



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 1060 OF 2012**

**MUTUNGA JAMES MUSYOKA.....CLAIMANT**

**VS**

**FACTORY GUARDS LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 15th June and filed in Court on 20th June 2012, the Claimant sued the Respondent for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Defence on 22nd August 2012 and the matter was heard between 10th April and 24th May 2013, with Mr. Makokha instructed by Namada & Co Advocates appearing for the Claimant and Mr. Kanyi instructed by T.K. Kariba Mbabu & Co Advocates appearing for the Respondent.

2. The Claimant testified on his own behalf and the Respondent called Moses Omondi Otieno, Bernard Kamulu Ntheketha and Alfred Kitonga Nguna. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant was employed by the Respondent as a security guard from November 2007 up to 30th June 2011 on periodical contracts renewable every twelve months. His last salary was Kshs. 12,261. The Claimant worked at various stations with his last station being Magadi soda/Kajiado site.

4. According to the Claimant, on 30th June 2011, the Respondent's Controller in charge of Magadi Soda/Kajiado site, one Mr. Kitonga verbally transferred the Claimant from Magadi Soda/Kajiado to the Head Office in Nairobi

5. Upon reporting to the Head Office on 8th July 2011, the Claimant was instructed by one of the Respondent's Managers, a Mr. Ali to go home and await further instructions on his redeployment. He was never redeployed.

### **The Claimant therefore claimed the following:**

6. A declaration that the Respondent's failure to deploy the Claimant amounts to unfair constructive termination of employment

Compensation for unfair termination

- i. One month's salary in lieu of notice.....Kshs. 12,261
- ii. Amount deducted on account of uniform.....3,000
- iii. 3 years' leave (12,261x3 years).....36,783
- iv. Salary for the remainder of contract term (12,261x7 months)..85,827
- v. Costs and interest

### **The Respondent's Case**

7. In its Memorandum of Defence the Respondent stated that by a contract dated 1st February 2011, it employed the Claimant as a security guard at a salary of Kshs. 6,974. The Claimant was deployed to work at Magadi Soda.

- 8. On 30th June 2011, the Claimant was found carrying away a metal drum from the site without permission. Following intervention by the Security Officer for Magadi Soda, the Claimant was pardoned and advised to shift his work site to Magadi Main Block near his immediate supervisor.
- 9. The Claimant declined and insisted on working at a site of his choice. At no time was the Claimant deployed outside Magadi. The Claimant failed to report on duty from 5th July 2011 and was therefore dismissed on 27th July 2011.

### **Findings and Determination**

10. The first issue for determination in this case has to do with the manner of the Claimant's departure from the Respondent's employment. The Claimant claimed that the Respondent failed to redeploy him following his verbal transfer from Magadi to the Head Office in Nairobi. It was the

Claimant's testimony that he was transferred verbally by Bernard Kamulu who required him to move from Magadi to the Head Office in Nairobi

immediately.

11. The Respondent on the other hand maintained that the Claimant was caught stealing a metal drum from his work site and following intervention by the Security Officer for Magadi Soda, the Area Controller, Alfred Kitonga decided to transfer the Claimant from Kajiado to Magadi for closer supervision. Upon the Claimant declining to move to Magadi, Kitonga offered to have him transferred to Nairobi but the Claimant declined this offer as well.

12. The Respondent's three witnesses were consistent on the issue of the Claimant having been caught stealing a metal drum. Moses Omondi Otieno, a supervisor at the Kajiado site testified that he saw the Claimant carrying the drum in issue. Otieno reported the matter to Bernard Kamulu who was the overall supervisor. Kamulu told the Court that the Claimant admitted having stolen the drum.

13. Kamulu further testified that he asked the Claimant to record a statement on the incident but

the Claimant declined. Kamulu reported the matter to Kitonga. Kitonga testified that the Claimant told him that he declined to record his statement because he was afraid of losing his job.

14. Section 47(5) of the Employment Act, 2007 provides that:

*For any complaint of unfair termination of employment wrongful dismissal the burden of proving that an unfair*

*termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the*

*grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

15. The Claimant gave an account of the circumstances leading to the termination of his employment. He nevertheless failed to offer any corroborative evidence to support his account and only admitted having taken a drum under cross examination. The Court was unable to confirm that the Claimant had been given the drum by one Kisia as alleged.

16. The Court therefore found the Claimant's account of the circumstances surrounding the termination of his employment untruthful and unreliable. The Claim for unfair termination and salary for the remainder of the contract therefore fail and are dismissed. The claim for one month's salary in lieu of notice also fails.

17. With regard to the claim for refund of Kshs. 3,000 deducted on account of uniform, Kitonga confirmed that the Claimant returned his uniform. This claim therefore succeeds.

18. The Claimant told the Court that he did not go on leave in 2007, 2008 and 2009 and the Respondent did not produce any leave records to prove otherwise. I therefore award the Claimant leave for three years at 21 days per year.

**The effect of this Award is as follows:**

- a) Refund of money deducted on account of uniform.....3,000
- b) Leave (12,261x21days X 3 years.).....25,748

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**Total.....Kshs.28,748**

Each party will bear their own costs.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF JULY 2013**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....*Claimant*

.....*Respondent*