



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 384 OF 2014**

**BETWEEN**

**CHIMWAGA MWAMUYE MWABONJE..... CLAIMANT**

**VERSUS**

**NINE ONE ONE GROUP LIMITED ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. Okanga Advocate instructed by Okanga & Company Advocates for the Claimant*

*Mr. Makokha Advocate instructed by the Federation of Kenya Employers for the Respondent*

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

**AWARD**

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

1. Mr. Chimwaga Mwamuye Mwabonje filed his Statement of Claim on the 15<sup>th</sup> August 2014. He claims he was employed by the Respondent Company as Security Officer from the year 2004 to the year 2013. The Respondent terminated the Claimant’s contract of employment sometime in 2013, in circumstances the Claimant deems to amount to unfair and unlawful termination. His last salary was Kshs. 15,133 per month. Mwabonje seeks the following Award against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 15,133;
- b. 21 days of unutilized annual leave at Kshs. 10,593;
- c. 12 months’ salary in compensation for unfair termination at Kshs. 181,596;
- d. Gratuity for 9 years worked at Kshs. 81,718

Total.....Kshs. 289,040; and

e) Costs; Interest; and any other relief the Court may deem fit to grant.

2. The Respondent filed its Statement of Response on 17<sup>th</sup> October 2014. It acknowledges to have employed the Claimant as a Security Guard, from 1<sup>st</sup> October 2006. He was dismissed by the Respondent on 15<sup>th</sup> May 2013, while earning a monthly basic salary of Kshs. 7,735 and house rent allowance of Kshs.

1,000. He slept while on duty at Kencont Logistic within Mombasa County, leading to the loss of Side Mirror Lens and Holders of 10 vehicles through theft. He admitted he knew theft had taken place, but did not inform his Supervisor. He was fairly heard before dismissal. He appealed, was fairly heard on appeal, and appeal rejected. He had various warnings in the years 2012 and 2013. He does not merit notice pay; he was paid accrued annual leave of 34 days at Kshs. 10,115; he is not entitled to compensation; he was paid Kshs. 23,822 in terminal benefits; and is not entitled to gratuity, having been summarily dismissed, and having been subscribed to the National Social Security Fund [N.S.S.F].

3. The Claim was heard, and closed on 24<sup>th</sup> February 2015. The Claimant gave evidence, as did Respondent's Branch Manager Joseph Maina.

#### Claim.

4. In his evidence, Mwabonje stated he was employed by the Respondent for 13 years. He was employed on 1<sup>st</sup> October 2006. It was reported while he was on duty at Mbaraki that some Vehicle Side Mirrors were lost. The Respondent deals in tracking stolen cars and has Guards, who guard Warehouses.

5. The Company, according to the Claimant, was poorly managed. The Claimant asked to go on annual leave in 2012. He was advised his annual leave would be combined with that for the following year 2013. His persistent demand to go on annual leave led to the unfair termination of his contract of employment. He claims annual leave pay for the year 2012. He seeks gratuity pay. He was not negligent in the discharge of his duty. He patrolled the premises with a dog. Theft was occasioned by poor management. He was not given a proper opportunity to be heard.

6. The Claimant testified on cross-examination that on the material day he was the dog handler. He guarded the vehicles within the Warehouse. He did his rounds for the day as required. Everything was in order. He was found sleeping while on duty. Side Mirrors were stolen. Theft was discovered in the morning during the change in the shift. The Claimant had realized the mirrors were missing when he did his rounds. He did not agree he alone, was to blame; he agrees he, and the other Guards, were to blame.

7. He recorded a Statement on 3<sup>rd</sup> May 2013. He received the Notice of the disciplinary hearing. He conceded the Side Mirrors were stolen. He agreed he witnessed theft, and failed to report. He lodged an appeal against the decision to summarily dismiss him. He testified he performed his duty perfectly. The pay slip on his Final Dues indicated the Claimant was paid 34 days of annual leave. He testified on redirection that he was a Member of the Kenya Revenue Authority Workers Union, and Officials of the Union attended the disciplinary hearing. The Claimant prays the Court to allow his Claim.

#### Response

8. Maina testified Side Mirrors were stolen at Kencont. Kencont was Respondent's Client, who the Respondent provided guarding services to. Kencont operates a motor vehicle business. There are Night and Day Security Guards.

9. The Claimant was on duty on the material night. He noticed side mirrors were missing during his night patrol, but told no one. Day Guards realized the side mirrors were missing at the change of the shift. It was they, who reported the incident to the Management. The Client Kencont wrote to the Respondent demanding to be compensated. The Claimant wrote a statement in his own handwriting, confirming the incident. He was heard alongside his Colleagues Nicodemus and Benjamin. Nicodemus was summarily dismissed, while Benjamin who was the Supervisor was given a warning. The Claimant was found asleep at work. He never exonerated himself. His summary dismissal had nothing to do with demands for annual leave. The Respondent followed the right procedure. Terminal benefits were computed and paid to the Claimant.

10. Questioned by the Counsel for the Claimant, Maina testified there was no adult Employee accompanying the Claimant at the disciplinary hearing. The Respondent held there was neglect and ignorance on the part of the Guards. There were loopholes in the security arrangement. Outsiders could

exploit these. Control of persons coming into the premises was weak. Persons who brought in the cars were not checked. They possibly took the side mirrors. Benjamin the Supervisor was exonerated. Redirected, Maina stated the notice of the disciplinary hearing explained to the Claimant his right to be accompanied by a Colleague or Trade Union Official. He was charged with failing to prevent theft, not with the actual theft.

### Submissions

11. The Claimant submits that he was unfairly dismissed while Benjamin, who was likewise on duty on the material night, was spared the axe. The Claimant performed his duty as required; he found the side mirrors were missing, and found one of the clerks sleeping. The procedure in dismissing the Claimant was not fair. He was not accompanied by "any adult member or colleague." The composition of the Disciplinary Panel was tilted against the Claimant. The Claimant submits he is entitled to the prayers sought.

12. The Respondent submits the Claimant negligently and carelessly performed his duties on 3<sup>rd</sup> May 2013. He slept, rather than undertake regular patrols, leading to loss of side mirrors and holders of 10 vehicles through theft. He did not report the loss. The decision to summarily dismiss the Claimant was justifiable under Section 44 [4] [c] of the Employment Act. He breached trust and confidence. He recorded a statement; was notified of the disciplinary hearing; given adequate time to respond; was heard fairly; appealed and was heard on appeal; and decision to summarily dismiss him sustained. He is not entitled to any of the prayers.

### *The Court Finds:-*

13. The Claimant was employed by the Respondent Company on 1<sup>st</sup> October 2006. This is the date he gave in his evidence. It is not clear why he stated the year 2004 as the starting point, in his Pleadings and Submissions. He worked up to 15<sup>th</sup> May 2013, when he was summarily dismissed.

14. Was the summary dismissal fair and valid? Is the Claimant entitled to compensation for unfair dismissal and terminal benefits as pleaded?

15. He conceded he was on duty on the night of 3<sup>rd</sup> May 2013 at Kencont. He was assigned night duty, guarding imported motor vehicles. It is not disputed that side mirrors lens and holders were stolen from 10 of these vehicles. The Claimant afterwards recorded a statement conceding the items were lost during his shift.

16. He kept silent and failed to report the occurrence to Management. It was in the morning, during the handover to the Day Guards, that the Day Guards noticed the items were missing, and alerted Management.

17. These failures clearly brought the Claimant's actions and omissions within the employment offences created under Section 44[4] [c] and perhaps even [g] of the Employment Act 2007. The Respondent proved the reason for its decision and demonstrated the validity and fairness of reason. There was no truth whatsoever in the Claimant's evidence that he was victimized by the Employer for persistently demanding to go on leave. It was within the prerogative of the Employer to determine which of its Employees bore the responsibility for the loss of its Client's items, and what punishment to mete out. The Claimant was not discriminated against in the exercise.

18. Procedural justice was served in good measure to the Claimant. The incident was investigated. The Claimant recorded a Statement. He was served a Notice of Disciplinary Hearing/ Enquiry dated 4<sup>th</sup> May 2013. He was notified he would be heard on 12<sup>th</sup> May 2013. He was given the particulars of the offence and informed about the likely forms of punishment. He was advised of his right to be accompanied by 1 Representative from within the Company, which the Court understands to mean either a Workmate of any shade, or more specifically a Shop Floor Trade Union Representative. He was informed about his right of

appeal.

19. He was heard. He did not raise issues about the composition of the Disciplinary Panel as he has forlornly attempted to do in his Closing Submissions. He was heard and decision to summarily dismiss him made on 15<sup>th</sup> May 2013. He appealed and was heard on 12<sup>th</sup> July 2013 by an Appeal Committee. The Appeal was dismissed and the decision communicated to the Claimant on 2<sup>nd</sup> August 2013.

20. Preceding the Claimant's shortcomings of 3<sup>rd</sup> May 2013, were letters of warning issued in 2013, and which were valid at the time of the summary dismissal. It is therefore not an idle statement when the Court states at paragraph 18 above that the Claimant was served procedural justice in good measure.

21. Summary Dismissal was fair both in substance and procedure.

22. The Claimant does not merit compensation for unfair dismissal. The prayer is declined. The Regulation of Wages [Protective Security Services] Order 1998 which the Claimant relies upon in pursuit of gratuity, bars him from receiving gratuity. Clause 17[2] makes Employees who are summarily dismissed for lawful cause ineligible for gratuity pay. It is incorrect to submit that even if the Claimant was subscribed to the N.S.S.F, he would still merit gratuity pay under the Wages Order. The law does not contemplate multiple recognition and reward for years of service. Service / gratuity pay aims at recognition and reward of creditable years of service. Where the Employee enjoys one form of these social security payments, the law does not place an obligation on the Employer to pay for service twice. Unless it is agreed in the employment contract that gratuity is payable regardless of other social security benefits availed by the Employer to the Employee, the Court cannot endorse such additional benefits. The claim for gratuity has no merit, whichever angle looked at from, and is declined.

23. The claim for notice pay is similarly misplaced, the Claimant having been summarily dismissed for admitted acts of gross misconduct. He was not honest in his claim for 21 days of annual leave. In his Closing Submissions he changed this claim from 21 days to saying that it is the calculation of the 34 days offered and paid by the Respondent, which was defective. He submitted he is entitled to Kshs. 7,035 in the Closing Submissions, while in his Pleadings he claims annual leave of 21 days at Kshs. 10,593. The Respondent paid him Kshs. 10,115 based on 34 days of annual leave. Kshs. 15,133 which is reflected in the Claimant's pay as the net salary included variable income such as overtime pay. It cannot be included in calculating the daily rate as done by the Claimant in his Closing Submissions. There is nothing to support the claim for 21 days of annual leave, or any balance of annual leave pay based on 34 days of annual leave afforded the Claimant.

*IT IS ORDERED:-*

*[A] Summary dismissal was fair.*

*[B] The Claim is dismissed.*

*[C] No order on the costs.*

**Dated and delivered at Mombasa this 5<sup>th</sup> day of June 2015**

**James Rika**

**Judge**