



Mukundi & 3 others v South Cape Investment Limited & 2 others (Cause 1266 & 1267 of 2017 (Consolidated)) [2023] KEELRC 1889 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1889 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1266 & 1267 OF 2017 (CONSOLIDATED)**

**MN NDUMA, J
JULY 27, 2023**

BETWEEN

**JOYCE N. MUKUNDI 1ST CLAIMANT
PURITY NJERU 2ND CLAIMANT
ELIZABETH CHEGE 3RD CLAIMANT
IRENE OGOL 4TH CLAIMANT**

AND

**SOUTH CAPE INVESTMENT LIMITED 1ST RESPONDENT
ADVANCED INNOVATIONS LIMITED 2ND RESPONDENT
ACCESS PALACE LIMITED 3RD RESPONDENT**

JUDGMENT

1. The suit is premised on Amended Statements of Claim dated 4th October, 2022 in which the claimants seek the following reliefs:-
 - (a) A Declaration that, the Respondents' action in dismissing the claimants from employment, was unlawful and unfair.
 - (b) In the alternative, the Court declares that the respondents' action in dismissing the claimants from employment amounts to retrenchment or work place restructuring.
 - (c) Payment of terminal benefits as set out in the amended Statements of Claim.
 - (d) Equivalent of 12 months' salary in compensation for the wrongful dismissal.
 - (e) Interest and costs.



- (g) Any other equitable reliefs this Honourable Court may deem just and expedient to grant in the circumstances.
2. The first claimant Joyce Mukundi testified as C.W.1 on behalf of the four (4) claimants namely; Purity Njeru, Elizabeth Chege and Irene Ogol. Cause No. 1267 of 2017 was filed by Elizabeth Chege and Irene Ogol whereas Cause No. 1266 of 2017 was filed by Joyce Mukundi and Purity Njeru. All the claimants acted in person and were not represented.
 3. C.W.1 testified that she was employed by the respondent on 31/7/2006 as a driver, and rose through the ranks to the position of Inspector pit boss and finally to Shift Manager. That she served the respondent continuously for a period of ten (10) years until March, 2017.
 4. That the staff of the respondent joined the union due to discriminative dismissals occasioned by one Mr. Leonard Mathews, the Chief Operations Officer (C.O.O) to the staff in general.
 5. The joining of the union triggered hostility between management and staff and when the staff requested to be granted advance, the (C.O.O) would ask staff to get it from the union.
 6. The Chief Operations Officer (C.O.O) instructed the staff including the claimants to be remitting some money from live games and from slot machines to the cashier. That Kshs.21,400 was to be remitted for live game. That this became routine and the remittance was done in Nairobi and at the branches in Nanyuki and Nakuru. That the remittance was done in high secrecy for the Betting Control and Licensing Board (BCLB) not to know about it.
 7. That Government Inspectors (G.I.) are always present at the casinos, on daily basis. The manager and the gaming staff in a shift would wait for any chance when the G.I. had gone to the washroom or is not near the live game tables and get the live chips in haste. The cash chips were then handed to the manager by the dealer who in turn takes the money (chips) to the cashier on shift.
 8. At one point employees in the game department at Regency Casino (South) Cape Investment Limited demanded for a meeting with the management and raised their concern how this money was being remitted. The employees said it was unlawful and illegal and was a set up on the employees since they joined the union. Management did not heed the grievances by the gaming staff.
 9. The total amount in a clandestine manner from the slot machine was Kshs.30,000 per day making a total of Kshs.41,400 and Kshs.1,242,000 within 30 days.
 10. Months later, this scam was used to implicate staff in theft. The staff including the claimants complained about this victimisation because the taking of cash was mandated by management. The union got to know about this theft by management which was later used to victimise the claimants. C.W.1 states that the termination of employment of the claimants was unlawful and unfair and that the respondents did not pay the claimants terminal dues set out in the amended statements of claim dated 4/10/2022. That the Court to award the claimants accordingly. That the claimants were not accorded a hearing before the dismissal.
 11. C.W.1 testified that Purity Njeru; Elizabeth Chege and Irene Ogol were her colleagues. That C.W.1 was Safety Manager; Purity Njeru was Casino dealer; Elizabeth was supervisor and Irene was a cashier. That the 2nd respondent was sister company to their employer, the 1st respondent. That they had three branches of Casinos namely; Aces Palace Casino at Koinange, St. Regency Palms Casino at Grand Regency Hotel, and Golden Palms Casino in Westland's.
 12. C.W.1 produced documents dated 18/9/2017 as exhibits in support of their case. C.W.1 stated that she was employed in 2006. Purity was employed on 3/11/2008; Elizabeth on 2/4/2007 and Irene on



- 2/4/2007. That all the claimants worked in the three casinos and were summarily dismissed in the same manner unlawfully and unfairly. That the four (4) of them were instructed to keep some money aside daily and their resistance to continue the illegal practice led to the victimisation by the C.O.O. Mr. Len Mathews. That the money was recorded under food and transport by the cashier and they did it in a clandestine manner to avoid detection by the Government Inspector.
13. That the respondent threatened to close the Grand Regency Casino when the claimants and other staff resisted the practice of illegally taking money from the games to the cashier to evade government control. That the claimants were longest in service and had all joined the union which angered the respondent greatly.
 14. C.W.1 was dismissed on 11/4/2017. Purity Njeru on 19/5/2017; Elizabeth on 28/3/2017 and Irene on 11/4/2017. They were not given notices to show cause nor were they given a hearing before the summary dismissal. They were all victimised for joining the union and resisting to illegally siphon money for the respondent from the games to evade government regulation. They all got letters with same reason for dismissal. They had served for over 11 years except Purity who had served for 9 years and were not paid any terminal benefits upon dismissal.
 15. C.W.1 earned Kshs.61,501 per month; Purity Kshs.22,785; Elizabeth Kshs.33,099 and Irene Kshs.29,589. They all claim one month salary in lieu of notice; payment in lieu of leave days not taken for 19 days and 13 days respectively; unremitted National Social Security Fund; house allowance paid, below 1/3 of the basic salary and compensation for unlawful dismissal. The other claimants adopted their witness statements as their evidence in chief by consent of the parties recorded before counsel for respondent commenced cross-examination of the C.W.1. The Court made an order of the Court to that effect.
 16. Under cross-examination C.W.1 stated that the claimants appealed the summary dismissal. C.W.1 stated that though they were called to meetings by management; they were not given opportunity to explain themselves regarding the summary dismissal. That they were first suspended and called from home to receive letters of dismissal. There was no hearing between the suspension and the dismissal. That KUDHEIHA represented the claimant's in the appeal. That they did not attend the appeal hearings in person but were represented by union.
 17. R.W.1 Michael Muthui testified for the respondent. He adopted a witness statement dated 7/12/2022 as his evidence in chief and produced exhibits '1' to '5' in support of his testimony. R.W.1 stated that he was the General Manager of the respondent from 2018. That before that he was a shift manager. R.W.1 stated that he did not directly participate in this matter but was only invited to participate in the appeals committee. That the claimants did not attend the appeal hearing. That the union representatives did not also attend the appeal hearing.
 18. R.W.1 in his witness statement stated that the four (4) claimants were caught on CCTV on 13//3/2017 engaging in gross misconduct which entailed stealing from the 1st respondent.
 19. That the four (4) claimants were by letters dated 16th and 30th March, 2017 required to attend disciplinary hearing on 3rd, 13th and 17th April, 2017. That the claimants had been first asked to respond to the allegations made against them in writing before the hearing which they did. That the claimants attended the disciplinary hearing but were found guilty of misconduct and summarily dismissed on various dates stated in the letters of dismissal. That the claimants were first suspended before the dismissal.
 20. The 1st claimant was dismissed on 11/4/2017; the 2nd claimant on 29/5/2017; the 3rd claimant on 28/3/2017 and the 4th claimant on 11/4/2017. R.W.1 stated that BCCB had reviewed the CCTV



footage of the incidents and had concurred with the decision by the respondent to dismiss the claimants for gross misconduct.

21. However, under cross-examination, R.W.1 stated that he was not personally aware of the matters recorded in the witness statement as he was at the time based in Nanyuki Casino. That he was only invited to participate in the appeal process which did not take place because the claimants and their union representatives did not attend the hearings.

Submissions

22. The claimants told the Court that they would rely on the evidence adduced by C.W.1 Joyce Mukundi. That the respondents did not adduce any credible evidence to contradict their case because R.W.1 Mr. Michael Muchiri had no knowledge whatsoever of the matters that had led to the unlawful dismissal. That R.W.1 was at the time based at Nanyuki and was not a General Manager nor Investigation Officer of the matters. That the evidence by R.W.1 was pure hearsay and it should be disregarded.
23. That the claimants have proved their respective cases. They were the longest serving employees and were victimised with the intention of denying them long service benefits.
24. That the allegations of theft were false but was a scheme by respondent to siphon money from the business only to turn around and use the issue to frame them for stealing. That the respondent had no valid reason to summarily dismiss them and the dismissals were unfair. The respondents did not file any written submissions.

Determination

26. The issues for determination are as follows:-
 - a. Whether the summary dismissal of the claimants was for a valid reason following a fair process.
 - b. Whether the claimants are entitled to the reliefs sought.
27. The claimants served the 1st respondent in various capacities for long periods. C.W.1, the 1st claimant testified on behalf of all the other claimants. C.W.1 stated that they were instructed by management to make daily deductions from the Casino revenue and remit the deducted money secretly to the cashier to avoid detection by the government Inspector who used to be at the Casinos daily to monitor the transactions at the Casino.
28. That this went on for a while until the aggrieved employees called a meeting with the management to object to this practice which was dangerous to the employees. Meanwhile, the employees joined the union to protect their rights because employees were being regularly victimised at the work place.
29. That the 1st respondent was unhappy with the workers joining the union and it was after the joining of the union that the practice of siphoning money was introduced by management.
30. That the 1st respondent turned against the claimants and used the process of secretly remitting money to the cashier to accuse them of theft and summarily dismissing them.
31. The claimants testified that they were mandated to take and remit the money to the cashier and had no option in the matter. That this could not therefore constitute a valid reason to summarily dismiss them from employment.
32. That the procedure followed by the respondent to summarily dismiss them was not fair. That they were not served with notice to show cause and were not given fair hearing before the dismissals took place.



33. R.W.1 told the Court that he had no personal knowledge of the matters that led to the dismissal of the claimants as he was at the time a shift manager based at Nanyuki Casino whereas the claimants were based at Nairobi.
34. R.W.1 did not participate in the investigation of this matter nor was he the custodian of any documents and/or information relevant to the dispute. R.W.1 told the Court he was only brought to Nairobi to sit in the appeal hearings of the dismissal cases of the claimants. That the appeals did not take place because the claimants and their union representatives did not attend the hearing.
35. It is the Court's considered finding that the respondents did not adduce any tangible evidence to prove that it had a valid reason to summarily dismiss the claimants in terms of Section 43(1) and (2) of the *Employment Act*, 2007,
36. The claimants discharged their onus under Sections 47(5) of the *Act* to demonstrate that they were simply victimised by the respondent when they protested against the instructions given to them to secretly take some cash to the cashier to avoid Government Inspector accountability. That the employer was also unhappy with the fact that the claimants had joined the union to protect their employment which were constantly under threat at the time.
37. The Court is satisfied that the summary dismissal of the claimants was in violation of Sections 36, 41, 43 and 45 of the *Employment Act*. The dismissals were not for a valid reason and the respondent did not follow a fair procedure in summarily dismissing the claimants. The claimants were not paid their terminal benefits including payment in lieu of notice and payment in lieu of untaken leave days upon summary dismissal. Furthermore, the respondent deducted NSSF dues from the salaries of the claimants but failed to remit some of it. The claimants have proved that they are owed these items by the respondent and the Court grants them accordingly.
38. With regard to house allowance, the claimants have not proved that they were not paid consolidated salary and that they were entitled to a separate payment of house allowance. This particular claim is dismissed for lack of merit in respect of all the claimants.

Compensation

39. Having proved that the claimants were summarily dismissed from employment by the respondent, the Court finds that the claimants are entitled to compensation in terms of Section 49(1) (c) and (4) of the *Employment Act*, 2007.
40. The claimants were all victimised for disobeying an unlawful practice mandated by the employer. The employer detested the protestation by the employees and their joining the union to defend their rights. The claimants had served the respondent diligently and with no adverse records placed before Court for periods of 11 years and 9 years respectively. The claimants worked in similar environment but played different roles and earned varied salaries. The claimants suffered loss and damage for the sudden loss of their employment without notice and without payment of any terminal benefits or compensation for the sudden loss of job. The claimants desired to continue working for the respondent and were entitled to payment of their benefits upon termination.
41. Considering the circumstances of the case, the Court grants the claimants compensation as follows:-
 - a. Elizabeth Chege who had served 11 years and earned Kshs.33,099 per month at the time of summary dismissal, the equivalent of ten (10) months' salary in compensation for the unlawful and unfair dismissal.



- b. Irene Ogol who earned Kshs.29,589 per month and had served for 11 years the equivalent of ten (10) months' salary in compensation.
 - c. Joyce Njeri Mukundi who earned a monthly salary of 61,561 and had served for 11 years, the equivalent of 10 months salary in compensation for the unfair dismissal
and
 - d. Purity Njeri who earned a monthly salary of Kshs.22,785 and had served the respondent for 9 years the equivalent of 8 months' salary in compensation.
42. In the final analysis, judgment is entered in favour of the claimants as against the respondents as follows:-
- (a) Joyce Njeri Mukundi
 - (i) Kshs.61,561 in lieu of one month notice.
 - (ii) Kshs.26,676 in lieu of 13 days untaken leave.
 - (iii) 615,610 being compensation for the unlawful and unfair summary dismissal.
Total: 703,847.00
 - (b) Purity Njeru
 - (i) Kshs.22,785 in lieu of notice
 - (ii) Kshs,14,430,50 in lieu of 19 days untaken leave.
 - (iii) Kshs. 182,280 in compensation for the unlawful and unfair summary dismissal.
Total: 219,495.50
 - (c) Elizabeth Chege
 - (i) Kshs.33,099 in lieu of notice
 - (ii) Kshs.14,342.90 in lieu of 13 days untaken leave.
 - (iii) Kshs.330,990 being compensation for the unlawful summary dismissal.
Total: 378,431.90
 - (d) Irene Ogol
 - (i) Kshs.29,589 in lieu of notice.
 - (ii) Kshs18,739.70 in lieu of 19 days untaken leave days.
 - (iii) Kshs.295,890 in compensation for the unlawful and unfair summary dismissal.
Total: 344,218.700
 - (c) Interest at Court rates from date of judgment till payment in full.
 - (f) Costs of the suit to each of the claimants.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 27TH DAY OF JULY, 2023.

MATHEWS N. NDUMA



JUDGE

Appearances

Claimants in person

M/s Naswa for respondents

Ekale – Court Assistant

