REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1233 OF 2012

BETWEEN

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION……CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED ……..…… RESPONDENT

Rika J

CC. <u>David Kipsang'</u>

Ms. Onyancha Advocate appearing for the Claimant

Mr. Murimi Advocate appearing for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

<u>AWARD</u>

1. The Claimant Union filed the Statement of Claim on 20th July 2012. The Claim is brought on behalf of the Claimant's Member, hereinafter referred to as the 'Grievant,' Laban Shibambo. He alleges to have been employed as a Security Guard by the Respondent Private Security Firm, and to have been dismissed unfairly by the Respondent. He seeks for an Award against the Respondent on the following items-:

[a] 1 month salary in lieu of notice;

[b] 8 years' annual leave pay and 5 months' pro-rata leave pay;

[c] Underpayment of basic salary, house rent allowance, overtime;

[d] Gratuity for 8 years;

[e] Any other legal claim; and

[f] Certificate of service.

2. The Respondent filed its Statement of Reply on 24th October 2012 denying that it unfairly dismissed the Grievant. The Grievant testified and closed his case on 11th February 2013. The Respondent testified through its Human Resources Assistant Kevin Rono on 25th April 2013 when the hearing closed. The

dispute was last mentioned in Court on 24th May 2013 when the Court confirmed the filing of the Final Arguments, and advised the Parties Award would be delivered on notice.

3. The Grievant testified he was employed by the Respondent as a Security Guard, on 20th December 2002. He earned a consolidated salary of Kshs. 7,640, which settled at Kshs. 6,300 per month, after the statutory deductions. He worked a total of 8 years and 5 months. There was no annual leave in the entire period. He was not compensated for work performed during the public holidays, rest days and the 31st day of each month. His disciplinary record was good; he was never issued warning letters. He was suspended on 9th May 2011. The Respondent alleged the Grievant had addressed the Media inappropriately. Suspension was to run to 21st May 2011. There was no communication after the suspension period expired, prompting the Grievant to write to the Respondent on 26th May 2011, demanding to be given a clear word on his fate. There was no response. The Grievant approached his Union. The Claimant wrote to the Respondent on 8th June 2011, asking the Respondent to lift the suspension. The Respondent did not reply. The Grievant testified that he had on 6th May 2011 been compelled by the Respondent to write an apology letter, where he conceded that talking to the Media without the authority of the Respondent was an act of gross misconduct on his part.

4. On cross-examination, the Grievant stated he was not given a written contract of employment on joining the Respondent on 20th December 2002. He agreed appendix 4 of the Respondent's bundle of documents comprised actual leave application form, signed by the Grievant. He was not aware he was not supposed to talk to the Media. It was Labour Day when he addressed the Media. He discussed wage increment. He denied that he addressed the press at the Claimant Union's Offices; he was interviewed impromptu at his workplace. The suspension letter stated the Grievant should report back on 23rd May 2011. He reported as advised. The Management alleged on 27th May 2011 that the Grievant's whereabouts were unknown. He was available all the time. The Respondent did not have a Recognition Agreement with the Claimant. It was not the Claimant's General Secretary who organized a press meeting where the Grievant spoke. Redirected, the Grievant confirmed he was not given a letter of employment for the 8 years worked. The leave form displayed by the Respondent in its Reply only related to the year 2010. He had a Constitutional right to address the press. He was forced to write the apology letter. He did not pose for the press to take his photograph. He did not receive a copy of the letters dated 27th May 2011 and 2nd June 2011 from the Human Resource Officer Nancy Sang, alleging his whereabouts were unknown, and contract therefore terminated effective from 26th May 2011. He never acknowledged receipt of the letters anywhere. The Claimant prays the Court to Award in favour of the Grievant.

5. Kevin Rono acknowledged the Grievant was employed by the Respondent, as stated in the Grievant's evidence. The Employees at Lavington Security are not unionized. The Respondent has an internal grievance resolution mechanism. Shibambo addressed the Media, disclosing certain information which was detrimental to the corporate reputation of the Respondent. He spoke about inadequate wages and hardships. He was suspended for 2 weeks, as the Respondent has a policy against Staff addressing the Media. He failed to turn up after suspension. He was involved in an act of gross misconduct, which within Lavington Security was a ground meriting suspension, not dismissal from employment. He did not resume after suspension, and was issued a letter dated 27th May 2011, asking him to vacate office. He was supposed to go through a disciplinary hearing. He wrote explaining why he addressed the Media. His failure to report to duty after suspension, and address to the Media resulted in termination of the contract of employment.

6. Rono testified on cross-examination that the Grievant was employed before him. Rono joined in January 2011. There is nothing wrong in Employees of the Respondent joining a Trade Union of their choice. The Respondent has no recognition agreement with the Claimant. Rono was not there when the Grievant addressed the press. He was not aware that the Constitution of Kenya allows for free exchange of information. The Respondent did not compel the Grievant to write the letter of apology. Rono had no proof that Shibambo received the 2 letters dated 27th May 2011 and 2nd June 2011, from the Respondent. The letter of suspension had the Grievant's signature acknowledging receipt. The Grievant wrote to the Respondent stating he was waiting for clear communication from the Respondent on the suspension. No such communication was given by the Respondent. He did not mention the name of the company he worked for while discussing wages in the press, but wore the uniform belonging to Lavington Security. It was clear he was referring to the Respondent. There was no letter from the Respondent inviting the

Grievant to a disciplinary hearing. Redirected, the Witness told the Court he did not have a problem with the Grievant as an individual. Freedom of expression is not unregulated, and all companies have their policies. The suspension letter was served upon the Grievant because he was within the workplace, while other letters were sent to him because he was away. He did not report back on 23rd May 2011 as directed in the letter of suspension. The letter of 2nd June 2011 indicated the Respondent had terminated the Grievant's contract of employment. The Grievant's good employment record did not bar the Respondent from ending the contract. The Respondent was engaged in a search for the right Trade Union to recognize. The Respondent urged the Court to dismiss the Claim.

The Court Finds and Awards-:

7. There are certain prayers made by the Claimant which were not articulated in the evidence of the Grievant, or the submissions filed by the Claimant. The Grievant alleges he did not go on leave throughout his tenure. There was exhibited by the Respondent a leave application form, which the Grievant did not dispute he signed. It indicates there were nil days carried over from the previous year, and balance carried over to the following year was 9 days. There was no evidence of accumulated leave days of 8 years. Such accumulated leave days would have been captured in the leave form, which the Grievant signed on 8th September 2010. He did not give truthful evidence of leave, and the Court is unable to assist him on the claim for leave and pro-rata leave. There was no evidence led on the details of underpayments. There were no Wage Amendment Orders availed to the Court, and no attempt was made to draw the mind of the Court to any specific figures in underpayment. This is similarly the case with the claims for overtime. The Claimant just pleaded particular number of public holidays, days and hours, without leading the Grievant into substantiation of the claims for overtime. What is the Court to make of a claim for *'7 day i.e. 31st day in every year'*? This made no sense at all. The Claimant did not direct the Court to any law, contract or policy that conferred on him gratuity of 8 years. Nothing was given in the pleadings, evidence or submission of the Claimant/Grievant, upon which the unspecified gratuity of 8 years could be considered. The prayers left for determination are for 1 month salary in lieu of notice; any other legal claim; and certificate of service.

8. The substantive reason that led to the departure of the Grievant from employment was that he addressed a press conference, complaining about low wages. The Respondent was not able to show the Court any written policy that barred its Employees from speaking to the press on workplace grievances. The Court agrees entirely that freedom of expression, like all freedoms, has its limitations. It was for the Respondent to show to the Court the existence of such limitation placed upon the Grievant. The Court would in the circumstances lean in favour of the position given by the Grievant. He was merely expressing his views on labour grievances, at a time when the global labour family comes together to review their achievements, aspirations and market failures. It would be draconian if an Employer were to summarily dismiss an Employee on the ground that the Employee publicly expresses a labour grievance, on the occasion when such grievances are meant to be broadcast to the entire world. The Grievant had no reason to apologize to the Respondent, for merely discussing a wage issue with the press. Mr. Rono appeared to confuse issues when he told the Court that the Media address amounted to gross misconduct, but that gross misconduct was not an offence that would result in dismissal, rather, an offence that only ended in suspension. The Grievant was suspended, but there is no evidence that the Respondent lifted the suspension, or advised the Grievant on the outcome of the investigations that necessitated suspension. Mr. Rono testified the Grievant was supposed to return to work on 23rd May 2011, but there was no conclusive evidence that the Grievant failed to do so, or that the Respondent communicated to him enquiring why he had failed to return. In the end, the Respondent terminated the contract of employment, justifying its decision on two grounds given by Mr. Rono: that the Grievant had failed to return to work; and addressed the Media on a workplace issue. Neither of these reasons was in the view of this Court shown by the Respondent to be a valid ground for terminating the Grievant's contract of employment after 8 years of service. IT IS HEREBY ORDERED-:

[a] Termination of the Grievant's contract of employment was unfair;

[b] The Respondent shall pay to the Grievant 10 months' salary at the rate of Kshs. 7,640 per month,

total Kshs. 76,400 in compensation;

[c] The Respondent shall also pay to the Grievant 1 month salary in lieu of notice at Kshs. 7,640;

[d] In total, the Respondent shall pay to the Grievant through the Claimant a total of Kshs. 84,040

Within 30 days of the delivery of this Award;

[e] Certificate of Service to issue;

[f] No order on the costs.

Dated and delivered at Nairobi this 9th day of December 2013

James Rika

Judge