



**IN THE REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2820 OF 2012**

**MOSES OJANJI KHASAYA ..... CLAIMANT**

**VERSUS**

**WASSO SECURITY COMPANY LIMITED ..... RESPONDENT**

**JUDGEMENT**

The claimant, Moses Osanji Khasaya filed this claim on 16<sup>th</sup> November 2012 for unfair termination by his employer the respondent, Wasso security Company Limited. Summons herein were served and an Affidavit of Service sworn by Jackson Ngugi filed on 22<sup>nd</sup> February 2013. There was no appearance by the respondent. Further a hearing notice was served upon the respondent and an Affidavit of Service filed by Jackson Ngugi on 12<sup>th</sup> June 2013 but there was no defence or appearance filed by the respondent. The matter proceed for hearing in the absence of the respondent upon the court being satisfied that the respondent was aware but failed to file their appearance and defence or attend the hearing as scheduled.

In the claim, the claimant was employed by the respondent on October 2007 as a Night Watchman on a salary of kshs.5, 000.00 per month reporting to work from 6 pm to 6 am. His salary was increased over the years his last pay being Kshs.8, 000.00 which was an underpayment based on the government general wages orders. He was terminated from service on 5<sup>th</sup> April 2012 without any reason, hearing or notice or payment of his terminal dues.

The claimant further states that he was terminated without any hearing as to the reasons for termination which was unprocedural and now claim his terminal dues and compensation for unfair termination. That he was owed pay in lieu of notice, his pay for March 2012 and the 4 days he worked in April 2012, that he was never paid house allowance for 2 years, he had 63 leave days, 36 off days, service for 3 years, uniform refund and all the owing underpayments. He thus claims for reinstatement and payment for his dues as well as compensation for the unfair termination.

The claimant supported his claim with his sworn evidence and stated that he was employed by the respondent as a Night Watchman but he would sometimes serve during the day as directed. He was not issued with a written contract but he had his work card issued to him and he would report to work from 6 pm to 6 am when on night duty or 6 am to 6 pm when on day duty which was recorded by the respondent. He was in-charge of 6 other watchmen and his salary was thus increased to kshs.7, 500.00 in 2010. His salary was deposited in his bank account and no pay slip was issued to him to indicate the breakdown. In February 2012 he was taken to Mlolongo site and his salary increased to Kshs.8, 000.00. In March 2012 he was not paid and on 4<sup>th</sup> April 2012 he was terminated.

That his brother-in-law had a road accident along Mombasa Road and he left and went to see him at Kenyatta National Hospital and asked his colleague at work to notify the respondent on 5<sup>th</sup> April 2012. He had been at work from 5.45 am to 2.30pm when the Manager came, Mr. Hassan came and demanded that he return Kshs.500.00 that was alleged to have been given by a client. That he did not have such money and the details for such possessions were never disclosed to him. That he could not have received such money as he had been away at Kenya National Hospital visiting his brother-in-law. He was then terminated on this claim. That he was told to go home at 10.30 pm, he was never paid his due salary for March 2012 or for the days he had been at work in April and had to walk home at night. He was never given notice or the reasons for the termination.

On 13<sup>th</sup> April 2012 he went back to the respondent office to plead but he was told to clear with them but has never been paid his dues. The Union made a demand but the respondent failed to reply. His salary in 2007 was kshs.5,000.00 which was an underpayment as this was supposed to be Kshs.6,889.00, in 2010 the minimum wage was increased but he was still being underpaid by 2012 when he was terminated and claim the difference.

His NSSF dues were deducted every month but these were never remitted to the NSSF and thus demand this as a refund. He was never paid his house allowance. He asked for his leave days but was never granted and had 63 days pending. He was 53 off days not taken or paid for them. The respondent deducted Kshs.60.00 for insurance but he was never given the details for this. He was also forced to pay for his uniform which was the duty of the respondent to buy for him. That when he went to NSSF, he found out that his dues were never remitted.

Section 10 of the Employment require an employer to issue a contract of service to any employee employed for work that is not expected to end at a fixed time or who is paid at a specific time or monthly. This contract should outline the terms and conditions of service with the particulars of the employer and the employee. Where these details are not followed and there is a dispute between the parties, then the court will rely on the applicable law, the evidence on record and the submissions made in this regard.

Termination of employment must comply with section 35 as read together with 41 of the Employment Act where an employee alleged to have committed an offence or misconduct himself ought to be given a hearing, notice and the reasons for termination. This notice should be made in writing to enable the employee effectively respond or challenge the fairness of the reason for termination. Where it is shown that there was no notice or an opportunity for hearing, then the employee termination is procedurally unfair.

From the claimant's evidence he was not given notice and the reason he was given that he had received Kshs.500.00 from a client, were matters he challenged but he was never given the details. Therefore to base a termination on a matter that was challenged without an opportunity for the claimant to defend himself was unfair.

Where an employee is terminated, whether for gross misconduct and there is summary dismissal, all salary due and worked for should be paid. The claimant should have been paid his salary for March 2012 and for the 4 days he worked in April 2012. This also related to leave days pending and off days that are due. At the time of termination, all these should be qualified and paid in cash. These will be awarded.

House allowance was claimed by the claimant for two year. The claimant however failed to state for which years this house allowance was claimed for. It was not clear from his evidence and written submission, how this amount arose. This will be declined.

It is now an offence for an employer to make salary deduction and fail to remit any statutory dues. Where NSSF dues are deducted from an employee salary, these should be remitted to the statutory body failure to which this court will sanction such an employer and invite the Labour Officer responsible to commence criminal proceeding and to the employee pay service pay. In this case, I will award service pay.

Any deduction made from an employee's salary must be legitimate. The same must be with regard to any statutory deduction, as agreed by the employee or for the benefit of an employee. Where there is an insurance deduction directly from the salary that ought to have been remitted to an employee, that insurance must be for benefit that will accrue to an employee at a particular time, otherwise to make such a deduction without any justifiable reasons is tantamount to an unfair labour practice. I note the claimant was deducted Kshs.60.00 a month for such insurance. This has not been justified as to how it arose or the benefit relating to this deduction. This should be refunded to the employee.

Equally, the employer is supposed to provide all tools of work at work. If a night watchman I required to have a particular uniform, it becomes the duty of the employer to provide. This is similar to giving an employee their tools of trade or the necessary work tools once they report for duty. To make this deduction for the provision of uniform for a night watchman is an expense that should be met by the employer. This deduction as was done from the claimant's salary will be computed and awarded.

The claimant stated that he was underpaid over the years and outlined how this arose that based on the Wage Guidelines, in 2009 he was underpaid and Kshs.10,378.20 not paid to him, in 2010 Kshs.19,817.41 was not paid, in 2011, Kshs.39,789.40 and in 2012 the amount of 12,029.59 was not paid. All these amounted to Kshs.75, 014.80. I have looked through the Wage Orders and the Guideline applicable during this period under reference by the claimant and note that he was indeed underpaid by the respondent and will therefore award as claimed.

**For the above reason, I will therefore enter judgement for the claimant as against the respondent in the following terms;**

- 1. A declaration that the claimant was unfair terminated;**
  - a. Compensation for 12 months pay amounting to kshs.114,859.80;**
  - b. One month pay in lieu of notice at kshs.9,571.65;**
  - c. Unpaid salary for March 2012 at Kshs. 9,571.65;**
  - d. 4 days unpaid salary for April 2012 at Kshs.1,837.20;**
  - e. Pay for 63 days of leave at kshs.30,150.00;**
  - f. Pay for 36 off duty days at kshs.30,720.00;**
  - g. Refund of kshs.60 at kshs.720.00;**
  - h. Refund for uniforms at kshs.8,200.00;**
  - i. Underpayments at kshs.75, 014.60; and**
  - j. For non-remittance to NSSF, service pay for the 4 completed years will be Kshs.19, 144.00.**

**Total due amounting to Kshs. 299,788.90.**

- 2. The claimant be issued with a Certificate of Service within 14 days from this date; and**
- 3. Costs of the suit awarded to the claimant.**

**Delivered in open court this 24<sup>th</sup> day of September 2013.**

**M. Mbaru**

**Judge**

**In the presence of:**

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