



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 699 OF 2012**

**JOSHUA MUNGOKI NGOLWA.....CLAIMANT**

**VS**

**KK SERVICES LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by way of Memorandum of Claim dated 23rd April and filed in Court on 25th April 2012 seeks compensation for wrongful and unfair dismissal. The Respondent's defence is contained in a reply dated 4th July and filed in Court on 6th July 2012. At the trial the Claimant testified on his own behalf and the Respondent called its Deputy Human Resource Manager, Anthony Odera.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 23rd September 2001 and deployed as a security officer at the American Embassy in Nairobi. He was issued with a letter of appointment a year later, on 23rd September 2002. The Claimant worked at the Embassy until September 2009 when was notified by the Guard Force Commander not to report for duty in the evening of 27th September 2009.

3. Upon further inquiry, the Claimant was informed that his employment had been terminated. The Guard Force Commander sent him to the Human Resource Department where he was issued with a certificate of service. The Claimant denied receiving any termination letter from the Respondent. He further denied receiving the incident reports produced by the Respondent.

4. The Claimant states that the termination of his employment was unjustifiable and unfair and that he was not paid his terminal dues. He claims the following:

- a. General damages for wrongful and unfair termination
- b. Service gratuity, leave and notice pay
- c. Costs and interest

**The Respondent's Case**

5. In its reply filed on 6th July 2012, the Respondent states that the Claimant was involved in unprofessional and dishonest activities detrimental to the Respondent's operations and image. In particular, the Claimant had solicited money from clients leading to his summary dismissal.

6. The Respondent states that the Claimant had a negative employment record and had been previously warned for acts of gross misconduct. Upon dismissal, the Claimant was paid all his terminal dues.

### **Findings and Determination**

7. The following are the issues for determination in this case:

- a) Whether the termination of the Claimant's employment was justifiable and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

8. The Claimant testified that he was terminated verbally. The Respondent however produced a termination letter dated 29th September 2009 stating as follows:

*“Mr Ngolwe,*

#### ***SOLICITING MONEY FROM CLIENT.***

*On Monday 28th September, 2009, a complaint was received from the US Embassy to the effect that at 2200 hrs the previous evening, whilst on duty at F520, you rang the door bell of the house and asked the resident, Mr. Gerald Moore, to assist you with money to pay for your children's school fees. As a result the Embassy's Assistant Resident Security Officer (ARSO) has demanded your removal from the contract. This, combined with your poor disciplinary record (see attached), leaves the Company with no alternative but to terminate your services.*

*Kindly arrange to return your uniform and all other items of company property in your possession to facilitate the calculation of your final dues.*

*Should you wish to appeal against this decision you should do so within seven days of the date of receipt of this letter.*

*Ross Anson.*

***Manager – U.S Embassy Project.”***

9. From this letter, it would appear that the termination of the Claimant's employment was informed by incidences of misconduct on his part. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for the termination of the employment of an employee. In order to discharge this burden, the employer must take the affected employee through the disciplinary process set out under Section 41 of the Act which sets out the following procedural requirements:

- 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.

10. The Respondent's witness, Anthony Odera told the Court that the Claimant was given an explanation as to why his employment was being terminated on the same day of the termination. To my mind, this form of summary procedure is not what is anticipated under Section 41 whose purpose is to allow an employee the opportunity to show cause why disciplinary action should not be taken against them. A

manager who meets an employee with a termination letter in his hands cannot be said to have afforded that employee the right to be heard.

11. The termination letter dated 29th September 2009 makes reference to the Claimant's negative employment record. There was however no evidence that the incidents making up this negative record were ever put to the Claimant to enable him respond. The Court could not therefore verify the authenticity of the Claimant's employment record as presented by the Respondent.

12. For the foregoing reasons, the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

### **Remedies**

13. Before ruling on the remedies available to the Claimant, I need to make a determination on his employment period. There was divergence on this point on two scores; the date of employment and whether the Claimant ran a continuous employment period up to the date of termination. The Claimant stated that he started working for the Respondent on 23rd September 2001. He however produced a letter of appointment dated 23rd September 2002 showing the effective date of his employment as 29th September 2002.

14. The Claimant did not lead any evidence on the terms of his engagement prior to the issuance of his letter of appointment and the Court therefore adopted the date of 29th September 2002 given in the letter of appointment as the effective date of the Claimant's employment.

15. On its part, the Respondent stated that the Claimant had broken his employment period twice; first through resignation on 6th August 2007 and second through termination on 25th February 2008. However, in the two certificates of service issued to the Claimant by the Respondent in 2009 and 2011, there was no indication of any break in service. A certificate of service is an official document under the Employment Act, 2007 which unless contested by an employee provides reliable evidence on the employment period of an employee. Taking both the letter of appointment and the certificate of service, the Court fixes the Claimant's employment period as running from 29th September 2002 to 29th September 2009.

16. Now to the remedies. Having found the termination of the Claimant's employment unlawful for want of substantive justification and procedural fairness, I award him seven (7) months' salary in compensation. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process.

17. In his position as a security officer, the Claimant was governed by the Regulation of Wages (Protective Security Services) Order and he is therefore entitled to service gratuity at the rate of 18 days' pay for every completed year of service. Unlike service pay, service gratuity is not affected by an employee's membership to the National Social Security Fund (NSSF).

18. From the Claimant's payslip for October 2009, it is evident that he was paid notice pay and no details were provided for the claim for leave pay. These claims therefore fail and are dismissed.

19. In the final analysis I make an award in favour of the Claimant in the following terms:

a) 7 months' salary in compensation for unfair termination.....Kshs.95,711.00

b) Service gratuity for 7 years (  $13,673/30 \times 18 \times 7$ ).....Kshs.57,427.00

**Total.....Kshs.153,138.00**

20. The award amount shall attract interest at court rates from the date of the award until payment in full. The Claimant will have the costs of this case

21. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF  
AUGUST 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Kibera for the Claimant

Mr. Kamau for the Respondent