent wrote to him accepting resignation; he last earned a salary of Kshs. 14,622 per month; he never took annual leave, and was not compensated for his unutilized leave; he was never paid house rent allowance; he worked 12 hours a day, rather than the minimum 8 hours, and received no overtime pay; he worked on Public Holidays, without overtime pay; and lastly, worked for 4 years and was not paid severance pay.

*The Court Finds:-*

8. The Claimant did not explain the claim for house rent allowance to the satisfaction of the Court. His pay slips, attached to his Claim, consistently indicate an item named house allowance. This would suggest to the Court that house rent allowance was paid to the Claimant, and his claim for arrears as such, has no foundation

9. The same applies to the claims for overtime. The pay slips indicate the Claimant received 'Normal OT and P/H OT.' These seem to represent Normal Overtime Pay and Public Holiday Overtime. It cannot be that the Claimant never received overtime pay. He should have explained these payments, instead of making the allegation which is obviously untrue, that he never received overtime pay.

10. Severance pay is paid in cases of redundancy, under Section 40 of the Employment Act 2007. There was no redundancy situation, the Claimant having left employment voluntarily. If he intended to ask for service pay under Section 35 of the Employment Act 2007, again this is not available to him. The pay slips show he was actively subscribed to the N.S.S.F, and would not therefore be eligible for service pay under Section 35 [6] of the Act.

11. There was nothing to show the Claimant utilized his annual leave, or was availed annual leave pay in lieu of such utilization. The Claimant incorrectly pleads this as leave allowance, rather than annual leave pay. Leave allowance is the traveling allowance given to Employees in certain employment places, to facilitate the Employees' travel while on annual leave. Leave pay is the worth of the annual leave days, the monetary value attached to the annual leave days, what it would cost the Employer to 'buy' the Employee's annual leave days to keep the Employee working while ordinarily, the Employee would be out of work enjoying his paid annual leave.

12. The Claimant worked for 4 years. The Regulation of Wages [Protective Security Services] Order, Clause 10 entitled him to 24 working days of annual leave with full pay, after each period of 12 months consecutive service. He merits 24 days x 4 = 96 days of annual leave. Translated into money, this works out as follows- Monthly pay of Kshs. 14,622 divide by maximum number of 26 working days in a month = Kshs. 562 daily rate x 96 days of annual leave = Kshs. 53,988.90.

***The Respondent shall pay to the Claimant 96 days of annual leave pay, at Kshs. 53,988.90.***

13. The Claimant shall have the costs of the Claim, together with interest on the costs and the principal sum at the rate of 14% per annum, from the date of the delivery of this Award till payment is made in full.

In Sum, IT IS ORDERED:-

- a. *The Respondent shall, within 30 days of the delivery of this Award, pay to the Claimant Kshs. 53,988.90 in annual leave pay;*
- b. *Costs to the Claimant; and*
- c. *The Award to attract interest at 14% per annum, from the date of its delivery, till payment in full.*

Dated and delivered at Mombasa this 20th day of March 2015

James Rika

Judge