



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

**CAUSE NO. 1996 OF 2012**

**(Before Hon. Justice Maureen Onyango on 13.3.2015)**

**ALEX MUTHIORA KOOME ..... CLAIMANT**

**-VERSUS-**

**G4S SECURITY SERVICES KENYA LTD ..... RESPONDENT**

**JUDGMENT**

The claimant Alex Muthiora Koome filed this claim against the respondent G4S Security Services Kenya Limited seeking the following orders:-

- i. A declaration that the claimant's dismissal from his employment was wrongful and unfair and therefore null and void.**
- ii. The claimant be paid his terminal benefits as set out in paragraph 8 herein above amounting to Kshs 192,281/=.**
- iii. The honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.**
- iv. The respondent to pay the costs of this claim.**
- v. Interest on the above at court rates.**
- vi. The respondent be ordered to issue the claimant with a certificate of service as required by the provisions of Section 51 of the Employment Act, 2007.**

The Statement of Claim dated 4th October 2012 was filed on the same day through Nyabena Nyakundi & Co. Advocates.

The respondent filed its Memorandum of Reply on 26th October 2012 through Hamilton Harrison & Mathews Advocates. The respondent denied that it unlawfully or wrongfully dismissed the claimant. The respondent averred that the claimant was dismissed from employment on 9th December 2011 after he absented himself from duty without leave or lawful cause from 28th November 2011. The respondent further averred that the claimant, in addition, failed or refused to obey a lawful and proper command to report to Machakos station where he had been assigned. The respondent admitted owing the claimant payment for days worked upto 9th December 2011, unpaid overtime, house allowance and leave earned

upto 9th December 2011. The respondent however denied that the claimant is entitled to any other benefits set out in the claim.

The case was heard on 8th October 2014. The claimant testified on his behalf. The respondent called one witness, Boniface Ngungu, an employee relations co-ordinator at the respondent's head office in Nairobi, hereinafter referred to as RW1.

The main facts of the case are not contested. The claimant was employed by the respondent as a guard in October 1999. Originally he was paid a daily wage of Kshs 180/=. After confirmation his salary increased gradually to Kshs 8,464/= per month with a house allowance of Kshs 1,269/= at the time of his termination.

The claimant was suspended from duty on 8th November 2011 for reasons that the CCTV cameras at the premises where he was working showed footage of intrusion in the building. The claimant's suspension was lifted after investigations and a disciplinary hearing failed to show any theft at the premises or confirm any lapse on the part of the claimant. It was however decided that the claimant be transferred to a different location.

By a letter dated 28th November 2011 the claimant was transferred to Machakos branch. On 2nd December, 2011 the claimant appealed against the transfer to Machakos. He requested to be retained in Nairobi. By a letter dated 5th December 2011 the claimant's appeal against the transfer was rejected. By letter dated 9th December 2011 the claimant was dismissed from employment for failing to report to Machakos. The reasons given in the letter were absconding duty and failing to obey lawful instructions. The claimant appealed against the dismissal by his letter dated 14th December 2011. The appeal was rejected by letter dated 16th December 2011.

At the hearing the claimant stated that he did not report to Machakos because he did not have any money to use for the transfer. He stated the letter of 5th December was given to him together with the letter of dismissal when he went to the office to check the response to his appeal against transfer.

RW1 stated that the claimant was not given a hearing before dismissal because he was not available. RW2 also stated in his testimony that the claimant was not given a letter to show cause why he did not report to Machakos. RW1 further testified that the claimant was paid relocation allowance to enable him move to the new station in the total sum of Kshs 6,645/=. He however stated he did not have any proof of the payment.

From the foregoing facts, the issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the prayers sought.

Based on the admission of RW1 the termination of the claimant's employment was unfair as he was not taken through any disciplinary process or required to explain why he did not report to Machakos before a decision was made to terminate his employment contract. The claimant wrote a letter of appeal on 2nd December 2012 and the appeal was rejected by respondent's letter dated 5th December 2011 which the claimant testified was given to him together with the letter of dismissal on 9th December 2011. The claimant also testified that he was reporting to the office daily until 2nd December 2011 when he wrote his appeal. He also testified that he was not given any bus fare but was told to ask for fare from Machakos Branch Manager. These facts were not contested. RW1 stated the claimant was paid relocation allowances but was unable to prove that the claimant was paid as no payment records were produced in court. The letter of dismissal does not state the days when the claimant is alleged to have absconded duty.

The respondent failed to comply with Clause 20 of the Regulation of Wages (Protective Security Services) Order 1998 which provides that:-

**"1. Where an employee is transferred to a branch of the employer's business or to a place either within or outside the district, and the transfer results in disturbance to housing**

arrangements, the cost of transporting the employee's personal and household effects, his wife and up to three children (if living with him) shall be borne by the employer.

2. In addition to the amount payable under subparagraph (1) the employee shall be paid on hundred and fifty shillings per day for the first fifteen days".

Absconding duty refers to a situation where the claimant's whereabouts are unknown which was not the case herein.

From the foregoing, I find that the termination of the claimant's employment was unfair for both want of valid reason and fair procedure.

On claimant's remedies, the claimant is entitled to pay in lieu of notice. I award him one month's salary in the sum of Kshs 14,870/=. I also award the claimant the sum of Kshs 4,461/= being wages and allowances for 9 days worked and not paid for. The pay in lieu of notice and days worked is based on gross pay as provided in Section 49 of the Employment Act.

The claimant prayed for 6 months leave. The respondent submitted that the same was not proved. Section 10(3)(a)(i) and 74(1)(f) of Employment Act require an employer to keep records of leave entitlement, days taken and days due, the particulars to be sufficient to enable the employee's entitlement on termination of employment to be precisely calculated. Section 10(6) require the employer to keep such records for 5 years from date of termination of employment while Section 10(7) provides that where in any legal proceedings the employer fails to keep such records it will be the burden of the employer to disprove the allegation on the stipulated term by the employee. In the letter of dismissal the respondent stated that the claimant would be paid any leave earned but not taken to 9th December 2011.

In his testimony in court the claimant prayed for payment of remedies as prayed in the Memorandum of Claim. During the hearing a question was put to RW1 by claimant's advocate about calculation of benefits set out in the letter of dismissal and he responded that the calculations were done by the Finance Department and he does not work there.

From the foregoing the respondent cannot be heard to transfer the burden of proving the claim of 6 months *pro rata* leave to the claimant as is attempted in the submissions.

I find that the respondent failed to disprove the claimant's claim for 6 months *pro rata* leave and award him the sum of Kshs 3,669/= based on 26 leave days as per Regulation of Wages (Protective Security Services) Order and on basic pay.

On the prayer for gratuity, the claimant is entitled to gratuity at 18 days per completed year of service as provided in the Regulation of Wages (Protective Security Services) Order for employees who have worked for over 5 years. Having worked from October 1999 to 9th December 2011, the claimant worked for 12 years at the rate of 18 days per year worked. The respondent's contention that the payment of NSSF disentitles the claimant to gratuity is not borne by Section 35(6) of the Employment Act which on the contrary, confirms claimant's entitlement to gratuity but not service pay. I award the claimant Kshs 60,941/= (based on basic salary) on account of service gratuity. The case of **Carolyn Chegero Vereso V Pan Africa Life Assurance Limited** relied upon by the respondent is not relevant to this case as it does not refer to gratuity but to service pay. It is also not based on the Regulation of Wages (Protective Security Services) Order.

Having found that the claimant was unfairly terminated, and taking into account his length of service and all relevant circumstances of his case, I award him maximum compensation of 12 months salary in the sum of Kshs 178,448 (based on gross salary as provided in Section 49(1)(c) of the Act).

The claimant is also entitled to certificate of service. The respondent's contention that the claimant is responsible for failure to collect the certificate flies in the face of the provisions of Section 51 of the Employment Act which are couched in mandatory terms that "An employer **SHALL** issue to an

employee a certificate of service upon termination of his employment ---". The respondent is directed to issue the certificate of service to the claimant within 30 days from date of judgment.

The respondent shall pay claimant's costs for this suit and the decretal sum shall attract interest at court rates from date of judgment.

Orders accordingly.

**Dated and delivered in Nairobi this 13th day of March, 2015**

**MAUREEN ONYANGO**

**JUDGE**

***In the presence of:***

..... **for claimant(s)**

..... **for respondent(s)**