



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NUMBER 457 OF 2018**

**BETWEEN**

**RUMBA MNYIKA NGUTA.....CLAIMANT**

**VERSUS**

**SOUTHERN HILLS DEVELOPMENT AGENCY**

**LIMITED T/A RADIO KAYA .....RESPONDENT**

**Rika J**

**Court Assistant: Andrew Mwabanga**

**C.O. Tolo & Company Advocates for the Claimant**

**Mungai Kamau & Company Advocates for the Respondent**

**JUDGMENT**

1. Through his Amended Statement of Claim filed on 6<sup>th</sup> February 2018, the Claimant avers, he was employed by the Respondent as a Gardener on 1<sup>st</sup> January 2014, earning a monthly salary of Kshs. 8,500. He was based at Respondent's Radio Kaya Station, in Kwale County.
2. He was subsequently granted a 2-year contract on 1<sup>st</sup> January 2016, on a monthly salary of Kshs. 9,500. This was succeeded by another 2-year contract, commencing 1<sup>st</sup> January 2018, on a monthly salary of Kshs. 10,000.
3. He was dismissed by the Respondent through a letter dated 30<sup>th</sup> March 2018. He was not given a fair hearing. He did not take annual leave in 2015 and 2016. He was underpaid. He claims from the Respondent: -
  - a. 1-month salary in lieu of notice at Kshs. 10,000.
  - b. House allowance for 51 months at 15% of Kshs. 10,000 added up at Kshs. 76,500.
  - c. Leave allowance for the years 2015 to 2016 at Kshs. 20,000.
  - d. Underpayments of salary: 1<sup>st</sup> May 2013 to 30<sup>th</sup> April 2015 at Kshs. 8,386; 1<sup>st</sup> May 2015 to December 2015 at Kshs. 12, 856; 1<sup>st</sup> January 2016 to 30<sup>th</sup> April 2017 at Kshs. 9,712; 1<sup>st</sup> May 2017 to December 2017 at Kshs. 19,411; and 1<sup>st</sup> January 2018 to March 2018 at Kshs. 5,779 – total Kshs. 32,306.
  - e. 42 public holidays, 1<sup>st</sup> January 2014 to 30<sup>th</sup> March 2018 at Kshs. 32,306.
  - f. Remainder of the contract period between April 2018 to 31<sup>st</sup> December 2019 [21] months, at Kshs. 210,000.

g. Compensation for unfair termination equivalent of 12 months' salary at Kshs. 120,000.

Total...Kshs. 524,951.

h. Costs.

i. Interest.

j. Declaration that termination was unfair and unjust.

k. Certificate of Service to issue.

l. Any other suitable relief.

4. The Respondent filed its Statement of Response on 7<sup>th</sup> September 2018. Its position is that the Claimant was dismissed for being absent from duty without lawful cause. He was to report back to duty at 12.00 o'clock on 30<sup>th</sup> March 2018, so as to relieve Security Guard Haji, who had requested some time off, to attend a burial. The Claimant returned late, failing to relieve the Guard. He took annual leave of 21 days for the year 2015 and 10 days for 2016. He is not entitled to the reliefs sought.

5. The Claimant gave evidence, and closed his case, on 16<sup>th</sup> September 2019. Respondent's Administrator, Florence Gichuku, gave evidence on 13<sup>th</sup> October 2020 for the Respondent, as did Security Guard Juma Hamisi Haji, closing the hearing.

6. The Claimant restated the contents of his Pleadings, in his oral evidence. He took the Court through his terms and conditions of service, and his employment history, with the Respondent. He was asked by Florence to relieve one of the Guards temporarily, on 30<sup>th</sup> March 2018. The Guard was to attend a funeral. The Claimant took his lunch break. On returning to duty, he was locked out. Florence told the Claimant he should not return. He was not granted any form of hearing. He did not leave employment of his own volition. He was underpaid. He worked on public holidays without compensation. Cross-examined, he testified that he was never suspended. He was warned on a date he could not remember. He had been asked on the material date, to report back to duty at a particular time. He did not report back at the particular time. He was late. He had been warned earlier about lateness.

7. Florence Gichuku confirmed that the Claimant was employed and summarily dismissed by the Respondent. Florence had issued oral and formal warnings before dismissal. The Claimant was dismissed on account of insubordination. Another Employee had asked for time off, to go and bury his aunt over the lunch hour. The Claimant was to take his break and return at a specified hour, to relieve his colleague. He did not return on time. He ate into the time his colleague had asked to go and bury his aunt. The Management decided that the Claimant is summarily dismissed, effective 1<sup>st</sup> April 2018. He was employed in January 2015. He applied for and utilized annual leave. Any untaken leave was forfeited. It cannot be encashed.

8. Cross-examined, Florence told the Court, she did not have a work identity card. She did not have a written authority to testify for the Respondent. She confirmed that the Claimant was employed by the Respondent as a Gardener. He earned Kshs. 8,500 initially. She could not say, if the Claimant was paid below the Minimum Wage Law. Florence could not recall when she issued oral warnings to the Claimant. He did not sign acknowledgement of any warning letter. He was to relieve a Security Guard. He was a Gardener. Florence did not have evidence that the Claimant reported back to duty late. The Respondent did not ask the Claimant to show cause, why he should not face disciplinary action. No disciplinary hearing was convened. Florence called the Claimant to explain himself. There was no notice of termination. The Claimant received an all-inclusive salary. The contract mentions gross salary. It does not mention house allowance. Florence agreed, upon being shown extracts of Wage Orders exhibited by the Claimant, that the Respondent did not pay the Claimant according to the Wage Orders.

9. Redirected, Florence testified that she had oral instructions from her superiors to testify on behalf of the Respondent. There was no need for a disciplinary hearing, as the Claimant was involved in an act of gross misconduct. The contract refers to gross salary, which means, it was an all-inclusive package.

10. Security Guard, Juma Hamisi Haji, told the Court, he was bereaved on 30<sup>th</sup> May 2018. He asked for a break to go and participate in a burial. The Claimant was to leave early, return early, and relieve Haji. The Claimant left early, but did not come back in time to allow Haji attend burial. Haji did not go for the burial in the end. Cross-examined, Haji testified, he had a work identity card. He did not exhibit it in Court. The Claimant was a Gardener. Haji was a Guard. Haji asked for permission to attend burial. The Claimant was asked to take his break early, return and relieve Haji. He left at 12.00 o'clock and returned at 1.00 p.m. There was no document capturing the timelines.

**The Court Finds: -**

11. The Claimant was employed by the Respondent as a Gardener. He was placed on various fixed-term contracts, the last of which is dated 1<sup>st</sup> January 2018. It was to last 2 years. He was entitled to a monthly salary, described as gross, of Kshs. 10,000. The contract also allowed the Claimant to perform the relieve duties of a Security Guard. The contract was terminated by the Respondent with immediate effect, on 30<sup>th</sup> March 2018. The main reason given by the Respondent in justifying its decision, was that the Claimant failed to relieve Security Guard Haji, who had asked for some hours off, to attend the burial of his aunt.

12. The evidence by Florence and Haji for the Respondent, is satisfactory, to establish valid reason, justifying termination, under Section 43 and 45 of the Employment Act.

13. Haji was bereaved. He asked for some time off, to participate in the burial of his aunt. The Respondent allowed him time off, during the lunch break. The arrangement was that the Claimant would take his own break earlier than was his routine, return earlier and relieve Haji. The Claimant's contract required that, although he was a Gardener, he could be called to relieve the Security Guard. This evidence was supported in clear language, by Respondent's Administrator, Florence. Cross-examined, the Claimant conceded he had been told to report back earlier than usual. He conceded that he returned late, and that he had earlier been warned about lateness. In the end, poor Haji missed the burial of his aunt. The Claimant was clearly guilty of acts of gross misconduct, under Section 44 [4] of the Employment Act: [a] he without leave or other lawful cause, absented himself from the place appointed for performance of his work; [e] knowingly failed, or refused to obey lawful and proper command, which it was within the scope of his duty [contract] to obey, issued by his Employer or person placed in authority over him by the Employer [Florence]. Termination was fair in substance.

14. Fair procedure was completely thrown out of the window. The Respondent did not take into account Section 41 and 45 on fairness of procedure. Florence testified on cross-examination that the Respondent did not issue letter to show cause. She did not convene a disciplinary hearing. On redirection, Florence chillingly told the Court that, there was no need for disciplinary hearing, as the Claimant was engaged in acts of gross misconduct. The Respondent did not accord the Claimant a fair procedure. Section 41 of the Employment Act, demands that an Employee is heard, in the manner prescribed therein, before termination. It was not sufficient as advanced by Florence, that she had issued oral and formal warnings to the Claimant; or that the Claimant was summarily dismissed, on account of engagement, in acts of gross misconduct. None of these facts, obviate the need for a disciplinary hearing under the Employment Act.

15. The Claimant states he worked from January 2014. The date was disputed by the Respondent. The Claimant supplied to the Court contracts of his employment, the first dated 1<sup>st</sup> January 2015. He did not explain why the contract of January 2014, was not available. His N.S.S.F Provisional Member Statement of Account, dates back to the year 2015. The Court would go by the contract of 1<sup>st</sup> January 2015, and adopt this, as the date of employment.

16. He therefore worked for 3 years, and 2 months. His last contract was 21 months away from expiry when terminated. There was a valid reason justifying termination. The Claimant conceded he had received warnings about lateness. He was therefore not a model Employee. With all these serial warnings to his name, it was always likely the axe would fall on him, sooner, rather than later. He contributed largely to the events leading to termination. He was paid nothing on termination. **He is allowed the prayer for compensation for unfair termination, equivalent of 5 ½ months' salary, at Kshs. 55,000.**

17. The prayer for notice is allowed at Kshs. 10,000.

18. The Court has concluded that the date of employment is 1<sup>st</sup> January 2015. Florence conceded in her cross-examination, that the Claimant was not paid in accordance with the Wage [Amendment] Orders, exhibited by the Claimant. **The Court grants the prayer for underpayment of wages, between 1<sup>st</sup> January 2015 and 30<sup>th</sup> March 2018, tabulated at Kshs. 38,254.**

19. The Claimant did not supply the Court with evidence of work performed during public holidays. He did not specify on which date he did which work. Why would gardening be done on public holidays? This is not work whose nature, requires daily attention. He makes a blanket prayer for public holiday pay, which the Court is not able to accede to.

20. The contract executed by the Parties, describes Claimant's monthly salary as gross. It would suggest to the Court that salary included all conceivable allowances, including house allowance. The Claimant ought to have asked about details of his gross salary from the outset. In light of him, having agreed from the outset, that he was to receive a gross salary, the Court cannot come to his aid on the prayer for house allowance.

21. He prays for leave allowance for 2015 and 2016, computed at Kshs. 20,000. His contract does not have a clause on leave allowance. From the evidence given by the Parties, it seems that the Claimant seeks Annual Leave Pay- which is different from Leave Allowance. If this be the case, there are Annual Leave Forms for 2015 and 2016, specifying the days the Claimant utilized his Annual Leave. In 2015, he took his contractual 21 days. There was no balance for 2015. In 2016, the record indicates he took 10 days. His balance would be 11 days. The Employment Act does not support the leave forfeiture clause, contained in Claimant's contract. The Court does not agree that leave entitlement was forfeited, when it was not utilized. There is no provision in law, supporting forfeiture. Leave, when not taken, becomes an accrued benefit, which is monetized, and paid out, at the request or demand, of the Employee. **The Claimant is granted Annual Leave Pay of 11 days at Kshs. 4,230.**

22. Having been compensated for unfair termination, the Court declines the prayer for salary for the remainder of the contract period. The Court considered, under Section 49 of the Employment Act, the Claimant's length of service, and the reasonable expectation of the Claimant as to the length of time he expected his contract would have continued but for the termination. There is no justification in having the Claimant receive salary for a period he did not render any labour. This prayer is declined.

23. It is declared that termination was unfair.

24. The Respondent shall release to the Claimant the Certificate of Service.

25. No order on the costs and interest.

**IN SUM, IT IS ORDERED: -**

**a. It is declared that termination was unfair.**

**b. The Respondent shall pay to the Claimant: Compensation at Kshs. 55,000; Notice at Kshs. 10,000; Underpayment of**

**Wages at Kshs. 38,254; an Annual Leave at Kshs. 4,230 – total Kshs. 107,484.**

**c. Certificate of Service to issue.**

**d. No order on the Costs and Interest.**

**Dated, signed and released to the Parties electronically, at Nairobi, under Judiciary and Ministry of Health Covid-19 Guidelines, this 15<sup>th</sup> day of December 2020.**

**James Rika**

**Judge**