



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**CAUSE NO. 43 OF 2013**

**THOMAS OTUKE MATATO**

**CLAIMANT**

**v**

**ALINA SECURITY SERVICES LTD**

**RESPONDENT**

**JUDGMENT**

1. Thomas Otuke Matato (Claimant) was employed by Alina Security Services Ltd (Respondent) on 23 December 2006 as a security guard.
2. On 17 February 2010 the Respondent's Operation Manager Dismus Ogot wrote to him a letter suspending him from work for 7 days without pay. The letter gave the reason for termination as *insubordination due to failure to report to work on 16 February 2010*. He alleges he was subsequently terminated verbally.
3. The Claimant was not happy and he sought legal advice and later filed a Statement of Claim on 27 February 2013 claiming the termination was unlawful and without justifiable reason.
4. According to the record, the Respondent's representative one Ms. Saida Abeid was served with Notice of Summons and copy of Statement of Claim on 22 March 2013.
5. On 25 April 2013 the Cause was placed before me and only Mr. Omwenga on behalf of the Claimant was in attendance. I was not satisfied with the affidavit of service which had been filed on 25 April 2013 and I therefore ordered the Claimant to file a proper affidavit of service and set hearing for 10 June 2013.
6. On 10 June 2013 the Cause was called up for hearing and there was on record an affidavit of service filed in Court on the same day showing that Ms. Saida Abeid had acknowledged service of a hearing notice. Ms. Abeid had signed and stamped the hearing notice in acknowledgment and a copy was attached to the affidavit of service filed in Court on 10 June 2013.
7. Having satisfied myself that the Respondent had been served with a hearing notice, I allowed the Cause to proceed. In this respect the Cause proceeded as an undefended Cause because the Respondent had failed to file a Response within 14 days of service of Notice of Summons and Statement of Claim and further failed to appear at the hearing despite service of a hearing Notice.

**Statutory burden in unfair termination complaints**

8. The statutory burden placed upon the shoulders of an employee who alleges unfair termination or wrongful dismissal is set out in section 47(5) of the Employment Act. The relevant provision requires the employee or Claimant to prove that the termination was unfair or dismissal wrong.
9. Section 46 of the Act has provided for circumstances which if proved would mean the termination

- was 'automatically unfair'. These include termination because of a female employee's pregnancy, going on entitled/due leave, participation in activities of a trade union outside working hours among other grounds.
10. A termination could also be unfair because the written notice contemplated by section 35(1)(c) of the Act was not given, or that the procedural safeguards of section 41 of the Act were not complied with.
  11. A termination could also be unfair because the employer did not comply with any contractual terms as to termination. The list or reasons enumerated here are not exhaustive at all.

### **Claimant's case**

12. In the Cause under consideration, the Claimant testified that he was not issued with an employment contract but was suspended through letter dated 17 February 2010 and later verbally sacked. No reasons for the dismissal were given.
13. According to a payroll for August 2009 (Exh 4) the Claimant was a supervisor earning a gross salary of Kshs 7000/-. After the dismissal, the Claimant sought legal advice and his Advocates sent out a demand to the Respondent who replied through letter dated 30 July 2010 (Exh. 2). The letter stated that the Claimant had absconded from duties and that the Claimant had been on three months' renewable contracts. The letter also stated that the Claimant had involved himself in criminal activities.
14. The Claimant therefore sought three months notice pay, unpaid leave not taken, severance pay, stand by days, 36 days off unpaid and compensation.

### **Evaluation**

15. From the payroll record, it is not in dispute that the Claimant was being paid a monthly wage. Under section 35(1)(c) of the Employment Act, a contract where wages are paid periodically at intervals of or exceeding one month are terminable by the giving of notice in writing. If no notice is given, section 36 of the Act expects payment in lieu of Notice.
16. The Claimant was terminated verbally. No written notice was given. The Claimant further testified no reasons were proffered for the termination. The Respondent despite and in spite of service of Summons never filed a Response. It did also not take part in the hearing. It failed to take the opportunity availed to it by section 43 of the Act to prove the reasons for the termination and by section 45 of the Act to prove that the reasons were valid and fair. Equally, it did not attempt to justify the reasons for the termination. Therefore, I reach the conclusion that the termination was unfair.

### **Appropriate relief**

#### ***Compensation***

17. Compensation of up to an equivalent of a maximum twelve months' gross salary is one of the primary remedies set out by the Employment Act where a determination is made that termination of employment was unfair or dismissal wrong.
18. I have found that the termination of the Claimant was unfair. Weighing and balancing the thirteen factors set out in section 49(4) of the Employment Act, it is my finding that compensation equivalent to three months gross pay, which I assess at Kshs 21,000/- would meet the ends of justice in this case.

#### ***Payment in lieu of Notice***

19. The Claimant sought three months' pay in lieu of Notice. He did not lay any contractual or statutory basis for the payment of three months' salary in lieu of notice. There was no written contract and therefore I must turn to the statute. The Claimant was being paid by the month and pursuant to section 35(1)(c) as read with section 36 of the Employment Act, he is entitled to one month's pay in lieu of notice.

### ***Unpaid leave not taken***

20. The Claimant testified that he never went on leave for the three and a half years he was in the employ of the Respondent. The duty to keep employment records is on the employer. Section 10(3)(a) of the Act requires particulars to be kept which enable determination of an employee's leave entitlement to be precisely calculated. Because the Respondent did not bother to participate in the proceedings, I invoke the provisions of section 28 of the Employment Act and hold that the Claimant was entitled to 21 days annual leave with full pay for each of the three and half years served, the half year service being prorated to 12 days. In total therefore the Claimant is entitled to be paid off in cash for 75 days.
21. The formula for determining the monetary value is well known, and I need not repeat it here. Using the formula, I assess the Claimant's equivalent cash for the 75 leave days as Kshs 20,192/- and not the Kshs 24,500/- claimed.

### ***Severance pay***

22. The Claimant was not declared redundant and the claim for severance pay must fail.

### ***Stand by days and off days***

23. The Claimant was not issued with a written contract. In the demand letter written by the Claimant's Advocate, reference was made to these two heads of claim but the Respondent did not directly respond to the same. An employee is entitled to one rest day after every seven days. Where an employee works during the rest day, he becomes entitled to an off day. Ordinarily an employer would keep attendance records of its employees.
24. Due to the non-participation of the Respondent in the proceedings and relying on section 10(7) of the Employment Act, I do find in favour of the Claimant in the sum of Kshs 9,000/- being stand by days and off days.

### **Conclusion and Orders**

25. In conclusion, I do find and hold that the termination of the employment of the claimant was both procedurally and substantively unfair and I award him

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|------------------------------------|---------------|
| a. Three months' compensation      | Kshs 21,000/- |
| b. One month pay in lieu of Notice | Kshs 7000/-   |
| c. Unpaid leave                    | Kshs 20,192/- |
| d. Standby/off days                | Kshs 9000/-   |

TOTAL

**Kshs 57,192/-**

26. The Claim for severance pay is denied.

27. The Respondent to issue the Claimant with a Certificate of Service.

**Delivered, dated and signed in open Court in Mombasa on this 12<sup>th</sup> day of July 2013.**

**Justice Radido Stephen**

**Judge**

**Appearances**

Mr. Nyabena M. instructed by

Mathew Nyabena & Co. Advocate for Claimant

No Response filed/attendance by Respondent