



**Nyakundi v Gelian Investment Limited (Cause 2 of 2017)
[2024] KEELRC 13346 (KLR) (5 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13346 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CAUSE 2 OF 2017
MA ONYANGO, J
NOVEMBER 5, 2024**

BETWEEN

JOSIAH MARUBE NYAKUNDI CLAIMANT

AND

GELIAN INVESTMENT LIMITED RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 30th October and filed on 11th December, 2017 the Claimant avers that he was an employee of the Respondent, a limited liability company registered in Kenya and carrying on business in hotel and hospitality industry in Machakos.
2. He avers that the Respondent wrongfully, unfairly and unlawfully dismissed him summarily by letter dated 4th September, 2017 and received by him on 12th September, 2017.
3. In the Memorandum of Claim the Claimant prays for the following remedies:
 - i. The sum of Kshs. 4,941,000/- as particularized in paragraph 6 of the claim.
 - ii. Compensation for wrongful dismissal
 - iii. Costs of the suit and interest thereon at court rates.
 - iv. Any other relief the court may deem fit and just to grant
4. The Respondent filed a Memorandum of Defense and Submissions dated 26th February, 2018 in which it states that the Claimant was employed by the Respondent as a Food and Beverage Manager on a three-year contract by letter dated 21st February, 2015. The contract was effective from 23rd February 2015. His salary was Kshs. 180,000 per month. His employment was subject to a probation of 6 months. He was confirmed on 1st August, 2015.



5. The Respondent further states that on 9th July, 2015 the Claimant tendered a letter of resignation which he withdrew on 15th July, 2015.
6. The Respondent states that the Claimant was appointed to act as General Manager from 26th June, 2016 until the position is filled. The Claimant was again appointed to act as General Manager from March, 2017 until July, 2017.
7. It was the Respondents case that vide letter dated 1st July, 2017 the Respondent's Chairman addresses a letter to the Claimant pointing out that the Claimant had failed to attend a meeting scheduled for 29th June, 2017 on account that he was attending the burial of a cousin in Burnt Forest. The Claimant had earlier on 13th June, 2017 also failed to attend a meeting stating that he was accompanying his wife to Kenyatta National Hospital for a surgical operation. The Claimant later confessed that on both occasions he was attending interviews after the Chairman of the Respondent bumped into him at the venue of the interview on 29th June 2017.
8. As a result of the two incidents the Claimant was sent on compulsory leave with effect from 3rd July, 2017. The Claimant filled a leave form and proceeded for 91.5 days leave.
9. While the Claimant was on leave the Respondent carried out an audit which revealed that the Claimant voided bills amounting to Kshs. 445,406.23 between April and May, 2017.
10. A show cause letter dated 21st August 2017 was sent to the Claimant requiring him to give a detailed explanation for the voided bills by 28th August, 2017. He was likewise required to attend a disciplinary hearing on 28th August, 2017 at 11.30 am. He was advised of his right to attend the disciplinary hearing with an employee of his choice.
11. The Respondent avers that the Claimant declined to attend the disciplinary hearing or give reasons for his failure to attend. The meeting went on in his absence and a decision was made to summarily dismiss the Claimant. The letter of dismissal dated 4th September, 2017 was served upon him, advising him of his right of appeal within 3 days.
12. The Claimant did not exercise his right of appeal and his terminal dues were tabulated and paid into his account as follows:
 - Basic salary for August Kshs. 180,000.00
 - Basic salary up to 4th September Kshs. 26,671.20
 - Leave 32 days Kshs. 189,369.80
 - Total Kshs. 393,041.10
 - The balance after deductions Kshs. 274,965.10
13. It is stated that the Claimant declined to sign the discharge voucher indicating that he would go back for the same. The Claimant instructed his advocates who wrote a demand letter dated 20 September, 2017 while the Respondent was still waiting for him to go and sign the discharge form.
14. It was the Respondent's case that the termination of the Claimant's employment was fair and complied with section 41 of the Employment Act. That the Claimant squandered his opportunity to be heard and cannot complain that he was not given a hearing before dismissal.



15. At the hearing of the case the Claimant testified on his own behalf as CW1 while the Respondent called its Human Resource Manager, CAROLINE KABURIA who testified on its behalf as RW1. The parties thereafter filed and exchanged written submissions.

Analysis and determination

16. I have considered the pleadings and evidence on record. I have further considered the submissions filed by the parties and the authorities cited. The issues arising for determination are whether the Claimant's employment was unfairly terminated and if he is entitled to the prayers sought in his Memorandum of Claim.
17. The Claimant testified that he did not receive the show cause letter which was sent to him while he was on leave. That he was dismissed summarily without being given an opportunity to defend himself. That the Respondent did not file any proof of service of the show cause letter to the Claimant.
18. It was further the Claimant's case that he did not void any bills. That voiding was done by waiters authorized by supervisors. That the Respondent carries out daily, weekly, monthly and annual audits that should have captured any shortage. That the Respondent did not submit the audit report to the court.
19. For the Respondent it was submitted that the show cause letter was sent to the Claimant via email on 22nd August, 2017 through his email address nyakundijm@yahoo.com. A copy of the email was filed through the Respondent's Further List of Documents dated 24th November, 2021.
20. The Respondent submitted that in the show cause letter the Claimant was informed that the Finance and IT Departments would offer him the support he needed in compiling his report.
21. It was submitted that the Claimant failed to submit a detailed report on the voids or to attend the meeting of 28th August, 2017 and as a result the disciplinary committee resolved that he should be summarily dismissed.
22. The Respondent submitted that the Claimant admitted during cross examination that he received the show cause letter, albeit late.
23. It is submitted that the Claimant produced an excerpt showing that the email address used to send the show cause letter was correct.
24. The letter sending the Claimant on compulsory leave reads:

Gelian Hotel, Machakos

Ref: 2017/07/01/admin Date:01.07.2017

Josiah Nyakundi

Box 6905 - 00100

NAIROBI

Dear Josiah,

Re: Leave

On 29th June, 2017, the Chairman had a meeting with the Heads of the department, however you requested for a one day off claiming that you needed to take your spouse for an operation at Kenyatta hospital. The off day was approved, though the meeting was very critical and



given our position at the hotel you were required to attend. This was the second time you were missing to attend the Chairman Meeting, the first time being on 13th June, 2017.

On the same day, you attended an interview in Nairobi town and the Chairman of the hotel accidentally bumped into you. During your one on one meeting with the Chairman on 1st July, to discuss further, you said that the operation did not take place. You also confirmed, that was the second interview you were attending from the same company. This clearly shows that you are not really settled in your employment with Gelian.

Due to the above issue of giving wrong information to the Chairman, the board does not have trust in you and we therefore request you to take your leave effective 3rd July, 2017. A further communication will be given to you on the way forward.

Regards

Signed

Kioko

Chairman

25. The show cause letter is reproduced below:

Gelian Hotel, Machakos

Ref: 2017/08/21/FBM Date:21.08.2017

Josiah Nyakundi

Box 6905 - 00100

NAIROBI

Re: Show Cause Letter

Management undertook an audit exercise while you were on leave and the following issues was identified

1. That between April 2017 and May 2017, you voided bills worth Kshs. 445,406.23.

Therefore, you are hereby required to show cause why disciplinary action should not be taken August you by dismissing you summarily.

During the supervisors hearing on 18th August 2017, John Muthengi', who is the restaurant supervisor, told the committee that some of the bills that he voided were actually as per instruction from you

Your behavior violates the following.

1. Employment act Section 44, 4 (C)

Due to this you are therefore, required to provide a detailed report to the General Manager by Monday 28th August 2017. at 9.00am. The finance and IT department will give you the support you need to compile the report. The report should have the voided bill, the correct bill, event order if necessary and an explanation as to why the void was done. The disciplinary hearing will be on the same day at 11.30am where by you will be given an opportunity to explain yourself. You are allowed to bring any person of your choice to the hearing.

The agenda for the meeting will be.



1. To explain the reason for the voids

Reports to the HR office first to get the room for the meeting. You are allowed to come with an employee of your choice to the hearing.

Kind regards

Signed

George Ochiel

General Manager

26. The letter of dismissal is also reproduced below:

Gelian Hotel

Machokos

The Cradle of Hospitality

Ref:2017/04/09/FBM 04/09/2017

Josia Nyakundi

BOX 6905 – 00100

NAIROBI

Dear Josiah

RE: Summary Dismissal

We refer to our two communication (show cause letter)

We refer to our communication (show Cause letter) dated 21st August 2017 which was in relation to void audit for April 2017 to May 2017 totaling to Ksh. 445,406.28.

As per the show cause letter, your hearing was on 28th August 2017 at 11.30 am. where management wanted to give you a chance to explain the reason for the voids. The committee met and you did not come neither did you send any apologies for being absent (Minutes attached)

Based on that, you are summarily dismissed with effect from the date of this letter.

Employment Act section 44(e) an employee knowingly, fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey, issued by the employer or a person placed in authority over him by his employer.

Employment Act section 44 (c) an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which form its nature it was his duty, under is contract to have performed carefully and properly.

You are however, allowed to appeal this decision in writing within 3 days of receipt of this letter after which a decision on said appeal will be communicated to you.

If you do not wish to appeal, you are required to clear with the Hotel after which your final dues will be duly processed.

I wish you all the best in your future endeavors.

Regards,



Signed
George Ochiel
General Manager
CC: HR
CFO

27. During cross examination the Claimant stated that he did not respond to the show cause letter because he received it late when he had already been dismissed. In his submissions it is stated that the show cause letter was sent to the Claimant while he was on compulsory leave through his personal email as he had been blocked from the official email of the Respondent.
28. The Claimant did not expressly deny receiving the show cause letter through his personal email address. The fact that he had been blocked from the Respondent's official email or that he was on compulsory leave or that the email was sent through his personal email address does not make the service of the show cause letter wrong or ineffective. I therefore find that the Claimant received the show cause letter and invitation to attend the disciplinary hearing but failed to either respond to the show cause letter or attend the disciplinary hearing.
29. On whether there was valid reason for termination of employment, the show cause letter informed the Claimant that an audit was carried out that revealed he had voided bills to the tune of Kshs. 445,406.23. The Claimant was not supplied with a copy of the audit report. The audit report was done in his absence without requiring him to give explanation before the report was prepared.
30. At paragraph 1 of the show cause letter the Claimant is accused of voiding bills. At paragraph 3 of the letter it is stated that a supervisor by the name John Muthengi told the committee on 18th August, 2017 that some bills that he voided were as per instructions of the Claimant.
31. In the first place it is not clear whether the Claimant is accused of voiding bills or authorizing the voiding of bills or instructing the said John Muthengi to void bills.
32. Further, the list attached to the show cause letter gives reasons for voiding of the bills and indicates that John provided signed bill by Josiah the Claimant for only 3 of the 6 bills on the list. It is not indicated who signed the other bills.
33. The Respondent did not explain if voiding bills per se is wrong or what was wrong with the voiding of the bills in the list which clearly indicated the reasons for voiding as follows:

Void Report Banquets

Date: 4th May, 2017

Check no: 6097

Name: John Muthengi

Menu Item: BQT Package

Void total: 24,146.28

System reason code: Wrong Item

Employee explanation: John Provided signed bill by Josiah

Date: 19th April, 2017



Check no: 6079
Name: John Muthengi
Menu Item: PA hire
Void total: 4065.05
System reason code: Wrong Item
Employee explanation: John Provided signed bill by Josiah
Date: 19th April, 2017
Check no: 6999
Name: John Muthengi
Menu Item: BQT Package
Void total: 1422.75
System reason code: Wrong Item
Employee explanation: John Provided signed bill by Josiah
Date: 19th April, 2017
Check no: 6005
Name: John Muthengi
Menu Item: BQT Package
Void total: 234,146.40
System reason code: Wrong Item
Employee explanation: John Provided signed bill by Josiah
Date: 19th April, 2017
Check no: 6016
Name: John Muthengi
Menu Item: BQT Package
Void total: 4,065.00
System reason code: Wrong Item
Employee explanation: John Provided signed bill by Josiah
Date: 26th April, 2017
Check no: 6054
Name: John Muthengi
Menu Item: BQT Package
Void total: 177,560.76.00
System reason code: Wrong Item



Employee explanation: John Provided signed bill by Josiah

34. No minutes of the meeting held on 18th August 2017 where the said John Muthengi stated that the Claimant signed and authorized the voiding were produced in court. No statement or affidavit or other form of explanation by the said John Muthengi was produced in court. The voided bills were also not produced in court or even sent to the Claimant with the notice to show cause.
35. The Claimant's evidence that he had no rights to void bills was not controverted. Neither did the Respondent produce the policy or other document with instructions or procedure for voiding bills.
36. The reasons for dismissal as per dismissal letter are that the Claimant was guilty of gross misconduct under section 44(e) and 44(c) (sic). The two section which should be sections 44(4)(e) and 44(4) (c) provide for insubordination and neglect of duty. The particulars of acts constituting the gross misconduct under section 44(4)(c) and (e) were not specified in the letter of dismissal and neither were they proved by the Respondent at the hearing.
37. Section 43 of the employment Act provides that:
 43. Proof of reason for termination
 - (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.
38. I find that the Respondent did not prove the reasons for termination of the Claimant's employment.
39. Section 45(4) and (5) further provide that termination of employment shall be unfair where 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 and that in deciding whether it was just and equitable for an employer to terminate the employment of an employee, Court shall consider the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; the conduct and capability of the employee up to the date of termination; the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; the previous practice of the employer in dealing with the type of circumstances which led to the termination; and the existence of any previous warning letters issued to the employee.
40. It is my finding that in the instant case the termination did not meet the test in section 45(4) and (5). The Respondent appears to have already made up its mind to dismiss the Claimant when he was sent on compulsory leave and then went to look for reasons to justify the termination.
41. It is my finding that the termination of the Claimants employment was in the circumstances, unfair in terms of section 43 and 45(4) and (5) of the Act.

Remedies

42. The Claimant prayed for the following:
 - a. Twelve (12) months' salary compensation at Kshs. 180,000 pm = 2,160,000/-



- b. Three (3) months' salary in lieu of notice at Kshs. 180,000 pm = 540,000/-
 - c. Salary for remaining 5 months of the contract period at Kshs. 180,000 pm = 900,000/-
 - d. Unpaid General Manager acting allowance for 9 months Kshs. 981,600/-
 - e. Service pay at 15 days' salary for each completed year of service (2 years) Kshs.180,000/-
total Kshs. 4,761,600
43. The dismissal of the Claimant having been found to be unfair he is entitled to compensation. It is my view that compensation equivalent to 2 months salary is reasonable in the circumstance. In arriving at the compensation I have taken into account all the circumstances surrounding the termination of the Claimant's employment especially the length of service and the manner in which the termination was undertaken as well as all the relevant factors in section 49(4) of the Act. I award him Kshs. 360,000.
44. The Claimant is further entitled to pay in lieu of notice. His contract provided for 3 months' notice or pay in lieu. I award him 3 months' salary at Kshs. 540,000.
45. The Claimant is not entitled to payment of salary for the unexpired term of the contract as this is covered by the compensation and his contract did not provide for the same and neither does the law. This prayer is rejected.
46. The Claimant did not prove that the terms of his employment provided that while acting as General Manager he would be entitled to a financial benefit. He has further not proved that the acting benefit, if at all payable, would amount to what he has claimed as acting allowance. The prayer is rejected.
47. The Claimant was a member of NSSF. He is thus not entitled to service pay under section 35(5) and (6) of the Act.
48. The Respondent shall pay the Claimant's costs of the suit.
49. The decretal sum shall attract interest at court rates from the date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 5TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

