



**Kitheka v Tamarind Management Limited (Cause 1566 of 2016)
[2023] KEELRC 2054 (KLR) (25 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2054 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1566 OF 2016**

J RIKA, J

AUGUST 25, 2023

BETWEEN

JOEL MWIKUYU KITHEKA 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 1565 of 2016 [*Darius Mwandisha Mwakuja v Tamarind Management Limited*].
3. Evidence for the Respondent, common to all Claims, was recorded in Cause 1566 of 2016 on March 6, 2023, when the hearing closed. The Claims were last mentioned in Court on July 25, 2023, when Parties confirmed filing and exchange of their closing submissions.
4. The Claimant states that he was employed by the Respondent as a bartender on January 20, 2011. He was summarily dismissed by the Respondent on July 6, 2015. His letter of summary dismissal states that there was a discrepancy of Kshs 345,272 between his closed bills and M-pesa statements. The Respondent alleged to have lost all trust, faith and confidence in the Claimant, and dismissed him for gross misconduct.
5. There was no hearing or valid reason given to the Claimant. He was not supplied with adequate information to defend. He earned a monthly gross salary of Kshs 31,887 and net monthly salary of Kshs 27,138 as at the time of termination.
6. He claims compensation equivalent of 12 months' salary; notice pay of 3 months; general damages for wrongful dismissal, mental torture and anguish; costs and interest.



7. He gave evidence and rested his case on March 11, 2022. He adopted his 2 witness statements and documents [1-4] as his exhibits.
8. Cross-examined, he told the Court that he was called to a meeting attended by the Human Resource Manager, the Restaurant Manager, and the Internal Auditor. He was shown some documents alleging the Respondent had lost money. He was told to comment on the printouts. He wrote something saying he knew nothing. He was arrested and charged. He had a card which was unique to him. It could not be used by anyone else.
9. Redirected, he told the Court that he could not recall the date of the meeting. The Managers explained to him about the missing money. He did not have the report, prior to the meeting. He did not have time to read it. He was given a piece of papers and told to write his response. He was given about 5 minutes to write his response. The meeting was attended by 2 Police Officers. The Claimant was charged, in a criminal case which was still pending, as of the date he gave evidence in the current proceedings. All permanent Employees had MICROS cards, unique to them. IT and Management had access to the system. Only 3 Employees were investigated.
10. The Respondent filed its Statement of Response on February 13, 2017. It is conceded that the Claimant was employed by the Respondent on September 1, 2012 as an assistant bartender. He used MICROS system in taking customers' orders and in settling bills. He posted cash bills using his card, amounting to Kshs 332,682, whose settlement could not be traced in the M-pesa statements. He was called to a disciplinary hearing, heard and summarily dismissed. He was charged with the offence of stealing by servant, at the Criminal Court in Kiambu.
11. Human Resource Manager Maureen Namiroi, gave evidence for the Respondent on March 6, 2023 closing the hearing. The Claim was last mentioned on July 25, 2023 when Parties confirmed filing and exchange of their closing submissions.
12. Namiroi relied on her witness statement, original and further documents [1-7], in her evidence-in-chief. She told the Court that the Respondent is in hospitality industry, running restaurants. The Claimant alongside his colleagues, was dismissed on account of cash discrepancies attributed to his unique MICROS card.
13. Cross-examined, Namiroi explained how MICROS system worked. Employees had cards with PIN numbers. The cards and PIN numbers were not shared. The Claimant was alongside his colleagues taken through a disciplinary hearing. The Claimant did not have MICROS printouts and M-pesa statements, before the meeting. He was not accompanied by a representative to the meeting. 2 Police Officers attended the meeting at the invitation of the Respondent. The Claimant was arrested the same day. He was taken to Court the same day, the letter of summary dismissal issued- July 6, 2015. Redirected, Namiroi restated that Employees were not allowed to share their cards and PIN numbers.
14. The issues are whether the Claimant was summarily dismissed on account of a valid reason; whether procedure was fair; and whether he merits the remedies sought.

The Court Finds

15. The Claimant was employed by the Respondent on January 20, 2011, as an assistant bartender. He was summarily dismissed on 6th July 2015, on account of financial loss sustained by the Respondent, arising from unaccountable use of his MICROS card. The card had features unique to the Claimant. The Respondent formed the view that it could no longer have trust and confidence in the Claimant, and dismissed on account of gross misconduct.



16. Valid reason. The Claimant does not deny that the Respondent sustained loss, attributable to use of his MICROS card. The card had unique features. It was not shared with other Employees. The PIN number was known to only the Claimant. M-pesa postings through MICROS did not match with the entries shown in the M-pesa statements. The Claimant did not explain where the money he allegedly paid to M-pesa, in settling bills from customers he had served, was deposited. It was not available to the Respondent, through kopokopo agent. The Respondent had a valid reason to justify termination, under Section 43 of the [Employment Act](#).
17. Procedure. The Respondent did not achieve the minimum statutory standards of procedural fairness, under Sections 41 and 45 of the [Employment Act](#).
18. There was no letter to show cause issued to the Claimant. There were no specific charges. There was no disciplinary hearing, as contemplated by Section 41 of the [Employment Act](#). What was held was an investigatory meeting, complete with 2 Police Officers, invited by the Respondent. The letter of summary dismissal characterized investigations as ongoing. The MICROS report, and M-pesa statements, were not shared out with the Claimant, before he attended the meeting. The documents were availed to the Claimant on the floor of the meeting. He did not have adequate time to study the documents. He was not advised on his right to be accompanied by a colleague, or a trade union representative of his choice. Procedure was unfair.
19. Remedies. The claimant was dismissed for gross misconduct, and does not merit notice or notice pay.
20. He worked for 4 years and 6 months. His record was untainted. His contract was open-ended. He contributed to premature termination of his contract. He was unable to account for his Employer's funds, paid through him by his Employer's customers. He undermined faith, trust and confidence, the cornerstones of the employer-employee relationship. He is granted compensation equivalent of 4 ½ months' gross salary for unfair termination, at Kshs 143, 491.
21. The prayer for general damages for unfair discrimination, mental torture and anguish, has not been established and is declined.
22. No order on the costs.
23. Interest allowed 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 4 ½ months' gross salary in compensation for unfair termination at Kshs 143,491.
- b. No order on the costs.
- c. Interest allowed at court rate, from the date of Judgment till payment in full.

Dated, signed and released to the Parties electronically, at Nairobi, via e-mail, under Practice Direction 6[2] of the Electronic Case Management Practice Directions 2020, this 25th day of August 2023.

JAMES RIKA

JUDGE

