



**Kamau v Pride Inn Hotels & Investments Limited (Cause 881 of 2017)
[2023] KEELRC 2832 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2832 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 881 OF 2017
M MBARÚ, J
NOVEMBER 9, 2023**

BETWEEN

JOHN MUIRURI KAMAU CLAIMANT

AND

PRIDE INN HOTELS & INVESTMENTS LIMITED RESPONDENT

JUDGMENT

1. The claimant is a male adult and the respondent is a limited liability company ruling hotels. The respondent employed the claimant as the general manager on 2 December 2015 earning Kshs. 69,565 as the basic pay. The claimant worked until 15 February 2017 on the grounds that the respondent had received numerous complaints form clients through TripAdvisor and high food costs.
2. The claim is that there was unfair termination of employment as there was no notice or hearing before the termination of employment, there were no valid or justified reasons and the claim is for the following terminal dues;
 - a. Notice pay of Kshs. 69,565;
 - b. Leave pay for 2 years at Kshs. 97,391;
 - c. Compensation at 12 months; and
 - d. Costs of the suit.
3. The claimant testified that the respondent employed him as the general manager where he worked diligently until 15 February 2017 when he was unfairly terminated in his employment without a hearing or being given notice to respond to any matter. He was not given any notice to show cause over any alleged misconduct. he had taken his annual leave over accumulated days and when he resumed duty, he was surprised to be issued with notice terminating his employment which put him into shock since he had not foreseen such matter, he had family to take care of and this put him to great distress.



4. The claimant testified that he had worked so hard for the respondent and earned loan facilities which were recalled and he could not pay due to loss of employment.
5. The respondent alleged that the claimant's branch at Diani received poor comments from clients who noted through TripAdvisor that the hotel was not clean and the food was boring. The claimant as the manager could only make recommendations to management with regard to food items. The cleanliness of the hotel was not directly under the claimant and the respondent had a duty to ensure sufficient staffing to clean up the rooms. The comments made by the clients were not brought to his attention to be able to respond and give his views. The negative comments were in the midst of so many other positive comments which the respondents failed to consider leading to unfair termination of employment.
6. The claimant testified that the alleged warning letters filed with the response were never issued to him and have only been filed to put him in bad light. There is no evidence of service.

In response, the respondent's case is comprised of mere denials.

7. In evidence, the respondent called Nicholas Ochieng the ground human resource who testified that the claimant was found to have failed to abide the Food Policy of the respondent which was pegged on usage and not on the season. Food items were lost without proper accounting and when guests were not booked in the hotel. Customers made comments on TripAdvisor which were negative on the claimant. The claimant's deliverables related to maintenance which was to be reported to the general manager but he failed to address.
8. The claimant was issued with a notice to show cause but he failed to respond. The question of being on leave and public holidays is different and the claimant took his annual leave.
9. The claimant refused to clear with the respondent for payment of his terminal dues. he is owed notice pay upon clearing pending bills paid by clarinets and which remain outstanding.
10. The claimant was not taken through a disciplinary process because he failed to respond to the notice to show cause.

At the close of the hearing, both parties filed written submissions.

11. The pleadings, evidence and written submissions analysed, the issues which emerge for determination are whether there was unfair termination of employment and whether the remedies sought should issue.
12. The claimant testified that he took his annual leave and upon resuming duty on 15 February 2017 he was served with notice terminating his employment on the grounds that the respondent had received negative reviews from clients on his work performance and being negative, this had an impact on his employment. the respondent also noted that the claimant failed to abide the Food Costs Policy and despite a warning, he did not take heed.
13. Part of the work records filed by the respondent is leave application form by the claimant dated 17 January 2017 where the claimant took 7 days of annual leave running from 2 to 9 February 2017 and hence resuming duty on 10 February 2017.
14. It appears that soon after resuming from his annual leave, on 15 February 2017 the respondent issued the claimant with letter terminating his employment on the grounds that there were complaints from clients through TripAdvisor and high food costs.



15. The respondent has attached a warning letter dated 21 October 2016 to the claimant with regard to high costs of food items. This warning letter is not received by the claimant as required and the space for his acknowledgment is left blank.
16. The respondent filed a warning letter dated 18 May 2016 with regard to alleged poor cleanliness and presentability but this is again not received by the claimant. The space for his acknowledgement is blank.
17. Mr Nicholas Ochieng testified in support of the response that the claimant was issued with a notice to show cause and he admitted to the allegation made against him. Such admissions response is not attached as part of the record. The Notice to show cause dated 25 January 2017 required the claimant to give an explanation on various matters and to show cause why disciplinary action should not be taken against him within 48 hours. The claimant testified that he made his response through email but he has no access to his work emails since he has no access.
18. The respondent's case is that the claimant failed to respond to the notice and for this reasons, employment was terminated.
19. However, even in a serious case of gross misconduct that justify summary dismissal, the employer is required to ensure notice is issued to the employee and that he is allowed to attend and make representations in the presence of another employee of his choice in terms of Section 41(2) of the *Employment Act*, 2007;
 - 2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
20. The employee should not be denied a fair hearing before his employment is terminated. This much the employer should secure.
21. Indeed, from the notice dated 25 January 2017, a few days before on 17 January 2017 the respondent had approved annual leave for the claimant from 2 to 9 February 2017. Had this not been the case, where he was required to respond to the notice to show cause within 48 hours from 25 January 2017, the respondent ought to have ensure annual leave was held in abeyance until the claimant was able to respond and attend hearing.
22. The court takes it that the claimant proceeded on his annual leave well aware that he had time to rest and while outside the workplace had no access to the internal emails. Whether he responded to the show cause notice or not, upon resuming duty form annual leave on 10 February 2017 before the notice dated 15 February 2017 issued, the claimant was entitled to a hearing at the shop floor in terms of Section 41 of the Act. without adhering to the mandatory provisions of the law, this resulted in unfair termination of employment. failure to accord the claimant a hearing is not justified.
23. The claimant was last earning Kshs. 69,565 which is due in notice pay.
24. For unfair termination of employment, the warning letters alleged to have issued to the claimant are not acknowledged by him to form part of his work records. Since the respondent as the employer is the custodian of all work records, original copies signed by the claimant would have clarified the matter. As the filed records demonstrate, the claimant had no record to affect the assessment of his compensation



which the court filed at 5 months' gross wage as appropriate award. At the last wage of ksh. 69,565 x 5 total compensation is Ksh. 347,825.

25. The claimant is also seeking payment for annual leave days for 2 years at 97,391. Part of the record filed is that the claimant took 15 days in the year 2016 and 7 days in 2017 total being 22 days.
26. In the contract of employment, the claimant had 21 days allocated for annual leave. There is a balance of 23 leave days. On the basic wage of Ksh. 69,565 per month, for the leave days due, the claimant is entitled to ksh. 61,540.
27. At the end of employment, the employee should attend and clear all pending liabilities and upon which terminal dues should be paid. the claimant shall attend and address and have his terminal dues assessed and paid accordingly together with notice pay, compensation and leave pay due.
28. The claims being largely successful, the claimant is entitled to 50% of his costs.
29. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
30.
 - a. A declaration that employment terminated unfairly;
 - b. Compensation awarded at Kshs. 347,825;
 - c. Notice pay Kshs. 69,565;
 - d. Leave pay Kshs. 61,540;
 - e. The claimant shall attend for clearance upon which his terminal dues shall be processed;
 - f. The claimant is awarded 50% of his costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 9TH DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

