



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 604 of 2012**

**GALSHIR WAMBILE.....CLAIMANT**

**VS**

**MRS. ROSEMARY KINYANJUI.....RESPONDENT**

**JUDGMENT**

The Claimant has brought a suit against the Respondent, his former employer, claiming his employment terminal dues amounting to Kshs.500,399.65. He avers that he was employed on 2-2-2009 as a Night Security Guard at the Respondent's Residence at Lower Kabete Nairobi. His salary Kshs.8,000/- per month. That the salary was an underpayment in relation to the minimum guidelines. He also avers that his dismissal was unfair and prays for compensation.

The Respondent has opposed the claim and put the Claimant to strict prove of his claim. She has denied ever entering into any employment contract with the Claimant. She contends that the Claimant was employed by her late husband between January, 2010 and December 2011 at which time she was out of the Country.

That she only came back to Kenya when her husband fell sick and at which time the claimant had already terminated his employment.

The suit was heard on 11-10-2012 when the two parties testified as CW1 and RW1 respectively. CW1 testified that he was employed on 2-2-2009. That the agreed salary was Kshs.10,000/- but he was only paid Kshs.8,000/- until his termination. That he was a night guard at the Respondent's residence. That he was dismissed without notice in January, 2012. That the respondent brought another guard. That upon dismissal, he was not paid anything and he now claims pay in Lieu of Notice, Service Pay, Off and Holidays, overtime and salary increment arrears. He concluded by saying that he was now a member of NSSF.

On cross-examination, he insisted that the Respondent was present when he was employed and she indeed used to pay him his salary even when her husband was present. That she is the one who used to instruct him and finally she is the one who sacked him.

He however, confirmed that there were times when she would be away. That is December, 2011 he went on Christmas leave with the permission of the Respondent and when he returned in January 2012 he found that the Respondent's husband had died.

He denied that the Respondent was away from Kenya from 2008. He also denied even being given duty to do at Kitengela.

In defence RW1 confirmed that she stays at Lower Kabete in Nairobi. She, however denied ever employing the Claimant. That from June 2008 – July 2011 she was working in China as Chief Librarian at Shanghai American School and only visited Kenya twice in a year for holidays which was less than 45 days.

She confirmed that the Claimant's salary was Kshs.8,000/- but denied ever paying him personally. That she never left him working at her residence when she left for China. According to her, other employees told her the Claimant was employed by her husband in 2010. That she never spoke to the Claimant during her visit to Kenya.

He was dismissed in December, 2011 because he was found sleeping four times, by her husband, son and a visitor. That he was given an alternative job at Kitengela but he declined. That the claimant took his leave in December, 2011 and when he came back in January he was told to go away.

That her husband died on 24-1-2012 after which the Claimant went to her home with a Labour consultant demanding Kshs.400,000/- which she refused. She denied ever employing or sacking the Claimant. She also denied ever paying him any salary. She asked me to dismiss the suit because it was only an opportunistic one.

On cross-examination she admitted that the Claimant visited her twice with a Labour Officer after her husband's death. She, however denied that she told the claimant to go away in January 2012 because her husband was still alive and she did not know Swahili or Rendile.

On re-examination she confirmed that she knows little Swahili but was not sure whether the claimant knew English. After the close of the hearing, the Respondent filed written submissions but the Claimant did not.

I have carefully perused the pleadings and considered the witness testimonies and also the submissions by the counsel for the Respondent. The issues for determination are:-

- (1) whether there existed any contract of employment between the parties herein between 2-2-2009 and January, 2012.
- (2) whether the said contract was unfairly and unlawfully terminated by the Respondent.
- (3) whether any remedy is available to the Claimant.

To answer the first issues, I have carefully considered the testimonies of the two witnesses. It is not in dispute that the Claimant was working as a night guard at the Respondent's family residence at Lower Kabete, Nairobi at a salary of Kshs.8,000/- per month. It is also not in dispute that the claimant went for his Christmas leave in December 2011 and when he reported to work in January 2012 he was told to go away (summarily dismissed).

The dispute is on who was the Claimant's employer, the period of service and who dismissed him.

The Claimant has insisted that he was employed by the Respondent personally on 2-2-2008 and she was the one paying his salary and she is the one who indeed sacked him in January, 2012. The Respondent has denied all that. She alleges that he was employed by her husband in 2010 according to what she learned not from her husband but her other employees.

Let me say that I find that statement not honest. First she did not call the witnesses who told her about the employment of the Claimant in 2010. Secondly, she did not avail any records from her late husband to prove that he was the one who employed and fired the Claimant. Thirdly, the statement

confirms that she was in a position to employ workers at her residence even when away.

As regards her absence from Kenya she did not prove by travel documents that indeed she was always away as alleged in her evidence. She has also not succeeded in disproving that she never paid salary to the Claimant or dismissed him.

In my view, she should have called witnesses like her children or employees to disprove the allegations by the Claimant especially now that she did not produce any records of employment for the Claimant. I would have arrived at a different finding had the Respondent called witnesses to prove that indeed the Claimant was not employed on 2-2-2009 by the Respondent and that she did not dismiss him summarily in January, 2012. Without such evidence to the contrary, it is my finding that there was indeed an oral contract between the parties herein from 2-2-2009 to January, 2012.

As regards the second issue, it is on record that the termination of services was by summary dismissal. That the manner of dismissal was the cause of the claimant reporting the matter to the Labour Officer and the subsequent visit to the residence by the Claimant and the Labour Officer. The respondent's testimony is that she did not dismiss the Claimant because he was not her employee. She has however, not told the court whether any notice was given to the Claimant before termination. I do not believe the Respondent's explanation. She is not honest and has contradicted herself openly. For example she says that the Claimant was dismissed by her husband in December, 2011 for being found asleep four times while on duty but again says that the Claimant was on leave in December, 2011 and was dismissed in January, 2012 when he returned to work. She also says she never used to speak to the Claimant because she did not know Swahili or Rendile but later on re-examination, she says that she knows little Swahili. She also says that she knew nothing about the terms of the contract between the Claimant and her husband but later she confirms that the salary was actually Kshs.8,000/-.

I instead, believe the evidence of the Claimant that he was summarily dismissed by the Respondent personally when he reported to work in January, 2012. That no reason was given for the dismissal and no terminal dues were paid to him.

Consequently it is my finding that the Claimant was unlawfully and unfairly dismissed from employment by the Respondent.

Lastly, I will now consider what remedy is available to the Claimant. He has not prayed for reinstatement and so, the only remedy exists in pecuniary compensation under Section 35, 49 and 50 of the Employment Act 2007.

Section 49 provides for the following terminal benefits in case of unlawful and unjustified dismissal.

- (a) Salary in Lieu of Notice.
- (b) Salary arrears worked for.
- (c) Maximum 12 months' salary for unfair dismissal.

In addition, Section 35(5) provides for payment of Service pay for every year of service for employees who are not members of NSSF or other permission or provident schemes.

The Claimant has prayed for all the above statutory entitlements plus leave, overtime and underpaid wages. He has calculated the said dues at the rate different from his confessed salary of Kshs.8,000/-. I will only apply the known salary which the Claimant used to receive without complaining.

Thus I award the following:-

- (a) One month's salary in Lieu of Notice - Kshs. 8,000/-**

(b) Six (6) months' salary for unlawful termination	-	<b>Kshs.48,000/-</b>
(c) Service pay at 15 days per year of service for 3 years (45) days	-	<b><u>Kshs.12,000/-</u></b>
<b>TOTAL</b>	<b>=</b>	<b><u>Kshs.68,000/-</u></b>

I will not award anything for leave because he did not prove which other leave he was entitled to after the one he took in December, 2011.

I will also not award the prayer for overtime for lack of prove.

**Consequently, the claim is allowed as shown above and the claimant awarded Kshs.68,000/- plus costs and interest.**

**Orders accordingly.**