



Ngumbao v Carslake Nominees Limited t/a Diani Sea Resort (Cause E101 of 2021) [2023] KEELRC 2342 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2342 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E101 OF 2021
M MBARŪ, J
SEPTEMBER 28, 2023**

BETWEEN

JOHN CHARO NGUMBAO CLAIMANT

AND

CARSLAKE NOMINEES LIMITED T/A DIANI SEA RESORT RESPONDENT

JUDGMENT

1. The claimant is a male adult. The respondent is a limited liability company in the hospitality/hotel industry.
2. The claim is that the claimant was employed by the respondent as an executive chef on 1st May 2018 but his employment was terminated on 28 July 2020 through summary dismissal.
3. The claim is that employment was terminated unfairly and without any given reasons or payment of terminal dues. the last salary paid was Kshs. 170,500 per month.
4. The claimant seeking the following dues;
 - a. Two months' notice pay at Kshs. 341,000;
 - b. Bonus for the year 2020 for 6 months Kshs. 85,250;
 - c. 12months compensation Kshs. 2,046,000

The claimant is also seeking payment of cost of the suit.

5. The claimant testified in support of his case that upon employment by the respondent he worked without any disciplinary issue until he receives notice of summary dismissal. The respondent's case is that he was negligent while on duty, that he failed to consider food costs which went too high but such matters had not been brought to his attention. Any food costs that went high were dependent on what the hotel guests would request for and the alleged theft of food stuffs from the stores was without



- evidence. food stuffs were removed from the stores upon requests. The respondent has CCTV and any food thefts would have been detected.
6. The claimant testified that through notice dated 18 July 2020 he was called to show cause and invited to attend disciplinary hearing and he responded but the accusations made were without particulars and based on assumptions. There was no specific accusation was made.
 7. Of the issued outlined in the notice to show cause, issued (f) had been resolved and settled. The rest of the accusation, he asked for particulars and none issued. The food costs and requisitions were not addressed and the disciplinary hearing was only meant to dismiss him from his employment.
 8. The claim for bonus is due as the respondent had reported profits and had previously paid in the last two years. in the year 2020 there was COVID and which affected travel and business.
 9. In response, the respondent's case is that there was summary dismissal of the claimant from his employment for good cause and after a show cause notice issued and disciplinary hearing conducted and which found him culpable. The claimant was allowed to respond to the show cause notice and he had no satisfactory response. The claimant was found to have various flaws in the kitchen and the procedures thereon following a notice to show cause dated 18 July 2020.
 10. At the time of summary dismissal, the claimant was earning Kshs. 170,500 per month and for the summary dismissal, notice pay or compensation were not due. In the year 2020 no bonus was paid.
The respondent filed work records.
 11. In evidence, the respondent called Angela Mwenderani the human resource manager who testified that the claimant was employed as a chef but on 28 July 2020 his employment was terminated by summary dismissal for gross misconduct.
 12. The claimant was in charge of the kitchen staff with the role to ensure that all stock is ordered in the correct quantity, quality and price and to ensure that stock is kept securely and under the correct conditions and to meet with the store keeper regularly to ensure correct stocks are kept. No item could be used in the kitchen without the approval of the claimant and in a case where he was absent, all requests and approvals were to be made prior with his guidance as he remained in charge of the kitchen department and its staff.
 13. In this regard, the claimant had a detailed job description with an outline of all his duties including supervision of kitchen department.
 14. The respondent noticed that it had high food consumption costs when pitted against the guest who were in occupation at the hotel. This was suspicious which was flagged early November 2018 and due to trust on the claimant, the matter was not pursued. John Muchiri (deceased), head of security was asked to carry out an investigation as a retired police officer, to establish where the problem was and why there were high food costs as compared to hotel guest's attendance. The investigations revealed that food costs went down upon the investigations. An analysis of the problem was outlined in a report and a notice to show cause issued to the claimant dated 18 July 2020.
 15. On 27 July 2020 the claimant responded and blamed other kitchen staff like the butcher and sous chef to absolve himself from blame and noted that some of them flouted procedures and over requisitioned food items without his consent.
 16. The claimant was invited to a disciplinary hearing on 27 July 2020 and he brought his witness, Alfred Nguwa but confronted with the various accusations, he failed to give satisfactory responses and for



- such lapses, the respondent found him to be of gross misconduct and issued notice of summary dismissal which does not justify a claim for notice pay or compensation.
17. In the year 2020 the respondent was confronted by COVID pandemic and did not make profits to justify a claim for bonus. Most of the business was closed and there were major losses.
 18. The claimant refused to sign the disciplinary hearing minutes written by the late John Munjuri.
 19. Mwenderani also testified that the claimant has refused to attend and clear for payment of his terminal dues and his cheque is pending his collection.
 20. The respondent has filed a different case against the claimant and 13 others which matter is ongoing. The main reasons leading to termination of employment was the failure by the claimant to do his duties well and properly leading to financial losses to the respondent.
 21. At the close of the hearing parties filed written submissions.
 22. Through letter and notice dated 28 July 2020, the respondent dismissed the claimant from his employment on the grounds that, following a disciplinary hearing on 27 July 2020, he was found to be of gross misconduct contrary to Section 44(4) (c) and (g) of the Employment Act, 2007 (the Act) and which justified summary dismissal. The respondent invited the claimant to attend and clear for payment of his terminal dues;
 - a. Pay for days worked in July 2020;
 - b. Ongoing leave up to 3 August 2020;
 - c. Less statutory deductions.
 23. Section 44 (4) (c) and (g) of the Act provides that;
 - (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
 - ...
 - (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
 - ...
 - (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
 24. Neglect of duty, which in its nature is placed upon the employee to perform and who fails to do so, this is defined as gross misconduct.
 25. In the case of *Peter Wangai v Egerton University* [2019] eKLR the court held that where an employer alleges that the employee has neglected his duties leading to loss and damage, the particulars thereof must be particularised to allow the employee a fair chance to respond and make his representations.



26. In this case, through a notice to show cause dated 18 July 2020, the respondent outlined nine (9) areas for the claimant to respond to and which he did through his written responses on 27 July 2020.
27. Part of the issues put to the claimant to respond to were that;
- a. Kitchen requisitions are normally altered to remove stolen dry goods/food items from the food store. Items commonly stolen from the store include corn oil, flour, rice, sugar, among others.
 - b. ...
 - c. ...
 - d. The chef ladder has been mentioned as a ‘custodian to store’ the overages.
 - e. Butcher loss – there have been huge losses incurred from the Butcher section for various products, beef, fish, pork products, chicken whose orders and requisitions were frequently manipulated with the direct intention of fraud.
 - f. The most notable incident from the butcher section was the Pork Leg loss of 83kgs discovered in December 2019, the 12kgs lobsters that were discovered on 15th January 2020.
 - g. ...
28. The claimant gave a detailed response to each issue put to him.
On charge (e) he responded that;
- No orders are done by the heads of department or assistant; kitchen department gives projection of expected focus per the hotel reservations. The projection is then taken to the operations manager and the directors for approval and they are free to do any alterations or adjustment for the purchasing manager to write an L.P.O. or Purchasing Order. Order and requisitions are not related in any way.
29. With regard to issue (f), the claimant responded that;
- i. Pork leg 85kgs; A case was opened against the butcher man (Amos Kizugani) and the store clerk, a decision was made on this case and I gave my report on the same issue.
 - ii. Lobster 12kgs: A case was opened against the butcher man (Amos Kizugani) who admitted forgetting 12kgs of marinated baby lobster and he accepted liability. The company charged him for the damage of 12kgs and he paid.
30. The notice to show cause was to the claimant and not any other employee. As the Executive chef in charge of the kitchen department, his detailed job description attached to his employment contract required him to take charge of the department. This was particularly with regard to;
- ... hold daily meetings with the Sous-Chefs de parties to ensure smooth running of all kitchen departments. ...
- To ensure that all stocks are ordered to the correct quantities, quality and price.
- ... To regularly meet with the storekeeper to ensure that the correct stocks are kept. ...
- These were part of his duties.
31. A response that the butcher man’s case had been addressed and settled was to miss the point. The claimant, as the overall responsible employee over the butcher man was called to account for his



department. He shifted blame from himself to other persons. Upon the notice to show cause, the claimant was required to give his responses and make his representations which chance he squandered. Indeed, an employee given the opportunity to render and account of his conduct and misses the chance cannot turn around and blame the employer as held in the case of Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2023] eKLR that;

... In a case where the employee is invited to attend his disciplinary case and refuses to do so, such an employee squanders that moment to his detriment and cannot claim unfair termination of his employment.

32. Failure to give a proper explanation about matters put to the employee during a disciplinary process is one such moment. The claimant put to waste such a chance to give his explanations.
33. Hence, in deciding whether it was just and equitable for an employer to terminate the employment of an employee, the court must look at the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of the disciplinary process. The claimant was called to account for his improper performance of his duties, neglect of his duties and which is defined as gross misconduct.
34. The court finds the sanction of summary dismissal was justified.
35. Notice pay and compensation are remedies not available to the claimant.
36. The claim for bonus pay is not allocated as a benefit under the contract of employment. ordinarily, bonus pay is discretionary upon the employer. Such is gratuitous.
37. On this basis, the claim herein is found without merit and is hereby dismissed. each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

