



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Citation Cause 168 of 2012**

**SAMUEL KONGA**

**CLAIMANT**

**v**

**LAVINGTON SECURITY COMPANY LTD**

**RESPONDENT**

### **JUDGMENT**

#### **Background**

1. Samuel Konga (the Claimant) filed a Memorandum of Claim on 7 April 2011 against Lavington Security Company Ltd (the Respondent) and the issue in dispute was stated as

*Non-payment of salary in lieu of notice, leave, unlawful termination of employment and overtime.*

2. A Notice of summons addressed to the Respondent was issued on 7 April 2011 by the Registrar of the Court.

3. On 16 November 2011, the file was placed before Justice Madzayo and both parties were marked as absent. The Judge ordered that the matter be mentioned on 2 February 2012.

4. On 17 November 2011, the Registrar of the Court wrote to both the Claimant and the Respondent that the Cause was scheduled for mention on 2 February 2012. The address used for the Respondent was P.O. Box 98708-80100 Mombasa, which is the address which had been indicated by the Claimant in the Memorandum of Claim.

5. On 2 February 2012, the matter was mentioned before Justice Mukunya and it is only the Claimant who attended. The Judge, as was the practice of the Court then, directed that the Respondent should file a Response on or before 16 February 2012 and fixed the hearing for 13 June 2012. The Claimant was ordered to serve a hearing notice upon the Respondent and the Registrar to notify the Respondent to file a Response.

6. As a consequence the Registrar wrote to the parties on 14 February 2012 informing them of the orders of the Court and that the Cause was fixed for hearing on 13 June 2012.

7. On 13 June 2012, the Claimant appeared before Justice Madzayo but there was no representation for the Respondent. The Court ordered the Respondent to file its documents and serve the Claimant on or before 4 July 2012 and set the Cause for mention on 10 July 2012. On 10 July 2012 only the Claimant appeared and further mention was set for 31 July 2012.

8. There is on record an affidavit of service sworn by the Claimant on 24 July 2012 that he served the

Respondent with a hearing notice for 31 July 2012 upon a Mr. Shallet C. Kairus.

9. On 31 July 2012 none of the parties appeared and the Cause was stood over generally. The Cause was mentioned before my brother Justice Onesmus Makau on 24 September 2012 and he directed that the hearing proceed on 12 November 2012.

10. There is an affidavit of service by the Claimant sworn on 17 August 2012 and filed in Court on 21 September 2012 deposing to the fact that he served a Mr. Shallet C. Kanos, a Human Resources officer of the Respondent on 13 August 2012 with a mention notice for 24 September 2012.

11. On 25 September 2012, the Registrar wrote to both parties informing them that the Court had set the Cause for hearing on 12 November 2012.

12. On 12 November 2012 the file was placed before my sister Lady Justice Wasilwa and only the Claimant was in Court. The Judge noted on record that the Respondent had been served but she ordered the file be transferred to Mombasa where the cause of action arose.

13. The record bears out that the Respondent had been served with a hearing notice for the hearing on 12 November 2012, and an affidavit of service by Jackson Ngugi indicates that the Respondent acknowledged the service on 29 October 2012 by stamping the on the Notice.

14. Consequent to the transfer of the file to Mombasa, the Claimant appeared in the registry and fixed a hearing for 26 March 2013.

15. On 26 March 2013, after satisfying myself that the Respondent had been served with a hearing notice and an affidavit of service by a process server Timothy Kiringi filed in Court on 20 March 2013, I allowed the hearing to proceed.

16. I have set out the background in detail to establish that the Respondent was aware of the Cause the subject of this judgment and neglected or failed to file a Response or send a representative during the various Court appearances.

### **Claimant's case**

17. According to the pleadings and sworn evidence of the Claimant, he was employed by the Respondent from 14 November 2004 as a security guard. On 21 January 2010 he was dismissed without notice or payment of salary in lieu of notice, after working for 5 years and that his salary at time of termination was Kshs 6000/-.

18. It was Claimant's further evidence that he never went on leave during the 5 years employment with the Respondent

19. Further it was his case that the Respondent had refused to pay his salary for December 2009 and he made several visits to the Respondents offices in Mombasa to no avail and that it was only upon making a report to the Ministry of Labour upon which he was paid his December 2009 salary.

20. The Claimant is therefore seeking a total of Kshs 197,600/-. I will discuss each individual head of claim shortly.

21. The Claimant annexed to the Memorandum of Claim a letter marked 'SK 3' from the District Labour Office to the Respondent asking the Respondent to appear for conciliation and to produce employment records.

22. The Claimant also annexed to the Memorandum of Claim 'SK 2' being a demand letter to the Respondent from his Advocates, Gichana Bw'Omwando & Co. Advocates dated 6 August 2010.

## **Issues for determination**

23. In my view the central issue for determination is whether the termination of the Claimant was unlawful and if so what the appropriate remedies are.

### ***Whether the termination was unlawful***

24. Section 41 of the Employment Act, 2007 has created a statutory obligation upon an employer to notify an employee of the reasons for termination if the termination is on one of the grounds of *misconduct*, *poor performance* or *physical incapacity*. The employer is similarly required to listen to and consider any explanations given by the employee. The requirement in section 41 is what has been referred to as natural justice in administrative law and what is called procedural fairness in industrial relations/employment law field.

25. Section 43 of the Employment Act, 2007 on the other hand obligates an employer to prove the reasons for the termination. Section 45 of the Employment Act on its part requires that the reasons given or proved by an employer must be valid and fair reasons. In the industrial relations/employment law field this is now generally referred to as substantive fairness.

26. In the instant case, all that I have is the testimony by the Claimant and no pleading or evidence from the Respondent. Considering the Claimant gave sworn testimony I do find that his termination was procedurally unfair because there is no indication that he was notified of the reasons for the termination as required by section 41 of the Employment Act, and also that the termination was substantively unfair because the Respondent by failing to appear in Court to give its side of the story has failed to prove the validity or fairness of the reasons for the termination as required by section 45 of the Employment Act.

27. I also do find that the Claimant was in the employ of the Respondent for slightly 5 years and about two months, that is from 14 November 2004 up to 21 January 2010.

28. In any case, sections 9, 10 and 74 of the Employment Act require an employer to do certain things and keep records and since the Respondent neglected or failed to appear or defend the Cause, I would invoke section 10(7) of the Employment Act and consider that it has failed to discharge the burden of disproving the terms of employment of asserted by the Claimant.

### ***Appropriate remedies***

#### ***One month salary in lieu of Notice***

29. It is not disputed that the Claimant was employed by the Respondent in 2004 and was terminated in 2010. At the time of termination the unchallenged evidence is that he was earning Kshs 6000/- per month.

30. Section 35(1)(c) of the Employment Act requires that contracts such as the one between the Claimant be terminable by either one month's notice or payment of one month's salary in lieu of notice.

31. The Claimant has satisfied me that he is entitled to payment of one month salary in lieu of notice.

#### ***Public holidays worked, Overtime***

32. The Claimant sought Kshs 17,600/- as payment for public holidays worked and Kshs 144,000/- being overtime. In my view, the Claimant did not lay before the Court evidence on which and the actual number of public holidays he did work and was not paid, the overtime and rate of calculation and number of hours.

33. These claims are in the nature of special damages and should have been specifically proved, but were not. I am unable to assess the quantum thereof based on the testimony presented before Court.

#### ***Leave Allowance***

34.The Claimant also sought Kshs 30,000/- which he indicated was leave allowance for 5 years. The Employment Act, 2007 does not make provision for payment of leave allowance. Section 28 thereof provides that an employee shall be entitled to not less than 21 days annual leave after every twelve months consecutive service, with full pay.

35.The letter to the Respondent from the Ministry of Labour marked 'SK 3' requested the Respondent to produce for inspection and examination the employment records kept in respect of the Claimant. The Respondent ignored or failed to respond to this lawful request. The Respondent had the opportunity to demonstrate whether the Claimant went on leave during his 5 years service.

36.In my view, based on the provisions of section 28 of the Employment Act and my finding that the Claimant was in the employ of the Respondent for about 5 years and 2 months I am able to assess payment in lieu of leave (not leave allowance) not granted at the equivalent of 5 months' salary which I assess in the sum of Kshs 30,000/-

37.I need to note that under the Labour Institutions Act and the various Wages Orders, provision is usually made for payment of leave allowance.

### ***Terminal benefits***

38.Section 35(5) of the Employment Act, 2007 provides that members or contributors to the National Social Security Fund are not entitled to payment of service pay which I take is what the Claimant pleaded as terminal benefits.

39.The Claimant attached as 'SK 4' and 'SK 5', documents which suggest that he was a member of the National Social Security Fund. In the circumstances I would decline to make an award towards terminal benefits.

### ***Compensation for unfair termination***

40.The Claimant in his pleadings and testimony did not seek any compensation as contemplated by section 49(1) (c) of the Employment Act, of the equivalent of not more than 12 months gross wages.

41.However, it is my considered view that in granting a remedy, being a Court of both law and equity, this Court should grant an appropriate remedy and an appropriate remedy must be an effective remedy.

42.The Claimant was a lay person conducting his case. In the Memorandum of Claim he sought *any other relief this Honourable Court may deem fit and just to grant to meet the ends of justice*. Section 12(3)(v) and (viii) of the Industrial Court Act empowers this Court to make an award of compensation in any circumstances contemplated under the Act or any other written law or grant any other appropriate relief as the Court may deem fit to grant, respectively.

43.I have also reached the conclusion that the termination of the Claimant was procedurally unfair and that the Respondent failed to attend Court to prove the validity or fairness of the reasons for the termination.

44.Considering my discussion in paragraphs 34, 35, 36 and 37 hereinabove, it is my considered view that an award of the maximum twelve months' gross salary would meet the ends of justice and equity. I do assess such compensation in the sum of Kshs 72,000/-.

### **Conclusion and Orders**

45.The claims for public holidays worked and overtime are declined.

46.In the final result I do find that the termination of the Claimant was unlawful in that it lacked procedural fairness and the Respondent has failed to prove substantive fairness and the Claimant is

awarded:

- |       |                                    |               |
|-------|------------------------------------|---------------|
| (i)   | One month salary in lieu of Notice | Kshs 6000/-   |
| (ii)  | Payment in lieu of 5 years leave   | Kshs 30,000/- |
| (iii) | 12 months compensation             | Kshs 72,000/- |

**TOTAL**

**Kshs 108,000/-**

47. There will be no order as to costs.

**Dated, delivered and signed in open Court in Mombasa on this 12<sup>th</sup> day of April 2013.**

**Justice Radido Stephen**

**Judge**

**Appearances**

Samuel Konga

Claimant

In person