



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1242 OF 2010**

**JOHN MOGAKA OKEMWA.....CLAIMANT**

**-VERSUS-**

**LAVINGTON SECURITY GUARDS LIMITED .....RESPONDENT**

CLAIMANT IN PERSON.

M/S. MURIMI FOR RESPONDENT.

**JUDGMENT**

The facts leading to this claim are that the Claimant was employed as a night guard by the Respondent on 1<sup>st</sup> January, 2002. He worked continuously in that capacity up to the 15<sup>th</sup> November, 2009. His initial salary was Kshs.2,800/= without any house allowance.

He worked from 6 p.m. in the evening up to 6 a.m. in the morning for six (6) days a week. He claims that he was not paid overtime for the extra hours worked.

He worked in various stations but from 2003 to 2009, he was stationed at Wanandegge Flats, Kirichwa Road. He had two supervisors namely **Mr. Panyako** and **Mr. Ouma**.

The Respondent in its initial Memorandum of response to the Statement of claim dated 8<sup>th</sup> October, 2010 had denied that the Claimant was ever its employee but in a change of heart amended its Memorandum of Response dated 15<sup>th</sup> April, 2013 and filed on same date admitting that the Claimant was its employee and was therefore not a stranger to it. The Respondent however continued to deny other particulars of claim as contained in the amended Statement of claim.

It is the Claimant's evidence that he left work due to sickness after he got a letter from a medical doctor that he was not fit to work at night.

He had never been issued with a letter of appointment. He returned his uniform upon leaving his employment.

He claims terminal benefits to wit;

**a) Underpayments:**

That he was paid less salary than the minimum wage prescribed in the Regulation of Wages (General) (Amendment) Order 2000 attached from the date of employment in 2000 which was Kshs.3,412/= for Nairobi area plus 15% housing allowance; Ksh.3,668/= plus 15% housing allowance in terms of The Regulations of Wages (General) Amendment) Order, 2001; Kshs.3,925/= plus 15% housing allowance in terms of the Regulation of Wages (General) Amendment) order, 2002; 2003 was Ksh.4,365/=, 2004 was Ksh.4,836/=, 2005 was Kshs.5,175/=, 2006 was Kshs.5,796 and 2007 was Kshs.6,839.

The Claimant attached to the Memorandum of claim at page 50, a letter of resignation dated 2<sup>nd</sup> December, 2009, on medical grounds and frustration. He requested terminal dues for 10 years. He thanked the company for employing him for that period. The underpayments have been calculated in terms of the aforesaid Legal Notice and totals Kshs.128,544/=.

The Respondent has offered bare denial to this claim, yet it is obliged to produce payslips to counter the claim. This the Respondent has failed to do.

In terms of **Section 74 (1)** as read with **Section 10 (2) (h)** the employer is obliged to provide to the employee a written contract specifying “*the remuneration scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits.*”

And in terms of **Section 10 (7)** “*if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*”

In this case, the Respondent initially denied that it had employed the Claimant then belatedly in an amendment admitted that it was indeed the Claimant’s employer from 1<sup>st</sup> January, 2000 up to 15<sup>th</sup> November, 2009, when the Claimant resigned from the employment on grounds of sickness.

The Respondent did not produce any written contract or written particulars of the contract of employment but made a bare denial of the claim for underpayment and other claims herein without producing any documentary evidence to disprove the evidence of the Claimant regarding the terms and conditions of service tendered by the Claimant.

**Mr. Kevin Kipkemboi**, the Human Resource Assistant who testified on behalf of the Respondent was not employed by the Respondent at the time the Claimant was there. He had little or no information at all regarding the specific claims made by the Claimant.

This witness did not offer any useful evidence at all to counter the evidence of the Claimant even on the circumstances that led to his leaving work.

The Claimant made out a *prima facie* case of underpayments for the period 2000 to 2009 and the Respondent has failed to discharge its evidentiary burden to disprove the claim.

**b) One month’s salary in lieu of notice:**

From the evidence of the Claimant himself, he gave a notice of resignation dated 2<sup>nd</sup> December, 2009 backdated to 15<sup>th</sup> November, 2009. Clearly, the Claimant did not give the necessary notice to the Respondent and is not entitled to payment in lieu of notice at all. If the Respondent had counterclaimed in this respect, the court would have been inclined to award the Respondent, one month’s salary equivalent in lieu of notice.

**c) Gratuity for 9 years at 15 days a year (162) days in the sum of Kshs.42 612.20**

With respect to this claim, the Claimant told the court that he was not registered with National Social Security Fund (NSSF) nor did the Respondent make contributions to the Fund on his behalf.

There is no evidence that these deductions were made from his salary.

The witness for the Respondent Kevin Kipkemboi simply told the court that he was not aware if the claimant was registered with NSSF.

In the circumstances, the court relies **on Section 35 (5)** of the Employment Act to find that the Claimant is entitled to severance pay for a period of nine (9) years completed service at the rate of Kshs.2,389/= which is 18 days salary in the sum of Kshs.43,011/=.

**d) Payment in lieu of leave for nine years.**

The claimant told the court that he never went on leave for the nine (9) years he served the Respondent. The witness for the Respondent in response told the court that he did not know if the claimant went on leave or not.

The Claimant has a statutory right to 21 days leave for each completed year of service which makes a total of 189 days. The daily rate calculated on a salary of Kshs.7,965/= equals 265 Kenya Shillings giving a sum of Kshs.50,179/= which the court awards in lieu of leave days not taken.

**e) Public Holidays worked.**

The Claimant told the court that he worked during all public holidays and was not paid overtime. He claims payment of 106 public holidays. The witness for the Respondent simply told the court that he did not know if the claimant worked during holidays.

The claim thus remains undefended and the court awards Kshs.265 per day for 106 days in the sum of Kshs128,090/=.

**f) Normal overtime.**

The Claimant also told the court that he worked from 6 p.m. to 6 a.m. daily for 6 days a week and was not paid overtime. The witness for the Respondent told the court that the Claimant got four (4) off days a month to cover for the extra hours. Again no documentary evidence was produced as is required by the law to counter this claim.

The Claimant having made out a *prima facie* claim for non-payment of overtime, the Respondent failed to discharge its evidentiary burden to disprove the same by way of documentary evidence. The court has no other choice but to award the claim for 1920 hours week days overtime in 24 months at 1.5 times in the sum of Kshs.87,526/40.

**g) Compensation.**

The Claimant failed to show that his employment was terminate by the Respondent. It is clear that the claimant resigned following recommendation by a doctor that he should cease working at night.

The claim for unlawful termination is accordingly dismissed.

In the final analysis, the court finds that the Respondent is to pay to the Claimant in terms of this judgment;

- a. Kshs.128,544/= being underpayment.
- b. Severance pay in the sum of Kshs.43,011/=.
- c. Payment in lieu of leave Kshs.50,179/=.
- d. Payment for public holidays worked Kshs.28,090/=
- e. Payment for overtime Kshs.87,526/=

**Total award:** Kshs.337,350.

The Respondent is to pay costs of the suit.

*Dated and delivered at Nairobi this 25<sup>th</sup> day of October, 2013.*

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**