



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

**AT MOMBASA**

**CAUSE NO. 96 OF 2014**

**RAJAB ABDU OMAKADA ..... CLAIMANT**

**=VERSUS=**

**READY CONSULTANCY COMPANY LIMITED ..... RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

The Claimant has brought this suit Claimant Kshs.608725 as employment benefits and compensation for unfair termination of his employment by the Respondent on 28.10.2013.

The Respondent has denied liability and accused the Claimant of deserting work voluntarily after being given a transfer to another station. The suit was heard on 11.6.2014 when Claimant testified as CW1 and Respondent called Gakuyu Mwadime and Gloria Edegwa as RW1 and 2 respectively.

**CLAIMANT'S CASE**

CW1 was employed by the Respondent by a contract of employment dated 7.8.2009 as a Security Guard. He was posted at the Mombasa Maize Millers (Headquarter of the Respondent) and then transferred to a branch where he worked until 9.10.2013 when he was transferred to the Headquarters due to an alleged theft of wheat. At first he refused the transfer but after consulting with the Boss of the Mombasa Maize Millers, he proceeded on the transfer.

On 28.10.2013 CW1 reported to work as usual and at 7.15 a.m. His supervisor Mr. Isaya called CW1 to his office at the Headquarters to work from there. At that time CW1 had been attached at Milly Guru Nanak go-down. CW1 protested and demanded for a transfer letter but in response Mr. Isaya told CW1 to go home.

At 8.30 a.m. Isaya called CW1 again and told him to go see Gloria (RW2) at her office at the Headquarters. On arrival he met Gloria, Mercy, Ali Sese and Isaya (supervisor). Gloria accused CW1 of disturbing people with the issue of NSSF and NHIF and enlightening other workers. She directed CW1 to go downstairs to wait for a letter after she had checked CW1's records.

CW1 waited but no letter was given and he went to report to the Labour Office. When Gloria was summoned by the Labour Officer, she stated that CW1 was a member of trade union and CW1 ought to lodge the claim with the union.

CW1 however denied being a member of any trade union. Later CW1 instructed lawyers who wrote demand letters and thereafter filed this suit. He prayed for Salary in lieu of Notice, House Allowance arrears for 52 months, leave for 5 years and refund of unremitted NSSF deductions. He further prayed for overtime worked in 358 days, each day working for 12 hours. He also prayed for compensation for unfair termination.

On cross-examination by the defence counsel, CW1 confirmed that initially he had been employed by Mombasa Maize Millers on 18.1.22008 but from 7.8.2009, Respondent took over as the new employers. CW1 contended that Laki was employee of the Mombasa Maize Millers working as Security Officer.

CW1 reported Laki's conduct to the General Manager and the Boss of the millers. CW1 admitted that nobody told him that he was dismissed but the conduct of Gloria meant that CW1 was dismissed.

CW1 denied that his salary was inclusive of House Allowance. He also denied ever going for any leave. He contended that he reported to work at 6.00 a.m. And left at 6.00 p.m. According to the records which he alleged were in the custody of the Respondent.

### **DEFENCE CASE**

RW1 is the Respondent's supervisor of the security guards. He stated that CW1 was attached at Milly Grain Millers at Guru Nanak as security guard.

On 28.10.2013, RW1 received information from Ali Sese, that CW1 had quarreled with Mercy a workmate after CW1 went to sleep after reporting to work.

RW1 called CW1 to go to the Headquarters to work from there but he refused. At 9.00 a.m. on the same day, CW1 went to the Headquarters to the office of Gloria while looking mad and complaining about NSSF deductions not being remitted and saying that he had been dismissed. After talking to Gloria, CW1 went to the Labour office.

On cross-examination RW1 confirmed that on the fateful day, he called CW1 by phone to relocate from Milly Guru Nanak to go and work at the Headquarters. CW1 was to leave Mercy to work at the Milly Guru Nanak.

RW1 stated that attendance register was signed upto 7.00a.m. RW1 denied that the transfer of CW1 was not due to the alleged theft of wheat. He admitted that on 27.10.2013 when Mercy alleged CW1 slept at work was on a Sunday and CW1 was off duty. RW1 admitted also that on 28.10.2013 when CW1 went to talk to Gloria, the latter sent RW1 downstairs to check CW1's records but the records were locked up by Ali Sese. On re-examination RW1 changed his story to say that CW1 was found sleeping on 25.10.2013 and not 27.10.2013.

RW2 is the Respondent's manager. She confirmed that CW1 worked for the Respondent but left without anybody dismissing him. According to her the last day CW1 signed the Attendance Register was on 26.10.2013 when CW1 came to her office with Ali Sese, RW1 and Mercy who was crying. RW2 alleged that he had received report that CW1 was found sleeping at work and that he was reporting to work late and leaving earlier than time. There was also a complaint by Mercy who came crying saying that CW1 had insulted her that morning. On the other hand RW2 alleged that CW1 was complaining that he had been dismissed.

When RW2 asked all of them to record statement, CW1 refused and left saying that he was being mistreated and that had already been dismissed.

RW2 denied ever dismissing CW1 or ever serving him with Show Cause letter as required by the law.

CW1 returned with a letter from the Labour Officer which RW2 responded to denying the alleged dismissal. According to RW2, CW1 was only being transferred after the client complained about CW1's

conduct in order to be near the Respondent's office for supervision. RW2 agreed that security workers worked from 6.00 a.m. to 6.00 p.m. but contended that they were adequately paid as per the General Wage Order.

According to RW2, CW1 disappeared from work between 2010 and 2011 and during that time no NSSF contributions were remitted for him. He also denied that CW1 worked overtime.

On cross-examination by the Claimant, RW2 denied that CW1 was attacked and disappeared in 2009. She also admitted that there were months when NSSF was not remitted. RW2 denied that she told CW1 to go downstairs to wait for a letter. She stated that Laki had no power to dismiss any employee. She however confirmed that Laki attended the said meeting at her office on the fateful day. RW2 further denied ever calling CW1 to her office to collect Kshs.19950 in order for him to drop this suit. RW2 stated that CW1's salary was Kshs.13075.

After the hearing both parties filed written submissions.

### **ANALYSIS AND DETERMINATION**

After considering the evidence and the submissions, the following issues arose for determination:

- (a) whether the Claimant deserted work or he was unfairly terminated.**
- (b) Whether the orders sought out to issue.**

#### **Desertion vs. unfair termination**

The Claimant contends that he was unfairly dismissed by his supervisor (RW1) on 28.10.2013 for protesting against transfer by the said RW1 to a new station through a telephone call. That when he was summoned by RW2 to the office at the Respondent's Head office, RW2 accused him of enlightening other workers through his complaint about NSSF and NHIF remittance. She then ordered CW1 to go downstairs to wait for a letter. According to CW1, although RW2 did not tell him that he was dismissed from employment, her conduct demonstrated that she had dismissed him and went to report the matter to labour office.

On the other hand, however, the Respondent has contended that there were several complaints raised by a client and co-worker (Mercy) that CW1 was misconducting himself and was not properly performing his duties. As a result the CW1 was transferred to work at the headquarters where he could be closely supervised by the office. It is the defence case that CW1 refused the transfer and was summoned to the office where he came while complaining that the supervisor had dismissed him and that his NSSF deductions had not been remitted to the fund. That when RW2 requested all parties who were present in her office to record statement about the alleged misconduct, CW1 refused went away only to return with a letter from the labour office. According to the Respondent, CW1 deserted work without anybody dismissing him.

The court agrees with the defence on a balance of probability that CW1 deserted employment protesting against transfer from Milly Guru Nanak to the millers headquarters. It is possible that he had a genuine fear of being exposed to Mr. Laki who had earlier on differed with CW1, or feared that he was being victimized for the alleged theft of wheat or quarrel with Mercy. However the court believes that CW1 had no legal right to disobey orders from his supervisor or RW2 regarding the transfer by phone or when asked to record statement. He also did not have any right to create disturbance at the RW2's office when he was summoned there regarding his alleged misconduct.

The court however takes great exception with the manner in which the supervisor transferred the Claimant by phone. Ordinarily a transfer should be in writing followed by proper handing over of ones station to the employer or his successor. The court also notes that the Claimant had a valid grievance about his unremitted NSSF dues. Nevertheless, the foregoing reasons did not warrant the Claimant to

disobey orders by his seniors or to desert work.

### **Reliefs**

The prayer for salary in lieu of notice is dismissed in view of the finding that the Claimant voluntarily deserted work protesting against transfer by telephone and the failure by the Respondent to remit NSSF dues.

The prayer for House Allowance is also dismissed because no evidence was adduced to support the claim. The RW2 contended that the salary was Ksh.13,075 and it was inclusive of House Allowance. No records were produced, but the court agrees with the defence that the salary was consolidated. One wonders why the Claimant never raised any complaint about the same until he left work yet he was complaining about NSSF remittances alone. The court shall make the presumption that the Claimant's claim at this time is only an afterthought which may lead to unfair enrichment.

The prayer for leave was not challenged in evidence and no leave records were produced. Although in his own testimony CW1 mentioned that he had just returned from leave on 30.9.2013, he did not explain the nature of the leave he had taken and how many days they were. The defence never raised it on cross-examination or in her own evidence. Consequently the court grants the prayer for accrued leave but only for the 3 years immediately before filing this suit in view of Section 90 of the Employment Act regarding limitation of actions. Hence  $Kshs.13,075 \times 21 \div 30 \times 3 = Kshs.27,457.50$ . The court also grants the prayer for the unremitted NSSF at the rate of Kshs.400 per month for 8 months as prayed which amounts to Kshs.3200. The prayer for overtime is dismissed because according to the Respondent the salary of Kshs.13075 was the salary prescribed under the General Wage Order for security guards working for 12 hours per day. In addition, why didn't the Claimant raise the issue before the termination of employment? He should have reported the matter to the labour office or this court while the contract was subsisting. The court finds the claim as being an afterthought.

The Respondent is however directed to issue Claimant with a Certificate of Service.

### **DISPOSITION**

Judgment is entered for the Claimant for Kshs.30,657.50. He will also have Certificate of Service and costs plus interest.

**Dated, Signed and delivered this 25<sup>th</sup> July 2014.**

**O.N. MAKAU**

**JUDGE**