



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 1983 OF 2011**

**KENNEDY NYAGUNCHA OMANGA.....CLAIMANT**

**VS**

**BOB MORGAN SERVICES LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant brought this claim against the Respondent by way of a Memorandum of Claim dated 17<sup>th</sup> November and filed in Court on 22<sup>nd</sup> November 2011 vide which he claimed compensation for unfair termination of employment and payment of terminal dues.
2. The Respondent filed a Reply on 21<sup>st</sup> December 2011 and the matter came up for hearing on 27<sup>th</sup> May 2013. However, when the Claimant took the witness stand, the Court took notice that he was too ill to testify and stood him down. With the consent of the parties the Court directed that the matter would proceed by way of written submissions. The Claimant and the Respondent filed their submissions on 8<sup>th</sup> July and 18<sup>th</sup> July 2013 respectively. This Award is therefore based on the pleadings and submissions filed by the parties.

**The Claimant's case**

3. According to the Memorandum of Claim, the Claimant was employed by the Respondent as a security guard effective 1<sup>st</sup> October 1990. The Claimant worked for 72 hours over a 6 day week. He also worked on public holidays.
4. In January 2009, the Claimant began experiencing health complications prompting him to seek medical attention in various health facilities. The Claimant's condition deteriorated and he was put on sick leave. On 15<sup>th</sup> December 2009 the Respondent terminated the Claimant on medical grounds. Upon the termination of the Claimant's employment the Respondent drew a cheque in payment of the Claimant's terminal dues which the Claimant declined to receive. Attempts were made to settle the matter but no agreement was reached.
5. It was the Claimant's case that his illness was caused and accentuated by his working conditions, specifically long working hours in a standing position. He further claimed that the termination of his employment was unfair.

6. The Claimant's claim according to the Memorandum of Claim is as follows:

- a. One month's salary in lieu of notice.....Kshs. 7,130
- b. Service pay.....67,735
- c. Salary arrears for October-December 2009.....10,695
- d. 12 months' pay in compensation for unfair termination..85,560
- e. Medical refund.....17,000
- f. Salary underpayment.....41,508
- g. Overtime.....51,336
- h. Uniform deposit.....3,500

7. In the written submissions filed on 8<sup>th</sup> July 2013, the Claimant sought to introduce further claims under the Work Injury Benefits Act, 2007.

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

8. In its Reply, the Respondent stated that it was made aware of the Claimant's illness on 4<sup>th</sup> August 2009 when the Claimant went for treatment at the Company clinic. As per organisational policy, the Respondent granted the Claimant 100 days' sick leave; 50 days being on full pay and 50 days on half pay.

9. At the end of the sick leave on 14<sup>th</sup> November 2009, the Claimant was unable to resume work. The Respondent therefore terminated the Claimant's employment on medical grounds by letter dated 15<sup>th</sup> December 2009.

10. It was the Respondent's case that the termination of the Claimant's employment was based on various medical reports provided to the Respondent and the Claimant's inability to resume duty after the 100 days' sick leave. Following the termination, the Respondent forwarded his terminal benefits to the Claimant's wife, Josephine Kerubo Musomi who discharged the Respondent from any further liability.

### **Findings and Determination**

11. The first issue for determination is whether the termination of the Claimant's employment on medical grounds was unfair. It is not in dispute that by the time of the termination, the Claimant's health had deteriorated to an extent that it was difficult for him to perform his usual duties.

12. In the written submissions filed on behalf of the Claimant, his Counsel sought to establish a nexus between the Claimant's ill health and the working conditions set by the Respondent. Counsel apportioned blame to the Respondent for failure to exercise due care in handling the Claimant's case.

13. The Employment Act, 2007 recognises ill health as a ground for termination of employment. However, like in all other forms of termination of employment, due process must be followed. Prior to his termination, the Claimant was put on 50 days' sick leave with full pay and 50 days on half pay.

14. Section 30 of the Employment Act, 2007 provides for sick leave at 7 days with full pay and 7 days on half pay. However, the Regulations under the repealed Employment Act (Cap 226) which remain in force provide for 30 days full pay and 15 days half pay. Since the provision in the regulations under Cap 226 is more advantageous to employees, employers are expected to apply them in calculating sick leave.

15. With regard to the Claimant's case, the Respondent's provision for sick leave was more superior to the requirements set by law. However, an examination of the procedure

adopted by the Respondent in effecting the termination exposes significant flaws.

16. While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination for want of procedural fairness.

17. In the case before me, this procedure was clearly not followed and I therefore find the termination of the Claimant's employment on medical grounds unfair for want of due process. Consequently, I award the Claimant the equivalent of 10 months' salary as compensation for unfair termination of employment. I also award him one month's salary in lieu of notice. The claim for uniform deposit is also allowed.

18. With regard to the claim for salary underpayment, the Regulation of Wages (General)(Amendment) Order, 2009 provides the minimum wage for a Night Watchman (inclusive of house allowance) as Kshs. 7,864. According to the Claimant's payslip for June 2009, his salary (exclusive of standard overtime) was this same figure. The claim for overtime therefore fails. From the same payslip, it is evident that the Claimant was a contributing member of the National Social Security Fund (NSSF). He is therefore not entitled to service pay. Since the Claimant was paid standard overtime, the claim for overtime is disallowed. The claims for salary arrears and medical refund were not proved and are dismissed.

19. The Court did not find any evidence to link the Claimant's illness with his work and was therefore unable to make a finding for occupational illness as defined in the Work Injury Benefits Act, 2007. Moreover, the Court found the additional claims made in the Claimant's final submissions akin to amending the claim through the back door. These claims are therefore disallowed.

20. In the final analysis I make an Award in favour of the Claimant as follows:

a. 10 months' salary in compensation for unfair termination	Kshs.78,540
b. One month's salary in lieu of notice.....	7,854
c. Uniform deposit.....	<u>3,500</u>
Total.....	<b><u>89,894</u></b>

I further award the Claimant the costs of this case

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF OCTOBER 2013

**LINNET NDOLO**

**JUDGE**

***In the Presence of:***

.....*Claimant*

.....*Respondent*