



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 944 of 2012

DOUGLAS OUMA OYOBO.....CLAIMANT

VS.

P.W. WASWA.....1ST RESPONDENT

JAPA PROTECTION SYSTEMS.....2ND RESPONDENT

Mr. Oyatta Ibrahim for the Claimant

AWARD

The Claimant filed a Memorandum of Claim on 4th June 2012 seeking various remedies for unlawful termination of his employment.

The particulars of the Claim are that, he was employed by the Respondents on 1st March, 2006 as a Security Guard at a basic monthly salary of Kshs.5,000 and this amount was subsequently increased to Kshs.6,600 per month in June 2011.

That he worked continuously for the Respondents until 15th March, 2012 when his employment was unlawfully and unfairly terminated by the Respondents, in that ;

- (a) He was not given any reason for the termination;
- (b) He was not given a hearing prior to the termination;
- (c) He was not given any notice or paid in lieu thereof; and
- (d) He was not paid any terminal benefits upon termination.

In his Memorandum of Claim, he has pleaded that on 15/3/2012, the 1st Respondent, Mr. P. W. Waswa stopped him from working and sent him home for 4 days and was to return on 19/3/2012. That when he returned on 19/3/2012, he was told to hand over his uniform and come back on 15/4/2012 to collect his terminal dues because his services were no longer required.

He testified under oath in support of his case that on 1/3/06, he was stationed at Tusky's Super market at Moi Avenue, Nairobi. That he had served the Respondent for 6 years and had a clean record during that period.

He said that he was neither registered with NSSF nor a member of any pension scheme. That he

worked 7 days a week without any rest days and also worked during public holidays. He was not paid any overtime.

That he was never given leave for the 6 years he worked nor was he paid in lieu thereof or got any off days.

He told the Court that a manager of Tuskys Super Market alleged that a customer had paid the Claimant to guard his luggage at the entrance of the Supermarket. He told the court that the allegation was not true. The Manager sent him to the 2nd Respondent's office at Ngara, where he found the 1st Respondent, Mr. Patrick Waswa. Mr. Waswa sent him home as earlier stated and later terminated his services on 19/3/2012. Mr. Waswa did not give him a chance to defend himself. He told the court that no customer had complained at all that he had asked or taken any money from them so as to keep their luggage.

He told the court that he went several times to demand his terminal benefits in vain until he decided to come to court.

The Respondents were served with the Statement of Claim on 4/6/2012 at 11.00 a.m. at the offices along Ngara Road and an Affidavit of Service was duly filed on 12/7/2012 by Mr. Aggrey Ochome, a Process Servicer of the Court. The Managing Director of the Respondent received the summons and declined to sign the same. The respondents did not enter any appearance nor file any statement of response.

That notwithstanding, the Respondents were served with a hearing notice for 22/1/2013 dated 10/01/2013 on 11/1/2012 at 2.30 p.m. at the Respondent's offices located at Ngara Post Office along Ngara Road. The Notice was served on one Mr. Wekesa, who was personally known to the Process Server, Mr. Edward Murithi Muchemi. Mr. Wekesa had acknowledged receipt by signing a copy of the Hearing Notice filed in court on 21/1/2013.

The court being satisfied that the Respondents were in default of appearance and had failed to respond to the Claim inspite of service directed that the matter proceed *ex-parte*. The hearing proceeded on 22/1/2013. Written submissions were filed on 8th February 2013 and the matter was reserved for Judgement on 21/2/2013.

The Claimant prays that, the Court finds that his employment was unlawfully and unfairly terminated and enter judgment in his favour for payment of;

- a. 12 months' salary being compensation for unlawful termination of employment.
- b. One month's salary in lieu of Notice at Kshs.9,732.45.
- c. 126 days in lieu of leave days not taken for 6 years at Kshs.40,824.00.
- d. Severance pay for each completed year of service at Kshs.29,160.00.
- e. Salary underpayment in terms of Legal Notice No. 38 of May 2007; No.70 of 2009; No.89 of 2010 and No.64 of 2011 totaling Kshs.144,459.20.
- f. Overtime for Monday to Saturday calculated at 12 hrs x 1.5 x 4 x 12 x 6 x 40 in the sum of Kshs.207,360/=.
- g. Overtime for Sundays calculated at 12 hrs x 2 x 4 x 12 x 6 x 40 totaling Kshs.276,480/=
- h. Salary for 15 days worked in the month of March 2012 at Kshs.4,866; and
- i. Overtime for Public Holidays worked calculated at (11 x 2x6x324) = Kshs.42,768/=.

The Claimant has attached to the Statement of Claim, the Regulation of Wages (Protective Security Services) Order 1988 which provides for payment of 15% house allowance of the basic monthly minimum wage; 52 hours spread over six days of the week as the normal working hour for the Security Services and payment of overtime at the rate of 1½ times, normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and twice the normal rate of wages per hour in respect of any time worked on a rest day.

He has also attached Legal Notice No.64 – The Regulation of Wages (General) Amendments Order, 2011 showing the minimum monthly wage for a night watchman was Kshs.8,463 (exclusive of housing allowance). Legal Notice No.98, The Regulation of Wages (Amendment) Order 2010 effective 1st May 2010, indicating that the minimum monthly wage (exclusive of housing allowance) for a Night Watchman was Kshs.7,525/=.

Legal Notice No.70, The Regulation of Wages (General) (Amendment) Order 2009 effective from 1st May 2009 showing that the minimum wage (exclusive of housing allowance) for night watchman was Kshs.6,839/=, and Legal Notice No.38; The Regulation of Wages (General) (Amendment) Order 2006 effective 1st May, 2006; showing that the minimum wage (exclusive of housing allowance) for night watchman was Kshs.5,796

The tabulation of the Claims made by the Claimant aforesaid with respect to payment in lieu of Notice, Annual Leave, Severance pay, overtime and salary were duly made by the Union and a demand Notice dated 15/4/2012 was given to the Respondents. The notice is also attached to the Memorandum of Claim and revised in Appendix B produced in court. The court finds that the said claims have been duly proven by the Claimant on a preponderance of evidence and enters judgment in favour of the Claimant as follows;

1. Kshs.8,723.90 being one month's salary in lieu of notice.
 2. Kshs.45,396 in lieu of leave days not taken for 6 years (156 days @ 291/= per day).
 3. 15 days salary for March 2012 , (15 days @ 291/= per day) = Kshs.4,866/= .
 4. Overtime /weekdays: (20hrs x 1.5 rate x 4 wks x 12 months x 6 yrs x 33/70 per hr = 291,168.00.
 5. Overtime/Sundays: (12hrs x 2 rate x 4 wks x 12months x 6 yrs x 33 x 70 per hr) = 232,934.40.
 6. Underpayments:

| | | |
|-----------------------|---|-----------|
| May 2006 – April 2009 | = | 35,073.00 |
| May 2009 – April 2010 | = | 24,594.00 |
| May 2010 – April 2011 | = | 24,653.00 |
| May 2011 – Feb. 2012 | = | 21,239.00 |
 7. Public Holidays; 10 days x 12hrsx2x6yrsx33/70 per hr = 48,528/=
 8. Severance pay for 6 years (90 days @ 291/= per day) = 26,190/=
- Total = Kshs.763,365/=.

The Claimant has proven that his termination of employment was wrongful and unfair in that he had not committed the alleged misconduct and was not given an opportunity to defend himself before the decision to terminate his services was arrived at.

The Respondent having failed to defend the claim missed the opportunity to provide any justification for the termination of the employment of the Claimant.

That notwithstanding, the court has evaluated the Claimant's evidence and come to the

conclusion that there was no valid reason to terminate the services of the Claimant and that the termination was not effected in terms of a fair procedure.

Accordingly, the court finds that the Claimant lost his means of livelihood wrongfully and unfairly and has suffered loss and damage.

In terms of Section 49(1)(c) of the Employment Act, 2007, the court awards him 6 months' gross salary as compensation for the unlawful and unfair termination in the sum of Kshs.52,343/=.

Total Award = Kshs.815,708/=.

The Respondent to pay costs of the suit.

It is so ordered.

Dated and Delivered at Nairobi on this 25th day of June, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE – INDUSTRIAL COURT