



Case Number:	Cause 849 of 2011
Date Delivered:	20 Mar 2014
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Award
Judge:	James Rika
Citation:	Justus Atulo Ashioya v 'A' Team Security Limited [2014] eKLR
Advocates:	Mr. Nyende instructed by Nyende & Company Advocates for the Claimant Mr. Onyony instructed by Onyony & Company Advocates for the Respondent
Case Summary:	-
Court Division:	Industrial Court
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 849 OF 2011

BETWEEN

JUSTUS ATULO ASHIOYA CLAIMANT

VERSUS

'A' TEAM SECURITY LIMITED RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Nyende instructed by Nyende & Company Advocates for the Claimant

Mr. Onyony instructed by Onyony & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND ULAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 3rd June 2011 and an Amended Statement of Claim on 11th August 2011. The Respondent filed its Statement of Response on 19th September 2011. The Claimant gave evidence on 17th October 2012, and called one Witness, his friend and former colleague at the Respondent Firm George Ng'ang'a, who testified on 15th November 2012 when the Claimant's case closed.

2. The Respondent called three Witnesses: Supervisor Francis Njuguna Muriithi; Driver Simon Muthui Kimani; and Administration Manager Catherine Wanjiru. The first two of these Witnesses gave evidence on 15th November 2011, while the last gave evidence on 30th September 2013 when the hearing closed.

3. The dispute was last mentioned on 2nd December 2013, when the Parties confirmed the filing of their Closing Submissions and were advised the Award would be delivered on notice in the New Year.

4. The Claimant testified he was employed by the Respondent Security Firm as a Security Guard on 23rd December 2000. His starting salary was Kshs. 1,800 per month. He worked for 10 years. He left employment on 26th January 2011 upon dismissal. He earned a salary of Kshs. 4,415 per month at the time of dismissal.

5. He claims dismissal was not on valid grounds, was not fairly carried out, and while in service, he was underpaid the monthly salary contrary to the various Wage Orders in force; was never paid house

rent allowance; worked overtime without compensation; was denied leave, or pay in lieu of leave and leave traveling allowance; and was not upon dismissal granted service pay for the 10 years worked. Ashioya makes the following prayers:-

- a. Underpayment of salaries for the period between December 2000 to January 2011 at Kshs 189,580;
- b. Arrears of house rent allowance 102,000;
- c. Salary for January 2011 at Kshs. 8,651;
- d. One month salary in lieu of notice at Kshs. 8,651;
- e. Annual leave pay for 10 years at Kshs. 86,510;
- f. Gratuity pay of 10 years at Kshs. 56,422;
- g. 110 days of Public Holiday at double rate at Kshs. 31,828;
- h. 480 weekly rest days at Kshs. 288,000;
- i. 12 months' salary in compensation for unfair termination at Kshs. 103,812;
- j. Uniform refund at Kshs. 5,000; and
- k. Refund of good conduct deposit at Kshs. 1,000

Total..... Kshs. 881,354

The Claimant also seeks a declaration that termination was unfair and unlawful amounting to unfair labour practices; the Respondent to release the Claimant's certificate of service; interest; costs; and any other remedy the Court may deem appropriate to grant.

6. The Claimant explained underpayment of salaries as follows:-

i. From the date of employment 23rd December 2000, up to 31st December 2002, the Claimant was paid a monthly salary of Kshs. 1,800. The Regulation of Wages [Protective Security Services] Order 2000, provided for a basic minimum wage of Kshs. 3,412 per month. House rent allowance ought to have been Kshs. 750 per month in accordance with the Protective Security Services Order 1998- giving the Claimant a salary of Kshs. 4,162 per month.

ii. The minimum wage was amended through the Regulation of Wages [General] [Amendment] Order 2002 bringing the minimum wage for a Night Guard to Kshs. 3,925. The effective date was 1st May 2002. The Claimant contends for the period of 24 months, he was underpaid [Kshs. 3,412 –Kshs. 1,800 =

Kshs. $1,612 \times 16 \text{ months} = \text{Kshs. } 25,792] + [\text{Kshs. } 3,925 - \text{Kshs. } 1,800 = \text{Kshs. } 2,125 \times 8 \text{ months} = \text{Kshs. } 17,000] = \text{Kshs. } 42,792.$

iii. From January 2003, the Respondent increased the Claimant's salary from Kshs. 1,800 to Kshs. 2,300. Still there was no house rent allowance paid to the Claimant. The Order of 2003, revised the minimum wage to Kshs. 4,357 for Night Guards from 1st May 2003. The Claimant continued to be paid Kshs. 2,300 up to April 2004. He calculates the underpayments for 16 months as $[\text{Kshs. } 3,925 - \text{Kshs. } 2,300 = \text{Kshs. } 1,625 \times 5 \text{ months} = \text{Kshs. } 8,125] + [\text{Kshs. } 4,357 - \text{Kshs. } 2,300 = \text{Kshs. } 2,057 \times 11 \text{ months} = \text{Kshs. } 22,627] = \text{Kshs. } 30,752.$

iv. The minimum wage for the following year was revised to Kshs. 4,836 per month for Night Guards in the Amendment to the Wage Order effective 1st May 2004. The Respondent raised the Claimant's salary to Kshs. 3,700 from May 2004 to April 2005. For 12 months, he was underpaid in the amount of $\text{Kshs. } 4,836 - \text{Kshs. } 3,700 = \text{Kshs. } 1,136 \times 12 \text{ months} = \text{Kshs. } 13,632.$ The correct figure here should be **Kshs. 13,632.**

v. Effective 1st May 2005, the minimum rate applicable in the Order of 2005, was Kshs. 5,175. The Claimant went on receiving Kshs. 3,700 from the Respondent, up to April 2006. In the 12 months between May 2005 and April 2006, he was underpaid $\text{Kshs. } 5,175 - \text{Kshs. } 3,700 = \text{Kshs. } 1,475 \times 12 = \text{Kshs. } 17,700.$

vi. The Respondent reviewed the Claimant's monthly salary to Kshs. 4,415 at the beginning of May 2006. The Regulation of Wages [Amendment] Order of 1st May 2006 [Note that review of the minimum wage is traditionally announced by the Government during the Labour Day], fixed the minimum wage at Kshs. 5,796. The Claimant was underpaid from May 2006 $\text{Kshs. } 5,175 - \text{Kshs. } 4,415 \times 36 \text{ months} = \text{Kshs. } 27,504$ for the period going up to April 2009. This is not mathematically correct. The Court notes that working with the minimum rate of Kshs. 5,175 against the amount received of Kshs. 4,415, for 36 months would yield Kshs. 27,360. The minimum wage from 1st May 2006 was $\text{Kshs. } 5,796 - \text{Kshs. } 4,415 = \text{Kshs. } 1,381 \times 36 = \text{Kshs. } 49,716.$ **The correct amount, mathematically, would be Kshs. 49,716, for the period between 1st May 2006 and April 2009.**

vii. In May 2009, the Government fixed the minimum wage at Kshs. 6,839 for Night Guards. The Respondent continued to pay the Claimant Kshs. 4,415 per month. For the next 12 months ending April 2010, the Claimant was undercut by Kshs. 6,839 – Kshs. 4,415 = Kshs. 2,424 x 12 months = **Kshs. 29,088.**

viii. From May 2010 to his exit in January 2011, the Claimant was entitled to Kshs. 7,523. He retained the longstanding rate of Kshs. 4,415. He was underpaid by Kshs. 7,523 – Kshs. 4,415 = Kshs. 3,108 x 9 months = **Kshs. 27,972.**

In total the correct underpayment of salaries claimed, based on the various Regulation of Wages [Amendment] Orders from the year 2000 to 2011 is Kshs. 211, 652.

7. The Claimant justified his claim for arrears of house rent allowance on the Regulation of Wages [Protective Security Services] Order 1998 which states that the Guard shall be entitled to house rent allowance of Kshs. 750 per month, or 15% of the basic pay, whichever is higher. From 1st May 2003, the house rent allowance was reviewed to Kshs. 1,000 per month. The Claimant therefore prays that from December 2000 to April 2003, he was entitled to rent of Kshs. 750 per month x 28 months = Kshs. 21,000. Between May 2003 and January 2011, he claims a rate of Kshs. 1,000 per month x 81 months = Kshs. 81,000 In total the Claimant prays the Court to allow arrears of **house rent allowance at Kshs. 102,000.**

8. He testified he worked the whole night, for 12 hours for 7 days a week, without any benefit of a rest day. He worked during Public Holidays. He was not compensated for the excess hours worked. He claims 4 days in every month for 10 years at double rate [960] days, at Kshs. 300 per day = **Kshs. 288,000 in overtime pay.**

9. He was entitled to 26 days of annual leave with full day. Leave travelling allowance was payable at Kshs. 850. He claims Kshs. 86,510 in leave pay over the period of 10 years.

10. He claims he was entitled to gratuity pay of 18 days' salary for every completed year of service, based on the basic salary at the time of termination. He calculates this at Kshs. 56,422.

11. On unfair termination, the Claimant told the Court that he reported for night guard duties on 26th January 2011 at the assigned site Elite Tools within Industrial Area, Nairobi. He reported at the prescribed time, 6.00 p.m. At around 11.00 p.m. his Supervisor Jared visited the Claimant at Elite Tools. He informed the Claimant that he had become old, had worked for 10 years and needed to retire. Jared accused the Claimant of being a habitual drunkard, slapped the Claimant and told him '*Mzee umefutwa kazi*' [*Kiswahili for 'Old Man, you have been sacked*]. A replacement guard was immediately allocated duty in the Claimant's place.

12. Ashioya was made to leave the place of work at night. He was attacked by thugs as he walked home, injured, and was not able to report to the Respondent's Office in follow-up until 4th February 2011. When he reported, he was slammed with a letter of the same date alleging he had deserted duty after

insulting his Manager on the 25th January 2011. The Claimant denied that he abused any Manager, or deserted employment. He holds the termination of his contract was unfair and seeks 12 months' salary in compensation and 1 month salary in lieu of notice.

13. On cross-examination the Claimant testified he presently resides in the Western Region. He retains the Guard Book, which he acknowledges belongs to the Respondent. He did not desert duty, but was ejected by the Employer on 26th January 2011. He returned to the Office on 4th February 2011. He was attacked by thugs but did not report to the Police or go the hospital; he purchased drugs off the counter. He informed his Supervisor of the attack after three days. He did not know if the Supervisor informed the Management. When he reported on 4th February 2011, he found the Respondent's Officers Muriithi and Dominic. He informed them he was assaulted. They told him he was lying to them. He conceded he had received warnings in the course of his employment, from the Respondent. He did not fail to shave and groom. He was not found by his Employer sleeping on the job. He had insignificant problems with the Employer before 26th January 2011. He was attacked by thugs around Pumwani area in Nairobi, on the Night he was dismissed by his Supervisor. He testified on redirection that he returned the Respondent's office effects on 19th February 2011.

14. George Muguro Ng'ang'a testified he was working with the Claimant as a Guard at the service of the Respondent, at the site called Elite Tools on the night of 25th January 2011. George worked for the Respondent from 2009. On the material night a Supervision Team from the Respondent was doing its rounds. The Team visited Elite Tools at around 11.00 p.m. The Supervisor called Ashioya and asked him for the Guard Book. On the following night of 26th January 2011 the same Team visited the two Guards. A new Guard was brought by the Team, and Ashioya directed to go home. It was around 11.00 p.m. The Supervisor and Ashioya were involved in a quarrel. Ashioya asked to be accorded transport home. The Supervisor declined. Ashioya changed from his work uniform and left. The Claimant was ill and used to cough profusely, but still reported for work. George never saw the Claimant take leave, or off days.

15. On cross-examination George testified he did not employ the Claimant, and would not have the Claimant's leave record. George knew the vehicle used by the Respondent's Team on supervision, and knew it was the Supervisor who engaged the Claimant in a talk that night. George was guarding an area five metres away from where the Claimant guarded. He did not hear every word spoken between the two. He confirmed on redirection that the Claimant did not go on annual leave.

16. Francis Njuguna Muriithi testified he supervised Night Guards at the Respondent. He found the Claimant in deep slumber at the assigned place of duty Elite Tools, on the night of 25th January 2011. The Claimant was covered in his own jacket and a mosquito net. He suddenly woke up and started to hurl insults at Muriithi, insisting he was not asleep. He called the Supervisor 'Mjinga' [*Kiswahili for 'fool'*]. Muriithi avoided confrontation, called another vehicle and got a replacement for the Claimant. He asked the Claimant to board the other vehicle, go home and report to the Respondent's office the following day for disciplinary action. He refused to board the vehicle, and did not report to the Office as directed; he only reported to the office much later. It is not true that the Witness abandoned him. Elite Tools is a large business, which leases out premises to other tenants.

17. Questioned by the Advocate for the Claimant, Muriithi stated he found Ashioya asleep. The Team drove almost next to Ashioya but did not arouse him. There were other Respondent's Guards at the premises. The Witness did not sack the Claimant. Ashioya was summoned the next day for a disciplinary process, but did not show up. Muriithi signed the Claimant's Guard Book on 25th January around midnight. He did so just in confirmation that he had been to the place of work. The Book says, "*we have inspected the assignment and found everything in satisfactory condition.*" There was an entry

for 26th January 2011. Jared was the Supervisor. Muriithi and the Team called Jared after they found the Claimant asleep. It was not Jared who went to site at night and purported to sack the Claimant. Muriithi worked for the Respondent for about 5 years. He did not know about the Employees' terms and conditions of service. Redirected, the Witness testified he drove to the far end of Elite Tools, persuaded Ashioya to wake up, but he would not.

18. Simon Muthui Kimani recalled he drove the 'A Team' on the night of 25th January 2011. He has worked with the Respondent from 2008. The Team found the Claimant asleep, covered with a jacket, a cap and mosquito net. The Supervisor took these items, which prompted the Claimant to wake up. The Claimant hurled insults at the Supervisor. The Night Manager got a replacement for the Claimant, and asked the Claimant to report to the office the following day. The Manager called for an alternative vehicle to transport the Claimant. Ashioya refused to Board and walked off. It is not true that the Respondent denied the Claimant transportation home. Jared drove the second car. The Witness did not see the Claimant after this. He testified under cross-examination, that it was possible for one to sleep even while a car was driven close to him.

19. Catherine Wanjiru told the Court the Claimant was not summarily dismissed by the Respondent; he deserted. The Manager on patrol found the Claimant asleep. He became rude when woken up. He insulted the Night Manager. The 'A Team' asked for a replacement. The Claimant first refused to board the vehicle. He resurfaced at the Respondent's Office on 19th February 2011 to return the uniform. He refused to return the Guard Book. He had in the course of employment received several warnings – for refusing to shave and for sleeping while on duty.

20. He was not underpaid; he was paid all his salary arrears as borne out in the Petty Cash Vouchers, appendix 8 of the Statement of Response. He used to go on leave and was paid his dues as captured in the Muster Rolls, annexure 10 of the Response. It is not possible that he worked for 10 years without going on leave. He never gave the Respondent any medical or police evidence of an attack made upon him by thugs.

21. Cross-examined, the Witness stated she had worked for 13 years with the Respondent. The Claimant worked from 2000 to 2011. He was not issued a pay slip, but was paid through the vouchers. Catherine is aware issue of a pay slip to an employee is mandatory. The Respondent did not intend to hide anything by not availing a pay slip to the Claimant.

22. The Witness testified that the Claimant was paid in accordance with the Wage Orders in place. She conceded he was entitled to 15% basic pay as monthly house rent allowance. He was paid all benefits. The vouchers did not show details of payment. The vouchers acknowledge there were underpayments. The Claimant had loans with the Respondent. The vouchers were meant to show what was paid, not that there were underpayments. He is shown as having taken leave from 10th June 2010, to 29th June 2010, while the approval is given on 30th June 2010. The documents were not manufactured with the dispute in mind. He worked 12 hours. He was paid overtime as shown in the vouchers. He at times worked during the Public Holidays and was compensated. He was heard and given a chance to defend himself. Catherine gave him the hearing when he went to the Respondent's Offices on 19th February 2011. He was rude and told the Panel Members if they intended to sack him they were free to do so. He did not work on 26th January 2011, and may have altered the Guard Book. She could not say if the Claimant was a Member of any Trade Union.

23. Redirected, the Witness testified the Claimant did not ask for pay slips. He refused to return the Guard Book and had instead opted to rely on it in Court, to say he was working on 26th January 2011. There were payments made to the Claimant in the middle of the month. This was done by agreement.

He had a poor disciplinary record. His N.S.S.F contributions were deducted and remitted and he would not be entitled to claim gratuity. The Respondent urges the Court to reject the Claim.

The Court Finds and Awards:-

24. There is no dispute the Claimant was employed as a Night Guard by the Respondent on or about 23rd December 2000. He worked up to 26th January 2011, having left employment in contentious circumstances.

25. The questions raise by the Claim are whether the Claimant was unfairly dismissed by the Respondent; whether he is entitled to compensation; and whether he is entitled to the balance of the various statutory claims contained in the Claim.

26. The Claimant was on night guard duties with his colleague George Mugoro Ng'ang'a at the Elite Tools premises. The evidence of George was forthright and narrated simply and convincingly. The two Guards were working on 25th January 2011. The Supervisory Team visited them as was routine at around 11.00 a.m. on 25th January 2011. The Supervisor called Ashioya and asked him for the Guard Book. The following day at around the same time, the Supervisor and the Team visited the Guards again. Ashioya was asked to go home. There was an altercation between him and the Supervisor. Ashioya asked the Supervisor to help with transportation because it was late. No such help was offered, and the Claimant walked home. According to the Claimant, these were the facts, and as he walked home on the night of 26th January 2011, he was beaten up by thugs and was unable to report to the Management the following day as instructed. He reported on 4th February 2011, found Muriithi and Dominic who refused to buy his explanation that he had been beaten up by thugs. He was issued the letter of dismissal on 4th February 2011.

27. This version of the events narrated by the Claimant and his Witness was more persuasive than that told by the Respondent's Witnesses. In particular, Catherine who is the Administration Manager did not seem to have any recollection of the Claimant reporting to work on 4th February 2011. She testified that on the material night, the Claimant refused to board the vehicle, and resurfaced on 19th February 2011. The letter of dismissal was written by Dominic and issued to the Claimant on 4th February 2011. Secondly, the Guard Book which is a fair recollection of the events leading to the Claimant's exit from employment, is clear the Claimant worked on both the nights of 25th January 2011, and the night of 26th January 2011. The documentary evidence tallies with the oral testimony of the Claimant and his Witness.

28. The Guard Book does not capture the Claimant sleeping at work, either on the night of 25th January 2011 or 26th January 2011. It was stated in the book that upon inspection, everything was found satisfactory. This was the entry for 25th January 2011. There is no record in the Guard Book showing the Claimant was asleep on 26th January 2011. Muriithi stated he filled the Guard Book merely to confirm the Claimant was present on duty. In the view of the Court the Guard Book was a complete record of the work done by the Night Guards, capturing inspection, handing over and the status of the guarded property. A Supervisor or Night Manager could not find a Guard in deep slumber, call for replacement and simply pass it off. The occurrence ought to have been captured somewhere in this book.

29. In effect the Court finds there was no demonstrable valid reason justifying termination. It is not true that the Claimant deserted. He was present at work on 4th February 2011, and was handed the desertion letter. There was no attempt made by the Respondent to hear the Claimant out, either for the offence of desertion or that of sleeping at work. Catherine, who testified she was in the Panel that heard the Claimant, was only aware of the Claimant resurfacing on 19th February 2011. There is no record

calling on the Claimant to show cause why disciplinary action should not issue; no formal charges outlining his offences in a language understood by him; and no hearing of representations made by him or his representative as contemplated under Section 41 of the Employment Act 2007. There are no findings on any charges.

30. The Court finds the Respondent terminated the Claimant's contract of employment. He did not desert. There were no valid reasons given by the Respondent. The procedure was not fair. Termination was unfair. The Claimant is entitled to compensation under Section 49 of the Employment Act 2007. **The Court grants him 10 months gross salary at the rate due to him as of 26th January 2011. He merits notice pay, the equivalent of 1 month basic salary payable as of the date of termination.**

31. The underpayment of salaries is made clear at paragraph 6 of this Award. The claims are supported by Regulation of Wages [General] [Amendment] Orders running from the year 2000. The actual rates paid to the Claimant over the years were not disputed by the Respondent. The Respondent attached some payment vouchers for 2008 -2010, showing the Claimant to have received a total of Kshs. 87,168 in what was described as 'further claims of payments.' The Court formed the view that the Claimant had persistently been making demands for these underpayments, and the Respondent was aware of its obligation to the Claimant, but only paid partly. The Claimant did not reveal that these payments were made to him. Weighing his evidence against that of the Respondent under this item, the Court grants to him the amount of Kshs. 211,652 under paragraph 6, less the sum of Kshs. 87,168 contained in the vouchers, total **Kshs. 124,484 in salary underpayment for the period worked.**

32. There is nothing much to contest about the claim for house rent allowance. Catherine was clear in her evidence the Claimant was entitled to 15% of the basic pay as house rent allowance. There was no evidence this was paid. The mode adopted in computing the house rent allowance is based on the Regulation of Wages [Protective Security Services] Order 1998. **The claim for house rent arrears at Kshs. 102,000 is allowed as prayed.**

33. Ashioya worked up to 26th January 2011. His letter of dismissal, titled 'Desertion letter,' issued upon him on 4th February 2011. **He is entitled to his entire salary for the month of January 2011. The Certificate of Service is guaranteed to him by Section 51 of the Employment Act 2007.**

34. The Claimant did not offer adequate proof of overtime worked. The Muster Rolls indicated he was not continuously on duty as claimed. It was up to the Claimant to offer clear evidence of the hours, and days worked. His assertion that he worked 7 days a week without break for 10 years appears less than truthful, in the light of the Muster Rolls. He did not account for the days he was shown to be on leave, or off-duty, or simply absent. The Claim for Public Holidays worked was similarly without adequate evidential support. The claim for overtime pay is rejected.

35. The Claimant alleged he was never granted annual leave or leave pay, and leave traveling allowance for the entire 10 years worked. There were no less than 6 Leave Application Forms exhibited by the Respondent, with details of the Claimant's leave record. There was nothing to persuade the Court that these documents were manufactured by the Respondent to defeat the claim for leave. The Forms have details of the Claimant, including his signature, and comments of authorizing officers, which appear too mundane to be concocted. These are the kind of everyday comments made by Employers on Leave Application Forms. The claims for leave pay and leave traveling allowance are declined.

36. The Claimant was subscribed to the N.S.S.F. At the time his contract was terminated, Section 35 [6] of the Employment Act was in place. He would not be entitled to gratuity of Kshs. 56,422. He had the social security payment from the N.S.S.F, and would not be entitled to double social security payment.

The claim for gratuity payment is rejected. No evidence was led on Uniform Refund and Good Conduct Money Refund. These prayers are refused.

37. His basic as of January 2011 total monthly salary of January 2011 ought to have been Kshs. 7,523 add 15% of this as house rent allowance- total Kshs. 8,651. **Compensation at 10 months' salary is allowed at Kshs. 86,510.** In sum:-

[a] Termination was unfair;

[b] The Respondent shall pay to the Claimant compensation for unfair termination at Kshs. 86,510; arrears of house rent allowance at Kshs. 102,000; salary underpayments at Kshs. 124,484; 1 month salary in lieu of notice at Kshs.7,525; and salary for January 2011 at Kshs.8,651 - total Kshs. 329,170, to be paid within 30 days of the delivery of this Award; and

[c] The Respondent to avail to the Claimant his Certificate of Service forthwith; and

(d) No order on the costs.

Dated and delivered at Nairobi this 20th day of March 2014

James Rika

Judge



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