



**Muema v Kenga Equitorial Hotels Limited t/a Mombasa Continental Resort
(Cause E007 of 2022) [2023] KEELRC 1236 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1236 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E007 OF 2022**

**M MBARÚ, J
MAY 25, 2023**

BETWEEN

GEOFFREY KYALO MUEMA CLAIMANT

AND

**KENGA EQUITORIAL HOTELS LIMITED T/A MOMBASA CONTINENTAL
RESORT RESPONDENT**

JUDGMENT

1. The claim is that on 14th August, 2018 the respondent employed the claimant as the chief accountant and issued him with a written contract dated 15th August, 2019. On 23rd October, 2021 the respondent terminated the claimant's employment on allegations that he was involved in fraudulent activities during his tenure without giving him a hearing or payment of terminal dues. That the terminal dues paid were insufficient.
2. The claim is that there was unlawful termination of employment since there were no charges levelled against the claimant or any disciplinary hearing conducted before his employment was terminated. The claimant is seeking the following dues;
 - a. Compensation Ksh. 1,980,000;
 - b. Service charge Ksh. 104,910;
 - c. Acting allowance Ksh. 23,833;
 - d. 19 public holidays Ksh. 104,500;
 - e. Off days in 2021 Ksh. 225,500;
 - f. Off days in 2020 Ksh. 209,000;
 - g. Overtime worked Ksh. 2,574,000;



- h. Damages for defamation.
3. The claimant testified in support of his case that on 13th September, 2021 he received a call from Fredrick Chege who knew one of the accountants in a sister company and he read to him a message to him indicating that one of the directors of the respondent required the claimant to call a security company. On the same day, one Njeri Ndegwa a daughter to the hotel owner and part of the legal team came to the claimant's office with a team including Fredrick Chege who was introduced as the new finance manager and other 4 persons who were introduced as the security team. Later, Mr Muriuki Ndegwa a son to the hotel owner called the claimant and directed him to leave the premises immediately without any notice, explanation or reasons. This direction was in disregard of pending work that the claimant required to do but the caller declined any engagement. 5 other employees were affected and required to leave the premises. Mr Chege took over the finance functions and indicated that he would make payments of terminal dues.
 4. The claimant testified that on 14th September, 2021 he was called back to the office by Mr Chege and when he went to his office he found his computer had been fitted with a device to monitor what he was doing and the other employees came and their dues were paid. The claimant was left to work but under very difficult circumstances noting that his colleagues were being escorted out of the premises under police security and their dues underpaid.
 5. On 23rd October, 2023 the owner of the hotel Mr Ndegwa summoned the claimant to his office and interrogated him about his family member's bills in the hotel especially with regard to his daughter Maryann and when she learnt of it she called him and demanded that he should resign or be dismissed. The claimant had no reason to resign from his employment. He left but was denied access to his office but was issued with an unsigned letter terminating his employment and on 30th October, 2021 when he went to collect his terminal dues he found the police and a letter terminating his employment.
 6. The claimant testified that he was not taken through the due process, he was alleged to have engaged in fraudulent activities which was not true but defamatory and the orders sought should issue.
 7. Upon cross-examination, the claimant testified that on 30th October, 2021 the respondent paid Ksh. 887,167 and a memo was sent to staff that they would receive half pay due to COVID impact on the business. In the statement of claim the claimant is seeking acting allowance following an email he received to act in a higher position but was not paid and that he did not take his annual leave.
 8. The claimant testified that as the accountant, various cheques would be written in his name to go and cash to make various payment as was the practice. He was issued with cheque for Ksh. 102,045 which had been paid in excess by County Government of Homa Bay at ksh. 500,000 issued in his name. he was later called by the EACC about cheques and financial transaction about Homa Bay County but he had left the respondent company.
 9. In response, the respondent's case is comprised of mere denials and that the court lacks jurisdiction to determine a defamation claim, the damages claimed for unfair termination have not been proved and should be dismissed with costs.
 10. The response is also that in the letter of appointment, the claimant was provided with annual leave of 21 days to be taken every year and not carried forward without consent. Part of the terminal dues paid was the sum of Ksh. 264,000 inclusive of leave days in 2020 and 2021.
 11. The claimant was in senior management where operational decisions were made and in one such meeting held in March, 2020 the respondent discussed ways to mitigate Covid -19 pandemic and resolved that only a skeleton number of employees would be retained and anyone who wished to work



extra time or long hours would do so out of his own volition. The claimant was part of that meeting and hence aware of this resolution and through an internal memo dated 20th march, 2020 all employees were notified of this resolution and the claim for overtime and work during public holidays does not arise.

12. In evidence, the respondent called Crispus Mwamidi the general manager who testified that he was previously the operations manager and worked closely with the claimant who was the chief accountant but was issued with warnings severally. On 23rd October, 2021 his employment was terminated and the claims made that his computer was installed with monitor devices is not true since the claimant had exclusive use of the same. The claimant had access to the password and he was not asked or authorised to share.
13. The claimant was called to a meeting to explain why a credit of Ksh. 503,873 owed to one of the clients had been issued to him personally through cheque No.014109 dated 13th September 2021 and another for Ksh. 102,045 cheque No.014108 on the same date and which had been issued contrary to company policy. The claimant failed to give any satisfactory responses.
14. Upon termination of employment, the claimant cleared with all departments on 23rd October, 2021 and as the chief accountant he computed his dues and the respondent paid based on own tabulation all at Ksh. 1,256,500 and upon taxation, Ksh. 887,167 was paid.
15. On 29th October, 2021 the claimant was issued with cheque No.53416 in payment of terminal dues. This payment comprised annual leave days not taken at Ksh. 264,000 and being part of senior management, the claimant had no overtime claims.

Determination

16. In a letter dated 23rd October, 2021 which was received by the claimant on 30th October, 2021 the respondent terminated his employment on the grounds of involvement in fraudulent activities during his service. The respondent's case was that the claimant had received of Ksh. 503,873 owed to one of the clients through personal cheques No.014109 dated 13th September 2021 and another for Ksh. 102,045 cheque No.014108 which was contrary to company policy and as part of management, the claimant was aware of such matters. The claimant testified that as the chief accountant he would have cheques written in his name so as to cash them.
17. Indeed, is it common practice that an employer may require one employee and particularly in the finance or accounts department to be the bank agent and for purposes of accessing cash, such bank agent is issued with personal cheques. The respondent filed copy of cheque No.014108 with an amount of Ksh. 120,045 in the name of the claimant and drawn by the respondent. There is cheque No.014109 for Ksh. 503,873 in the name of the claimant and drawn by the respondent.
18. The claim that there were fraudulent transactions during the claimant's tenure as the chief accountant on the face of the records relied upon then called for evidence to challenge these basic tenets in employment practice. That where the claimant was alleged to have engaged in fraudulent activities, before termination of his employment, due regard should have been taken that a hearing be conducted for him to give his responses as required under the provisions of Section 41 of the [Employment Act, 2007](#).



19. In the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) the court held that;

Under this Section, [Section 41 of the *Act*] four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -

- a) An explanation of the grounds of termination in a language understood by the employee;
 - b) The reason for which the employer is considering termination;
 - c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
 - d) Hearing and considering any representation made by the employee and the representative chosen by the employee.
20. The claimant was entitled to a fair hearing or procedure in disciplinary proceedings before his employment was terminated despite holding a management position. To proceed without regard to the mandatory provisions of Section 41 of the *Act* was unlawful and unfair contrary to Section 45 of the *Act*.
21. Upon termination of employment, the respondent offered to pay the claimant for 23 days worked in October, 2021 but the notice was only served on 30th October, 2021. The claimant has claimed for dues owing until such date but he did not offer his labours to the respondent after the 23rd October, 2021.
22. For leave days not taken, for the year 2021 the claimant was paid Ksh. 121,000 and for the year 2020 the claimant was paid Ksh. 143,000. Based on the contract of employment, the claimant had 21 days of annual leave each year. For the completed year in 2020, the tabulation of annual leave days not taken is fair since untaken leave days should be paid based on the basic salary and not gross.
23. With regard to the year 2021, in terms of Section 28 of the *Act*, for months worked, leave pay due is prorated and a correct tabulation applied.
24. The respondent also offered to pay one months' notice pay allowed at Ksh. 165,000.
25. The respondent also paid half salary for March, 2020 to January, 2021 at Ksh. 701,000 and the claimant was issued with cheque No.534136 for the sum of Ksh. 887,167 dated 29th October, 2021.
26. On the claims made, compensation is due based on the findings that there was lapse in due process together with unlawful and unfair termination of employment. The court in assessing the compensation due is required to look at the work record of the employee pursuant to Section 45(5) of the *Act*. The claimant had a warning issued during the course of his employment and he admitted this much. He was also paid his terminal dues immediately employment was terminated and taking these matters into account, compensation is hereby assessed at one-month salary all at Ksh. 165,000.
27. service charge was not a term in the contract of employment. the claimant has not produced any policy or other record to support such matter as a benefit.
28. On the claim for acting allowances, on the contract of employment, the terms and conditions of service were agreed upon and could only change through written communication or by mutual consent. The claim that there were additional duties issued on email and so an acting allowance should be paid is not supported by any evidence that upon allocation of additional duties, the terms agreed upon changed.



- 29. With regard to the claim for 19 public holidays worked in the year 2020 and 2021, public holidays are gazetted and cannot be general.
- 30. Taking off days is a right under Section 27 of the *Act*. in any industry, the employer has the prerogative to allocate an off day to suit its needs. Under clause (7) of the em0loymntn contract, the work hours were agreed at 48 hours spread over 6 working days. There was no evidence as to how the claimant enjoyed such terms and on the record and contract filed, application of 48 hours in a week gives the claimant 6 days of 8 hours each and hence allowing taking of rest days.
- 31. On the claim for overtime, the claimant is seeking payment for overtime work for 234 days in the year 2020 and 208 days in the year 2021 without giving account as to how many hours he worked overtime over and above the 48 hours allocated in a given week. To apply his claim logically would mean, in the year 2020 out of the 365 days the claimant was on overtime work sae for 131 days. The number of hours worked beyond the 48 hours allowed in a given week should then have been accounted for which is not done in this case.
- 32. With regard to defamation claims, indeed where an employer uses work records or the employment relationship to bring into public ridicule of the employee and leading to defamatory matter, the court has jurisdiction to deal and address firmly as held in *Mercy Kawira Mithika v Kenya Women Microfinance Bank PLC* [2021] eKLR that;

In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Petitioner had the potential to damage his employability..... in employment related, defamation is based on the old tort of defamation but with a new spin: the employee’s injured or damaged employability and not merely the personal stigmatization must be compensated.
- 33. A claim in defamation ought to establish that there is a defamatory statement and that the respondent published or caused another to publish the statement that refers to the claimant as the law of defamation is concerned with the protection of reputation. Particulars of such matters then should be pleaded with a certain degree of precision to allow a respondent a fair chance to defend their actions as alleged. The only matter the court can discern from the claimant’s case is that he was called by the EACC with regard to some cheques and payments from Homa Bay County government, that he was escorted out of the respondents premises by the police and nothing else. A call by EACC is part of its mandate where investigations are necessary and this was not cited as the core of any defamatory matter. The presence of the police within the respondent’s premises was not linked to any defamatory matter.
- 33. Accordingly, judgment is hereby entered to the claimant with a finding that his employment was terminated unfairly and shall be paid compensation of Ksh. 165,000. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: JAPHET MUTHAINE

..... **AND**

