



REPUBLIC OF KENYA



KENYA LAW
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**Myovi v Boma Hotels (Cause 2488 of 2017)
[2023] KEELRC 3076 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3076 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2488 OF 2017
J RIKA, J
NOVEMBER 30, 2023**

BETWEEN

DAVID MWEU MYOVI CLAIMANT

AND

BOMA HOTELS RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, on 20th December 2017.
2. He states that he was employed by the Respondent as a Barman, on 28th September 2009.
3. His contract was terminated on 8th May 2017 through a letter received by him from the Acting General Manager, Gianfranco Astori.
4. He states, he was not issued notice or sufficient reason to justify termination. At the time of termination, he was earning a monthly salary of Kshs. 77,108.
5. He prays for Judgment as follows: -
 - a. Declaration that termination was unfair.
 - b. 12 months' salary in compensation for unfair termination at Kshs. 7,402,368.
 - c. 3 months' salary in lieu of notice at Kshs. 231, 324.
 - d. Salary for the month of May 2017 at Kshs. 77,108.
 - e. Service gratuity at Kshs. 570,599.
 - f. Annual leave pay.
 - g. Certificate of Service to issue.



- h. Costs.
 - i. Interest.
6. The Respondent filed its Statement of Response dated 29th January 2019. It is confirmed that the Claimant was employed by the Respondent as pleaded. He was summarily dismissed on 8th May 2018 on valid grounds. He abandoned his duty, allowing an unqualified person to stand in for him; his conduct led to loss of revenue to the Respondent at Kshs. 40,000; and he was negligent in conducting his duties. Customers complained about poor service, on account of the Claimant delegating his duty to unqualified person. Its image was tarnished.
 7. The Claimant was issued a letter to show cause why he should not be disciplined. He replied on 29th April 2017. He was invited for disciplinary hearing, in the company of a representative of his choice. He was heard on 5th May 2017 in the presence of the Human Resource Manager, Food and Beverage Manager and the Shop Steward. He did not bring any Witness. He was accorded a fair hearing.
 8. He had been issued a first warning through a letter dated 20th April 2010 for unexplained shortages at the bar and absence. His salary was not Kshs. 77,108 monthly. This figure included service charge, which varied from month to month.
 9. The Claim has no merit. The sum of Kshs. 8,281,399 claimed, is extortionist. Termination was fair and compensation unmerited. The prayer for 3 months' salary in lieu of notice is not supported by the Claimant's contract. He was paid his salary up to the last day at work, 8th May 2017. He is not entitled to gratuity. He was paid pending annual leave at Kshs. 48,235, as shown in his May 2017 pay slip. He was offered Certificate of Service, which he declined to pick from the Respondent. The Respondent prays that the Claim is dismissed with costs.
 10. The Claimant filed a Reply to the Statement of Response, on 15th February 2019. He reiterates that his monthly gross salary was Kshs. 77,108. He did not abandon his duty and is unaware about loss of revenue sustained by the Respondent. He did not entrust his duty to a stranger. The amounts claimed are justified under the *Employment Act*.
 11. The Claimant testified, and rested his case on 22nd September 2022. The Respondent's Business Partner, Sandra Mukhana, testified on 11th July 2023 when the hearing closed. The Claim was last mentioned on 21st September 2023, when the Parties confirmed filing and exchange of their Closing Submissions.
 12. The Claimant relied on his Witness Statement and 4 Documents, contained in a list dated 20th December 2017. He restated the grounds advanced by the Respondent in justifying termination. He explained that he merely crossed over to the other side of the same hotel premises. He left his Assistant Lawrence Maina at his workstation. It was alleged that a shortfall of cash in the sum of Kshs. 40,000 was occasioned to the Respondent. The Claimant was not sure if this was correct. The allegation was not supported by stock sheet. There was no document showing the opening and closing stock. The Claimant worked for 7 years without warning. He was accompanied at the disciplinary hearing by a colleague from the kitchen, not from the bar. Lawrence Maina was present as an accused person and was questioned. But the hearing report generated by the Respondent did not capture this.
 13. Cross-examined, the Claimant told the Court that Lawrence was at the hearing. This was not shown in the disciplinary hearing report. The Claimant was heard, and dismissed. The reasons for the decision were communicated in the letter of dismissal. The Respondent had House Rules. The Claimant was familiar with the Rules. Rule 10 required the Claimant to notify his Supervisor, whenever he was absent. He did not inform his Supervisor about his absence.



14. The Claimant did not receive the letter dated 20th April 2010 from the Respondent on poor performance. He received the letter to show cause leading to termination. He replied. He said he had a painful knee, and left his workstation. He did not call his Supervisor. He was notified about the disciplinary hearing. He attended. The Shop Steward attended. The Claimant did not have a Witness. Lawrence was the Claimant's Assistant. He was also dismissed.
15. The Claimant agreed that he did not work the whole of May 2017. His gross monthly salary was Kshs. 77,108, net Kshs. 43,018. He claims Kshs. 7 million in compensation. He was summarily dismissed and would not merit notice. He did not detail annual leave claim, because he had not cleared with the Respondent. He was subscribed to the N.S.S.F as shown in the pay slips.
16. Redirected, the Claimant told the Court that Lawrence was in the same disciplinary meeting as a Witness for the Respondent. His name is omitted from the disciplinary report, because whatever the Respondent wished him to say against the Claimant, he did not say. Shortages at the bar were normal. Barmen would pay for the shortages. Lawrence was a qualified barman, a graduate of Utalii College. Rule 10 of the House Rules, would only apply if the Claimant was not on duty. He had closed his day's sales before leaving. Shortages would be deducted from the Claimant's salary. Pay slips show no shortages were deducted.
17. Sandra Mukhana adopted her Witness Statement and Documents filed by the Respondent in her evidence-in-chief.
18. Cross-examined, she told the Court that she is the Senior Human Resource Business Partner, and knows the Claimant. She was the Human Resource Officer, in 2016-2017. The Claimant was dismissed on 8th May 2017 after working for about 8 years. He had a warning in 2010. His contract did not contain his job description. Best practice would include a job description. Section 10 of the Employment Act requires duties to be spelt out. The House Rules did not describe duties. The Respondent investigated shortages at the bar. The Claimant was heard. Union Representative was present. The report of the disciplinary hearing was not exhibited in Court. The minutes are available. They were not signed. Surcharge in event of cash shortage, was an option. Even if the Claimant had a call of nature, he should have informed his Supervisor before leaving. He left without adherence to the House Rules.
19. Redirected, Sandra told the Court that the job description was in the letter of appointment. The Claimant was appointed as a barman. He handed his docket to a glass cleaner, not a barman. He was taken through a fair disciplinary procedure.
20. The issues are whether the Claimant was dismissed for valid reasons[s]; whether he was taken through a fair procedure; and whether he merits the remedies sought.

The Court Finds: -

21. The Claimant was employed by the Respondent, at the time known as Red Court Hotel, on 28th September 2009.
22. He was employed as a Barman, Union Grade 4. The letter of appointment states that he would be given a job description by his Head of Department. Although there is no evidence of a job description supplied to the Court, it is hard to believe that the Claimant worked from 2009 to May 2017, a period of 8 years, without knowing what his job entailed. The Court did not quite understand what the Claimant's dispute concerning his job description was.



23. He worked until 8th May 2017 when he was summarily dismissed for reasons stated in the letter of summary dismissal.
24. Before looking into the validity of those reasons, and fairness of the procedure, it is not out of order to look into some of the prayers made by the Claimant.
25. From the outset, there is no basis for the prayer for Kshs. 7,402,368 as compensation for unfair termination. 12 months' salary based on the pleaded gross monthly salary of Kshs. 77,108, cannot yield a total of Kshs. 7,402,368. It is mathematically impossible. The prayer is absurd. The Court thought that this was an error in the Claimant's Pleadings, but on cross-examination, the Claimant restated that he was pursuing compensation in the sum of Kshs. 7,402,368.
26. Equally baseless, is the prayer for 3 months' salary in lieu of notice. There is no clause in the Claimant's contract, providing for 3 months' salary in lieu of notice. There is no provision under the [Employment Act](#), for payment of 3 months' salary in lieu of notice.
27. On annual leave, the Claimant told the Court that he did not have details of annual leave owed, "because I have not cleared with the Respondent." His prayer [c] is that the Court compels the Respondent to pay him for "leave days earned but not given." How is the Court to know what these days are? Why plead annual leave if details would only be available after the Claimant cleared with the Respondent?
28. On the prayer for service gratuity at 15 days' salary for each year worked, the Claimant confirmed that he was subscribed to the N.S.S.F and subscriptions were paid, as shown in his pay slips. There is no provision for gratuity in his contract of employment. He was adequately socially protected under section 35 of the [Employment Act](#), through his active subscription to the N.S.S.F.
29. Validity of reason[s]. The Claimant walked out his workstation and left it to the attention of a glass cleaner. He conceded that he was aware of the Respondent's House Rules, and in Particular Rule 10, which required him to notify his Supervisor, whenever he was away from his place of work. His place of work was the at bar. He left and alleged to have gone to the other side of the business premises. He cannot have been present at his appointed place of work, while outside the bar. He alleged his knee was paining. He does not state what he went to do on the other side of the business premises, while his knee was paining. He allegedly closed his books for the day, and did not have the intention of returning. The Court is satisfied that the Claimant absented himself, without leave or other lawful cause, from the place appointed for the performance of his work. This was an act of gross misconduct under section 44 [4][a] of the [Employment Act](#). It was against Rule 10 of the Respondent's House Rules. There was valid reason to justify termination under Section 43 and 45 of the [Employment Act](#). It is not necessary to go into the other reasons stated in the letter of summary dismissal, in justifying termination.
30. Procedure. The Claimant confirmed that he received the letter to show cause. Details of the allegations were outlined. He replied in full. He was invited to disciplinary hearing. He was advised he could avail Witnesses. He attended the hearing. The Shop Steward was present. The Claimant was heard. The Court does not think that the omission of what the Claimant's Assistant stated from the minutes of the disciplinary hearing, prejudiced the Claimant. The Assistant attended the hearing as an accused person himself. The Claimant was heard, in the presence of his Union Shop Steward. The decision to summarily dismiss him was communicated to him. Procedure was in conformity with the minimum statutory standards of fairness under sections 41 and 45 of the [Employment Act](#)

It is ordered: -

- a. The Claim is declined.



b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 30TH DAY OF NOVEMBER 2023.

James Rika

Judge

