



Onguso v Sarova Panafric Hotels Ltd (Employment and Labour Relations Cause 2345 of 2017) [2023] KEELRC 1978 (KLR) (8 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 1978 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2345 OF 2017**

**AN MWAURE, J
AUGUST 8, 2023**

BETWEEN

JOHN AMENDA ONGUSO CLAIMANT

AND

SAROVA PANAFRIC HOTELS LTD RESPONDENT

JUDGMENT

Introduction

1. The claimant filed his memorandum of claim dated November 23, 2017

Claimant's Case

2. He says he worked diligently for the respondent from 2003 and was confirmed in 2008 and was terminated on June 2, 2016. He says the respondent caused him to be arrested for an offence of theft by servant which offence was never established. He says he was earning a salary of Kshs 18,692/-. He says he was accused of stealing respondent's point and was later discharged.
3. He says his termination was irregular and malicious and his performance of duty was always excellent.
4. He says he cleared with the respondent's departments but was never paid his terminal dues.
5. He therefore prays that the court to declare his termination unlawful and unfair and he be paid his terminal dues and compensatory damages

Respondent's case

6. The respondent filed his response dated January 18, 2018. He avers the claimant did not serve diligently and faithfully and reports had been made previously of his theft of paint.



7. He says that claimant was not dismissed but absconded from work when he was found to have stolen paint.
8. He further says claimant was arrested after his dismissal but his commendation letter was before his dismissal.
9. So he says claimant absented himself from work to avoid being put through disciplinary proceedings.
10. He also says he is ready to pay claimant's dues once he finishes his clearance with all the departments.

Claimant's evidence in court

11. The claimant testified in court on November 9, 2022 and he states how he was arrested when he went back to the company to clear. He says he got a commendation letter.
12. He says he was not found to be culpable of any theft by police and he claims he cleared with the hotel but was never paid his dues.

Respondent's case

13. The respondent also gave his evidence in court on February 1, 2023. He says claimant was not painting a hotel as painting was done by external painters and the claimant was captured stealing paint with the driver. He says he asked them to go see the human resource manager but they did not turn up.
14. He says this was on April 24, 2016 and he reported the case to the police on April 26, 2016. He says they could not get the claimant for disciplinary hearing.

Submissions

15. The court considered the claimant's submissions dated March 1, 2023 and the respondent's submissions dated March 8, 2023.

Determination.

16. The main issue for determination in this case is whether the claimant was fairly and lawfully terminated from his duty or did he abscond from duty.
17. The respondent's case is that claimant was on April 24, 2016 found having stolen paint from the premises of the respondent and was called to the security office. He was ordered to report to the human resource office in order to be investigated but instead he absconded and did not show up. Then on June 2, 2016 he was reported to the police and police exonerated him by their letter dated June 24, 2016. They said they did not have sufficient evidence to prosecute the claimant.
18. The respondents did not deny the authenticity of that report by the police.
19. By then they had already dismissed the claimant on April 30, 2016 on allegation of theft of paint. The said allegation is premised on allegation that the claimant was seen carrying a can of paint but there is no further explanation where he got it from, where he was taking it or even who saw him carrying it. The respondent witness the chief security officer says it was friends of Sarova who saw paint being off loaded at Ngumo. He was not an eye witness who testified about the paint being dropped on Ngong Road.
20. There is reference of one tin of paint that was stolen. It is not clear how much was stolen but just alludes to colase paint.



21. The witness further said the claimant never used to paint and the painters were from outside the hotel. Yet in his statement dated July 232019 he said claimant was a painter.
22. There are a lot of inconsistencies and contradictions pertaining to that issue. That leads the court to conclude there is no valid reason why the claimant employment was to be terminated. It is of the court's view that the respondent were on a fishing expedition to look for a reason to terminate the claimant.
23. The respondent also claimed claimant absconded duty. This is a mere allegation and there is absolutely no evidence on how many days he absconded and what efforts the respondent made to reach out to the claimant and to notify him that they were considering terminating him on the grounds of absconding duty. So as earlier said it seems evident the respondents had no valid reason to terminate the claimant from employment and were merely looking for a reason to do so.
24. This was an employee of the respondent for many years from 2003 to 2016 and had received in the past several commendation and no warning letters were produced as evidence.
25. In the case of *Pius Machafu Iindu vs Lavington Security Limited* (2017) eKLR the court held:-

“ there is no doubt that the act which was enacted in 2007 places heavy legal obligations on employers in matters of summary dismissal for each of employment contract and unfair termination involving breach of statutory law. The employer must prove the reason for termination/dismissal. (Section 43) Prove the reason are valid and fair (section 45), prove that the grounds are justified (section 47 (5) amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.
26. The procedure is as provided in section 41(1) of the employment at which states as hereunder.

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative.”
27. The respondent alleged the claimant in a copy of a statement claimed to have been written by the claimant and dated April 24, 2016 he admitted having stolen paint worth ksh 2,000/-. There is no evidence that the claimant wrote the statement and who was present when he wrote it.
28. Respondent in his submissions claims the claimant squandered his opportunity and refused to turn up for hearing. The court was not privy to any letter or notice inviting claimant for disciplinary hearing before the dismissal.
29. In the case of *Kenfreight (EA) Ltd vs Benon K Nguti* 2016 eKLR the court held:

” the court noted that the *employment act* 2007 was modelled along international labour organisation on termination of employment convention no 158 of 1982. In particular section 41 of the *employment act* and article 7 of the convention require in mandatory terms that no decision to terminate a worker for reason relating to workers conduct or performance can be taken without providing him with an opportunity to defend himself on the allegations so that although there is a freedom to contract under the present requirement



the terms of the contract must be in consonance with the irreducible minimum terms and conditions in the *employment act*.

30. The claimant in this case contended he was not accorded an opportunity to be heard and indeed there was no evidence that such a hearing took place.

Consequently I find the respondent failed to prove that fair procedure was followed before termination of the claimant's employment on account of theft by servant contrary to the mandatory provisions of the *employment act*.

31. Therefore the court declares the claimant was unfairly and unlawfully terminated and enters judgment in favour of the claimant and holds that the respondent should compensate.

Claimant's reliefs

32. The claimant is entitled to some reliefs: the court is however uncertain of the basic salary of the claimant at the time of termination. In the claim he says his salary was kshs 18,692/- but in calculating the remedies he works with kshs 46, 377/-. The court orders the parties to give the accurate salary of the claimant to enable the final award to be given. Mention on September 19, 2023 for the parties to give the correct agreed salary of the claimant at the time of termination.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF AUGUST 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

