



**Mwakuja v Tamarind Management Limited (Cause 1565 of 2016)
[2023] KEELRC 2053 (KLR) (25 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2053 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1565 OF 2016
J RIKA, J
AUGUST 25, 2023**

BETWEEN

DARIUS MWANDISHA MWAKUJA CLAIMANT

AND

TAMARIND MANAGEMENT LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, on August 8, 2016.
2. The Claim was heard alongside Cause Number 1564 of 2016 [Julius Sore Amunya v Tamarind Management Limited] and Cause Number 1566 of 2016 [Joel M Kitheka v Tamarind Management Limited].
3. The Claims were heard separately, but common evidence for the Respondent, given by Human Resource Manager Maureen Namiroi, was recorded in Cause Number 1566 of 2016, on March 6, 2023 when the hearing closed.
4. The Claims were last mentioned in Court on July 25, 2023, when the Parties confirmed the filing and exchange of their closing submissions.
5. The Claimant states that he was employed by the Respondent on February 16, 2009 as an assistant head bartender. He was summarily dismissed by the Respondent unfairly and unlawfully, on July 6, 2015. He was not fairly heard, and was not given a valid reason to justify termination. There was no disciplinary hearing. He earned a gross monthly salary of Kshs 42,261, and net salary of Kshs 34,835.
6. He claims equivalent of 12 months' salary in compensation for unfair termination at Kshs 418,021; 3 months' salary in lieu of notice at Kshs 104,505; general damages for wrongful dismissal, mental torture and anguish; costs; and interest.
7. He adopted his 2 witness statements and 4 documents on record, in his evidence –in-chief.



8. Cross-examined, he told the Court that he was called to a meeting attended by the Internal Auditor, Restaurant Manager and the Human Resource Manager. He was handed a printout and told to explain. He wrote an explanation. He admitted that there were M-pesa deals which took place due to his negligence. He agreed he could have been negligent, by leaving his card behind. Others were using the card. His colleagues were called separately to the meeting. The Claimant was their boss- the head barman. He was alongside others, charged with the offence of stealing by servant. He confirmed that the card was unique to its holder.
9. Redirected, the Claimant told the Court that he was called to the meeting on Friday evening. There were 2 Police Officers also present. He was told money was missing. He was handed printouts at the meeting. He had not seen these documents previously. He was not given adequate time, to study the documents and respond. He was just given a foolscap and told to write his explanation. He was not given opportunity to call any witness. He was arrested on the same day. He was locked at Gigiri Police Station. IT gave his card code to bartenders. They were allowed to use his card, while he was away. Management authorized this. The criminal case is pending.
10. The Respondent filed its Statement of Response on February 13, 2017. It is conceded that the Claimant was employed by the Respondent as an assistant bartender [the letter of appointment designated the Claimant as an assistant head bartender]. He posted cash bills amounting to Kshs 84,250, in fictitious M-pesa bills. He was called to a disciplinary meeting, heard and summarily dismissed. He was charged with the offence of stealing by servant, alongside his colleagues. Termination was fair. The Respondent urges the Court to dismiss the Claim with costs.
11. Human Resource Manager Namiroi, told the Court that the Claimant was dismissed because of discrepancies between the bills settlement and M-pesa statements. The Respondent used Micros system, where the bartender punched the order into the system, and the order settled by M-pesa, cash or card. Every bartender had a unique card. There was a discrepancy of Kshs 84,250 attributed to the Claimant.
12. Cross-examined, Namiroi told the Court that Employees accessed the system through their cards. Management and IT staff had their own cards. If an Employee gave his PIN to the other, the other would access the system. The Claimant was taken through a disciplinary process. He was not informed that it was a disciplinary process. Documents were only availed at the meeting. There was no disciplinary hearing at the meeting. The Claimant was arrested the same day. 2 Police Officers were in the meeting. Namiroi did not recall if the Claimant was in custody, at the time the letter of summary dismissal issued. Redirected, she told the Court that Employees were not allowed to share cards, or their pin numbers.
13. The issues are whether the Claimant was summarily dismissed on valid reason; whether procedure was fair; and whether he merits the prayers sought.

The Court Finds: -

14. The Claimant was employed by the Respondent at Tapas Bar and Grill, as an assistant head bartender, on March 1, 2009. He was summarily dismissed with effect from July 3, 2015. The letter of summary dismissal is dated July 6, 2015.
15. His monthly gross salary was Kshs 42,261, and net salary Kshs 34,835.
16. The letter of summary dismissal states that M-pesa sale audit, covering the period September 1, 2014, to February 28, 2015, disclosed system fraud, committed by the Claimant, occasioning the Respondent loss of Kshs 84,250. The Claimant was alleged to have failed to account for the funds. The Respondent



states it lost faith, trust, and confidence in the Claimant, and therefore dismissed him summarily for gross misconduct.

17. Valid reason. The Claimant was an assistant head bartender, overseeing other bartenders. He does not deny that there was discrepancy of Kshs 84,250 traced back to his unique Micros card. His explanation was that his card was at times left with bartenders, who were authorized by Management to use it in his absence. He did not establish that this was the practice or policy at the Respondent. Other bartenders had their own cards, so why would the Claimant's card alone, be used by others? The Claimant was fully in control of his card, and cannot blame others for its use. The cards were unique to their holders. PIN numbers were not shared. This was explained by Namiroi. The Court upholds the evidence of Namiroi, over that given by the Claimant, on access and use of the Micros card. If the Claimant shared his card and pin number with other bartenders, it was against the Respondent's practice and policy.
18. The Respondent lost money through the Claimant's card, and has established valid reason to justify termination, under Section 43 of the *Employment Act*.
19. Procedure. Procedure was significantly below the threshold of fairness, prescribed by Sections 41 and 45 of the *Employment Act*. There was no letter to show cause, and no charges communicated to the Claimant. There was no disciplinary hearing. A meeting involving the Internal Auditor, the Restaurant Manager, the Human Resource Manager and the Claimant was called. There were 2 Police Officers in attendance. This was an investigation process, calling in the attendance of Police Officers. The letter of summary dismissal indicated that investigations were ongoing. The Claimant was shown micro's printouts and the M-pesa statements, at the hearing. There was no time to prepare his response. He was arrested the same day, and arraigned in Court on July 6, 2015
20. Procedure did not meet the minimum standards of fairness, under Sections 41 and 45 of the *Employment Act*.
21. Remedies. The Claimant was summarily dismissed on account of an act of gross misconduct, and notice is not payable.
22. He worked for 6 years and 5 months. He contributed to the circumstances leading to termination. He was entrusted funds belonging to his Employer, and was unable to explain the circumstances of the loss of those funds. No previous disciplinary lapses were noted in his record. Performance was not in issue. His contract dated 16th February 2009, was open-ended. He is granted compensation for unfair termination, equivalent of 6½ months' gross salary, at Kshs 274,696.
23. There is no justification for grant of general damages for wrongful dismissal, unfair discrimination, mental torture and anguish, in addition to the compensatory award above.
24. No order on the costs.
25. Interest allowed at the 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 6 ½ months' gross salary in compensation for unfair termination at Kshs 274,696.
- b. No order on the costs.
- c. Interest allowed 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

