



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO 1215 OF 2011**  
**GEOFFREY NYANDUSI OERI.....CLAIMANT**  
**VS**  
**SECURITY GUARDS SERVICES LIMITED.....1ST RESPONDENT**  
**GEORGE ZIBARAS.....2ND RESPONDENT**

**AWARD**

**1. Introduction**

The Claimant's claim brought by way of Memorandum of Claim dated 19th July and filed in Court on 20th July 2011 seeks compensation for unfair termination of employment and payment of terminal dues. The Respondents filed a Memorandum of Reply on 8th August 2011. At the hearing, the Claimant testified on his own behalf and Ernesto Mawioo King'ondo testified for the Respondents.

**2. The Claimant's Case**

The Claimant states that he was employed by the Respondents as a Security Guard initially on casual basis from 2nd July 2001 upto 2005 when his employment was formalised. He was paid a basic salary of Kshs.7,523 plus a house allowance of Kshs.1,128.00.

3. On 25th April 2011, the Claimant reported for work but was prevented from carrying out his duties by a supervisor by the name Nyagah. The Claimant was then referred to the General Manager, a Mr. Mbugua who notified him verbally that his services were no longer required. The Claimant pleads that no reason was given for the termination of his employment.

4. The Claimant reported the termination to his union whose officials sought audience with the Respondent. The matter was not resolved prompting the filing of the claim now before the Court.

5. The Claimant's claim is as follows:

- a. Salary for the days he has been out of employment
- b. Two months' salary in lieu of notice.....Kshs.15,046.00
- c. Leave pay for 102 days.....Kshs.29,508.00

- d. Unpaid salary for January and February 2011.....Kshs.14,646.00
- e. Refund of money deducted on account of lost vehicle bulbs.....21,000.00
- f. Severance pay (135 days).....Kshs.39,055.50
- g. 12 months' salary in compensation for unfair termination.....103,817.40
- h. Certificate of service
- i. Costs

## 6. **The Respondent's Case**

In their Memorandum of Reply filed on 8th August 2011, the Respondents state that the Claimant was employed by the 1st Respondent on 1st February 2005 and not from 2nd July 2001 as alleged in the Memorandum of Claim. The Claimant's employment was terminated by a letter dated 26th April 2011 on the ground of habitual lateness for work. Prior to the termination, the Claimant had been issued with warning letters on 10th January 2011, 24th April 2011 and 17th May 2012,

7. According to the Respondent, the Claimant was notified of the reason for the termination of his employment through a warning order and dismissal letter. Pursuant to negotiations with the Claimant's union, the 1st Respondent offered to pay to the Claimant Kshs. 7,523 for one year's leave which was pending as at the time of the termination. The Claimant however rejected this offer.

8. The 2nd Respondent states that the Claimant's claim as against him in his capacity as the Managing Director of the 1st Respondent is misconceived.

## 9. **Findings and Determination**

The issues for determination in this case are as follows:

- a. The effective date of the Claimant's employment;
- b. Whether the 2nd Respondent is properly joined in these proceedings;
- c. Whether the termination of the Claimant's employment was justifiable and lawful;
- d. Whether the Claimant is entitled to the remedies sought.

## 10. **Effective Date of the Claimant's Employment**

Before determining whether the termination of the Claimant's employment was justifiable and lawful, I need to dispense with the question as to the effective date of the employment. The Claimant states that his employment with the Respondent commenced on 2nd July 2001. The Respondents on the other hand state that the Claimant was employed by the 1st Respondent on 1st February 2005. In support of their plea in this regard, the Respondents produced a document marked Serial No 1274A showing the Claimant's date of enlistment as 1st February 2005.

11. According to the Respondents this document was the Claimant's letter of appointment. Section 10 of the Employment Act, 2007 sets out the particulars to be contained in a letter of appointment. I have examined the document marked Serial No 1274A against the requirements set out under Section 10 and do not find any correlation. The Court therefore finds that this document cannot pass for a letter of appointment; at best it is an internal employee data form. That said, it follows that the Respondent failed to document the Claimant's employment and the Court therefore invokes Section 10(7) of the Act and adopts the Claimant's evidence as to the effective date of his employment.

## 12. Joiner of the 2nd Respondent

In the Respondents' Memorandum of Reply, the 2nd Respondent who is sued in his capacity as the Managing Director of the 1st Respondent takes issue with his joiner in these proceedings. For some reason which was not clear to the Court, the Claimant chose not to respond to this significant point of law.

13. It is now well settled that subscribers, directors and officers of limited liability companies should not ordinarily be joined in proceedings against the bodies corporate which they represent. The only exception is where the Court is satisfied that the corporate veil is being used to defeat the ends of Justice in which case the Court may order lifting of the veil to allow personal liability (see *Salomon Vs Salomon & Co. [1897] AC 22. H.L* and *Aviation and Allied Workers Union Vs Kenya Aerotech Limited & Another (Industrial Court Cause No 1494 of 2011)*).

14. Since no such argument was advanced by the Claimant, the Court finds no basis for joiner of the 2nd Respondent. The Claimant's claim as against him is therefore dismissed.

## 15. The Termination

According to the Claimant, his employment was terminated verbally on 25th April 2011. On their part, the Respondents produced an unsigned termination letter dated 26th April 2011. The Claimant denies having received any such letter and the Respondents did not produce any evidence that the letter was actually served on the Claimant.

16. Section 43(1) of the Employment Act, 2007 provides that:

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

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

17. In my view, the reason for termination of employment is first made known to the employee at the beginning of the disciplinary process which is initiated by a show cause letter. The termination letter finally confirms the reason and by the time an employee exits from employment, the reason for their termination should be clear.

18. From the evidence presented before the Court, it would appear that the decision to terminate the Claimant's employment was triggered by his reporting late for work on 24th April 2011. Prior to the termination, the Claimant was issued with a warning order dated 24th April 2011 citing the offence as:

***“REJECTED BY THE CLIENT FOR REPORTING ON DUTY LATE (1830 HRS) ALWAYS. THE CLIENT SAID HE SHOULD BE REPLACED BY 25/4/2011.”***

19. The Respondents' witness, Ernesto Mawioo King'onde told the Court that the incident leading to the issuance of this warning order is the same one that led to the termination. In employment law and practice, a warning and a termination are distinct disciplinary actions which are available to an employer against an employee. It follows therefore that an employee who has been issued with a warning for an offence cannot be terminated on account of the same offence.

20. As held by this Court in *Banking Insurance and Finance Union (Kenya) vs Kenya Commercial Bank Limited [2015] eKLR* once a distinct disciplinary action is taken against an employee, the allegations forming the subject matter of the disciplinary action cannot be made the subject of future disciplinary action. The offence thus becomes a spent cartridge and cannot be used save for the determination of the employment record of the employee. To rule otherwise would be to subject

employees to a state of anxiety over disciplinary processes *ad infinitum*. For there to be industrial peace at the work place, there must be a conclusive end to each and every disciplinary process.

21. In line with this reasoning, this Court takes the position that once the warning order dated 24th April 2011 was issued, the disciplinary process arising from this incident came to a close and any further disciplinary action amounted to double jeopardy against the Claimant and was therefore null and void. I do not need any further argument to reach the conclusion that the termination of the Claimant's employment was without any legal justification and was therefore unfair to that extent.

22. I will now deal with the procedure adopted by the Respondent to effect the termination. The accusations made against the Claimant would fall under the broad categories of poor performance and misconduct. Section 41 of the Employment Act, 2007 establishes the procedure for handling such cases as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

23. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

24. There was no evidence of any attempt by the 1st Respondent to comply with the disciplinary procedure set out under Section 41 with regard to the Claimant's termination and the Court therefore finds the termination unfair for want of due process as well.

## 25. Remedies

That brings me to the remedies sought by the Claimant. In light of my finding that the termination of the Claimant's employment was both substantively and procedurally unfair, I award him ten months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the fact that prior to the termination of his employment, the Claimant was not afforded an opportunity to be heard. I also award him one month's salary in lieu of notice. The Respondent did not produce leave records as proof that the Claimant had exhausted his leave. The claim for leave is therefore allowed.

26. With regard to the claim for unpaid salary for January and February 2011, the Court could not understand the circumstances under which the Claimant was paid salary for March 2011 as evidenced by the payslip produced by the Claimant himself and not the previous months. Without any further explanation, the Court finds this claim far fetched and proceeds to dismiss it. There was no evidence that the Claimant was declared redundant and the claim for severance pay therefore has no basis and is dismissed. The claim for refund of money deducted on account of lost bulbs was not proved and is also dismissed.

27. Finally I make an award in favour of the Claimant as against the 1st Respondent as follows:

- a. 10 months' salary in compensation for unfair termination.....Kshs. 86,510.00
- b. One month's salary in lieu of notice..... Kshs.8,651.00
- c. Leave pay  $(8,651/30 \times 21 \times 9) + (8,651/30 \times 1.75 \times 8)$ .....Kshs.58,538.00

**Total.....Ksh.153,699.00**

28. The award amount will attract interest at court rates from the date of the award until payment in full. The 1st Respondent is further directed to issue the Claimant with a certificate of service.

29. In view of the finding that the 2nd Respondent was not properly joined in these proceedings, the Claimant's claim succeeds only in part and I therefore direct that each party will bear their own costs.

30. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MARCH 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Mageto for the Claimant

Mr. Sagini for the Respondent