



**Onduma v Bontana Hotel Nakuru t/a Rift Valley Adventures and Hotels
(Cause 153 of 2015) [2023] KEELRC 16 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 16 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 153 OF 2015
HS WASILWA, J
JANUARY 19, 2023**

BETWEEN

BENARD MOCHAMA ONDUMA CLAIMANT

AND

**BONTANA HOTEL NAKURU T/A RIFT VALLEY ADVENTURES AND
HOTELS RESPONDENT**

JUDGMENT

1. By an Amended memorandum of claim dated 4th May, 2018, the Claimant alleged to have been unfairly terminated and sought for the following reliefs;
 1. A declaration that the dismissal be found wrongful and unfair therefore be converted to normal termination.
 2. The Claimant be paid termination benefits as per clause 9(b) and 27(b)(i) of the CBA.
 - a. 3months pay in lieu of notice of Kshs. 87,462.
 - b. Gratuity for 6 years of Kshs 58,308.
 3. The Claimant be paid annual leave and off duties as per clause 9 and 12 of the CBA.
 - a. Annual leave of Kshs 25, 800.
 - b. 44 off duty claim of Kshs 105,253.40
 4. Leave travelling allowance of Kshs 2,300.
 5. Underpayment of Kshs 443,448.
 6. Compensation under section 49(1)(c) of the *Employment Act* of Kshs 349,848.



Claimant's case.

2. The Claimant avers that he was employed by the Respondent on 15th March 2009 as a laundry supervisor at a salary of Kshs 18,000 without any house allowance. This pay was, in 2010, restructure to reflect basic salary of Kshs 16,000 and House allowance of Kshs 2,000 contrary to legal notice number 207 of 1990 that set up the house allowance at 15% of the basic pay.
3. His basic salary was increased to Kshs 16,500 from February, 2011 while the house allowance remained constant. In January, 2014, the Claimant's basic salary was increased to Kshs 18,150 while House allowance was raised to Kshs 2,200. A further raise in salary was made in October 2014 to Kshs 20,000 and the House allowance raised to 2,486 and amount which he earned until his termination.
4. The circumstances leading to the termination is that sometimes in September, 2013, the Respondent's Human Resource officer demanded for an issue raised on mixing of guest clothes and management clothes which was duly responded. That on 1st November, 2013 another letter was received from the Human resource, titled '1st Warning' on allegation of poor planning of daily duties and poor coordination and delegation of duties. In the same month on 7th November, 2013, the Human resource officer wrote another letter seeking explanation as to alleged lost clothes belonging to the Human resource officer and damaged jacket belonging to Director Sila.
5. The Claimant avers that he always responded to those queries. On 19th July, 2014 he received another letter alleging that he was rude to the junior staff and on 10th January, 2015 he received another letter alleging that he overcharged a client for washing of under pant when the same was not provided in the list. This issue earned him a suspension letter from the same day till 19th January, 2015.
6. While still serving the suspension notice, the Respondent without carrying out any investigation or hearing the Claimant on the issues raised, placed him on leave as per the letter dated 3rd March, 2015, all this while he was not paid his salary. On 11th March, 2015, the Human Resource officer on his volition filled the leave forms for 26 days not taken and 44 off duty days and served upon the Claimant to serve both leave and off days.
7. As soon as the Claimant started his leave, he received another letter dated 10th April, 2015 terminating his services before completion of the leave and off days instructed to serve.
8. He stated that he requested the Respondent by the letter dated 19th February, 2015 to be heard on the charges against him however the said letter did not elicit any response instead he was placed on leave and directed to take all his pending off days only to be dismissed from employment for being rude to a guest and overcharging a him when the price of washing under pant is indicated at the list as Kshs 450.
9. Upon receiving his dismissal letter, the Claimant lodged an appeal which appeal was never considered by the Respondent.
10. He stated that the Respondent violated the CBA signed between it and his union KUDHEIHA which provided at paragraph 10 page 8 for suspension to be less than 14 days however that he was suspended from 10th January, 2015 for a period of 4 months without any explanation.
11. It is stated also that the Respondent underpaid the Claimant in that the CBA at page 50 provide for basic pay for the Claimant at Kshs 25,800 and not Kshs 20,509 which the Claimant was receiving at the time. Additionally, that the CBA at page 48 provided for house allowance at 13% which he received less as per the payslips attached.



12. In totality, the Claimant stated that the termination was unfair as it did not follow the dictates of sections 41 and 45 of the [Employment Act](#).
13. During hearing the Claimant testified as CW-1 and adopted his witness statement dated 14th July, 2018 which basically reiterates the claim herein and on cross examination, he testified that he was employed as a laundry supervisor and his main role was to ensure the smooth running of the laundry area. He stated further that he is a member of KUDHEIHA Union which provided for amounts to be paid to various cadres of employees, however that the Respondent did not pay him as indicated therein.
14. On further cross examination, he testified that the issue of mixing of clothes was not done by him but by a junior employment, infact that he was off duty on the said date. He testified further that he gave satisfactory explanation to all the queries the Respondent had over his performance of duties. He however maintained that he was dismissed without any hearing.

Respondent's case.

15. The Respondent entered appearance and filed a reply to the amended memorandum of claim on the 28th November, 2018, denying the entire claim and in particular averred that the Claimant applied for work at their establishment on 15th March, 2009 and employed on 1st April, 2009 as laundry supervisor earning a consolidated salary of Kshs 18,000 inclusive of house allowance.
16. It is averred that as a Union member, the Claimant was bound by the terms of CBA including the mechanism employed therein for dispute resolution which the Claimant has not exhausted as such the suit herein has been filed prematurely.
17. The Respondent states that the Claimant did not perform his duties of a laundry supervisor to the required standard informing their numerous request for explanation from him as evidenced in the document attached herein, therefore the eventual termination was justified.
18. It is averred that the Claimant utilized all his leave and off days and therefore is not deserving of any on both reliefs or any other reliefs sought therein.
19. Christopher Komen, the Human Resource Officer, testified for the Respondent as RW-1. He adopted his witness statement of 23rd June, 2015 and in addition stated that the Claimant was dismissed because of poor performance. He avers that the Claimant used to argue with guests, a behavior which began in 2013. That he was given several chances to change his ways but he failed to make amends leading to summary termination.
20. Upon cross examination, he testified that the Claimant was paid Kshs 18,000 as per provision of page 50 schedule (b)(1) but on being show the CBA he confirmed that the CBA provides for basic salary of laundry supervisor at Kshs 25,800 with house allowance of 13%. He quickly changed his statement and averred that the Claimant was employed as a laundry supervisor in 2013 not 2009 and the CBA came to force in 2013.
21. Upon further cross examination, he testified that the Claimant though worked for 5 years for the Respondent is not entitled to gratuity as he was summarily dismissed from employment.
22. On procedure employed, the witness testified that the Claimant was given 3 warning letters and even heard on the issue of losing clothes but affirmed that no minutes are before Court. He testified with regard to the issue of overcharging a client that the Claimant charged Kshs 450 for washing under pant when the right price ought to be 150.



23. It was his testimony that he suspended the Claimant on the same day for the mistake of overcharging a client and had a meeting with him before leaving the hotel. He added that he directed the Claimant to take his utilized off and public holidays together with leave days which he fully served but that no proof of payment of the said leave and off days.
24. On re-examination, the witness testified that the Claimant was initially paid Kshs. 18,000 but when the CBA came to force in 2013 he was paid Kshs 23,783. He maintained that the Claimant was terminated for poor performance.

Claimant's Submissions.

25. The Claimant submitted on three issue; whether the summary dismissal was unlawful; whether the Claimant was underpaid as per the dictates of the CBA and whether the Claimant was paid for the 44 pending off days and 26 leave days.
26. It was argued that as per the pleadings and testimony and evidence by the Claimant, the Claimant was unfairly terminated because the reason given of overcharging a client was duly explained and in fact that the Hotel price list indicate under pant charges at Kshs 450, moreover that the receptionist was the one that billed the client and not him as such the reason given for termination was not justified. On procedure used, it was submitted that the Respondent did not subject the Claimant to disciplinary hearing on the pretext that he was subjected to summary dismissal as such not entitled to either notice or hearing thereof.
27. On the issue of underpayment. The Claimant maintained that the Respondent paid him less than what was provided for under the CBA and therefore the Respondent should be compelled to pay the difference. On leave and off days, the Claimant submitted that he was not allowed to serve the said unutilized off and leave days and therefore he ought to be compensated by the Respondent.

Respondent's Submissions.

28. The Respondent submitted from the onset that the reason for dismissal was communicated to the Claimant vide he letter of 10th April, 2015, which procedure was in accordance with the provisions of section 41 of the *Employment Act*. Furthermore, that the Claimant's work ethic was wanting as exhibited in the warning and explanation letters of 10.1.2015, 3.3.2015 and 11.3.2015.
29. With regard to procedure, it was argued that disciplinary hearing need not be done orally as emerging jurisprudence provide for correspondence as another mode where the said procedure can be undertaken. Similarly, that the procedure adopted in the dismissal of the Claimant was done through several correspondences as elucidated in the pleadings and evidence by the letters attached therein.
30. It was submitted further that the Claimant has not discharge the burden placed upon him under section 47(5) of the *Employment Act* and demonstrate the fact that he was allegedly targeted by the Human Resource officer and pushed towards his exit. It was argued to the contrary that the several letters issued to the Claimant showed an employee who was not performing in accordance with expectation and in fact that he exhibits laxity in the way he carried out his duties leading to the termination which is justified in the circumstances therefore the reliefs sought should not issue.
31. On the reliefs sought, the Respondent argued that the Claimant is not entitled to any of the reliefs sought because he was legally terminated from employment. Emphasize was placed on Gratuity pay and argued that section 35 of the *Employment Act* disentitles an employee pay when they resign or



are terminated legally. On that basis the Respondent cited the case of *Duke Onchiri Mose v Rosoga Investments Limited* [2017] eKLR where the Court held that;-

“A scrutiny of the respective cases of the parties tilts the matter to the Respondent. This is because the Claimant in the presentation of his case has failed to establish a case of unlawful termination of employment on a balance of probabilities. He does not rebut the Respondent’s case of involvement in the theft of tools or even his admission of the same. Again, the Respondent submits that this matter was investigated with the involvement of the Claimant. He was found culpable and acknowledged the finding. What further substantive or procedural requirements would be required to cure the Claimant’s case of default as an employee. What further avenues would exonerate or even salvage the Claimant out of this mess. This clearly comes out as a case of lawful termination of employment and I hold as such. With a finding of lawful termination of employment, the Claimant becomes disentitled to the relief sought. I am therefore inclined to dismiss the claim with orders that each party bears their own cost of the claim.”

32. I have examined all evidence and submissions of the parties herein.
33. The Claimant’s contention is that he was dismissed unfairly and without any hearing.
34. The Respondents on their part aver that the Claimant had been employed as a Laundry Supervisor but failed to perform his duties as expected and was thus terminated for poor performance.
35. The RW1 when cross-examined about this issue testified that there were many instances when the Claimant was arguing with guests and was given several chances to change but he didn’t.
36. From the documents produced in Court, the Claimant always responded to all the allegations against him.
37. The Claimant was finally suspended from duty vide a letter dated 10/1/2015 and was asked to report to the HRM on 19/1/2015 for further instructions.
38. On 4/4/2015 he was now asked to clear all his outstanding leave, public holidays and off days pending with effect from 19/1/2015.
39. He was also asked to hand over all laundry products. On 10/4/2015 he was now summarily dismissed.
40. The letter of dismissal indicated that he was dismissed over an incident that occurred on 10/1/2015 when he was arrogant to a customer in room 235.
41. From the communication between the Claimant and the Respondent, despite many complaints levelled against the Claimant by the Respondent the Claimant was never given any opportunity to be heard as per Section 41 of the *Employment Act*.
42. The Claimant also submitted that he was suspended and dismissed without following provisions in the CBA between the Respondents and Claimant under Article 10 of the CBA which provides for suspension/interdiction as follows;

“ 10. Suspension/Interdiction

The employer reserves the right to suspend with full pay an employee from employment up to a maximum of 14 days pending investigations into alleged gross misconduct or other offences.



Should the employee be found to have committed gross misconduct or other offences, then he/she shall be summarily dismissed or terminated with effect from the date of the investigations. Should the employee be found innocent of gross misconduct or other offences, then he/she shall be reinstated forthwith.

Where the employee's case is under investigation by the police or is pending before Court of law the employee's suspension shall be extended without pay until the result of the police investigation or the Court action is known".

43. Article 8 provides for the process relating to warnings and clause 9 provides for termination process.
44. In the case of the Claimant however, I note that the procedure envisaged was not followed.
45. The Claimant was summarily dismissed without any notice and without any hearing and therefore there is no valid reasons established for the dismissal.
46. The Claimant was also denied an opportunity to be heard and so was condemned unheard.
47. In the circumstances of the case, I find the dismissal of the Claimant unfair and unjustified.
48. In terms of remedies, I find for the Claimant and award him as follows;
 1. 3 months pay in lieu of notice
 $= 3 \times 24,486 = 73,458/=$
 2. Gratuity for 6 years as prayed and provided for under Article 27 (b) of the CBA being 1/3 of his salary and 1/3 of house allowance for each completed year of service.
 $= 1/3 \times 6 \text{ years} \times 24,486$
 $= 48,972/=$
 3. Annual leave = 24,486/=
 4. Underpayments as pleaded
 $= 443,448/=$
 5. Compensation equivalent to 8 months salary for unfair termination
 $= 8 \times 24,486 = 195,888/=$
Total = 786,252/=
Less statutory deductions
 6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Awuor for Claimant - present

Cheloti for Respondent – present



