



**Gathungu v Muthaiga Country Club (Cause 329 of 2019)
[2024] KEELRC 1049 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1049 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 329 OF 2019**

**L NDOLO, J
MAY 9, 2024**

BETWEEN

BEATRICE GATHUNGU CLAIMANT

AND

MUTHAIGA COUNTRY CLUB RESPONDENT

JUDGMENT

1. On 21st June 2018, a black pouch was found as a lost item within the precincts of Muthaiga Country Club. The pouch was taken to the Reception where the Claimant, Beatrice Gathungu was on duty. The handling of that pouch and its contents gave rise to this action between the Claimant and the Respondent.
2. The Claimant states her claim in a Memorandum of Claim dated 22nd May 2019 and amended on 19th June 2019. The Respondent filed a Statement of Response dated 22nd July 2019.
3. The matter went to full trial where the Claimant testified on her own behalf and the Respondent called its Events and Communication Manager, Yvonne Magambo. The parties further filed written submissions.

The Claimant’s Case

4. The Claimant states that she was employed by the Respondent as a Telephonist on 1st April 2007. She was later promoted to the position of Senior Receptionist, earning a gross monthly salary of Kshs. 89,772 in the year 2018.
5. The Claimant avers that on 31st October 2018, she was issued with a termination letter on allegations of gross negligence. She terms the grounds advanced in the letter as unfair and discriminatory, stating that she had followed the laid down procedure regarding the safekeeping of lost property.



6. The Claimant avers that whereas she was invited to a meeting by the Human Resource Manager on 8th and 9th October 2018, in addition to being invited to respond to a show cause letter dated 3rd October 2018, these were mere courtesies to rubberstamp a predetermined position. She points out that no action was taken against Ms. Yvonne Kinanu, to whom she gave the pouch forming the subject matter of the termination.
7. The Claimant particularises her claim as follows:
 - a. A declaration that the termination of her employment through the letter dated 31st October 2018 was unfair and discriminatory;
 - b. An order for compensation in the amount of Kshs. 1,077,264 for unfair termination of employment;
 - c. An order for compensation in the amount of Kshs. 1,077,264 for discrimination;
 - d. Certificate of service;
 - e. Costs plus interest.

The Respondent's Case

8. In its Statement of Response dated and filed in court on 22nd July 2019, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim.
9. The Respondent however denies the allegations of unlawful and unfair termination made by the Claimant and states that on 21st June 2018, the Claimant was the Receptionist on duty when a pouch containing a recorder, earphones and lapel microphone was handed over to her, as a lost item.
10. The Claimant is said to have requested the Events and Communications Manager, Yvonne Magambo to confirm the owner of the pouch. It was confirmed that the pouch belonged to one Anthony Mwangi. The pouch was handed back to the Claimant to await collection by the owner.
11. On 30th August 2019, when the owner came to pick the pouch, it was retrieved from the general box in the lost and found safe. It was however discovered that the recorder and earphones were missing from the pouch. The matter was reported to the Human Resource Manager who invited the Claimant to her office to explain the missing items. The Claimant is said to have failed to give a satisfactory explanation and she was therefore suspended for seven days to allow for comprehensive investigations into the matter.
12. The Claimant was subsequently served with a show cause letter dated 3rd October 2018, accusing her of failure to follow the right procedure of receiving and storing lost and found items. By letter dated 16th October 2018, the Claimant was invited to a disciplinary hearing scheduled for 18th October 2018. The Claimant was notified of her right to be represented, to call witnesses and ask questions on any evidence produced or statements from witnesses.
13. The hearing took place as scheduled and the Claimant was accompanied by one Samuel Kibui. The Claimant's employment was subsequently terminated by letter dated 31st October 2018. She was informed of her right of appeal, which she chose not to exercise.
14. The Respondent's case is that the termination of the Claimant's employment was lawful and fair.



Findings and Determination

15. There are two (2) issues for determination in this case:
- a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

16. The Claimant's employment was terminated by letter dated 31st October 2018 stating as follows:

“Dear Beatrice,

RE: Termination-gross Misconduct

Our letter dated October 3, 2018 and the subsequent disciplinary hearing held on Thursday October 18, 2018 refers.

During the said hearing, the following allegations were discussed and considered:

Gross negligence on your part by way of:

1. Failure to follow correct procedure for storing valuable lost and found items.
2. Failure to verify the contents of the pouch before receiving it for safe custody.
3. Failure to properly record the contents of the lost and found book.

Following investigations and disciplinary hearing, it was established that:

On 22nd June 2018, Charles Owiso picked up a black pouch from the Ballroom following clearance from the previous day's event and handed it over to you at the reception, as a lost and found item, in accordance with Club's procedures. You were on duty at the time thus received the pouch. You stated that there was a 'black thing' inside the pouch but did not know what it was. You thus, enquired from the maintenance team if the pouch together with its contents belonged to them and they answered in the negative. Thereafter, you took the pouch to Yvonne and requested her to check if its owner was from the previous day's event, which she did via email communication. Yvonne emptied the pouch in your presence to see its content. She then wrote to Hannah Emmrich who was the performer and stated that the team found a black pouch with a recorder, earphone and lapel mic. Hannah responded that she knew the owner and said that he (Anthony) would pick it up from the Club. Yvonne then handed over the pouch plus its content back to you.

In your statement, you said that you sealed the pouch in front of Yvonne and kept it at the lost and found area, waiting for the owner to pick it up. You however admitted that you did not confirm the content of the pouch upon receiving and before sealing it. Yvonne, on the other hand, maintains that all the three items were intact upon handing the pouch back to you.

It has also been established that the pouch had some valuable items, hence you should have kept it in the safe, as per normal procedures. This was not the case as the pouch was later retrieved by David Itambo from other non-valuable lost and found items storage area. It was not at the safe, as expected. It was noted that the recorder and earphones were missing from the pouch. The lapel mic was however intact.



It was also established that the contents of the pouch were not recorded in detail in the lost and found book. The only entry noted in the book was 'black pouch' hence a different person would not know what was in it. Thus, this omission was by design.

Consequently, your above actions amount to gross negligence, as you carelessly and improperly performed your work which was within your scope to do so, thus leading to loss of valuable items. The said allegations amount to gross misconduct within the MCC Disciplinary Code and Procedure as well as the Employee Handbook which you acknowledged and signed on 08 April 2018.

Consequently, in consideration of your length of service, the management, at strictly its own discretion, has determined to terminate your employment contract with effect from 31st October 2018, by giving you one month's notice, in accordance to (sic) the terms of your employment contract.

You have the right to appeal against this decision within five (5) days from the date of this letter.

Otherwise, your final dues will be paid as detailed below after clearance with the Club and returning all Club property in your possession: -

1. Pay for days worked, up to and including 31st October 2018-your last day of employment.
2. One month's pay in lieu of notice.
3. 23.7 days' pay in lieu of leave earned on prorate basis-2018/2019.
4. 23.7 days' pay in lieu of leave travelling allowance earned on pro rata basis-2018/2019.
5. 6 days pay in lieu of public holidays worked in 2018-payable at double daily rate.
6. Your provident contributions will be paid out by Zamara Actuaries, Administrators & Consultants Limited (Formerly Alexander Forbes Retirement Fund). Enclosed herein, please find notification of Exit forms, for your further action.

Less;

1. Statutory deductions.
2. Any other dues, loans, breakages, losses owed to the Club, if any.

Please carefully check the above and the attached dues computation to ensure that there will be no further claims.

You shall be issued with a Certificate of Service in accordance with the requirements of the Kenyan Laws.

Yours faithfully,

For: Muthaiga Country Club

(signed)



Human Resources Manager”

17. This letter accuses the Claimant of negligence in handling lost and found items at the Club. Specifically, the Respondent states that the Claimant did not record or secure the items immediately they were brought to her attention.
18. Further, she is said to have failed to verify the specific items contained in the pouch received by her at the Reception. According to the Respondent, verification would have informed the Claimant that the items were valuable and therefore ought to have been stored in the safe not in the lost and found box, where the Claimant placed them.
19. The Claimant’s case is that the Respondent picked on her while sparing the Events and Communication Manager, Yvonne Magambo, who also handled the items. The Claimant termed this as discrimination.
20. An employee cannot however get away from their duty to their employer by pointing to alleged mistakes by another employee. Moreover, it was established that the responsibility of recording and securing lost and found items lay with the Reception where the Claimant was the shift leader on the material day. The Claimant cannot therefore assign her failure to Yvonne Magambo.
21. In its final submissions dated 5th April 2024, the Respondent made reference to the decision in [Galgalo Jarso Jillo v Agricultural Finance Corporation](#) [2021] eKLR where it was held:

“In terms of section 43 of the [Employment Act](#), an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken...what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.”
22. In the present case, the Claimant failed to verify and record lost and found items promptly as required. In addition, she stored them in the general box rather than in the safe, thus exposing them to manipulation. The Claimant admitted at the disciplinary hearing that this was a mistake and as it turned out, by the time the presumed owner of the items came to pick them, two of the items were missing. More significantly, perusal of the lost and found register reveals an attempt to tamper with the record, by backdating the entry date of the items in issue.
23. Overall, I find and hold that the Respondent had a valid reason for terminating the Claimant’s employment as required under Section 43 of the [Employment Act](#).
24. The next question is whether the Respondent observed the procedural fairness requirements set by Section 41 of the [Employment Act](#). There is evidence that the Claimant was issued with a show cause letter to which she duly responded. She was also invited to a disciplinary hearing, at which she was accompanied by an employee of her choice. In my view therefore, the dictates of Section 41 were fully satisfied.
25. Cumulatively, I find and hold that the termination of the Claimant’s employment was substantively and procedurally fair. The claim for compensation is therefore without basis and is disallowed. The claim on discrimination was not proved and is also disallowed.



26. In the end, the Claimant's entire claim fails and is dismissed with an order that each party will bear their own costs.

27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF MAY 2024

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JUDGE

Appearance:

Mr. Ashioya for the Claimant

Mr. Githiri for the Respondent

