



Malului v Red Court Hotel Limited t/a the Boma Hotel (Employment and Labour Relations Cause E001 of 2024) [2025] KEELRC 1134 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1134 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE E001 OF 2024**

MA ONYANGO, J

APRIL 4, 2025

BETWEEN

THOMAS NZIOKA MALULUI CLAIMANT

AND

RED COURT HOTEL LIMITED T/A THE BOMA HOTEL RESPONDENT

JUDGMENT

1. Vide his Statement of Claim dated 10th December, 2023 and filed in Court on 9th January, 2024, the Claimant alleges that the Respondent unfairly terminated his employment.
2. The Claimant states that he was employed by the Respondent, a limited liability company registered in Kenya operating in the hotel industry, as a Food and Beverage Services Manager at Boma Hotels by letter dated 1st February, 2012. He was promoted to the position of General Manager in charge of The Boma Inn Eldoret from 1st June, 2016 by the Respondent's letter of even date.
3. The Claimant states that in or about December, 2019 the Respondent was placed under Administration and Mr. Rao of TACT Company appointed as Administrator, to whom the Claimant henceforth reported.
4. It is the Claimant's case that in March, 2019 when Covid-19 Pandemic struck, he was instructed to assist the Boma Nairobi while remaining the General Manager of the Boma Inn, Eldoret, having to go to Eldoret every other week to execute his duties there.
5. The Claimant states that in March, 2021 the Hotel Administrator intimated to him that the Hotel Board intended to bring in a new operator to run the business after expiry of the administration contract. That in the same month a new operator, Alef Hospitality started managing the hotel.
6. The Claimant avers that on 30th April, 2021, Mr. Rao informed him that the hotel Board Chairman had given instructions that the Claimant should stop reporting to work until advised otherwise. The



- Claimant states that he complied with the instructions and stopped reporting to work. That soon thereafter he discovered that his work emails had been disabled. That in May, 2021 the Respondent stopped paying his salary.
7. It is the Claimants case that by letter dated 10th May, 2021 the Confederation of Kenya Trade Unions wrote to the Respondent seeking compensation for termination of the Claimant's employment. The Respondent responded to the letter on 15th June, 2021 stating that it was not aware of the Claimant's whereabouts.
 8. The Claimant avers that on 26th June 2021 he received a call from the Respondent's Human Resource Department asking where he was and he informed them about the instructions from the Board Chairman conveyed to the Claimant by Mr. Rao that he should stop reporting to work.
 9. The Claimant states that on 29th July, 2021 he received a Show Cause Letter charging him with absence from work without permission from 7th June, 2021. The letter advised him to give a written response if he wished to and invited him for a disciplinary hearing on 5th August, 2021. He did not respond to the show cause letter.
 10. The Claimant states that he attended the disciplinary hearing accompanied by his friend. That the disciplinary panel consisted of the Cluster General Manager of Alef Hospitality and the Human Resource Officer of the Respondent.
 11. The Claimant states that on 11th August, 2021 the Respondent summarily dismissed him from employment with effect from 7th June, 2021 on account that his explanation for absence as tendered at the hearing had not been satisfactory.
 12. The Claimant states that his attempts to clear with the Respondent were frustrated as he was twice stopped from returning the Respondent's laptop for reasons that the Cluster Manager was absent during the two occasions he attempted to do so. He states that he managed to return the office keys, name budes and business cards.
 13. The Claimant avers that during his employment the Respondent deducted 7.5% of his gross salary towards the pension scheme which the employer was supposed to match. That from July, 2017 to August, 2021 he accumulated a principal sum of Kshs. 1,958,000 as at March, 2020. That ICEA Lion, the pension scheme manager applied interest of 10.25% per annum to the pension contributions.
 14. The Claimant further averred that a sum of Kshs. 10,000 was deducted from his salary on account of Kentours Sacco where he was a member from November, 2020. That the amount outstanding as at April, 2021 was Kshs. 70,000.
 15. The Claimant prayed for the following reliefs:
 - a. An award of compensation for wrongful and unlawful termination of employment
 - b. An award of general damages for denial of the Claimant's rights to have his grievances heard.
 - c. Interest at Court rates on the sums awarded above, from date of filing suit until payment in full.
 - d. Salary of May, June, July and 11 days of August, 2021
 - e. Three (3) Month's salary in lieu of notice.
 - f. Unremitted pension deduction from July 2017 to March 2020.
 - g. Unremitted pension deductions from April, 2020 to April 2021.



- h. Interest at the rate of 10.25% for items “g” and “h”.
 - i. Unremitted Kentour Sacco Deductions.
 - j. Unpaid leave days for the years: 2019, 2020 and 2021
 - k. Unpaid public Holidays in the years: 2019, 2020 and 2021.
 - l. Costs of this Cause.
16. The Respondent filed a Statement of Response dated 4th June, 2024 in which it admits that the Claimant was its employee as pleaded in the Statement of Claim. It further admits that the Hotel was placed under administration to aid in business recovery to a level where the company was no longer insolvent.
 17. The Respondent states that the reason for termination of the Claimant’s employment was valid, lawful and procedurally arrived at.
 18. The Respondent admits that Aleph Hospitality was brought on board to run the Respondent’s hotels. It however states that it is a stranger to the Claimant’s averments that the Claimant was instructed not to report to work by Mr. Rao as the same is unsubstantiated. According to the Respondent the Claimant deserted duty.
 19. The Respondent states that the Claimant was notified of his dues and informed that the same would be paid once he cleared with the Respondent as per procedure, which he failed to do.
 20. The Respondent states that it reached out to the Claimant on 30th June, 2021. That it was the duty of the Claimant to prove his allegations that he was away from duty on instructions of Mr. Rao. That its human Resource Department did in fact carry out investigations and reached out to the Claimant to establish his whereabouts but he declined to do so.
 21. The Respondent prayed that the claim be dismissed with costs.

Evidence

22. The claim was heard on 5th June, 2024 when the Claimant testified as CW1, adopted his witness statement and documents dated 10th December, 2023, was cross examined and closed his case. The Respondent also called Dorese Ambani who testified as RW1 and adopted her witness statement dated 3rd June, 2024 together with the documents filed by the Respondent as her evidence in chief and was cross examined. Both witnesses largely reiterated the averments in their pleadings and witness statements. Thereafter parties filed and exchanged written submissions.

Analysis and determination

23. Having considered the pleadings, evidence on record and the submissions, the issues that arise for this court’s determination are whether or not the Claimant deserted duty, whether the termination of the Claimant’s employment was unfair and if he is entitled to any of the prayers sought in his claim.
24. On the validity of the termination, section 41 of the *Employment Act* provides for procedural fairness while sections 43 provides for substantive justification.
25. Section 45(2) provides that where the employer fails to prove procedural fairness or substantive justification the termination is deemed unfair.



26. The burden of proof is provided for in section 47(5) of the Act as follows:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

27. In the instant suit the Claimant does not deny that he did not report to work for the days indicated in the show cause letter dated 29th July, 2021 from 7th June, 2021. In fact, he stated that he stopped reporting to work on 30th April, 2021, allegedly on instructions of Mr. Rao, the Administrator of the Respondent. He however did not substantiate the same as he neither obtained documentary proof or other form of confirmation by Mr. Rao of the said instructions which he alleged were verbal. He failed to respond to the show cause letter and did not convince the disciplinary hearing panel of the validity of his averment that he was away on instructions of the Board conveyed verbally to him by Mr. Rao.

28. The Claimant confirmed that he received a call from the Respondent's Human Resource office seeking to know his whereabouts following his failure to report to work.

29. The show cause letter is reproduced below:

Red Court Hotel

29th July, 2021

Our Ref:HR/Show/Cause/TM/2021

Thomas Mulului

Box 26454-00504

Nairobi, Kenya

Dear Thomas,

Re: Show Cause Letter

Reference is made to your absence from work since 7th June, 2021. You have not reported to duty since the said date and efforts by management to reach you have been fruitless, despite the telephone call made to you on 30th June, 2021 you have still declined to disclose your whereabouts.

Without leave or lawful cause, you have continued to absent yourself from work, which is not consistent with the expectation of your position and therefore unacceptable. As a General manager, you are well aware of all our procedures, policies rules and regulations. this conduct amounts to desertion from duty, overriding of positions and breach of your employment contract.

Arising from the above, you are required to show cause as to why disciplinary actions should not be taken against you. your response should be received by Wednesday, 4th August 2021 at 09.00hrs.

Subsequently you are required to appear before a disciplinary hearing committee on Thursday, 5th August, 2021 at 10.00 am please come with a witness of choice.

Yours sincerely

Signed



Mohamed Welly
Human Resources Manager
cc. Personal File

30. The minutes of the disciplinary hearing held on 5th August, 2021 show that the Claimant was accompanied to the disciplinary hearing by Mr. Festus Mutunga, CEO, Confederation of Kenya Trade Unions (COKTY-K)
31. The minutes further indicate that the Claimant confirmed that he did not respond to the show cause letter which the Claimant confirmed that he received.
32. An excerpt from the minutes at page 1 thereof under the heading “Statement” that is relevant to this issue is reproduced below:

Statement

Thomas was asked since we did not receive a written explanation prior to the deadline, to explain verbally why he has been absent and why he did not report back to duty or communicated in any form or way directly with the hotel, which as a General Manager who should be aware of the hotel policies, procedures, rules and regulations is obviously not acceptable.

It was noted by the committee that Thomas’s arguments which were brought up, none of which were underbuilt by solid proof either in written or confirmed by the persons mentioned and all were mere “he said, she said” only verbally coming from Thomas.

It was clearly explained that any witness of choice could have been brought to the hearing in order to verify and confirm his explanations why he chose to be absent without lawful cause and returning to his duties and responsibilities as a General Manager.

It was confirmed by Thomas that he did not have any signed documentation by either the Administrator or the Newly appointed Hotel Management (once the period of receivership came to an end) to justify his absence as stipulated in the show cause letter

Thomas was asked more than once by the Chairman what he wanted to get out of this hearing, what were his expectations from Red Court Hotel and how he wanted to proceed from here onwards, which he did not have a straight structured answer on which we could not follow up.

33. Section 44(4)(a) of the [Employment Act](#) provides that if “without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work” the employee is liable for summary dismissal.
34. The Claimant having not given valid reasons for his failure to report for work, the Respondent had valid reason to terminate his employment by way of summary dismissal.
35. The evidence on record further shows that the procedure adopted by the Respondent was fair. First the Claimant was called on telephone and asked about his whereabouts. He was thereafter issued with a notice to show cause and invited for a disciplinary hearing which he attended, accompanied by a friend. It was after he failed to exonerate himself by justifying the reason for his absence from duty



that a decision was reached to terminate his employment. The letter of dismissal which is reproduced below indicates the reasons for dismissal:

Red Court Hotel

11th August, 2021

Our Ref:HR/Dismissal/TMS/2021

Thomas Mulului

Box 26454-00504

Nairobi, Kenya

Dear Thomas,

RE: Summary Dismissal

Reference is made to the show cause letter to you dated 29th July, 2021 which you did not respond to and the subsequent discipline hearing on 5th August, 2021.

In the hearing, you failed to give a satisfactory explanation as to why without leave or lawful cause you have not reported to duty since 7th June, 2021 despite the efforts by management to establish your whereabouts. You explained that you did not work from the 6th May, 2021 on verbal instruction of the then administrator who asked you to report back on 7th of June. You were unable to provide any documentation or references to support your absence even for the period after the 7th June, 2021, which is not consistent with the expectation of your position as the General Manager of the Hotel. Arising from this, your conduct is considered desertion from duty, which amounts to Summary dismissal.

In view of this, your services will be terminated summarily from the employment of Red Court Hotel/Boma Hotels with effect from the date of desertion 7th June, 2021, in accordance with the *Employment Act*, 2007.

Your terminal dues will be paid as follows:

1. Payment of salary up-to and including 7th June, 2021.
2. Payment of days of leave days earned but not utilized upto 7th June, 2021.
3. Withdrawal of accrued pension benefit subject to conditions set by the Retirement Benefits Authority (RBA).

These final dues will be paid less any direct liabilities to the hotel and statutory deductions. Please note that the dues will be released to you after you have completed the enclosed clearance certificate and returned all the Hotels property in your possession.

Should you have any queries or need clarification, kindly contact the undersigned.

Yours sincerely,

Signed

Daniel Van Der Heijden

Cluster General Manager

36. From the forgoing I find that the termination of the Claimant's employment was fair and lawful both procedurally and substantively.



Is the Claimant entitled to any of the remedies he seeks?

37. The Claimant is not entitled to compensation as the termination of his employment was not unfair.
38. He is not entitled to general damages for the same reason that the termination was not unfair. I hasten to add that the Claimant did not adduce any evidence to support his claim for payment of damages in addition to compensation.
39. The Claimant having not reported for work for the months of May, June, July and August, he did not earn any salary that the Respondent would be under obligation to pay him.
40. The termination of the Claimant's employment having been by way of summary dismissal which the court finds to have been lawful, he is not entitled to notice or pay in lieu of the same.
41. The Claimant was a member of the Respondent's staff pension scheme and under section 35(5) as read with 35(6) of the *Employment Act* he is not entitled to service pay.
42. Unremitted pension deductions, if any, are to be claimed by the Pension Scheme and not refundable to the Claimant as provided under the *Retirement Benefits Act*.
43. Unremitted Kentour Sacco deductions were not proved as there was no current statement or other communication to that effect from the Sacco to prove the non-remittance of the same by the Respondent whose position was that it remitted all deductions. The Sacco is by law authorized to make the claim on behalf of the Claimant for any deductions not remitted.
44. The Claimant is entitled to any leave days earned but not taken for the period the Claimant was in employment. The Respondent is directed to tabulate and pay the same. No leave is to be forfeited taking into account the explanation given by the Claimant that as General Manager he was required to be on duty to source for business for the Respondent which was not doing well financially as was evident from the facts on record, especially the fact that it became insolvent and an Administrator had to be appointed.
45. The Claimant is not entitled to payment for work done on public holidays which is essentially overtime, as his position as general manager did not entitle him to the same.
46. The Claimant is not entitled to interest as prayed having not proved any items in respect of which interest was claimed.
47. The foregoing notwithstanding, the Respondent is directed to pay the Claimant his terminal dues, if any, as stated in the letter of summary dismissal, provided that he returns the laptop which was in his custody or pays the value of the same to the Respondent. There is no need for the Claimant to clear with the Respondent noting that there was no evidence that, apart from the laptop, the Claimant was indebted to the Respondent in any way or was in possession of any assets or property of the Respondent other than the laptop.
48. Each party shall bear its costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 4TH DAY OF APRIL, 2025.

M. ONYANGO

JUDGE

