



REPUBLIC OF KENYA



KENYA LAW
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**Korich v Fairview Hotel Limited (Cause 594 of 2018)
[2023] KEELRC 499 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 499 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 594 OF 2018
J RIKA, J
FEBRUARY 28, 2023**

BETWEEN

MOHSINE KORICH CLAIMANT

AND

FAIRVIEW HOTEL LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on April 24, 2018. He states that he was employed by the Respondent Hotel as the Executive Chef, on May 12, 2012.
2. He was summarily dismissed by the Respondent on December 5, 2017. His gross monthly salary was Kshs 1,516,884.95.
3. He worked diligently and was commended by the Respondent. He was awarded Players Player of the Year award by City Lodge, the parent company of the Respondent.
4. He was asked to show cause why he should not be disciplined, through a letter dated November 23, 2017. He was suspended, and requested to hand over Respondent's property. This included access keys. He was barred from communicating with Staff. He responded to the letter to show cause.
5. He was issued a short notice to attend disciplinary hearing on November 27, 2017. He complained about the short notice, and hearing was deferred to November 29, 2017. The date was communicated to the Claimant on the eve of the hearing.
6. The Claimant made further objection on various grounds, and without addressing these, the Respondent rescheduled hearing to December 5, 2017. He did not attend the hearing, to avoid legitimization of a fundamentally flawed process. The Respondent went ahead to dismiss the Claimant, without hearing his objection.



7. The Claimant avers that dismissal was actuated by malice. He details these to include: he was suspended without good reason; the General Manager told the Claimant that the Claimant was guilty of the allegations against him; he was denied by the Respondent, communication with potential witnesses; the disciplinary panel was contrary to the Employee Handbook; the panel included an external Lawyer, at the pay of the Respondent, who could not be impartial; the panel included also, Ross Thomson who was the originator of the complaints against the Claimant; Ross Thomson was conflicted; and the Claimant's concise response to the letter to show cause was not considered.
8. The Claimant had earlier opposed the recruitment of Thomson as the Assistant General Manager Food and Beverage, on the ground that Thomson was a young, inexperienced South African National, while there were more experienced and qualified Kenyans.
9. The Claimant had earlier fought for the rights of the Staff, and was opposed by the General Manager, another South African, who made racial slurs against the Claimant.
10. The Claimant avers that he had in the past turned down homosexual and inappropriate advances, made upon him by the General Manager. Termination was actuated by malice, and was unfair under Sections 41 and 45 of the *Employment Act*, and the Respondent's Human Resources, Policy and Procedure Manual. He prays for Judgment for: -
 - a. Declaration that termination was unfair.
 - b. 12 months' salary in compensation for unfair termination.
 - c. Exemplary damages.
 - d. Interest.
 - e. Costs.
 - f. Any other suitable relief.
11. It is admitted in the Statement of Response filed on May 29, 2018, that the Claimant was employed by the Respondent, and that employment was governed by the Employee Handbook.
12. He was not a model Employee. On March 22, 2017, a meeting was held, attended by the Claimant and the General Manager, involving Staff of the Respondent's kitchen. The Staff had raised complaints about the Claimant's abusive conduct against them. The Claimant was advised to treat the Staff fairly.
13. The Kitchen Administrator raised a complaint against the Claimant, which resulted in the Claimant attending a counselling session in the General Manager's office, on June 6, 2016.
14. On October 9, 2017, the Claimant threatened the Assistant General Manager with physical assault, and shouted vulgarities at the Assistant. When invited by the General Manager to attend a meeting to discuss the incident, in the presence of the Assistant, the Claimant wrote an e-mail to the General Manager stating that he was not going to attend any meeting. He told the General Manager to wait for the Board to convene and he would only discuss the incident with the Board. He told the General Manager that if he wished to dismiss him, he was free to do, but the Claimant was not going to attend any more meetings.
15. It is true that the Claimant was issued the commendation as pleaded for good performance. Dismissal was not on account of poor performance; it was on account of insubordination and absconding.
16. On November 21, 2017, the Claimant was reported to the General Manager, for abusing kitchen Staff, Faustine Desai. He used vulgar and inappropriate language, and threatened to throw a plate at Desai.



17. When advised by the General Manager about the report, and that a meeting would be held the following day to deliberate on the incident, the Claimant threatened to beat up the General Manager, and used vulgarities. He threw items from his desk at the General Manager, while fellow Employees watched. He stormed out of the office, leaving the General Manager to clean after the Claimant.
18. The Claimant was issued a letter to show cause. He was suspended, but was not locked out, or prevented from contacting other Employees. He conceded to the charges in the letter to show cause, stating in his response that Morne Bester [General Manager] did not ask him what transpired the previous night, which made the Claimant feel angry and disappointed. "I reacted to those feelings," the Claimant conceded.
19. The Claimant further wrote that: -I am very sorry the way I reacted to Mr. Morne Bester. I am very sorry that Mr. Morne Bester felt intimidated and that he feels that this conduct has affected the employment relationship. I left and I said to Morne Bester if they were better at doing my job, they should do it. I left Morne in my office and went home. Dear Morne. I don't have words to justify my behaviour. I am sorry for what happened. It is not an excuse but please forgive me. I don't mind the disciplinary hearing, but I don't want to lose your friendship.
20. The Claimant was given adequate notice to attend hearing. He was advised on his right to be accompanied at the hearing. He attended hearing on November 29, 2017. He stated he was not prepared and was accorded more time. He was scheduled to be heard on November 30, 2017. He declined to attend hearing. He was accommodated further on December 5, 2017. He again refused to attend hearing on December 5, 2017.
21. It was determined that his services are terminated, based on the evidence on record, and his own admission of wrongdoing. He was advised of his right of appeal, exercisable within 7 days. He did not appeal. All objection preceding the disciplinary hearing was dealt with, in a letter from the Respondent to the Claimant, dated November 30, 2017. There was no reason for the Claimant to refuse to attend hearing.
22. The Respondent outsourced the Chair to the disciplinary panel, bringing in an external Lawyer, to ensure the Claimant received a fair hearing. He was a Senior Employee, and other Senior Employees were involved in the dispute. There was no other Employee who could competently and objectively chair the proceedings.
23. Ross Thomson was not a member of the panel, and there was no conflict of interest. He was not the originator of the complaints; the General Manager was.
24. It was not in the Claimant's role, to hire other Staff. It is not true that he raised objection against the hiring of Ross Thomson. The General Manager never used racial slurs against any Employee. The Claimant did not fight for the rights of any Employee. He abused the Employees. The General Manager did not make any homosexual or inappropriate advances on the Claimant, and he considered this allegation defamatory. The Human Resource Manual in any event, contained a clear procedure, for reporting sexual harassment.
25. Lastly, the Respondent states that the Claimant himself had recommended dismissal of an Employee from the kitchen, one Tarik, whom he accused of being incompatible, quick to anger, and disrespectful to colleagues in the Kitchen. It is submitted that the same standard he applied to his Junior, should apply with respect to his own misconduct. The Claim has no merit, and should be dismissed with costs.
26. The Claimant gave evidence on October 14, 2021 and June 9, 2022, when he closed the Claim. Human Resource Manager John Mungai gave evidence for the Respondent on June 9, 2022, while Assistant



Manager Ross Thomson, and General Manager Morne Bester, closed the hearing for the Respondent, on October 13, 2022. The Claim was last mentioned on November 22, 2022, when Parties confirmed filing and exchange of their Submissions.

27. The Claimant adopted his Witness Statement, and 14 documents as exhibit 1-14, in his evidence-in-chief. He worked for the Respondent for 7 years, while he had worked as an Executive Chef cumulatively for 27 years. He restated how a visitor complained about the quality of lasagne served at the Respondent Hotel. The dish was twice prepared, and twice rejected by the visitor. The General Manager was not happy. The Claimant was invited to disciplinary hearing. He complained that he was not allowed to have a Lawyer. His objection was overruled. He was denied access to his witnesses. He did not attend the rescheduled hearing. In the end he was summarily dismissed. He was escorted out of the Hotel with his family. He was given notice of 5 days only. It was all a set-up.
28. Cross-examined, the Claimant told the Court that he never confronted Ross Thomson. He refused to attend a meeting called by the General Manager, pursuant to Thomson's complaint. It was the instructions of the General Manager, to have the meeting. The Claimant had a clean record. Employees at the kitchen had complained about the Claimant. They said that the Claimant had a problem controlling his temper. They alleged that he shouted at them. He was taken through counselling. The Claimant stated in his response to the letter to show cause that he was sorry, he reacted angrily. He conceded he was wrong. He received notice to attend disciplinary hearing, and was advised on all his procedural rights. His witnesses were intimidated. He refused to go on with the hearing. The witnesses were intimidated by Ross Thomson. They were told they would be sacked if they gave evidence for the Claimant. Tariq was dismissed, because the Claimant intended to call him, as a witness. The Claimant had reported Tariq for coming to work while intoxicated. The Claimant was supplied relevant documents preceding the hearing. He requested for more, which were not provided. He was shut out by the Respondent from the hearing, and could not participate, because the Chair was a Lawyer. Allegations against the Claimant were from the General Manager, not Ross Thomson. Hearing was a charade.
29. Redirected, the Claimant told the Court that he was not aware of any complaints, before the letter to show cause. He was not aware of statements against him. Bester was his immediate boss. Ross was also his boss. The Claimant responded to the letter to show cause in detail. The Respondent did not fault the response. The Respondent's Lawyer attended the disciplinary hearing. The Claimant was denied the opportunity to have his. He was shut out and denied documents.
30. John Mungai adopted his Witness Statement on record, and the Documents filed by the Respondent, in his evidence. He restated the contents of the Statement of Response, as summarized above.
31. Cross-examined, he told the Court that the Claimant replied to the letter to show cause. The Respondent did not advise if his response was adequate. An external Lawyer chaired the disciplinary panel. The General Manager was the complainant and could not chair. The Claimant was availed documents leading to the hearing. The letter to show cause detailed the charges against the Claimant. He was not blocked from using his key card, while on suspension. He was barred from accessing his office and computer, while on suspension. Suspension was extended, when the hearing was rescheduled. There was no noticeable bad blood between the Claimant and Ross Thomson. The Claimant had no role in hiring of Staff, but could express his concerns. He was prone to outbursts and vulgarities. He was given counselling. There were several sittings.
32. Redirected, Mungai told the Court that the Claimant admitted to the allegations made in the letter to show cause. The Claimant did not write asking to be supplied with further documents or witness statements. Ross and Bester were available at all the hearings convened by the Respondent, and ready



- to be cross-examined. The Claimant did not request for access to his computer. Counselling was a milder way of dealing with the Claimant, before escalating to the disciplinary hearing. He conceded to all the allegations.
33. Ross Thomson and Morne Bester both relied on their Witness Statements and Documents filed by the Respondent, in their respective evidence. The former told the Court on cross-examination that he joined the Respondent while the Claimant was already in service. He was second in command, as an Assistant General Manager. The Claimant was aggressive at his colleagues in the kitchen when informed about a customer who had complained about poorly prepared lasagne. He gestured like he wanted to throw plates at them. Thomson attended the disciplinary hearing to answer to allegations made against him by the Claimant. Advocate Njiru is not an Employee of the Respondent. He chaired the disciplinary panel. He is a labour specialist. The minutes of the disciplinary meetings were not prepared in advance. The Claimant did not sign the minutes of the meeting. Redirected, Thomson clarified that the charge against the Claimant related to the General Manager, not to Desai. Thomson was not the originator of the charges against the Claimant. The Claimant lived at the hotel, and had access to Staff. He did not call any as his Witness, or Representative.
 34. Morne Bester told the Court on cross-examination that he was the General Manager from April 2014. The Claimant was employed by the former owners of the hotel in 2011. There was no disciplinary incident in his record, from 2011 to 2014. Bester issued letter to show cause, and the hearing notice. The Lawyer was outsourced to chair the disciplinary panel. There was nobody at a higher level than Bester, who could chair, from within. The Respondent's Human Resource Policy does not allow Employees to have legal representation, in disciplinary proceedings. The Chairman made the decision to terminate. Bester did not intimidate the Claimant. The Claimant lived at the hotel and had access to all facilities. Redirected, Bester reiterated that the Claimant was counselled before being taken to the next level- the disciplinary hearing. Termination was not predetermined. The Chairman recommended termination, but it was the Respondent who implemented the recommendation.
 35. The issues are whether termination was based on valid reason; whether it was procedurally fair; and whether the remedies pleaded are merited.

The Court Finds:

36. The Claimant was employed by the Respondent as an Executive Chef, in the year 2013 according to his Statement of Claim. The Respondent's General Manager told the Court that the Claimant was employed by the previous owner of the hotel in 2011.
37. There is on record a letter of confirmation of employment, showing that the Claimant was confirmed as Executive Chef, commencing October 1, 2015.
38. He was summarily dismissed through a letter signed by General Manager Morne Bester, dated December 5, 2017.
39. Reasons for termination decision. These are the same reasons the Claimant was called upon to show cause, why he should not be disciplined. There were restated at length, in the letter of summary dismissal.
40. It was explained in the letter of summary dismissal that: the Claimant failed to show respect to the General Manager; he addressed Staff inappropriately on November 21, 2017; he did not remain calm and composed, while discussing the incident with the General Manager; he brought disrepute to the management team; he used intimidating words against the General Manager; he was absent from work without the authorization of the General Manager; he admitted that he became angry towards the



- General Manager; and he told the General Manager to do the Claimant's job, if the General Manager thought he was better at it, than the Claimant.
41. The letter of summary dismissal also states that the Claimant declined invitation to the disciplinary hearing, for reasons best known to himself.
 42. The Claimant seems to the Court, to have conceded wrongdoing. In his response to the letter to show cause, he states that he felt angry and disappointed because the General Manager failed to ask him details of what had transpired the evening before. He alleged that he reacted to these feelings. He was sorry, that the General Manager felt intimidated. He admitted that he left work on November 22, 2017 without the leave of the Respondent, and that he told the General Manager to do his job, if the General Manager thought he was better at it, than the Claimant.
 43. The Claimant did not deny, that when invited by the General Manager to discuss complaints against him, he told the General Manager that he was not going to attend any meeting, and that the General Manager would have to wait, until the Board was present to discuss the issues. "If you want to fire me, please go ahead, but I am not coming to any meetings any more," the Claimant swore.
 44. There were complaints against the Claimant not only from the General Manager, but from those subordinate to the Claimant at the Kitchen. Kitchen Administrator Jacqueline, had reported that the Claimant used offensive words against her; he was cross with the Chef Desai, for poor preparation of lasagne; he shouted at the entire Kitchen Staff, using a four letter swear word; and according to Thomson who was present at time of the incident, Desai was left crying following the tirade from the Claimant. Other subordinate Staff such as Judith Komen, recorded statements, attesting to the cruelty subjected to Desai, by the Claimant, following the lasagne incident.
 45. Thomson, who was the second in command, and therefore also senior to the Claimant was not spared by the Claimant. The Claimant took the position from the inception, that Thomson was a young South African expatriate, not suitable to serve as second in command, in a labour market where there were better qualified indigenous Kenyans. He did not therefore submit himself to Thomson. On October 9, 2017, Thomson sought out the Claimant to discuss work issues. He recorded a statement, signed on October 9, 2017, explaining that the Claimant was not receptive, but instead told Thomson there was nothing to discuss, and when Thomson insisted on having a conversation, he was met with the same four letter swear word.
 46. There is evidence on record, that the Claimant was unable to fit in, with the corporate culture of the Respondent. He did not fit in, with those above him, and those below him. He insulted them all, and showed respect to none.
 47. The Claimant appears to the Court, even when he appeared to give evidence, to have a volcanic temper. He was easy to anger. It was mentioned in the record that at one time, the Claimant had walked away from his workstation to get insulin. He perhaps suffered a medical condition, predisposing him to quick temper.
 48. The Respondent reasonably accommodated him, taking him through counselling, before escalating its response to a disciplinary level.
 49. Employers are entitled to weed out Employees who are incompatible, under Section 45 [2] [b] of the *Employment Act*, which states that termination is fair, if it is related to the Employee's conduct, capacity or compatibility.
 50. In *Dede Esi Amanor Wilks v Action Aid International* [2014] eKLR, this Court held that Employers generally, are entitled to have harmonious working relationships in their Organizations, and can do



so by weeding out trouble makers, eccentrics and disruptive Employees from their Organizations. Employers can tolerate mild eccentricities or idiosyncrasies, but cannot reasonably be expected to tolerate downright impossible or unmanageable Employees [*Dede v Action Aid*]. Incompatibility was defined in *Wright v St Mary's Hospital*, 1992 [[ILJ] 987 IC], as “ the inability on the part of the Employee, to work harmoniously with fellow Workers or Managers, or failure by the Employee to fit with the corporate culture.”

51. In the view of the Court, the Claimant had become downright impossible and unmanageable Employee, throwing four letter words at his juniors and seniors alike, and going on to dare his General Manager to take his Executive Chef role, if he thought he was better at it. He turned physical, threatening to throw utensils at colleagues. He broke items in the presence of the General Manager, leaving the General Manager to clean up. There is a limit to reasonable accommodation. The Claimant probably had an underlying condition, which made him tempestuous. But the Respondent bore it all, took him through counselling before inviting the Claimant to a disciplinary hearing.
52. Procedure. The Claimant was presented with specific charges, which he admitted, and apologized. In light of his unequivocal admission, it appears somewhat unconvincing that, the Claimant faults procedure, complaining that he was denied certain documents, and that he was denied access to staff who could have testified in his favour. What would these documents and colleagues of the Claimant say, that would affect his admission of the allegations? He alleged that his potential Witnesses were intimidated by the Respondent not to testify. He did not detail the nature of intimidation. He named Tariq as one of the colleagues who were intimidated. He stated that indeed Tariq was dismissed because the Claimant intended to call him as his Witness. The Claimant had reported Tariq for coming to duty while intoxicated.
53. Further complaints about procedure by the Claimant related to the involvement of Counsel Mr. Njiru, as the chair of the disciplinary panel. This was explained persuasively by the Respondent. The complainant was the General Manager. Thomson could not chair because he was himself a Witness, and had been a recipient of the Claimant's offensive conduct. Other Employees had their own complaints against the Claimant. There was no Employee who could oversee the Claimant's disciplinary proceedings.
54. Section 41 of the *Employment Act* does not require that disciplinary hearing, is chaired invariably, by a member of Staff of the relevant Organization. There are Organizations with very small number of Staff, and without much leeway in composition of disciplinary panels. In the view of the Court, it is permissible to outsource a Chair, so long as the Chair conducts proceedings impartially and objectively, observing all the requirements of Section 41 and 45 of the *Employment Act*. In the circumstances of this case, the Claimant was at odds with all his colleagues, there was no member of staff senior to him, who could take the chair, and composition of a disciplinary panel from within was from the outset doomed. If Bester, Thomson, or other staff constituted the panel, it would be challenged by the Claimant on good grounds. The Claimant contributed to the situation he found himself in, where all senior and junior Employees were at odds with him, warranting the Respondent to seek the aid of an outsider, Mr. Njiru, a Labour Lawyer of good standing.
55. Mr Njiru did not come in as a Lawyer acting for the Respondent. He came in as an impartial chair, to aid a process that would have been stymied, without the assistance of an outsider. The Claimant appears to have misunderstood this, which led him to insist that he too, should have his Lawyer around. If it was the Policy of the Respondent not to engage Lawyers in its disciplinary proceedings, and this normally is the practice in most employment places, the refusal by the Respondent to grant the Claimant his wish to be accompanied by his Lawyer, cannot be faulted, and was within the discretion of the Respondent. Section 41 allows Employees facing disciplinary proceedings to be accompanied by a workmate of their



choice, or a trade union representative, where they are members of a trade union. The provision does not make it mandatory for Parties to disciplinary proceedings to be represented by Lawyers, although in the ever evolving and legally complex workplace, in the view of the Court, the disciplinary processes would be enriched by the input of Lawyers, which would perhaps reduce the amount of cases that are escalated to the Courts.

56. The Claimant did not adduce evidence to show that Mr Njiru failed to run the proceedings fairly. The fact that the Chair was engaged by the Respondent, and probably at a fee, was not shown to have affected his objectivity. Even Employees from within, called to chair disciplinary panels, are ordinarily on the payroll of the Employer. The Claimant did not show how the engagement of Mr. Njiru as the Chair, prejudiced the hearing, which any event, he opted in the end, not to attend. The process and the decision remained the property of the Respondent, not of the externally sourced chair.
57. The decision to terminate was ultimately made by the Respondent, upon the recommendation of the Chair, and in the absence of the Claimant from the disciplinary forum.
58. The Court is not able to fault the Respondent, on substantive justification or procedural fairness, in the termination of the Claimant's contract of employment. The Claimant appears to have an underlying medical condition, which made him short-tempered, and ultimately, incompatible with his colleagues, both senior and junior. He was reasonably accommodated. He was taken through counselling, but in the end, he remained unmanageable.

It Is Ordered:

- a. The Claim is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF FEBRUARY 2023.

JAMES RIKA

JUDGE

