



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 870 OF 2017

DANIEL MATHEKA KIKO.....CLAIMANT

VERSUS

PEARL BEACH HOTELS LIMITED T/A HOTEL ENGLISH POINT MARINA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 20.11.2017 through Otieno Asewe & Company Advocates. The respondent employed the claimant on 21.03.2016 as a house keeping supervisor in the house keeping department at Kshs. 25, 000.00 as at the time of termination. On 07.09.2017 he was accused of having accessed Block C where the guests had reported theft of \$100 and 200 Euros. The claimant's case was that the allegations were untrue because on the material day she was allocated to work at Blocks A, B and D by her boss Madam Pamela and he never accessed Block C. The claimant pleads that during investigations on 29.07.2017 the only keys that had accessed the said Block C were from two stewards and the guest and as confirmed by the IT personnel. He was not aware of the disciplinary hearing referred to in the letter of summary dismissal because on the purported hearing date he was on leave and Pamela summoned him to report at work and the Human Resource Manager asked him to write the statement. The allegations in the letter of summary dismissal were fabricated to achieve the dismissal. The dismissal was unfair because provisions of sections 41, 43, 44 and 45 of the Employment Act were breached, Further, Articles 41 and 47(1) of the constitution were violated as right to fair administrative action was not complied with. The claimant claimed for:

- a) One-month payment in lieu of notice Kshs. 25, 000.00.
- b) Unlawful or unfair deduction Kshs. 30, 700.00.
- c) Unpaid overtime 884 x Kshs. 962 = Kshs. 1, 275, 612.00.
- d) Compensation for unfair termination Kshs. 25, 000 x 12 = Kshs. 300, 000.00.
- e) Total claim Kshs. 1, 631, 312.00.

Further despite demand, the respondent has failed to settle the present claims. The claimant prayed for:

- a) Payment of Kshs. 1, 631, 312.00.
- b) Costs of the claim plus interest at Court rates.
- c) A declaration that the termination was unfair, unlawful and unjust.
- d) Any other relief that the Court may deem just and fit to grant.

The respondent filed the reply to the memorandum of claim on 08.03.2018 through Maloba & Amalemba Advocates. The respondent admitted the employment relationship as pleaded for the claimant. The respondent pleaded that it was discovered through significant and thorough investigation that the claimant had gained access to Block C on the material day. Further a proper disciplinary hearing took place and the claimant given chance to fully participate. The dismissal did not breach the provisions of the Act and the constitution as alleged for the claimant. The claimant was suspended on 07.09.2017 following revelation of lost property directly attributable to the claimant.

The respondent prayed that the claimant's suit is dismissed with costs.

To answer the **1st issue**, the parties were in a contract of service as pleaded for the claimant and admitted by the respondent.

To answer the **2nd issue**, the Court returns that the contract of service ended by the letter of summary dismissal dated 12.09.2017 on account that going by the readings on the lift, the key card in the claimant's possession accessed the said Block C lift thrice around the same time the penthouse C2 was accessed and later on in-house guest's complaint of losing \$ 100 and 200 Euros. Further, the claimant had failed to account about the person who may have used the card assigned to the claimant to access Bloc C on the material day. Thus, the claimant was summarily dismissed.

The **3rd issue** for determination is whether the termination was fair in procedure and substance.

On 29.07.2017 the security manager reported theft had taken place at penthouse C2 whereby an in-house guest had reported he had lost USD 100 and 200 Euros. According to evidence by RW readings on the lift showed that the claimant's allocated key had been used to access Block C thrice on the material day. The claimant's evidence is that he was in possession of his key throughout that day and he had been assigned Blocks A and B only. On 07.07.2017 the claimant was suspended for investigations to take place. Disciplinary hearing was on 31.08.2017. At the hearing the claimant admitted accessing Blocks A, B, and D but not Block C. The Court finds that the claimant was accorded due process of a notice and a hearing per section 41 of the Act. It was not unfair process.

The reason for termination is that based on the lift readings the the claimant's key was used to access Block C on the material date that the theft was reported to have taken place. The claimant's testimony and case is that he was not shown the evidence that the key allocated to him had been used on the material day to access the lifts at Block C thrice and as was asserted for the respondent. The respondent's witness (RW) was Nazir Jinnah, the respondent's director. In cross-examination, RW stated, "**Claimant had a key card. It accessed every electronic access including to the rooms. He was summoned why his card had been used to access. Each time an electronic card key is used I say as to whether there is a record, I will not answer.**" In absence of a printout or such other evidence of the access to block C using the electronic key on the material day of the alleged theft, it is impossible to find that the claimant was culpable as was alleged. The respondent's record of the disciplinary hearing of 29.07.2017 show that the claimant stated that he did not share his card key with any one and on the material day he never went to Block C. The respondent's IT or other staff or investigators appear not to have given evidence about the alleged use of the claimant's card key to access Block C on the material day. Accordingly, the allegation that the key was used to access Block C remains an empty allegation that was not established at all. The Court returns that the respondent has failed to establish that the reason for termination was valid and existed as at termination per section 43 of the Act, and, has failed to show that the reason was a fair reason relating to the claimant's conduct or compatibility and, the respondent's operational systems. The termination is therefore found to have been unfair in substance or merits.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a) As the termination was unfair, the claimant is entitled to the contractual one-month payment in lieu of notice **Kshs. 25, 000.00** and as per section 35 of the Employment Act, 2007.

b) The Court has found that the claimant was not connected to the alleged theft and is entitled to recover the unlawful or unfair deduction **Kshs. 30, 700.00** that was effected from the accrued contractual benefits as at the date of termination. RW testified to confirm that per the tabulation of the claimant's final dues, the Kshs. 30, 700.00 had actually been deducted from the dues.

c) The claimant prayed for unpaid overtime $884 \times \text{Kshs. } 962 = \text{Kshs. } 1, 275, 612.00$. To support the claim, the claimant testified thus, "**I claim overtime worked. I have proof I worked overtime. Is not exhibited. I say I worked over time. No exhibit filed but see my witness statement.**" In the witness statement, the claimant stated, "**The reason I am claiming my overtime is because. Since I joined the establishment in the year 2016 I have been working very hard given that I had to make sure I complete all extra work given to me by the manager. Most of the time is when she comes in our office at 1600hrs to give me extra work. I always report on duty before 0700hrs and leaving in the evening it's always late not before 1800hrs. these overtime readings can only be found on the biometric system and security check in books....**" On the other hand, RW testified thus, "**Overtime work is based on procedure where employee is given a form that has to provide all details given to Human Resources to confirm any overtime forms tallying with biometric entry and exit logo. Once form is submitted there is a signature and authority that validate claims. The claimant never presented a claim for overtime. I have not seen such a claim by the claimant.**" The Court finds that the evidence by the claimant and RW is that biometric logo records on check in and check out time are used to compute overtime. Further no such records are on record. The trite law is that special or liquidated damages are specifically pleaded and strictly proved. The claimant has failed to strictly prove the alleged hours of overtime and the claim and prayer will fail.

d) The claimant has prayed for compensation for unfair termination $\text{Kshs. } 25, 000 \times 12 = \text{Kshs. } 300, 000.00$. The Court has found that the reason for the termination of the claimant's employment was not fair and genuine. The Court has considered the factors for award of compensation in section 49 of the Act. The claimant had served from 2015 to 2017 with a clean record. She desired to continue in employment. She appears to have had a clean record of service. The Court considers that six months' salaries will balance justice for parties making $\text{Kshs. } 25,000.00 \times 6 = \text{Kshs. } 150,000.00$. The claimant has succeeded in the claim and is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) The declaration that the termination was unlawful, unfair and unjust.

2) The respondent to pay the claimant **Kshs. 205, 700.00** by 01.04.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

3) The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022.

BYRAM ONGAYA, JUDGE