



**Mwachuma v Fogo Gaucho Limited (Cause 1235 of 2017)
[2023] KEELRC 520 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 520 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1235 OF 2017
L NDOLO, J
MARCH 2, 2023**

BETWEEN

ARAFAT MWACHUMA CLAIMANT

AND

FOGO GAUCHO LIMITED RESPONDENT

JUDGMENT

Introduction

1. Arafat Mwachuma, the Claimant in this case, was an employee of Fogo Gaucho Limited. Mwachuma brought this claim following his dismissal from employment on January 23, 2017. The claim is documented by a Memorandum of Claim dated May 25, 2017 and filed in court on July 3, 2017.
2. The Respondent responded by a Response dated August 2, 2017 and filed in court on August 3, 2017.
3. The matter went to full trial with the Claimant testifying on his own behalf and the Respondent calling its General Manager, Elvio Bitello.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on March 1, 2016, as a steward earning a gross monthly salary of Kshs 12,000, which was later increased to Kshs 15,000.
5. On January 21, 2017, the Claimant was arrested while on duty, on an allegation of theft. He was booked at Kileleshwa Police Station and released on January 22, 2017.
6. Upon reporting to work on January 23, 2017, the Claimant was stopped at the gate where he was shown a notice indicating that he was no longer an employee of the Respondent.
7. The Claimant terms the Respondent's action as unlawful and unfair for want of justifiable cause and failure to adhere to due process.



8. The Claimant therefore seeks the following remedies:
- a) An order of reinstatement without loss of benefits;
 - b) 1 month's salary in lieu of notice;
 - c) Unpaid house allowance;
 - d) 12 months' salary in compensation;
 - e) Unpaid salary for the month of January to date;
 - f) Overtime worked on 25th December and 1st January;
 - g) Certificate of service;
 - h) Costs

The Respondent's Case

9. In its Response dated August 2, 2017 and filed in court on August 3, 2017, the Respondent admits having employed the Claimant but terms him as an untrustworthy and dishonest employee.
10. The Respondent claims that the Claimant was caught with 5 kg of rice, 5 kg of sugar, chocolate, 2 bottles of honey and 1 bottle of peanut butter, which he had stolen from the Respondent. The Respondent reported the occurrence at Kileleshwa Police Station.
11. The Respondent admits having left a notice with the watchman so as to alert the Claimant to obtain the Respondent's permission before gaining access to its premises.
12. The Respondent avers that its actions were justified as it was not under any obligation to wait for the Claimant to be charged in court before terminating his employment.
13. The Respondent further avers that the termination was well within the provisions of Section 44 of the Employment Act and therefore lawful.
14. The Respondent maintains that the Claimant is not entitled to the remedies sought as the action taken against him was lawful and justifiable.

Findings and Determination

15. There are two (2) issues for determination in this case:
- a) Whether the termination of the Claimant's employment was lawful and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Termination

16. The Respondent produced a letter dated January 23, 2017, addressed to the Claimant as follows:

“To: Arafat Mwachuma

Re: Dismissal Letter

This letter confirm (sic) that your employment with Fogo Gaucho has been dismissed (sic) with effect from January 22, 2017.



Reasons for dismissal: -

Colluding with fellow employee and stealing from the company. Please come on Thursday January 26, 2017 to collect your final dues.

Yours faithfully,

(signed)

Elvio Bitello

General Manager”

17. The Claimant told the Court that he did not receive this letter and the Respondent’s General Manager, Elvio Bitello could not confirm delivery of the letter to the Claimant. What is not contested is that the Claimant’s employment with the Respondent came to an end on January 22, 2017.
18. Bitello testified that the Claimant and his colleague, were found in possession of several items stolen from the Respondent’s premises and they were therefore instructed not to report to work from 23rd January 2017.
19. Assuming that it is true that the Claimant was found with items suspected to have been stolen from the Respondent, the correct procedure would have been to give him an opportunity to explain himself. Instead, the Respondent adopted a summary procedure of dismissing the Claimant without availing him the opportunity to defend himself as set out by Section 41 of the Employment Act, which provides:
 41. Notification and hearing before termination on grounds of misconduct
 - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
20. Having failed to adhere to this mandatory procedure, which is the minimum procedural requirement to be met by an employer intending to terminate the employment of an employee, the Respondent failed to establish a valid reason for the Claimant’s dismissal.

Remedies

21. As a result, I award the Claimant three (3) months’ salary in compensation. In arriving at this award, I have taken the Claimant’s short employment stint but also the Respondent’s unlawful conduct in terminating the employment relationship.
22. I further award the Claimant one (1) month’s salary in lieu of notice.



23. In its letter dated January 31, 2017, addressed to the Ministry of Labour Social Security & Services, the Respondent admits owing the Claimant Salary for 22 days worked in January 2017, service pay for 1 year, leave pay for 1 year and 14 holidays worked. I will therefore adopt these items as part of this award.
24. The claim overtime was not proved and is disallowed.
25. The claim for house allowance was abandoned at the trial.
26. Finally, I enter Judgment in favour of the claimant as follows:
- | | | |
|----|---|-------------|
| a) | 3 months' salary in compensation..... | Kshs 45,000 |
| b) | 1 month's salary in lieu of notice..... | 15,000 |
| c) | Salary for 22 days in January 2017..... | 11,000 |
| d) | Service pay for 1 year..... | 7,500 |
| e) | Leave pay for 1 year..... | 15,000 |
| f) | Holidays worked (14 days)..... | 7,000 |
| | Total..... | 100,500 |
27. This amount will attract interest at court rates from the date of judgment until payment in full.
28. The claimant is also entitled to a certificate of service plus costs of the case.
29. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MARCH 2023

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JUDGE

Appearance:

Miss Machuki for the Claimant

Mr. Mbogo for the Respondent

