



**Ojuok v Tourism Promotion Services (Kenya) Limited t/a Serena Hotels (Employment and Labour Relations Cause E342 of 2020) [2023] KEELRC 2441 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2441 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E342 OF 2020  
BOM MANANI, J  
OCTOBER 12, 2023**

**BETWEEN**

**JECONIAH OJUOK ..... CLAIMANT**

**AND**

**TOURISM PROMOTION SERVICES (KENYA) LIMITED T/A SERENA  
HOTELS ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The dispute before me relates to alleged unfair termination of the Claimant's contract of service. The Claimant alleges that the Respondent terminated his contract without cause and contrary to the laid down procedure. On the other hand, the Respondent posits that the Claimant was dismissed from employment for misconduct. As a consequence, the dismissal was lawful.

**Claimant's Case**

2. The Claimant avers that he was employed by the Respondent on 1<sup>st</sup> April 2009. He states that he rose through the ranks to the position of Assistant Lodge Manager, a position that he held until his contract was terminated on 27<sup>th</sup> March 2020.
3. The Claimant states that throughout his engagement with the Respondent, he served diligently and without disciplinary issues. At the time of his dismissal from employment, he was earning a monthly salary of Ksh. 124,146.00.
4. The Claimant states that on 17<sup>th</sup> January 2020, he got a note from his immediate head to cut down all dangerous trees around the lodge. He avers that he was instructed to liaise with the identified forester to execute the works.



5. The Claimant states that the forester who had been earmarked for the task quoted Ksh. 15,000.00 as the cost of felling every tree. According to the Claimant, this quotation was very high. It is the Claimant's case that in view of the high quotation by the forester, he opted to use the Respondent's members of staff to undertake the work at a cheaper price of Ksh. 5,000 per tree.
6. The Claimant indicates that the Respondent's policy does not permit its employees to trade with it. As a result, it was not possible for Respondent's management to directly pay the members of staff who had agreed to cut the trees.
7. To overcome this challenge, the Claimant indicates that the staff agreed to use the name of one Mwangi Kamau, an independent contractor, to process their payments. Consequently, the Claimant executed a contract with the said Mwangi Kamau which showed that he (Mwangi Kamau) was the one to fell the trees. However, this was to merely facilitate payments to the employees who were to undertake the work.
8. The Claimant states that although the company policy did not allow the Respondent to contract with its employees, there had emerged a practice where employees would render services to the Respondent outside their employment and seek payment through third parties. According to the Claimant, this practice was generally not frowned upon by the Respondent's management. In respect of the impugned tree felling contract, the Claimant avers that the Respondent's lodge engineer and accountant signaled their approval for the arrangement.
9. Upon this informal arrangement, the Respondent's employees proceeded to execute the works. Upon completion of the task, the process of release of payment for the works begun.
10. Before the payment was released, the Claimant states that he received a telephone call from the Respondent's Human Resource Director asking why he (the Claimant) had signed a contract with Mwangi Kamau showing that the work was executed by Mwangi when in actual fact, it had been executed internally by the Respondent's members of staff. In effect, the inquiry suggested mischief on the part of the Claimant.
11. The Claimant avers that he was asked to respond to the issue in writing. According to the Claimant, despite his comprehensive reaction to the matter, the Respondent ignored the response and convened a disciplinary session for the matter.
12. The Claimant avers that during the disciplinary session, he was denied critical material in respect of the case. He avers that he was not given the sworn statements by the whistle blower and the internal audit report on the matter. Further, the Claimant avers that he was not allowed to cross examine his accuser.
13. The Claimant avers that the Respondent acted as the accuser, the prosecutor and the judge in the cause. Further, the Claimant avers that the trial was a sham as it allegedly lasted for less than thirty (30) minutes thus denying him time to ventilate his case.
14. The Claimant has also accused the Respondent of leveling other allegations against him which dented his image before his colleagues. As a consequence, the Claimant has prayed for the various alternate reliefs as set out in his Statement of Claim.

### **Respondent's Case**

15. In response, the Respondent confirms that the Claimant served as its employee between April 2009 and March 2020. The Respondent further confirms that at the point of exit, the Claimant was serving as its Assistant Lodge Manager.



16. The Respondent states that it received an anonymous note from an employee at the lodge insinuating misconduct by the Claimant with regard to the tree cutting exercise. The report indicated that although the trees had been felled by the Respondent's members of staff, the Claimant had called for payments for the work in the name of an outside contractor.
17. The Respondent also stated that it had received complaints against the Claimant relating to acts of corruption whilst conducting staff evaluations and promotions. Further, female members of staff had allegedly complained of sexual harassment by the Claimant.
18. The Respondent states that following the adverse report by the whistle blower, it tasked its Internal Audit Manager to investigate the allegations. Meanwhile, the Claimant was asked to give his response to the allegations and to also write a statement on the matter.
19. The Respondent avers that after the investigation, it became apparent that the matter under consideration was of a grave nature. Although the investigations cleared the Claimant of charges relating to sexual harassment and corruption, there was evidence pointing to misconduct by him with regard to the tree felling exercise. Therefore, a decision was taken to subject the Claimant to a formal disciplinary process.
20. It is the Respondent's case that it invited the Claimant to a show cause disciplinary session on 27<sup>th</sup> March 2020 and informed him of the right to come with witnesses from among members of staff of the Respondent. The Respondent avers that the session proceeded as scheduled and the Claimant was given an opportunity to respond to the charges against him.
21. It is the Respondent's case that the Claimant was unable to successfully defend himself at the disciplinary session. Consequently, a decision was taken to summarily end the employment relation between the parties.
22. The Respondent avers that despite the Claimant being asked to clear with the company, he failed to do so. As a result, he continues to hold onto some properties that belong to the Respondent.

### **Issues for Determination**

23. After analyzing the pleadings and evidence on record, I consider the following to be the issues for determination:-
  - a. Whether the Respondent unfairly terminated the Claimant's contract of service.
  - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

### **Analysis**

24. On issue number one, there is evidence that the Claimant was asked to oversee the felling of dangerous trees around the Respondent's lodge. The hand over notes between the Claimant and the lodge Manager who was proceeding on leave show that the Claimant's immediate head had identified a feller of the trees at a cost of Ksh. 15,000.00 per tree. On taking over the matter, the Claimant decided to utilize the Respondent's staff to do the work at Ksh. 5,000.00 per tree.
25. The Claimant acknowledges that the Respondent's policy did not permit it to enter into contracts with its members of staff. With this knowledge, it is incredible that the Claimant would try to circumvent this policy by getting members of staff to cut the trees and seek payment through a third party.
26. The Claimant asserts that he was motivated by the desire to save the Respondent from incurring unnecessary costs. If this was the case, why did he not expressly inform the Respondent's management



- that he had entered into the informal arrangement where the Respondent's members of staff were to fell the trees and seek payment through a third party? Why did he find it necessary to withhold this information from the Respondent's Head Office where the decision to pay for the services was to be made?
27. The Claimant's conduct in this respect was less than desirable. It is even worse that he admits that the practice of getting into such informal arrangements with third parties in order to beat the Respondent's policies was not new. The Claimant ought to have been at the forefront of ensuring that the Respondent's policies were upheld and implemented. This court cannot countenance the illegitimate action by the Claimant allegedly because the practice was not new or that it was going to ultimately benefit the Respondent.
  28. Importantly, in his undated response to the Respondent's inquiry on the issue, the Claimant appears to concede that the decision to use Mwangi Kamau to get payments for the cut trees was inappropriate. He expressly regretted his actions and confirmed that the payments he was chasing through Mwangi could have been made to members of staff directly through the payroll.
  29. Having regard to the foregoing, I have no doubt in my mind that the Respondent had valid reason to terminate the Claimant's contract of service. The Claimant's conduct put to question his integrity. He ought not to have attempted to conceal the true character of the transaction by making it look like a third party had genuinely felled the trees when in truth the work had been done by the Respondent's members of staff.
  30. Despite the fact that there were valid reasons to terminate the Claimant's employment, the law obligates the Respondent to afford him fair process in the steps leading to closure of the employment contract. The question therefore is whether the evidence on record demonstrates that the Claimant was afforded due process before his contract of service was terminated.
  31. The Respondent states that after it got an anonymous report about the Claimant's misconduct, it instigated investigations into the matter. Besides, the Claimant was asked to react to the complaint and write a statement.
  32. It is the Respondent's case that after completion of the investigation, it became apparent that the Claimant had a case to answer with regard to the felling of dangerous trees. As a result he was subjected to a disciplinary process where he was permitted to state his case and to call witnesses.
  33. On the other hand the Claimant states that he was not furnished with the investigation report, a statement by the anonymous reporter and other materials in order for him to prepare his defense. He also states that he was denied the opportunity to cross examine his accuser.
  34. I have considered this aspect of the case in the context of the applicable law. Section 4 of the *Fair Administrative Action Act* entitles every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This requires that a person facing administrative action should inter alia, be: notified of the action that is proposed against him and the reason for the proposed action; supplied with information and materials on the basis of which the proposed decision is to be anchored; allowed an opportunity to respond to the charges against him; allowed an opportunity to cross examine his accuser; and notified of the right to challenge the decision on appeal.
  35. The *Fair Administrative Action Act* which is anchored on the right to fair administrative action under article 47 of *the Constitution* 2010 applies to employment matters to complement the *Employment Act* (see *Munir Sheikh Ahmed v National Bank of Kenya* [2020] eKLR). The Respondent was entitled to protect its whistle blower from exposure by protecting his or her identity. However, this did not mean



that it (the Respondent) was thereby entitled to withhold the results of the internal investigations on the matter under consideration from the Claimant.

36. The Respondent admits not sharing the investigation report with the Claimant. The failure to share this report with the Claimant compromised his right to appreciate fully the Respondent's case against him in contravention of the dictates of the *Fair Administrative Action Act*. In order to protect the identity of the whistle blower, the Respondent was entitled only to redact the name of the said whistle blower from the report.
37. The failure to share the investigation report with the Claimant before the disciplinary session was conducted compromised the integrity of the proceedings. For this reason, I arrive at the conclusion that although the Respondent had legitimate grounds to consider terminating the Claimant's employment, it nevertheless failed to follow due procedure in the processing the decision.
38. The Claimant has also alleged that the Respondent damaged his image by exposing him to accusations of corruption and sexual misconduct. He accuses the Respondent of spinning these accusations without basis.
39. The assertion by the Claimant in this respect is without valid basis. As the record shows, the Respondent did not originate the accusations of sexual misconduct and corruption against the Claimant. These accusations came to the Respondent by way of an anonymous report by a third party.
40. Under its whistle blower policy, the Respondent is obligated to investigate such matters once they are brought to its attention. The mere fact that the process of investigations may have indirectly disclosed the matters to other persons who had to be interrogated in order to verify the assertions cannot constitute defamation of character. As a matter of fact, it is these investigations that assisted in clearing the Claimant's name of the two accusations.
41. Further, defamation of character necessarily implies the lowering of one's standing in society. Therefore, third parties who perceive that the Claimant's standing in society has been lowered must testify to this fact.
42. The Claimant did not call any witness to state that the accusations against him had damaged his reputation in the eyes of right thinking members of society. Absent this evidence, the court has no basis for arriving at the conclusion that the Claimant's character was injured.

### **Determination**

43. The court finds that although the Respondent had valid reason to terminate the contract of service between the parties, the procedure adopted in terminating the contract was flawed. Consequently, the Respondent's decision in this respect is declared unlawful.
44. The court finds that the Claimant is entitled to be compensated for the irregular termination of his contract of service but limited to damages that are equivalent to the Claimant's salary for three months that is to say, Ksh 124,146.00 x 3 = Ksh. 372,438.00.
45. In addition, the court directs the Respondent to pay the Claimant his other terminal dues as computed in the Respondent's letter to the Claimant dated 15<sup>th</sup> April 2020.
46. The Claimant has claimed house allowance for the duration that he served in Tanzania. On the other hand, the Respondent asserts that this claim is misconceived since the Claimant was housed at the lodge.



47. From the email exchanges between the parties, it is apparent that the question of housing allowance kept cropping up. On the one hand, the Claimant kept reminding the Respondent to address his house allowance.
48. On the other hand, the Respondent indicated that the Claimant's pay was consolidated to cover all his benefits. Importantly, the Respondent indicated through its email of 30<sup>th</sup> August 2012 that the claim for house allowance was not payable since the Claimant had been given accommodation in the Respondent's lodge.
49. It does appear to me that the Claimant's insistence on this allowance was not because he was not accommodated at the workplace. Rather, it was in order for him to meet his rental obligations for his family back in Kenya. This is clear from the Claimant's email of 30<sup>th</sup> August 2012.
50. The employer has an obligation to provide an employee with either physical housing or pay him house allowance. However, this obligation applies only to housing the employee at the place of work.
51. The employer has no obligation to provide housing for the employee at the workplace and at the same time cater for his family's housing back at home. In other words, the obligation to provide housing cannot be duplicated to cover both the employee at the workplace and his family at his other residence. Once the employer provides housing for the employee at the workplace, the duty in respect of housing is discharged.
52. Having regard to the evidence on record, I am convinced that the Respondent had provided accommodation for the Claimant at the workplace and that what the Claimant was pursuing was house allowance to enable him meet his rental obligations back at home. This was outside the employer's duty. Consequently, the claim for house allowance is declined.
53. For the reasons advanced in the judgment, the claim for defamation of character has been declined. Consequently, it is dismissed.
54. The court grants the Claimant interest on the amounts awarded at court rates from the date of this decision.
55. The award aforesaid is subject to the applicable statutory deductions.
56. The Claimant is awarded costs of this action.
57. The Respondent is directed to issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.
58. All other claims that have not been specifically granted are deemed as having been denied.

**DATED, SIGNED AND DELIVERED ON THE 12<sup>TH</sup> DAY OF OCTOBER, 2023**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

..... for the Claimant

.....for the Respondent

**ORDER**



In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

