



**Kenya Hotel & Allied Workers Union (For and on Behalf of Benjamin Otieno Adala) v Tamarind Management Limited t/a Nairobi Carnivore Restaurant (Cause 292 of 2019) [2024] KEELRC 1223 (KLR) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1223 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 292 OF 2019  
NZIOKI WA MAKAU, J  
MAY 20, 2024**

**BETWEEN**

**KENYA HOTEL & ALLIED WORKERS UNION ..... CLAIMANT  
FOR AND ON BEHALF OF BENJAMIN OTIENO ADALA**

**AND**

**TAMARIND MANAGEMENT LIMITED T/A NAIROBI CARNIVORE  
RESTAURANT ..... RESPONDENT**

**JUDGMENT**

1. The Claimant Union filed this suit against the Respondent Hotel in May 2019 and by an Amended Memorandum of Claim dated 25<sup>th</sup> November 2019, seeks reliefs for the unfair termination of Mr. Benjamin Otieno Adala (hereinafter “the Grievant”). It averred that the Grievant is a former employee of the Respondent who was employed on 1<sup>st</sup> June 1999 as a Kitchen Steward and later promoted to Assistant Cook. That the Grievant’s employment was terminated on 21<sup>st</sup> May 2018, at which time his basic salary was Kshs. 21,400/- and the Respondent had declined to pay his housing allowance of Kshs. 5,400/- since January 2014. It contended that the Grievant had a clean record of employment with the Respondent and received different awards for his exemplary services. The Claimant’s case was that in January 2018, the Grievant and other employees of the Respondent exercised their right to affiliate with the Claimant Union following which the Respondent resorted to intimidating and issuing threats against the affiliation. That thereafter on 18<sup>th</sup> March 2018, Grievant was verbally locked out of his work station and asked to apologize and withdraw from the Claimant Union in order to be reinstated back to work. Consequently, the Grievant reported the case to the Union on 4<sup>th</sup> April 2018 and on 13<sup>th</sup> April 2018, the Claimant Union and the Respondent held a meeting at the Respondent’s premises in a bid to resolve the matter. It was the Claimant’s averment that after the said meeting, the Respondent issued the Grievant with a Suspension Letter alleging he was intoxicated on the evening



of 18<sup>th</sup> March 2018 after work. That the Grievant appealed against the suspension letter on 15<sup>th</sup> April 2018 and on 27<sup>th</sup> April 2018, he was issued with a Show Cause Letter for allegedly absconding duty on 20<sup>th</sup> April 2018. The Grievant responded to the show cause on 4<sup>th</sup> May 2018, denying having received information that his suspension had been lifted and that he was to report for duty. According to the Claimant, the Respondent issued the Grievant with a further show cause on 15<sup>th</sup> May 2018 indicating that the Grievant resumes duty after proving he had undergone rehabilitation against intoxication. The Grievant replied to the same on 16<sup>th</sup> May 2018 requesting for proof of intoxication before adhering to the said Respondent's conditions. That when the Grievant reported to his work station on 18<sup>th</sup> May 2018, the Chef summoned him to his office and ordered him to leave until further communication. The Claimant asserted that the Grievant was then issued with a Termination Letter on 21<sup>st</sup> May 2018 for purportedly declining to subject himself to alcohol rehabilitation.

2. The Claimant Union further averred that the Grievant appealed against the decision to terminate his employment without an opportunity to be heard but his appeal was refused. It asserted that its efforts to resolve the dispute between the parties failed thus prompting the intervention of the Ministry of Labour through the appointment of a Conciliator, whose report faulted the Respondent in the end. The Claimant stated that it filed the instant suit after the Respondent had declined to implement the Conciliator's findings and recommendations. It set out the Grievant's remaining claims to be the arrears for housing allowance and 12 months' salary as maximum compensation for unfair dismissal. The Claimant Union thus prays that the Court orders that:
  - a. the Respondent's decision to terminate the Grievant was unfair; the Respondent pays the Grievant his claim;
  - b. the Respondent pays interest on the amount so awarded from the time of termination;
  - c. and the cost of this suit be paid by the Respondent.
3. In response, the Respondent filed a Memorandum of Response dated 7<sup>th</sup> October 2020 averring that the Grievant was found intoxicated at his designated work place during working hours on 18<sup>th</sup> March 2018. That the Grievant was thereafter suspended with effect from 13<sup>th</sup> April 2018 and after considering his appeal against the suspension, it issued him with a final warning letter setting out various conditions he was expected to comply with going forward. That however, the Grievant declined to receive the said final warning letter and instead elected to respond through a handwritten Statement dated 19<sup>th</sup> April 2018 protesting the issuance of the warning letter. The Respondent's stance is that the Grievant thereafter absconded his duties from 20<sup>th</sup> April 2018 despite his suspension having been lifted and that it was forced to issue him with another Notice to Show Cause on account of his absence. The Grievant's response to the show cause was that certain issues had been ignored, that he was still on suspension and was thus not absent, and that he was ready to return only if his suspension was lifted unconditionally. The Respondent asserted that it nevertheless maintained in its response of 15<sup>th</sup> May 2018 that they were not aware of the Grievant's whereabouts and renewed the conditions for his immediate enrolment with an established alcoholic rehabilitation centre and his immediate return to duty, failure to which he would be facing summary dismissal. The Respondent further averred that despite the Grievant's indication that he would report to work on 18<sup>th</sup> May 2018 and enrol in a counselling program, he failed, refused and/or ignored to do the same notwithstanding the benefits it would have offered him. That it had no choice but to terminate the Grievant on account of his clear refusal to undergo rehabilitation and after the termination, the Grievant was paid Kshs. 108,614.27 after statutory deductions.



4. The Respondent asserted that they dismissed the Grievant's appeal against the termination because he posed a danger to his colleagues and the Company by being intoxicated at the work place and further because he had declined to enrol into an alcohol rehabilitation program before returning to work. It asserted that since the Grievant was paid his terminal and pension dues, there are no further dues to be paid to him. It denied the claim for arrears in house allowance for lacking legal or factual basis as the Grievant was paid a consolidated salary in addition to service charge which sufficiently caters for the same. It further denied that the termination of the Grievant's employment was related to his right to associate with the Claimant Union and refuted his claim for compensation because he was lawfully terminated for gross misconduct.

### **Evidence**

5. The Grievant testified in cross-examination that when he was found drunk, it was after he had completed his duties and was at the locker room preparing to go home and his testimony was that they were given alcohol on holidays. He confirmed having admitted to have been intoxicated while at work and having been given a last chance to undergo counselling and rehabilitation. He also confirmed that he was paid his dues. The Grievant noted in re-examination that he never got any letters for being drunk and clarified that he did not consume any alcohol during the morning hours and was thus sober during work hours.
6. The Respondent's Witness Ms. Maureen Namiroi testified that they do not issue alcohol to members of staff and that employees are not allowed to drink on the premises. She maintained that the Grievant was found intoxicated and unable to walk on 18<sup>th</sup> March 2018 and that they were unable to retain him when he refused to go to rehab. That the Grievant had been warned verbally and severally on being drunk.

### **Claimant's Submissions**

7. The Claimant Union submitted that the issue for determination before this Court is whether the Respondent's decision to terminate Benjamin Otieno Adala was unfair and if so, whether the said Grievant is entitled to compensation for unfair termination, together with interest. The Claimant asserted that it produced in court the Grievant's payslips showing his entitlement to house allowance. That the Respondent arbitrarily, unlawfully, unilaterally and irregularly declined and stopped paying to the Grievant the said house allowance, without any justifiable cause. The Claimant Union noted that the date in which it sought for a meeting with the Respondent relating to the Grievant's lockout is the same date the Respondent issued him with a suspension letter. That the Grievant served the Respondent for close to 20 years prior to termination of his employment, which period he was issued with certificates for the provision of excellent and/or exemplary services dated 13<sup>th</sup> May 2007, 12<sup>th</sup> November 2009 and 8<sup>th</sup> September 2017 for rendering 15 years of excellent service. The Claimant submitted that the Grievant's termination letter did not provide the reason for termination of his service and/or the provision of law under which his termination was anchored. That a disciplinary hearing was never conducted prior to the Grievant's summary dismissal and upon seeking conciliation, it was recommended that the Grievant be compensated 12 months' salary for unfair termination. The Claimant also argued that no iota of evidence was tabled linking the Grievant to the events of being intoxicated while on duty, including providing CCTV camera footages or key eye witnesses' testimony. It was the Claimant's submission that having established that the Grievant was unfairly dismissed from employment, this Court ought to grant him maximum compensation for unfair termination from employment, together with interest.



8. In support of its case, the Claimant Union referred to Article 50 of the *Constitution* of Kenya of 2010 on the right to a fair hearing, and sections 41 and 43 of the *Employment Act* of 2007 on procedural and substantive fairness prior to termination of employment. It submitted that section 45(4) of the *Employment Act* further states that a termination of employment shall be unfair if it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. The Claimant further referred to the decision by the Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR noted the Court of Appeal's agreement with the trial Court that the respondent was entitled to an opportunity to be heard in any event. In addition, the Claimant in the instant case urged this Court be guided by the finding of the three- Judge Bench of the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, which affirmed the necessity of an oral hearing and agreed with the trial Court's finding that the procedure adopted by the appellant was short of a fair one. It was the Claimant's submission that where a Court finds the termination of employment to be unfair or wrongful, section 49 of the *Employment Act* applies on the available appropriate remedy. It asserted that this Court should find that the termination of Benjamin Otieno Adala was unfair, unlawful and contrary to the *Constitution* of Kenya, 2010, the *Employment Act* and the rules of natural justice and that the Grievant is entitled to housing allowance from January 2014 to 18<sup>th</sup> May 2018, together with compensation for unfair termination, and interest.

### Respondent's Submissions

9. The Respondent submitted that section 45(2)(b) of the *Employment Act* of 2007 provides that a termination is deemed to be fair if it is related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and effected in accordance with fair procedure. It submitted that section 44(4) of the Act outlines various actions and inactions of an employee that constitute gross misconduct with section 44(4)(b) stating that summary dismissal shall be justifiable if - during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly. The Respondent submitted that the Court of Appeal in *Kenya Revenue Authority v Reuwel Waitthaka Gitabi & 2 others* [2019] eKLR said that the standard of proof is on a balance of probability, not beyond reasonable doubt, and that all the employer is required to prove are the reasons that it "genuinely believed to exist" that caused it to terminate the employee's services. The Respondent maintained that it fairly dismissed the Grievant's services as demonstrated in its evidence in court. That the Grievant's contention that he was not drunk during working hours cannot suffice since he acknowledges in his letter dated 15<sup>th</sup> April 2018 that he was already drunk when they found him. The Respondent argued that if the Grievant was already drunk at the time he was found, the only reasonable conclusion is that he had commenced drinking alcohol during working hours. It cited section 44(3) of the *Employment Act*, which provides that an employer may dismiss an employee summarily when the employee has by his conduct fundamentally breached his obligations arising under the contract of service. It also cited the case of *Godfrey Makindu v Trans Business Machines Limited* [2013] eKLR. It was the Respondent's submission that it was entitled to terminate the Grievant's services for gross misconduct, incapacity, incompatibility, and breach of terms of his contract as well as the Company's policy. That notably, the Grievant admitted he was indeed found drunk at the Company's premise and as such, there was no need for corroboration as claimed, as affirmed in the case of *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* [2021] eKLR.
10. It was the Respondent's submission that the Grievant is not entitled to any of the reliefs sought, as his termination was fair and lawful. That if this Court however finds that the termination was unfair and/or unlawful, this Court ought to award one (1) month salary as compensation since the Grievant



contributed to his termination as was noted by Court in *Robert Kavunza Kilonzo v Gokul Limited* [2018] eKLR. The Respondent argued that the claim for arrears in house allowance has no legal or factual basis as the Respondent's witness testified that the Grievant was paid a consolidated salary. That in any case, the Grievant cannot be awarded for any claims stretching back more than three (3) years as per section 90 of the *Employment Act*. That even if it is assumed that this Claim is not statute barred, the Grievant has failed to specifically plead the amount he claims and merely sought Kshs. 259,200/- as unpaid house allowance, without pleading in the Amended Claim how he arrived at the figure. The Respondent relied on the case of *Hahn v Singh* [1985] KLR 716 where the Court of Appeal held that special damages must not only be specifically claimed but also strictly proved, which position was reiterated in the case of *Dr. John Nanbukule Omukuba v N. Mesh P. Shab Brimji* [2008] eKLR. It urged the Grievant's case be dismissed with costs to the Respondent.

11. The Claimant filed suit seeking recompense for the termination that ensued after the Grievant, an employee of the Respondent, was allegedly found drunk on the premises. The Grievant asserts the drinks were a gift from the employer as was customary. The Respondent denied offering alcoholic drinks as alleged by the Grievant. The Grievant was given an opportunity to undertake rehabilitation before being re-absorbed but he declined to undergo rehabilitation insisting he had no problems with alcohol. The Respondent took the Grievant through a disciplinary process and even ensured there was psychosocial support offered in the form of rehabilitation. The Claimant's client was therefore terminated after due process and in addition was given all the necessary support required of an employer. The Grievant had no valid claim against the Respondent as the fact of his intoxication was ascertained by the Grievant's managers and colleagues. The Grievant worked in a section where knives and other sensitive equipment was in operation and any degree of intoxication posed a danger to the Grievant and other employees let alone the customers of the Respondent. The suit is therefore only fit for dismissal. Suit dismissed with costs to the Respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

