



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

**CAUSE NO. 1770 OF 2011**

ERIC MUSA ORUORI .....CLAIMANT

VERSUS

MARY WAMBUI KANG'ETHE T/A

NEW NEEM SUPERMARKET ..... RESPONDENT

**JUDGMENT**

The Claimant Eric Musa Oduori filed this suit against Mary Wambui Kang'ethe T/a New Leem Supermarket. The suit was commended by Memorandum of Claim dated 14<sup>th</sup> October 2011 and filed in court on 18<sup>th</sup> October 2011. The claim was filed through Namada & Company Advocates.

In the Memorandum of Claim the Claimant alleged that he was employed by the Respondent between 2007 and 4<sup>th</sup> January 2010 as a Security Guard. His monthly salary was Kshs.5,500/=. He alleged that his employment was terminated on 4<sup>th</sup> January 2010 without any lawful reason and in contravention of the provisions of the Employment Act. He prayed for the following reliefs:

i. Notice	-	Kshs.5,500
ii. Unpaid leave	-	Kshs.16,500
iii. Service pay	-	Kshs.6,600
iv. Compensation		Kshs.66,000
Total	-	<b><u>Kshs.94,600</u></b>

The Claimant further prayed for costs and interest.

The Respondent did not file Response to the Claim. Hearing and mention notices were served on the Respondent severally but she never attended court. When the case came up for hearing on 19<sup>th</sup> May 2014 I allowed the case to proceed in the absence of the Respondent after confirming that she was served with hearing notice dated 20<sup>th</sup> May 2014 according to the affidavit of service on record filed in court on 23<sup>rd</sup> September 2014.

The Claimant was on that day represented by Mr. Wathome. The Claimant testified that he was employed in the Respondent's shop called New Leem Supermarket as a guard on 17<sup>th</sup> September 2007. On 24<sup>th</sup> December 2009 he was injured by thugs while at work at 3.00 am. He was taken to Kamitha Health Centre and treated. He lost a finger in the attack. He stayed at the Health Centre until morning then went to the supermarket where he was given salary advance to go to hospital. After treatment he

went back to work on 10<sup>th</sup> January 2010 but was told by the Manager Mr. Kamau that there was no work for him. He was not paid any terminal benefits. He never went on leave. He was not a member of NSSF or NHIF.

He testified that on the day he was injured nothing was stolen from the shop. He did not make a claim for compensation for the injury. He prayed for judgment as set out in his Memorandum of claim.

The Claimant's advocates filed written submissions on 3<sup>rd</sup> October 2014.

I have considered the Memorandum of claim and documents attached thereto. I have also considered the evidence of the Claimant and the written submissions filed on behalf of the Claimant.

The issues for determination are whether there is sufficient proof of a relationship between claimant and Respondent, whether claimant was unfairly terminated and whether he is entitled to the reliefs sought.

I have looked at the medical history which confirms that the Claimant was treated at the hospital for attacks sustained while at work at 3 am which corroborates the Claimant's statement in court.

The Respondent having been served and failed to controvert this allegation by the claimant I find on a balance of probabilities that the claimant was employed by the Respondent.

Having been dismissed verbally following his injury in an attack while at work, the termination of employment of the claimant was unfair within the provisions of section 45 of the Employment Act. The Claimant prayed for several remedies.

Before I consider the remedies I have to establish the salary of the claimant at the time of termination as this will be the basis for granting the reliefs sought. The claimant in both his pleadings and in his evidence stated that his salary was Kshs.5,500/= per month. I take judicial notice of Section 48 of the Labour Institutions Act. I am also aware that the minimum wage for night watchmen according to the Regulation of Wages (Amendment) Order, 2009 was Kshs.6,893/=. I will therefore adopt this as the basic salary for the claimant. To this I will add 15% house allowance which comes to Kshs. 7,927/= as the gross salary for the Claimant. Having been unfairly terminated the Claimant is entitled to notice. I award him Kshs. 7,927/= being one months salary in lieu of notice.

The Claimant also prayed for leave not taken. Under section 28(1) of the Employment Act, the Claimant is entitled to 21 days for each year worked or 1.75 days per month. Having worked for 26 months he is entitled to 45.5 days. At a salary of Kshs.7,927/= per month the claimant is entitled to Kshs. 12,022.60 which I award him.

The Claimant also prayed for service pay. He is entitled to the same under section 35(5) of the employment Act. I award him 15 days for each year for the 2 years worked at Kshs.7,927/=.

The Claimant has further prayed for compensatory damages for wrongful termination. I have considered his length of service and the circumstances under which his employment was terminated. I especially take into account the fact that he was injured while in employment and the injury was not reported by the Respondent as required under the Work Injury Benefits Act for purposes of compensation. He lost a finger as a result of the injury.

For these reasons I award the Claimant 12 months salary as compensation in the sum of Kshs.95,124/=.

The Claimant shall also have costs of this suit and interest on decretal sum from date of judgment.

Orders accordingly.

Read in open Court this 18<sup>th</sup> day of December, 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:**

Osanyo holding brief for Namada for Claimant

No appearance for Respondent