



**Amunya v Tamarind Management Limited (Cause 1564 of 2016)
[2023] KEELRC 2080 (KLR) (25 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2080 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1564 OF 2016
J RIKA, J
AUGUST 25, 2023**

BETWEEN

JULIUS SORE AMUNYA CLAIMANT

AND

TAMARIND MANAGEMENT LIMITED RESPONDENT

JUDGMENT

1. This claim, filed on August 8, 2016, was heard alongside E&LRC Cause Number 1565 of 2016 [Darius Mwandisha Mwakuja v. Tamarind Management Limited] and Cause Number 1566 of 2016 [Joel Mwikuyu Kitheka v. Tamarind Management Limited].
2. The claims were heard separately, but evidence for the Respondent, adduced by Human Resource Manager Maureen Namiroi, common to all the files, was recorded in Cause Number 1566 of 2016.
3. Hearing closed on March 6, 2023.
4. The claims were last mentioned on July 25, 2023, when the Parties confirmed filing and exchange of their closing submission.
5. The claimant herein, Julius Sore Amunya, states that he was employed by the respondent on September 4, 2012, as an assistant bartender.
6. His contract was terminated by the respondent on July 6, 2015, in circumstances he considers were unfair and unlawful. He states that he was not heard, and was not given a valid reason, to justify termination.
7. He earned a gross monthly salary of Kshs. 22,341. His net monthly salary was Kshs. 19,620.



8. He claims 12 months' salary in compensation for unfair termination at Kshs. 235,445; 3 months' salary in lieu of notice at Kshs. 58,861; general damages for unfair dismissal, discrimination and mental torture; costs; and interest.
9. The respondent filed its statement of response on February 13, 2017. It is admitted that the claimant was employed by the Respondent as an assistant bartender, on September 1, 2012.
10. He was responsible for taking customers' orders and keying them in Micros system. He received payments by cash or M-pesa. He would then settle the bills by posting in the system, using his unique Micros card.
11. Revenue realized through M-pesa was remitted to the respondent through an agent known as kopokopo.
12. In May 2015, the respondent's finance department discovered that there were discrepancies in respect of M-pesa sales and Micros system. Many transactions in Micros system were not being paid by the M-pesa agent to the respondent. Internal audit was carried out.
13. The claimant and 3 of his colleagues were implicated in the loss of Kshs. 681,881, covering the period September 1, 2014 to February 28, 2015.
14. It was discovered that there were fictitious M-pesa postings to Micros, which were not reflected in M-pesa statements. This is shown in the Electronic Journal Printout of Micros and the M-pesa statements, exhibited by the Respondent. The Claimant, using his Micros card, posted bills amounting to Kshs. 246,029.
15. The respondent lodged a complaint with the Police, and the claimant was charged with the offence of stealing by servant, at Kiambu CM's Court Criminal Case Number 1576 of 2015.
16. His notice period was 1 month.
17. The respondent prays the court to dismiss the claim with costs.
18. The claimant gave evidence on March 11, 2022. He adopted his witness statement and documents [1-4] on record, as his evidence-in-chief.
19. Cross-examined, he told the court that he was called for a meeting by the respondent, attended by the Human Resource Manager, the Restaurant Manager, and the Internal Auditor. He was informed that money was missing. He was shown a list of transactions from his Micros card. He was asked to explain. He explained that he did not know what happened to his card. It had to do with M-pesa. He was arrested and charged. The card was issued to permanent Employees. If an Employee was not on duty, he carried the card home. Any transaction made using the card, was recorded.
20. Redirected, the claimant told the court that the meeting was on a Friday afternoon. The meeting was attended by 3 Management Officers, and 2 Police Officers. The claimant was told that money was missing. He was given a piece of paper to write his explanation. There was no chance to be heard, or call witness. He was not accompanied by a colleague or trade union representative. He was arrested the same day. The criminal case was pending by the time the claimant gave evidence in the proceedings herein.
21. Cards were used to cash in the money. The Manager could log in using digits. The digits were not visible to the Employee. The claimant held the physical card. Digits could be keyed in the system without the physical card. Other Employees were not investigated. The Manager told the claimant informally, that money was missing.



22. The Human Resource Manager told the court that the claimant was dismissed because of cash discrepancies.
23. The bartender would punch customer order into the system. The order was settled by M-pesa, cash or credit card. Every Employee had a Micros card, with unique features. The claimant and his colleague were shown to have settled the contested bills. On September 17, 2014, the claimant punched in an order for Kshs. 700. The bill was allegedly settled by M-pesa. M-pesa statement did not capture such a settlement. Total loss was Kshs. 681,881.
24. Cross-examined, Namiroi told the court that Micros system had been in use for long. There were no incidents of loss before. Employees access the system through cards, Management and IT staff have their own cards. User details are unique. Anyone with PIN number will access the system. M-pesa audit made reference to resources used. It mentions kopokopo. The Respondent did not exhibit report relating to kopokopo. Kopokopo was the processing agent. The audit report states that sms messages were being deleted real time, and that this was not questioned by treasury personnel.
25. The claimant was taken through a disciplinary hearing. He was not told that the meeting was a disciplinary meeting. He was availed the journal printout, and shown the discrepancies. These documents were availed at the meeting. There was no disciplinary meeting after this. Namiroi did not know if the claimant was denied his right to call a witness. Police Officers were present at the meeting. The claimant was arrested after the meeting. He was taken to court on July 6, 2015, the same date the letter of summary dismissal issued. Redirected, Namiroi told the court that Employees were not allowed to share cards and pin numbers.
26. The issues are whether the claimant was summarily dismissed for valid reason; whether procedure was fair; and whether he merits the remedies sought.

The Court Finds: -

27. Julius Sore Amunya was employed by the respondent on September 4, 2012 as an assistant bartender. He was dismissed on July 3, 2015. The letter of summary dismissal however, is dated July 6, 2015.
28. His letter of summary dismissal states that audit for the period September 1, 2014 to February 28, 2015 showed system fraud, committed by the claimant. Closed bills to M-pesa did not reflect in the M-pesa statements, to the tune of Kshs. 247,976. The claimant was unable to account for the amount. Management, the letter states, had lost all faith, trust, and confidence in the claimant.
29. His last gross monthly salary was Kshs. 22,234.

Valid reason.

30. The claimant's role as a bartender, included sale to customers. He did this by punching in customer orders to the system. The respondent employed Micros point of sale system. The claimant would receive payment through cash, M-pesa or credit card. He was supplied a Micros card with unique access details. The card was neither shared, nor was the PIN. It was a physical card, which the claimant carried home, if not at work. Payments would be posted in the system, using the card.
31. The Finance Department discovered some discrepancies in May 2015. Many transactions in Micros system were not being paid to M-pesa.
32. Internal Audit followed, establishing that the claimant and his colleagues, were making fictitious M-pesa entries in the Micros system. A comparative analysis of the M-pesa statements and Micros



Electronic Journal printout, exhibited by the Respondent, showed that the Claimant was liable for fictitious postings in the sum of Kshs. 246,029.

33. The total loss to the respondent was Kshs. 681,881.
34. The court is satisfied that the respondent established valid reason justifying termination. The reason or reasons for termination, under section 43 of the *Employment Act*, are the matters that the Employer, at the time of termination of the contract, genuinely believed to exist, and which caused the Employer to terminate the services of the Employee. It is hardly disputed that there were discrepancies between the Micros printouts and the M-pesa statements, and the claimant was not able to explain loss of Kshs. 246,029 made through his card.

Procedure.

35. There were procedural lapses, that stood out like a sore thumb. The meeting alleged to have been a disciplinary hearing, was an investigatory meeting involving the claimant, the Internal Auditor, the Restaurant Manager, the Human Resource Manager and 2 Police Officers present, at the invitation of the Respondent.
36. There was no letter to show cause. There were no specific charges communicated to the claimant. He was not availed the Micros printout and M-pesa statements until the date of the meeting.
37. The letter of summary dismissal dated July 6, 2015 confirms what the claimant attended, was not a disciplinary hearing. Paragraph 2 of that letter refers to ongoing investigations. The Respondent had not concluded investigations, at the time it summarily dismissed the claimant.
38. It is also likely that the claimant was in Police custody, at the time of dismissal. Police Officers present at the time of the meeting, arrested the claimant immediately after the meeting. This was on July 3, 2015, when the respondent states, dismissal became effective. The letter of summary dismissal issued on July 6, 2015, the date the claimant was arraigned before the criminal court.
39. Procedure was not in conformity with the minimum statutory standards of fairness, under sections 41 and 45 of the *Employment Act*.

Remedies.

40. The claimant was dismissed for an act of gross misconduct, warranting summary dismissal, and notice is not payable.
41. He worked for about 2 $\frac{3}{4}$ years. There were no past allegations of misconduct. The claimant's performance was not faulted. His letter appointment dated September 4, 2012 indicates that employment period was open-ended. The claimant contributed in no small measure, to the circumstances leading to termination. He is granted 2 $\frac{3}{4}$ months' salary in compensation for unfair termination at Kshs. 61,437.
42. There is no basis for the additional claim for general damages for unlawful dismissal, unfair discrimination and mental anguish.
43. No order on the costs.
44. Interest granted at court rate, from the date of Judgment till payment is made in full.



In Sum It Is Ordered: -

- a. The respondent shall pay to the claimant, equivalent of 2¾ months' gross salary in compensation for unfair termination at Kshs. 61,437.
- b. No order on the costs.
- c. Interest granted at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 25TH DAY OF AUGUST 2023.

JAMES RIKA

JUDGE

