



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 998 OF 2010**

**JOSEPH KUTELA INGATI.....1<sup>ST</sup> CLAIMANT**

**JOHN ETENYI OBONYO.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**CHARLES KAHENDE KINUTHIA.....RESPONDENT**

**JUDGMENT**

1. The Claimants filed suit against the Respondent on 3<sup>rd</sup> September 2010. In their Statement of Claim they averred that they were engaged by the Respondent on 22<sup>nd</sup> August 2008 and 30<sup>th</sup> August 2008 respectively as security guards at a monthly salary of Kshs. 5,000/-. They averred that the Respondent in November 2008 terminated the services of his cleaner/caretaker and instructed the Claimants to take up the cleaner/caretaker's duties and agreed to pay them a salary of Kshs. 5,000/- to be shared equally among them. They agreed to those terms and commenced undertaking the cleaner/caretaker's duties in addition to their guard duties. They averred that in spite of the agreement the Respondent failed to honour his side of the bargain and pay for the extra duties undertaken. They averred that when the Claimants approached the Respondent in January 2010 seeking to have these sums paid, the Respondent immediately became hostile and ordered them to leave the premises and informed them that their services had been terminated. They averred that they were not given notice of intention to terminate and claimed in respect of the 1<sup>st</sup> Claimant – one month salary Kshs. 5,000/-, 12 months salary compensation for unlawful termination Kshs. 60,000/-, one month salary for leave not taken Kshs. 5,000/- unpaid dues for extra work Kshs. 35,000/-, compensation for 16 public holidays worked Kshs. 5,333/- and compensation for 68 Sundays worked Kshs. 22,712/- making a total of Kshs. 133,045/-. In respect of the 2<sup>nd</sup> Claimant - one month salary Kshs. 5,000/-, 12 months salary compensation for unlawful termination Kshs. 60,000/-, one month salary for leave not taken Kshs. 5,000/- unpaid dues for extra work Kshs. 35,000/-, compensation for 16 public holidays worked Kshs. 5,333/- and compensation for 64 Sundays worked Kshs. 21,376/- making a total of Kshs. 131,709/-. The Claimants averred that they reported the dispute to the District Labour office but the Respondent has to date refused to compensate them for the unlawful termination. The Claimants also claimed the costs of the suit.

2. The Respondent filed a Response on 23<sup>rd</sup> September 2010. In the response, he averred that the joinder of the Claimants was a misjoinder as they had entered into individual and separate contracts of employment. The Respondent averred that he never had a cleaner/caretaker for his premises and that each tenant was responsible for cleaning the individual rented premises and had contracted a garbage collector

and hired help to trim and cut the fences and hedges when need arose. The Respondent averred that the Claimants took all their due rest days and leave days as and when they fell due and that he supplemented their security services with Group 4 Security. He averred that the Claimants were habitually absented themselves from duty without permission and reported to duty while drunk and so intoxicated as to be unable to perform their duties as a result of which one tenant lost a vehicle part. The Respondent claimed Kshs. 10,000/- which was the compromise sum agreed with the tenant for the loss of the vehicle part due to the negligence of the Claimants. He thus sought the dismissal of the Claimants case and entry of judgment against the Claimants for Kshs. 10,000/- with costs, on his counterclaim.

3. The 1<sup>st</sup> Claimant testified on 28<sup>th</sup> May 2014 and was led in his evidence by his counsel Mr. Maondo. The Claimant stated that he was employed on 22<sup>nd</sup> August 2008 by the Respondent and worked at the property in Dagoretti as a security guard. He testified that he would guard at night and was promised extra pay of Kshs. 2,500/- for doing extra work. He testified that he never received a coin of that money. He was dismissed on 16<sup>th</sup> January 2010 without notice, service pay and leave pay due. He thus sought the payment of the sums claimed – notice, damages for unlawful dismissal, leave pay due, extra pay for extra work done, public holidays and Sundays.

4. In cross-examination by Mrs. Chege for the Respondent, he testified that he was presently working in *jua kali* and that he had been employed by the Respondent in August 2008 and at the time there were two other guards. He testified that one of the two passed away and that the 2<sup>nd</sup> Claimant was employed on 30<sup>th</sup> August and they continued to guard the property together. He testified that the tenant who lost a vehicle part was undertaking a tender and parked his vehicle in the lot. He would guard at night and would clean the compound by day. He was called by the Respondent and asked about the missing part. He denied stealing the car part and absconding from work.

5. In re-examination by Mr. Maondo he testified that he was not aware of the theft in the compound and that the vehicle was parked when they were not on duty. He testified that the vehicle was driven to the premises and that he was not even aware of the part removed from the car. He testified that he was not taken to the police and that if he had been involved in the theft he would have been taken to the police.

6. The 2<sup>nd</sup> Claimant testified on 27<sup>th</sup> November 2014. He was led in his evidence by Mr. Ombassa holding brief for Mr. Maondo. The 2<sup>nd</sup> Claimant testified that he was hired in 2008 as a night watchman and worked alongside his colleague, the 1<sup>st</sup> Claimant. He testified that he was informed that they would get the extra salary for the third guard and split it among themselves. He testified that the caretaker had a disagreement with the Respondent in November and they were promised the pay for the caretaker if they undertook the duties that the caretaker used to undertake. In June 2010 he was told his services were no longer required. He was not given a letter informing him why this was so and testified that he had not received any pay for the extra work done or the extra guard. He testified that he was not paid for public holidays and Sundays.

7. In cross-examination by Mrs. Chege he testified that he was hired on 30<sup>th</sup> August 2008 and at the time when he was hired the 1<sup>st</sup> Claimant had worked for one week and he found him there. he testified there was back up and there was an alarm to press in case of distress. He testified there was one button. He testified that the property had 56 doors and that it had a fickle fence of three strands of barbed wire. He testified that the trash would be placed in bins in each row and they would walk to each sector and collect the trash and place it in one place. He testified that the caretaker was called Njuguna and his duties were to collect the trash, clean the compound and supervise entry of tenants. he testified that in November 2009 he was given tasks for the caretaker from around 15<sup>th</sup>. He stated that a vehicle was parked in the compound sometime in December and in January the driver came and found oil leaking. He testified that as a watchman he had no skills to go into the bonnet and check whether the car was intact on the inside. He did not know if the vehicle was towed or driven. He testified that if it had been proved they were involved they would have been taken to the police. He did not know if the Respondent had paid the owner of the vehicle. He denied going to work drunk.

8. In re-examination by Mr. Ombasa, he testified that they were the ones who disposed of the garbage and this was a duty assigned by the Respondent. He testified that he did not have any experience as a driver or mechanic. He testified that no report was made to the police and there were no police investigations. He stated there was no show cause letter and there was no invitation to record a statement.

9. The Respondent was to testify on 16<sup>th</sup> February 2015 but was absent. Defence case was closed but he sought reprieve through an application to set aside the orders and the case was reopened and he testified on 4<sup>th</sup> May 2015. He testified that he was a businessman and that he knew the 2 Claimants who were former employees. He denied terminating their services. He testified that on the morning of 16<sup>th</sup> January 2010, a Saturday, they came to him asking for their advance. He asked them to proceed on leave for two weeks. He stated there was a lot of tension as an allegation of theft had been made in December 2009 and when he had asked about the theft in December 2009 he noted the two were hostile. He asked them to proceed on leave. He testified that he paid them for it and asked them to report on 30<sup>th</sup> January 2010 and they did not. One of the tenants Michael Owino had suffered theft of a car part. He stated that the relationship between him and the watchmen turned very sour and he told Mr. Owino that he was sorry and to help him gave him 10,000/- and urged him to report to the police. He testified that he was told by Mr. Owino that a report was made to the police. He did not know what transpired after matter was reported to the police. He testified that the Claimants left employment after the theft. He testified that he had two guards so that they would alternate on the Sundays and public holidays. He testified that he had a contract with G4S to have back up security with 2 silent alarms and remote buttons with the *askaris*. He testified that the only issue was that the Claimants would at times be late to work or appear to work while drunk. He denied giving them any other duties and that Mr. Njuguna assisted him in collecting rent from the tenants but was not an employee of the Respondent but resided in his plot. He testified that he only exempted Njuguna from paying rent and this subsisted from 2007 till 2011 when he appointed an agent to collect rent.

10. In cross-examination by Mr. Ombasa for the Claimants, he testified that he was the employer of the Claimants. He stated that he did not have employment records and that he assigned them duties as night watchmen. He testified that each tenant cleans their verandah and there is a central collection point for garbage which is collected once weekly by contracted garbage collectors. He testified that he never gave the Claimants any warning letters for drunkenness and that he only discussed on friendly terms. He confirmed that he had not brought any document to show that Michael Owino was his tenant at the material times. He was not sure if Michael reported the incident to the police. He testified that he did not suspend the Claimants nor issue them with a letter seeking an explanation.

11. The Respondent called Samuel Njuguna Kariuki as the second witness. He testified that in 2008 he was helping the Respondent collect rent from tenants in the Respondent's premises and stopped collecting rent when his relationship with the tenants soured. He testified that he knew the two Claimants who guarded them at night. He testified that it was not his duty to collect garbage and each person was responsible for their own portion of the premises. He stated that the garbage was collected weekly by appointed collectors.

12. In cross-examination by Mr. Ombasa, he testified that he was only helping in rent collection and did not perform any other duty. He denied he was a caretaker and that tension arose when he went to collect rent and requested the Respondent that he ceases collecting rent.

13. Parties agreed to put in written submissions and the Claimant filed written submissions on 19<sup>th</sup> May 2015. In the submissions, the Claimant submitted that there was an allegation of theft but there was no report to police which begged the question whether there was any theft at all. The Claimants submitted that the Respondent had testified that the Claimants approached him for advances but the Respondent instead told the Claimants to go home until recalled due to tension at work. The Claimants submitted that this corroborated what the Claimants had testified that they were demanding their dues and this is what led to their termination. It was submitted that there no notice to show cause issued to the Claimants regarding the alleged theft. The Claimants submitted that the cheque produced was not supported by any evidence of encashment. The Claimant's submitted that they were underpaid as The Regulation of Wages

(General) (Amendment) Order 2009 Legal Notice No. 70, provided the salary of a night watchman was Kshs. 6,839/-. The Claimants relied on Section 41 of the Employment Act for the proposition that they were not accorded the safeguards set out in the law. The Claimants submitted that it was the duty of the employer to prove that he had a valid reason for the termination as provided for in Section 43 of the Employment Act. The Claimants submitted that their dismissal was unfair within the meaning of Section 45 of the Employment Act and relied on the cases of **Fred Makori Ondari v The Management Committee of the Ministry of Works Sports Club Cause No. 1079 of 2010**, **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** and **Whencelause Gilbert Jumba Swinnerstone v Ryce East Africa Limited [2014] eKLR**. The Claimants submitted that they were not given an opportunity to defend themselves by the Respondent before their termination.

14. The Respondent filed submissions on 4<sup>th</sup> June 2015 and submitted that the Claimants absconded work after a theft of a vehicle part in the Respondent's premises. The Respondent submitted that the Claimants were charged with the responsibility of ensuring security of the vehicles parked in his premises and that the Claimants became hostile after queries on the theft were raised. The Respondent submitted that the detailed evidence of what transpired over the period of time the Claimants were being interrogated about for the theft of the motor vehicle parts suffices for purposes of notice. The Respondent submitted that the Claimants did not lodge a claim for underpayment. The Respondent relied on the provisions of Section 44 of the Employment Act which permits summary dismissal where the employee absents himself from the place of work, or is found intoxicated at work, willfully neglecting to perform any work which is his duty to perform or where employee commits or is reasonably suspected of committing a criminal offence against or to the detriment of his employer. The Respondent submitted that the Claimants neglected their work and did not ensure the security of the tenants vehicle. The Respondent submitted that the Claimants had not sufficiently established their claims for days worked such as Sundays and public holidays. The Respondent submitted that the proceedings had the name Charles Njuguna Kinuthia which was not the Respondent and thus the Claimants were not entitled to an order for costs as no demand was made prior to institution of the claim.

15. The Claimants claim they were unfairly terminated while the Respondent asserts they absconded work. The evidence adduced was that there was a theft of a vehicle part sometime in December 2009 and that the Claimants sought some advance payment on 16<sup>th</sup> January 2010 and due to tension that had built up the Respondent told them to go and return at the end of January, precisely on 30<sup>th</sup> January 2010. It is clear from the narration by both parties that termination of the Claimants services was in January 2010. Even assuming that the theft of the vehicle part was proved, the period between the reporting of the theft and 16<sup>th</sup> January 2010 would have been sufficient to bring the force of law to bear. No report was made to the police, there was no process initiated by the Respondent to ascertain the veracity of the allegations of theft leveled against his employees. No amount of interrogation can suffice for purposes of showing cause. There is an elaborate way in which employees can be asked to show cause and failing to do so suggests that there was no adherence to the dictates of the law. The Court finds that the services of the Claimants were terminated on 16<sup>th</sup> January 2010 without any notice.

16. Section 74 of the Employment Act places an obligation on the employer to keep records. Section 74 provides as follows:-

74. (1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars?

(a) of a policy statement under section 7(2) where applicable;

(b) specified in section 10(3);

(c) specified in section 13;

(d) specified in sections 21 and 22

- (e) of an employee's weekly rest days specified in section 27;
  - (f) of an employees annual leave entitlement, days taken and days due specified in section 28;
  - (g) of maternity leave specified in section 29;
  - (h) of sick leave specified in section 30;
  - (i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;
  - (j) of food rations where applicable;
  - (k) specified in section 61;
  - (l) of a record of warning letters or other evidence of misconduct of an employee; and
  - (m) any other particulars required to be kept under any written law or as may be prescribed by the Minister.
- (2) An employer shall permit an authorised officer who may require an employer to produce for inspection the record for any period relating to the preceding thirty six months to examine the record.
- (3) Where an employer who employs a child maintains a register in accordance with section 61, the employer shall be deemed to have complied with this section if the register contains in relation to each child, the particulars required to be kept by the employer under subsection (1).

17. As no records were availed an inference will be drawn that these records would have revealed that the Claimants were not granted leave nor were they allocated off days as required. In their submissions the Claimants brought up the issue of underpayment. This issue was not pleaded and was not part of the claims presented to Court. That prayer would fail.

18. In the final analysis I will enter judgment for the Claimants as follows:-

1<sup>st</sup> Claimant

- a. one month in lieu of notice Kshs. 5,000/-
- b. leave dues for leave not taken Kshs. 5,000/-
- c. pay for 16 days worked in January 2010 Kshs. 2,666/-
- d. Kshs 17,666/- for 53 Sundays worked at double daily rate
- e. Compensation for unlawful termination for 6 months Kshs. 30,000/-

2<sup>nd</sup> Claimant

- a. one month in lieu of notice Kshs. 5,000/-
- b. leave dues for leave not taken Kshs. 5,000/-
- c. pay for 16 days worked in January 2010 Kshs. 2,666/-
- d. Kshs 17,666/- for 53 Sundays worked at double daily rate
- e. Compensation for unlawful termination for 6 months Kshs. 30,000/-

19. There will be no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this **23<sup>rd</sup>** day of **September** 2015

**Nzioki wa Makau**

**JUDGE**