



REPUBLIC OF KENYA



KENYA LAW
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**Muthinzi v Windsor Golf Hotel & Country Club (Cause 1627 of 2018)
[2023] KEELRC 2529 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2529 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1627 OF 2018
NJ ABUODHA, J
OCTOBER 19, 2023**

BETWEEN

STEPHEN MUTHINZI CLAIMANT

AND

WINDSOR GOLF HOTEL & COUNTRY CLUB RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim on December 19, 2018 and pleaded inter alia:-
 - a. The claimant was employed by the respondent as a security guard on or about 1st January, 2006 at a salary of Kshs 17,779.10/= plus house allowance of Kshs 8,697.70 /=-
 - b. On 4th October, 2018 the respondent unlawfully terminated services of the claimant without any lawful cause despite carrying out his duties diligently and that termination was without any justifiable cause and for unfair reasons hence unlawful, illegal and unprocedural.
 - c. The claimant further averred that he was not given a fair hearing before the termination, not given adequate information as to the reason for termination and he was denied an appellate forum after the orchestrated shambolic process.
2. The claimant in the upshot prayed for the following against the respondent;
 - a. Compensation for wrongful termination of employment of Ksh 26,496.8 x 12=317,961.60/=
 - b. Three months' salary in lieu of Notice=Kshs 79,409.40/=
 - c. Unpaid leave of 51,533 days=Kshs 57,553/=
 - d. Service pay at one months' salary and house allowance per year 12years x 26,496.8=317,961.60



- e. Extra medical expenses as a result of maladies and disability incurred in the course of the duty which the respondent was responsible
 - f. General damages for wrongful dismissal, unfair discrimination, mental torture and anguish.
 - g. Costs of the suit and interests on present court rates.
3. The respondent filed its statement of Response dated February 18, 2019 and they averred as follows;
- i. The respondent denied the contents of the claim and averred that the claimant employment was governed by respondent's Employee Manual together with the Memorandum of Agreement between the Union of Kenya Hotelkeepers and Caterers Association and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA Workers).
 - ii. The respondent averred that the claimant's termination was in total compliance with the prevailing law as pertains termination in that;
 - a. The gross misconduct clause of the Employee Manual provides that in the event of Gross misconduct the offender may be suspended with or without pay pending completion of investigations and the suspension period should also not exceed fourteen(14) days which is similar to clause 10 of the CBA to suspend an employee for maximum of 14 days with full pay pending investigations in to alleged gross misconduct.
 - b. That following the respondent's Board of directors meeting held on 16th August, 2018 the respondent learnt that the claimant had removed highly confidential board minutes inadvertently left behind by one of the respondent's directors and then he shared the same with colleagues Benard Kirui and Patrick and all these happenings were recorded by the CCTV Camera.
 - c. That the Confidential minutes detailed the respondent's human resource restructuring plan, the expected costs, the hotel liabilities and the undertaking by the respondent's shareholders to inject more capital in to business hence the sharing of this information instead of protecting it was injurious and amounted to gross misconduct that warranted further investigations.
 - d. Accordingly on 30th August, 2018 the respondent suspended the claimant with full pay for 14 days awaiting conclusion of the ongoing investigations with no loss of income and informed the claimant of the same and statements were recorded by the claimant, John Bosco Kung'u, Silas Koech and Fredrick Owira and upon collection of the statements the respondent on September 13, 2018 issued a notice to show cause to the claimant and informed him that investigations had been conducted and established that he had removed the confidential minutes from the boardroom and shared with his colleague in breach of his employment terms.
 - e. The claimant was given 4 days to respond to the NTSC and to attend disciplinary hearing on September 20, 2018 with his suspension extended for a further 7 days to allow adequate time to respond to the NTSC and to attend the disciplinary hearing.
 - f. The claimant did respond to NTSC on September 16, 2018 where he confirmed picking the document from boardroom and showing it to his colleague and the



- confidential information and that he did not have prior authority to share the document with his colleague Kirui.
13. On re-examination, CW1 clarified that he was not warned that the documents left behind were highly confidential and that he called Kirui to confirm if the document was important and the room was cleared the same day of meeting and all documents thrown away.
 14. The respondent on the other hand called two witnesses. The first one being Leah Nzioki. Who stated that she was the respondent's HRM. She testified on behalf of Judy Macharia and adopted her statement as her evidence in chief.
 15. In cross examination RW1 testified that the claimant presented the document to their boss in security department a Mr. James Mwangi after sharing the same with his colleague Kirui. Kirui was not authorized to see the document. The document was however not marked confidential but was of board level not to be shared with junior staff.
 16. RW1 further testified that the room was not supposed to be cleaned and that the claimant was not supposed to enter or inspect the room. His role was to lock the room after the meetings.
 17. RW 1 testified that the claimant was issued with a show cause letter and that the two weeks were for investigations and also conduct the disciplinary hearing. The claimant was terminated on account of disclosure of confidential documents. He appealed the decision and attended the appeal hearing but the appeal upheld the dismissal.
 18. On Re-exam RW1 confirmed that as per the claimant' letter of Appointment Kirui was not the chief security officer. He was his colleague.
 19. The respondent called its second witness RW2 one Nicholas Mbinda who stated that he was the controller and operator of CCTV camera and that he adopted his statement as evidence in chief together with bundle of documents filed with the claim.
 20. In cross examination, RW2 testified that the extract of CCTV was done on August 29, 2018 on events of the same day with the operator's signature but he did not indicate his name. It was further his evidence that he was employed in 2021 and succeeded the CCTV operator.
 21. The claimant filed written submissions dated 29th June and submitted among others that the court needed to consider the question of whether the documents left for two weeks in the conference room were confidential, why this was revealed to claimant one month after his suspension. No inquiry was done of lost confidential document. Counsel further questioned why there was no notice on the conference room on what to do with documents in the room.
 22. The claimant further submitted that there was no valid reason for his termination and that the disciplinary process was a sham, a façade and shambolic orchestration which was simply tailored to fit in the legal process in order to terminate the claimant.
 23. On the other hand, the respondent filed its submissions on July 28, 2023 and on the issue of whether the claimant was procedurally, lawfully and fairly terminated, submitted that the respondent followed the law in terminating the claimant's employment. Counsel relied on section 41 and 44 of the *Employment Act* on summary dismissal on gross misconduct and further on the case of *Thomas Sila Nzivo v Bamburi Cement Limited*(2014) eKLR.
 24. The respondent further submitted that it followed the required procedure where the claimant was given a show cause letter, he responded, attended disciplinary hearing with a fellow employee, he



- defended himself and a verdict to dismiss him was reached as per available evidence of disclosure of a confidential document.
25. The respondent submitted that all this while the claimant was suspended to pave way for investigations and disciplinary process. In that regard relied on the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation*(2021) eKLR.
 26. On the Procedural fairness the respondent relied on section 43(2) of the *Employment Act* and on *Postal Cooperation of Kenya vs Andrew K. Tanui*(2019)eKLR, *George Onyango Akuti v G4S Security Kenya Ltd*(2013) eKLR, *National Bank of Kenya vs Samuel Nguru Mutonya*(2019) eKLR and *Gitahi Z& 2 others Kenya Revenue Authority v Rewel Waitbaka*(2019) eKLR.
 27. The respondent submitted that the claimant was terminated for valid reasons and a proper procedure was followed and further that the claimant committed gross misconduct as per the manual and letter of appointment he signed by failing to perform his work properly and relied on the case of *Silvester Malei Kyengo v Kenya Meat Commission* (2019) eKLR.
 28. On the issue of reliefs sought the respondent submitted that the court should be guided by section 49 of the *Employment Act* and relied on the case of *Kenya Power & Lighting Company Limited vs Agrey Lukorito Wasike*(2017) eKLR on balance of the of the courts decisions to be fair between the parties and submitted that the claimant being procedurally terminated is not deserving of the reliefs sought.
 29. On the issue of costs the respondent relied on section 12(4) of the *Employment and labour Relations Court Act*, 2011, section 49 of the *Employment Act* and case of *Brian Asin & 2 others v Wafula W. Chebulati and 9 others*(2017) eKLR to submit that on principles court needs to take in awarding of costs which ought to be reasonable.
 30. 11The court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. Court has further considered submissions by both Counsel and authorities relied on and has come up with two main issues. Namely: a) Whether the claimant’s dismissal was for a fair reason and procedural and b) whether the claimant is entitled to the reliefs sought.
 31. In claims for unfair termination, the is always cautious not to overly scrutinize the reasons for which an employee has been dismissed or terminated. The test as has severally been stated is the reasonable test. That is to say, would a reasonable employer put in the circumstances dismiss? If the answer be in the affirmative, the court will not interfere.
 32. In this case, the respondent alleged that they summarily dismissed the claimant on grounds of disclosure of a confidential document to fellow employee.
 33. Whereas the claimant’s case is that he was dismissed on an invalid reason of disclosure of confidential document when in fact he did not know that the said document was confidential. According to him, he went to ask his colleague to confirm if the document was important and both did not understand the document as it was dated August 8, 2018. They then threw the document in the dustbin.
 34. The claimant acknowledged during hearing that he was supposed to take the document to his boss, the chief security officer and that his colleague was not his boss.
 35. The claimant did not dispute taking the document and showing it to his colleague Kirui which was against his terms of employment and therefore he committed a gross misconduct within the meaning of section 44(4) of the *Employment Act*. Gross misconduct is a valid reason for summary dismissal. The respondent was therefore justified in dismissing the claimant.



36. Regarding procedural fairness, it was held in the case of Walter Ogal Anuro -vs- Teachers Service Commission (2013) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness.
37. The Court is further guided by section 41 of the Employment Act regarding procedure to be followed. That is to say the employee to be notified, explained to the reason for which termination is being considered in language such employee understands and for the employer to consider the representations by such employee and or colleague of their choice.
38. The respondent has maintained that they issued the claimant with a show cause letter on September 13, 2018 and that he responded to the same. He was thereafter invited for a disciplinary hearing which he attended with a colleague and made representations. He was summarily dismissed thereafter. The claimant Appealed the decision and the appeal was not successful.
39. Whereas the claimant alleges that the process was a sham and orchestrated to fit in the legal process, he did not deny taking the documents and sharing them with his colleague. He further conceded at the hearing that he ought to have taken the documents to his boss and that Kirui whom he shared the documents with, was not his boss but a colleague. The claimant further did not deny being taken through disciplinary hearing and defending himself.
40. From the foregoing, the court is satisfied that there existed valid reasons for the termination of claimant's service and that the said termination was carried out through a fair procedure. The claim is consequently found without merit and is hereby dismissed with costs.
41. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023

DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2023

ABUODHA JORUM NELSON

JUDGE

