



Ogutu v Intercontinental Nairobi (Employment and Labour Relations Cause 1453 of 2018) [2024] KEELRC 1757 (KLR) (4 July 2024) (Judgment)

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1453 OF 2018**

MN NDUMA, J

JULY 4, 2024

BETWEEN

FREDRICK OGUTU CLAIMANT

AND

INTERCONTINENTAL NAIROBI RESPONDENT

JUDGMENT

1. Specific damages
 - a. 82 months' salary from April 2017 to retirement in December 2024 (446,500*2) Kshs 36,613,000/=.
 - b. House allowance from April 2017 to retirement in December 2024 (145,600*82) Kshs 11,939,200/=.
 - c. Fuel card from April 2017 to retirement in December 2024 (35,000*82) Kshs 2,870,000/=.
 - d. The claimant's child's school fees for 21 terms (115,500*21) Kshs 2,425,500/=.
 - e. Compensation for wrongful and unfair termination of employment calculated at twelve months gross salary being (12*446,500.00) Kshs 5,358,000/=
 - f. Damages for under paid wages (654,640*31) months worked as the DFB Kshs 20,293,840.00
Total claim for specific damages Kshs 79,499,540.00
2. General damages for racial discrimination and defamation to be assessed by the court.
3. Interest on (1) and (2) above
4. Cost of the suit



5. The claimant was initially employed by the respondent in the position of Banquet Manager from 16/09/1996. He resigned from the position on 8/9/2000.
6. The respondent rehired the claimant by letter of offer dated 22/04/2008 as Assistant Food and Beverage Manager in Job Band 4. The contract was effective 01/05/2008.
7. The claimant was paid a gross salary of Kshs 210,059/= made up of Basic Salary Kshs 141,000/=, House Allowance of Kshs 37,206/= and Travel Allowance of Kshs 31,853/=.
8. The claimant was then promoted to position of Assistant Director Catering and Events due to his good service and later to Assistant Director, Food and Beverage. In this position claimant was 2nd in command in the Food and Beverage Department and acted for the Food and Beverage Director in his absence.
9. That he worked diligently and continuously and his salary was increased progressively and in particular by a letter dated 24/6/2013 to a basic salary of Kshs 227,013.12, house allowance of Kshs 48,880.00 and travel allowance of Kshs 41,600.00.
10. The claimant was appointed by the Regional General Manager, Kark Hale, in Acting capacity as the Director of Food and Beverage for a 3 month period effective 6th June 2014 to 15th September 2014 and was paid acting allowance of Kshs 109,791.00 as per letter dated 30/5/2014. The claimant achieved 90% of key performance objectives (KPO) during the Acting period as required in the appointing letter. The position was always occupied by European expatriates.
11. The claimant was promoted to the position of Director of Food and Beverage effective 6th September 2014 which position he held until termination of employment. The claimant was the first African to hold that position. Claimant states that he worked diligently. At the time of appointment, the basic salary was increased to Kshs 295,000/= and house allowance of Kshs 140,000/=; school fees benefits for his children, fuel card of Kshs 20,000.00 per month and a company phone with a postpaid line.
12. That his salary was much less than that hitherto received by the Expatriate Food and Beverage Directors.
13. By letter dated 22/4/2015 the basic salary of claimant was increased to Kshs 300,000.00 per month and house allowance to Kshs 145,000.00 due to commendable work performance pegged on KPOS.
14. That the claimant during this period as Food and Beverage Director received too much intimidation and harassment for reason of being an African who had been promoted to the position of a Director, one of the most senior positions in the company.
15. That the starting salary offered to him as Food and Beverage Director of Kshs 295,000/= and Kshs 140,000/= house allowance was less than half of the salary scale which had been offered to each of the four (4) white predecessors who held the same position who were paid as follows:
 - a. Stephane Robert November 2008 to June 2009 Kshs 1,397,880.00
 - b. Ramy Cardiere July 2009 to January 2010 Kshs 3,198,498.67
 - c. Janine Gerlich February 2010 to August 2012 Kshs 1,142,820.00
 - d. Eric Fontaine April 2013 to May 2014 Kshs 1,101,140.00
16. Claimant states that he ought to have been paid a gross salary equivalent to his immediate predecessor in the sum of Kshs 1,101,140.00 since he took over the same post. The claimant stated that he raised those concerns with General Manager Deiter Franka who joined the company in the final month of



- claimant's Acting capacity seeking reasons why his salary was below that of his predecessors who held the same post. The General Manager's response was demeaning and unwelcoming by stating:
- a. You are not them and they are not you.
 - b. You should consider yourself lucky that we are offering you this position.
 - c. We had that option of saying 'thank you for acting in the position' and we could have brought in someone else.
17. Similarly, the claimant stated he raised the concern with Human Resource Manager Linda Miano, who asked the claimant to give her time to look into the matter. She came back to the claimant after three hours and informed the claimant that the offer would not change and after counselling from her, she appealed to the claimant to sign up citing job title advantage on claimant's CV for the future.
18. The claimant stated that the conduct by the respondent violated section 20 of the Respondent's Handbook, which emphasize on equality of opportunity without discrimination on whatever ground including race.
19. The handbook guaranteed the claimant the right to be promoted for any position within the company for which he was eligible and qualified for and the right to be free from discrimination. Claimant stated that he was denied the right to earn what his predecessors earned for comparable work on the basis of a personal characteristic that had no bearing on the job performance.
20. The said General Manager continued to foster a hostile work environment towards the claimant. The conduct of the General Manager was characterized by discrimination; intimidation; harassment; humiliation and outright witch hunt which culminated into an unlawful termination on 6th March 2017. The General Manager had a way of embarrassing and draining the claimant down even in the presence of the junior staff.
21. The claimant stated that since he wanted to keep his job he stood firm and went on to diligently discharge his duties.
22. Matters came to a head on 12th February 2017, when the respondent was receiving the Slovakian President at the Hotel and a table of around 10 guests had been reserved for the guests for an informal dinner.
23. The claimant said that he made all reasonable arrangements in his capacity as Food and Beverage Director to provide seamless service to the said guests. The claimant then went home leaving his staff in charge at night. The General Manager called the claimant and asked him who was in-charge of taking care of the restaurant and the claimant informed him that all the necessary arrangements had been made. He then responded to the claimant in a threatening tone saying "okay, you will see me tomorrow."
24. The claimant said services were rendered seamlessly and the guests were served to their satisfaction and the General Manager the following morning remarked that the guests were happy with the services but went on to serve the claimant with a letter dated 13th February 2017 to show cause why disciplinary action should not be taken against the claimant for there being no senior leadership in the restaurant when the said guests were received.
25. The claimant said that during his entire work at the hotel, the hotel had hosted various heads of state and government including Germany, Eritrea, Sudan, Somali, Nigeria, Burundi, Rwanda and Congo and where the head of state did not have a formal dining, the claimants had delegated to his able managers and at no occasion was the claimant even accused of having no senior leadership to serve



- them. Curiously, the previous visit by African Heads of State did not elicit such a reaction from the said General Manager as he did in respect of the Head of State of European decent.
26. The claimant stated that he made appropriate response to the notice to show cause by a letter dated 15/2/2017. Rumors circulated that the claimant would be dismissed any time and on 20/2/2017, the HRA, called the claimant to the General Manager's office and discussed the issue. The General Manager responded to the matter with a notice to file but not a warning.
 27. Barely a week later the claimant was served with another show cause letter dated 27th February 2017 in relation to an incident that happened on 14/2/2017. This incident had happened before the meeting held earlier but it was never raised. It was clear therefore that the General Manager was acting in bad faith and was hell-bent to have the employment of the claimant terminated.
 28. The NTSC preferred the following charges:-
 - a. That on the said date you were entertaining two unknown ladies within the food and beverage office and in particular in your office between 11:43 p.m. on 14th February 2017 and 01:27 p.m. on 15th February 2017.
 - b. That in your presence, the guests were consuming alcohol within the confinements of our office.
 - c. That you and your unknown guests were causing disturbance while in your office and could be heard from the corridor which also is on a guest accommodation floor.
 - d. That it is unknown to management the origin of the alcohol that was being consumed.
 29. The claimant said that it was now common knowledge among staff that there was vendetta against the claimant and this elicited mixed reactions among junior staff and the employee union and workers committee, who barely 3 years earlier had celebrated the rise of a Kenyan to the position of Director of Food and Beverage which hitherto was a preserve for European expatriates. In the same week, in a local newspaper, some staff had petitioned parliament on matters of racial discrimination at the work place.
 30. The claimant responded to the show cause letter by a letter dated 1/3/2017 and a disciplinary hearing was held on 3/3/2017. The claimant states that he was not afforded an opportunity to defend himself during the hearing as the matter was pre-determined. The committee disregarded the content of the answers to the charges by the claimant in the letter dated 1/3/2017 in response to the NTSC and in particular that: The guest in question were walk in guests who had come for dinner in the hotel and were not unknown guests. The office of Director of Food and Beverage was open to all including guests and there was no policy denying access to the said office. The allegation that the source of the alcohol consumed was unknown was not only untrue but was farfetched as no alcohol could come from outside and secondly, the hotel usually receives numerous free samples of food and drinks from prospective vendors for sampling and consideration. The said samples are normally stored in the office of the Director Food and Beverage and there was no policy whether the same should be sampled by either the staff and/or guests. It was incorrect therefore to state that the source of the alcohol consumed was unknown. In addition the office of Director Food and Beverage was tasked to ensure that all valentine display of the hampers, champagnes and artifacts are stored in the said office and the claimant had no option but to usher in the guests who had requested to see the claimant in the said office while ensuring that the valentine displays were returned as required. Furthermore, the respondent had a meticulous glitch report system where any single complaint of disturbance and/or incident is recorded and solution found thereto and there was no single complaint that was reported on the material night.



31. That the security manager; a security officer and duty manger entered the claimant's office and none of them complained of any disturbance coming from the claimant's office. It was therefore not true that the two guests had caused disturbance as alleged or at all.
32. In any event, it was already known to all staff that the respondent had made a decision to terminate the employment of the claimant.
33. The disciplinary hearing was a show, was unfair and un-procedural and contrary to the rules of natural justice.
34. The employment of the claimant was terminated by a letter dated 6/3/2017. That the grounds of termination set out in the letter of termination differed materially to those set out in the NTSC and disregarded all the explanation given in writing to the respondent in the response to NTSC.
35. The respondent stated in the notice to show cause letter that the alcohol consumed on the material night was hotel property and same should be accounted for.
36. That for the entire period the claimant served as Director Food and Beverage he had not been called upon to account for the free samples that had been tasted. The respondent did not state how the said sample should be accounted for since there was no such policy at the respondent for the purpose of accounting for free samples.
37. The claimant stated that he had never received a warning for the period of his 9 years' service. That he was devoted, diligent and had a clear record demonstrated by his promotions and salary raise, rising to the first African Director of Food and Beverage.
38. The claimant stated that his reputation and standing in society was greatly injured by the unfounded liberious allegations made by the General Manager against the claimant even in meetings held after the termination with the entire staff of the hotel on 10/3/2017.
39. That the termination was malicious, unlawful and unfair.
40. That the claimant has been brought to grave public ridicule, scandal, odium and contempt in the eyes of right thinking members of the society.
41. The claimant issued a notice of intention to sue and demand to remedy the situation dated 18/1/2018 to no avail, hence the suit.
42. The claimant was very closely, cross-examined by advocate, Omino for the respondent. The claimant stated that a hearing meeting was held on 3/3/2017 and was to report for a decision on 6/3/2017. The claimant explained that no hearing took place at all at the meeting. That the committee just read a report to the claimant on 6/3/2017. The claimant admitted that on 3/3/2017 he was given opportunity to say what he had to say and minutes were recorded. The claimant said that the committee read a security report on 6/3/2017, which the claimant had not seen earlier. The claimant said on 3/3/2017 he was not given any report of investigation or any other report relied upon by the respondent. The claimant said he had comprehensively responded in writing to the NTSC but his answers were ignored by the respondent in the final report by the respondent. The claimant said that he repeated his answers at the hearing. The claimant said that observations by the committee were read to him but he was not given opportunity to respond to them. That those observations were based on security investigation report which he had not seen.
43. The claimant said that the guests who came to his office were not his friends but were from Kenya Airways. That he had given them wine in his office which was not a private office. That Food and



- Beverage office is an open, coveted office since Food and Beverage manager entertains guests even in the kitchen as a privilege of Food and Beverage Director. That nothing stopped the claimant from taking the hotel guests to his office.
44. The claimant reiterated that he was paid much lower than his previous counterparts of European descent. That he knew how much they earned from records which were officially accessible to him being profit and loss accounts for Food and Beverage department. That the Food and Beverage reports showed the salaries paid to former Directors of Food and Beverage. The claimant said the reports had breakdown of salaries by department.
 45. The claimant produced the bundle with this information which however did not indicate individual salaries. The claimant however insisted he had access to the individual salaries by virtue of his position though he could not extract and provide same to court.
 46. The claimant said he saw a document which provided salaries of all past Directors of Food and Beverage and comprised a return to KRA. The claimant said he was paid a quarter of what the previous directors were paid. The claimant admitted that the directors worked over different periods. The claimant said that he was not aware that the salary for Stephen Roberts, former Director Food and Beverage was Kshs 604,400.00 but not as he had indicated. The claimant said he saw the pay slip for the first time in court. The claimant also was shown a pay slip of Phylis Kadir which showed a gross salary of Kshs 444,120.00 contrary to what he had said in chief. The claimant confirmed that his salary was Kshs 440,500/=. The claimant said he could not confirm that he earned more than Philip Kadir. The claimant confirmed that Philip Kadir was of European decent. The claimant stated that he did not complain about underpayment as compared to previous Food and Beverage Directors of European descent in writing but did so orally on the day he was appointed to the Human Resource Director. The claimant admitted that the respondent had a policy against discrimination but said the respondent did not comply with the policy. The claimant admitted that the hotel was not doing well financially during his tenure as Director Food and Beverage due to new entrants in the industry and 2013 elections and Westgate attack in 2014 and other factors. The claimant admitted that the hotel made losses in 2015 and 2016 also. The claimant admitted that he was not present when alleged defamatory statements were made to the staff by the General Manager.
 47. In re-examination the claimant admitted that he knew the guests from Kenya Airways seven (7) years before the incident. That they were his previous colleagues. That the guests had dinner at the hotel, paid their bills and then the claimant had requested one of the managers to bring them to his office. That it was normal to entertain guests in the Food and Beverage office. It was an open office in the industry. That Food and Beverage Director could entertain guests at his office just like the chief chef may give guests wine, biscuits and other things. That this was an acceptable practice in the industry. That the claimant had done that in the past without any issues and had given products to guests for sampling. That wine served to the two guests was one of the many samples brought by potential vendors. They were tasted with the hope that they could be stocked in the hotel.
 48. That staff, guests, suppliers tasted the samples so as to get an opinion whether they were suitable for stocking. That there was no policy regulating vendors who brought new samples and same were not merchandise of the hotel. They do not have stock code and who may or may not taste them. That this was in the discretion of the Director Food and Beverage. That Food and Beverage is 24 hours operational for example during dinner dance; room service and so on. That tasting was in restricted areas such the kitchen and Food and Beverage office. That Food and Beverage office was not a restricted area. That this was Valentine's Day and there was a lot of display which had to be returned to the Food and Beverage office after dinner. That they had to wait for all the display to be returned to his office.



49. The claimant said that reports made to the respondent on the matter were not shared with the claimant before the oral hearing and with the NTSC. The claimant said he had no opportunity to question people who made reports to the disciplinary committee. The claimant said the hotel had a master pay roll. The claimant said he expected to be paid similar salary with his predecessors. That he claimed to be paid the under payment. That the underpayment was not denied in the statement of defence since averements at paragraphs 17, 18 and 19 of the statement of claim were not traversed in the statement of defence. They did not deny the salaries made to the claimant's predecessors.
50. That the figures in the pay slips presented before court are not true salary paid to his predecessors. The the General Manager was condescending to him and told him he was lucky to be appointed and that he was not like the predecessors he wished to be paid equally with. The claimant said he signed letter of appointment since he had no choice but to accept the job on the low terms given with the promise by HRD that the matter would be looked into.

Defence

51. RW1 Steven Mutuma Kivangura testified for the respondent. She was Area Director, Human Resource for Africa. She adopted a witness statement dated 24/6/2021 as her evidence in chief and produced documents in support of the defence case.
52. RW1 said the claimant was Director Food and Beverage at the time of termination a position he was confirmed to on 6/9/2014. RW1 denied the claims for unfair termination, defamation and racial discrimination and underpayment.
53. RW1 said claimant's termination was not an isolated matter as on 5/4/2016, he was issued with a warning letter for being in a car with an intoxicated employee.
54. That on Saturday 20/2/2016, a Banquet Support colleague was found intoxicated and as a result incapacitated, within the premises of the hotel. There was evidence that the staff had received alcohol from the claimant. The claimant had been warned "A repeat of such incident in the following 12 months, will lead to severe disciplinary action."
55. That the claimant was issued with a NTSC dated 13/2/2017, facing three charges. This related to the Slovakian President's Dinning and Room service breakfast request which was scheduled for the 12th February 2017 and on 13th February 2017 as follows:
 - a. There was no senior leadership from the Food and Beverage operations to oversee the president's dinner and
 - b. There was no senior leadership from the Food and Beverage operations to oversee the room service breakfast request on 13th February 2017.
 - c. Considering the importance of the hotel visit it was observed that the claimant's absence was not only surprising but also no prior notice of the absence was given to the General Manger nor the Restaurant Manager.
56. Pursuant to the NTSC, the claimant was issued with a letter dated 20/2/2017 which informed him as follows:

to be present during hotel visits by high profile guests (especially presidential visits) so as to make impromptu decisions when called upon...In the event that you are unable to be present during such visits, you are advised to notify the Resident Manager in writing at least



48 hours before commencement of the visit...This letter hereby serves as a notice on your file.”

57. Arising from the event of 14/2/2017, the claimant was issued with the NTSC dated 27/2/2017.
58. The NTSC was precipitated by a report by the respondent’s security team dated 22/2/2017. The claimant responded to the NTSC by a letter dated 1/3/2017. RW1 stated that in the response the claimant admitted that he had entertained two ladies in his office and allowed the said guests to sample one of the free wine samples after their dinner. That the sample wine were forwarded to the hotel for sampling by Hotel Management in their “official capacity” and for consideration for inclusion into the hotel’s existing inventory.
59. That he was aware that hotel employees could only entertain their guests within hotel premises “at any restaurant or bar and sign the bills accordingly” and not within the hotel offices.
60. That he also admitted to be aware that he “had the liberty to entertain the guests in any other Food and Beverage outlet after dinner”, but chose to have them ushered to his office 29 minutes before the clearing process for the valentine’s day display had begun and that he remained with the two guests, drinking in his office despite the said outlets being empty and the clearance process only taking twenty-two (22) minutes.
61. RW1 said despite admitting the aforesaid facts, the claimant denied that his conduct breached any of the respondent’s policy.
62. RW1 said the disciplinary hearing was held on 3/3/2017 as scheduled and was attended by Resident Manager Oliver Geyer;
 - (b) The claimant and
 - (c) RW1 as Human Resource Director Africa
63. The committee compiled a report following the disciplinary hearing setting out the proceedings; observations and findings.
64. The employment of the claimant was terminated by a letter dated 6/3/2017. The committee had found that:
 - a. The admitted conduct by the claimant was in breach of clause IX (commitment to drug free work place) of the code of business conduct and independence which clearly prohibit, consumption of alcohol in the worksite.
 - b. The claimant’s conduct was against the respondent’s code of ethics which required all employees to behave ethically and protect reputation of the organization.
 - c. That the claimant misused hotel property for his personal gain.
 - d. That there was noise disturbance caused by the conduct of the claimant and his two friends.
65. That the termination of the claimant was for a valid reason and the respondent followed a fair procedure.

Defamation

66. RW1 denied that the General Manager made any defamatory statements against the claimant at a staff meeting held on 10/3/2017. The claimant was no longer an employee of the respondent at the time and his allegations amount to hearsay. That claim in any event is time barred.



Racial discrimination

67. RW1 states that the claim for racial discrimination has no basis at all. That the respondent has strict policy against racism and discrimination as provided for under clause X of the respondent's code of business conduct and independence and code of ethics and business conduct before court.
68. That the claimant never made a report or complaint relating to discrimination and the present claim is an afterthought and a red herring.
69. The respondent in the many years it operated in Kenya, identified, nurtured and developed local talent, including in the position similar to (Band 3) and even more senior than (Band 2) the position that was held by the claimant and empowered them to direct the strategic and operational functions of the hotel. RW1 set out ten (10) such positions held by Kenyans of indigenous descent in various directorships, senior directors, Area directors and managers.
70. RW1 said the allegations that the claimant was discriminated in relation to his pay has no basis because the salaries of his predecessors were not as claimed by the claimant but were instead as follows:-

S/No	Name of predecessors	Period work (on or about)	Salary paid per month
(a)	Stephane Robert	November 2008 – June 2009	Kshs 604,400.00
(b)	Reny Cardiere	July 2009 – January 2010	Kshs 444,120.00
(c)	Janine Gerlich	February 2010 – August 2012	Kshs 635,700.00
(d)	Eric Fountaine	November 2012 – May 2014	Kshs 924,620.00

71. RW1 produced true copies of the pay slips of the aforesaid employees, duly certified by the respondent's paymaster. RW1 stated that the qualification and experience of a particular employee determined their salary and in case of employees transferred from other Intercontinental facilities around the world, they earned the salaries they were earning in those other countries and the financial performance of the hotel at the time of their tenure also dictated the salary paid.
72. That both Janine Gerlich and Eric Fountaine were transfers from Intercontinental facility in other countries and were selected by Head office and brought for short stints with the aim of reviewing and uplifting the global food and beverage standards and protocols of the Nairobi property.
73. That Janine Gerlich was transferred from Vienna, Austria which is a larger facility than Nairobi Hotel and maintained the salary she earned in Austria, a country with a much higher standard of living than Kenya. Her contact was produced before court.
74. Similarly, Eric Fountaine was transferred from the Crown Plaza which is an Intercontinental hotel facility located in Kuwait and his salary before being transferred to Nairobi could not be lower than what he earned when he was in Kuwait which is similarly a more expensive country and facility much larger than in Kenya. His pay slip in Kuwait was produced before court.



75. RW1 added that a most important factor that determined the salary paid to staff was the performance of the hotel at any one given period. The hotel paid what it could afford to pay based on revenue and profits of the hotel at any one given time.
76. RW1 added that the period immediately prior to the claimant's employment in the position of Director Food and Beverage in 2014, was a drastically deteriorating financial performance period for the respondent that was precipitated by a number of factors including national elections held in Kenya in March 2013 and the Westgate terror attack in September 2013. Indeed the respondent's total comprehensive profit for the period ending 31/12/2013 was Kshs 17,600,000/= which represented a drop of more than half compared to the financial year ending December 2012 when the respondent managed a profit of Kshs 38,145,000/=.
77. RW1 added that the events of 2013 were felt even more acutely in 2014 when the claimant was appointed to the position of Director Food and Beverage as the hotel registered a total comprehensive loss of Kshs 78,437,000/=. RW1 presented copies of respondent's audited profit and loss statements for the stated periods. The revenue and profits had dropped critically she added, illustrating with a drop in average daily rate income and room rates in the period 2012, 2013 and 2014.
78. RW1 concluded that the salary earned by the claimant in his new position was informed by all the aforesaid factors and not by discrimination as alleged or at all.
79. RW1 was intensely cross-examined by Mr. Sagana for the claimant and by and large, he reiterated the evidence adduced by RW1 in chief. RW1 insisted that the matters admitted by the claimant constituted misconduct and violation of the respondent's policies. RW1 restated that a fair procedure was followed in implementing the disciplinary action taken against the claimant in that the claimant had a recent warning for a similar offence; the claimant was issued with NTSC to which he comprehensively answered in writing making material admissions, the claimant was also given opportunity to be heard orally by a disciplinary committee and the minutes of the proceedings were recorded and produced.
80. The claimant was given reasons for the termination in the letter of termination and that the claimant was paid his terminal benefits upon termination.
81. RW1 also reiterated that the claimant did not adduce any admissible evidence to prove that he was defamed by the respondent and that he had only relied on false hearsay evidence.
82. RW1 also reiterated the tangible evidence she had adduced in chief to demonstrate that the claimant was not discriminated and or treated differently unlawfully by the respondent in his capacity as Director Food and Beverage. RW1 urged the court to dismiss the suit with costs.

Determination

83. The parties filed written submissions, which the court has carefully considered together with the authorities produced and the evidence adduced by CW1 and RW1.
84. The issues for determination are: -
 - a. Whether the termination of the employment of the claimant was for a valid reason following a fair procedure?
 - b. Whether the claimant has proved defamation against himself by the respondent?
 - c. Whether the claimant was discriminated against by the respondent? and
 - d. Whether the claimant is entitled to the reliefs sought.



Termination

85. In terms of section 43(1) and (2) of the Employment Act, 2007, the employer has the burden of proving that the respondent had a valid reason to terminate the employment of the claimant.

“The section reads:-

43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

86. The claimant in this matter was dismissed for serving alcohol to two ladies in his office of the Director Food and Beverage. The claimant admitted that he in fact served the two ladies wine in his office between 11:43 p.m. on 14th February 2017 and 01:27 a.m. on 15th February 2017. The claimant admitted that the two ladies were his former colleagues at Kenya Airways and that they had gone to his office after having dinner at the restaurant and paying for it.

87. Whereas the respondent believed that it was wrong for the claimant to entertain guests and serve them with sample wine given to the hotel by potential suppliers for sampling and that sample wine, was the property of the hotel and tasting of the wine could only be done by the staff of the hotel and not guests, the claimant held a different view that, the samples brought to the hotel were not hotel property and that being the Director Food and Beverage he had the discretion to decide who to taste the sample wine given to the hotel by potential suppliers and that he did nothing wrong to invite the two ladies in his office and serve the sample wine to the guests for a period of about two (2) hours.

88. Claimant was found guilty of gross misconduct for what he had done in that the said conduct violated the code of business conduct and independence – clause XI which policy committed the staff to a drug free work place.

89. The claimant was further found guilty of jeopardizing the reputation of Intercontinental Nairobi IHG’s image and the overall image of the position of the Director of Food and Beverage, by issuing alcohol to his friends in his office.

90. The claimant was also found guilty of serving unaccounted alcoholic beverages to his friends in violation of the code of ethics and business conduct which action was contrary to the claimant’s responsibility to protect hotel property and assets which must not be used for personal gain.

91. The claimant was also found guilty of causing noise in his office with the two friends which caused disturbance whereas the claimant had the option of entertaining his guests in the hotel outlets since his office is located in a guest room floor.

92. The respondent found that as a senior leader at the hotel, the claimant had shown complete disregard of the company’s code of ethics and business conduct, code of business conduct and independence and colleague handbook on integrity as an Executive Committee member.

93. The respondent found that it had lost faith in the claimant upholding and or displaying the above values/policies as a senior leader hence the termination with effect from 6/3/2017.



94. The claimant largely admitted his actions on the 14th and 15th February 2017 only stating that he was being victimized by the General Manager for reasons of race since it was allowed and perfectly in order for the claimant as Director Food and Beverage to serve sample wine to his friends at his office and not at the designated outlets. And that the said wine was not hotel property and so there was no requirement to account for it and that it is not true that himself and his two friends made noise at the office for the period they were drinking in the office which noise was a disturbance to guests who were in the same floor as the claimant's office.
95. The court notes that the respondent has the mandate to decide what is permissible and not permissible in the work place. It is also without doubt that the staff including the claimant were bound by the terms and conditions of service per the contract of employment and all policy documents in place at the work place.
96. The court is satisfied that the claimant was provided with appropriate opportunity to explain his conduct, firstly in the written answer to the notice to show cause. That the claimant gave an extensive explanation of his conduct on the material night in answer to the NTSC. The claimant was further provided with opportunity to explain his conduct before a disciplinary committee which he did extensively.
97. The court notes that the requirement under section 43(1) and (2) of the *Employment Act* is for the respondent to prove reason(s) for termination which the employer genuinely believed to exist and which caused the employer to terminate the services of the employee.
98. The court is satisfied that the claimant failed to rebut the evidence presented by the respondent before court which proved that the conduct by the claimant on the material night went against the respondent's code of ethics which required all employees to behave ethically and protect the reputation of the organization. The claimant was also unable to rebut, compelling evidence by RW1 that the sample drinks, in this case, wine was the property of the hotel and that entertaining friends was for his personal gain and not for the benefit of the hotel.
99. Furthermore, the claimant was unable to rebut the compelling evidence that in the almost two hours he entertained the two guests in his office, which was next to the guest rooms, they made noise that was reported by the security to have caused disturbance on that floor. The claimant was unable to explain why he did not entertain his friends in designated outlets of the hotel.
100. The court is also satisfied that the claimant had recently been issued with a written warning for a similar offence and that a notice had been placed in his file recently for conduct unbecoming of his office in that he had failed to remain at the hotel to receive and take care of a visiting head of state and his delegation and the claimant had opted to justify his conduct by saying that he had made all the necessary arrangements and delegated his essential roles to the managers concerned.
101. In the case of *Opal Auma v Teachers Service Commission* [2013] eKLR, the court held,
“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
102. The court finds that the respondent had followed the provisions of section 41 by issuing the claimant with a NTSC to which he responded in writing followed by an oral disciplinary hearing before determining whether the conduct by the claimant amounted to gross misconduct.



103. The respondent had proved both the substantive and procedural fairness test as provided under section 45 of the Act which reads;

“ 45

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer;
 - (c) that the employment was terminated in accordance with fair procedure.”

104. The court finds that the termination of the employment of the claimant was for a valid reason and that the respondent had followed a fair procedure in arriving at the decision to terminate.

105. The court further finds that it was not for the court to substitute its reason for that of the respondent once the respondent has proved that it genuinely believed that the conduct by the claimant amounted to gross misconduct for which his employment could be terminated in terms of section 45 of the Act.

106. The court finds that the respondent acted in accordance with justice and equity in terminating the employment of the claimant.

(b) Whether the claimant was defamed as alleged.

107. The claimant adduced hearsay evidence to the effect that the General Manager had a meeting of staff, held on 10/3/2017 after the employment of the claimant had been terminated in which he uttered words that were defamatory to the claimant. The claimant did not adduce any direct or indirect evidence that was admissible to prove that the respondent had defamed him. The claimant did not issue the requisite notice to the respondent to retract the alleged defamatory words failing which he would file suit. Furthermore the demand that preceded this suit was issued in general terms on 18th January 2018 before the suit was filed on 22/10/2018. This action was taken more than a year from the date of alleged defamation.

108. Section 4(2) of *Limitation of Action Act*, Cap 21 Laws of Kenya provide:

“An action founded on tort may not be brought after the end of three years from the date which the cause of action occurred. Provided that an action for libel or slander may not be brought after the end of twelve months from such a date.”

109. It is the finding of the court that this claim not only lacks merit but it is also barred by statutory limitation aforesaid.



(c) Was the claimant discriminated?

110. The claimant made bare and unsubstantiated claims of racial discrimination in that he was not paid, equal remuneration for equal work on grounds of race. The claimant adduced evidence that his predecessors to the position of Director Food and Beverage, who were of Caucasian extraction were paid several times more than he was paid from date of appointment to the position.
111. The claimant alleged that his predecessors Stephane Robert who served in the period November 2008 to June 2009 was paid Kshs 1,397,880.00; Remy Cardiere who served in July 2009 to January 2010 was paid Kshs 3,198,498.67; Janine Gerlich who served in the period February 2010 to August 2012 was paid Kshs 1,142,820.00 and his immediate predecessor who worked for the period April 2013 to May 2014 was paid Kshs 1,101,140.00.
112. The claimant did not produce any documentary evidence to substantiate these claims.
113. On the contrary RW1 produced pay slips for the four former Directors, Food and Beverage that Stephane Robert was paid Kshs 604,400/=; Remy Cardiere was paid Kshs 444,120/=; Janine Gerlich was paid Kshs 635,700/= and Eric Fountaine was paid Kshs 924,620/=.
114. RW1 gave sound reasons as to why each of the Directors was paid a different salary including that some were transferred from overseas branches for short periods of time to improve the performance of the Nairobi hotel and they carried with them the superior salaries, they earned in their country of service.
115. That the other reasons for the disparity was the performance of the hotel at the time of the appointment.
116. RW1 demonstrated that the claimant earned more than Remy Cardiere and that his salary reflected the poor financial performance of the hotel in the period 2012, 2013 and 2014 financial years which preceded the appointment of the claimant to the position of Director Food and Beverage. RW1 produced undisputed audited accounts of the respondent to support the explanation of the differentiation in remuneration of different Directors Food and Beverage and indeed other staff.
117. RW1 also demonstrated that the respondent had a clear policy which affirmed non-discrimination on racial grounds and also proved that many indigenous Kenyans had over the years been appointed, nurtured and developed to hold very senior positions in the establishment of the respondent and that the allegations of discrimination on grounds of race had no basis at all.
118. The court finds that the claimant had the burden of adducing evidence tending to show that unlawful discrimination on grounds of race occurred against him but had completely failed to adduce tangible evidence to barely demonstrate that allegation. The respondent had the onus of disproving the allegations of discrimination and in fact discharged the burden on a preponderance of credible and cogent evidence as mandated under sections 5 of the Employment Act, 2007 as read with Article 27 of the Constitution of Kenya 2010.
119. The incident cited by the claimant where the General Manager told him that he could not be paid the same salary as his predecessors because he was not them and that the circumstances of their employment was different was not credible evidence to substantiate the serious allegation of discrimination on grounds of race by a most reputable hotel chain as the respondent.
120. In the case of Education of Women Lawyers Fida Kenya and 5 others v Attorney General and another [2011] eKLR the Court of Appeal per Warsame JA and Mwera and Mwilu JJAs (as they then



were) well-articulated the difference between mere differentiation and unlawful unequal treatment as constitutionally prescribed where they expressed themselves thus: -

“In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of equal protection clause. To attract the operation of the clause, it is necessary to show cause that the selection or differentiation is unreasonable or arbitrary, that it does not rest any basis having regard to the objective the legislative had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for clarification in all cases.”

121. In the present matter, the claimant relied on section 5 of the Employment Act which was enacted before the Constitution of Kenya 2010 and which uses similar words as those under Article 27 of the Constitution of Kenya 2010. Section 5(3) provides

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee –

a. On grounds of race...”

b. In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

Provision (3)

It is not discrimination to

a. ...

b. Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;

c. ...

d. ... and

5(4) An employer shall pay his employees equal remuneration for work of equal value.

122. In the present case, the respondent gave tangible and credible reasons why each appointee to the position of Director Food and Beverage earned differently from the period 2008 to 2017 which period was served by six (6) Directors of Food and Beverage including the claimant.

123. The court is satisfied that the claimant was not discriminated upon by the respondent on grounds of race by being paid a different salary from that earned by his five (5) predecessors. The claim lacks merit.

124. In the final analysis the claims by the claimant, under the three limbs of unlawful termination, defamation and discrimination lack merit and are dismissed. The court therefore finds that the claimant is not entitled to any of the reliefs sought in this matter.

125. The court has considered the long period the claimant served the respondent and the misapprehension of the situation that faced him as he rose from a relatively junior position to that of Director Food and Beverage and for that matter being the first employee of African descent to hold the position. The court in fact takes judicial notice that the respondent Intercontinental Nairobi is no longer operational. The court deems this an appropriate case for each party to bear their own costs of the suit.



DATED AT NAIROBI THIS 4TH DAY OF JULY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Sagana for claimant

Mr. Omino for respondent

Mr. Kemboi Court Assistant

