



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO.2383 OF 2016**

**ERICK MURUNGI NJAGI.....CLAIMANT**

**VERSUS**

**CLARION HOTEL LIMITED.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant has filed a Statement of Claim dated 21<sup>st</sup> November 2016 wherein he avers that the Respondent employed him as a Waiter on 20.04.2013 on contractual basis earning a monthly salary of Kshs.12,000/= and that his contract was renewed several times with an increase in salary. That his contract of employment was confirmed on 01.08.2014 with an increase in salary and, was issued with an appraisal letter on 09.12.2014. He says in May 2015 he was issued with a certificate recognizing him as employee of the month for high sales in the Restaurant Section. That he was later promoted to the position of Barman on 07.07.2015 earning Kshs.18,713/= per month, which was further increased to Kshs.22,031/= per month on 12.02.2016.

**CLAIMANT'S CASE**

2. It is the Claimant's averment that the Respondent terminated his services on 12.08.2016 without issuing him notice or warning letter despite him being a permanent employee. That he is subsequently suffering psychological anguish, financial constraints, loss and damage and thus claims damages for breach of contract, compensation for wrongful termination and service, and exemplary damages for breach of his constitutional rights. He particularises the breach of contract being the Respondent's failure to pay him his contractual dues as required by law. He prays for judgment for: an order directing the Respondent to pay him the said dues; an order declaring that termination of his employment was unlawful; and costs of this suit.

**RESPONDENT'S CASE**

3. The Respondent filed a Statement of Defence dated 20<sup>th</sup> December 2016 averring that the Claimant's service was full of inadequacies as he frequently struggled with efficiency and integrity issues. It avers that it lawfully terminated the Claimant's employment after he failed to improve his work, continued to make numerous errors, and failed to heed to warning letters issued to him. The Respondent prays that the Claimant's claim be dismissed with costs.

4. The Respondent also filed a Witness Statement by Daniel Wachira, an internal auditor, who states that it had been reported that other Barmen felt that some stock would go missing whenever the Claimant had access to the bar and which weakness was disclosed to him in writing during the appraisals. He further says that the Claimant was only promoted to the position of Barman after a previous barman had been dismissed and that the Claimant was then dismissed together with other barmen because of massive fraud at the bar discovered by the internal auditor involving several fake credit sales by all the barmen.

**CLAIMANT'S SUBMISSIONS**

5. The Claimant submits that this Court may be guided by **Sections 41 and 45 of the Employment Act** in establishing whether or not termination of his employment was lawful. That **section 45 of the Employment Act** and **Section 108 of the Evidence Act** in fact place the burden of proof on the Respondent as the employer to prove he had a lawful reason to terminate the claimant's employment.

6. He submits that he was denied an opportunity to be heard in breach of Section 41(2) of the Employment Act and which amounts to unfair dismissal as per Section 45(5) (a) of the Act. On this submission he relies on the case of **PRINCIPAL AND B.O.G MACHAKOS TEACHERS COLLEGE V WAMBUA MUANGE [2016] eKLR**. It is the Claimant's submission that the termination letter dated

12.08.2016 does not give any explanation as why his services were terminated and that furthermore the Respondent has added some clauses in its Code of Ethics produced in Court since the said contents are not contained in the Claimant's copy.

7. The Claimant further submits that he confirmed to this Court that he was only responsible for the stock he took at the store keeper upon presenting a requisition form to be signed by the hotel's auditor and controller. Further, during his time all the stocks he took were accounted for and payment done and handed over to the concerned parties. That he also confirmed to this Court that none of the accused was charged with fraud yet the Respondent could have reviewed the CCTV cameras to obtain the evidence needed and that this shows he was framed to tarnish his name and terminate his employment.

8. That on the other hand, Defence witness (DW1) for the Respondent confirmed there was no disciplinary meeting that was held to discuss the Claimant's misconduct. It is the Claimant's submission that the Respondent has therefore failed to prove the reason for terminating his employment as envisaged under **Section 43 of the Employment Act** and should be held to have wrongfully, unfairly and illegally terminated his employment. That the Court should consider he was neither afforded a chance to be heard nor accorded an appeal forum and proceed to award him his rightful terminal dues as pleaded.

### **RESPONDENT'S SUBMISSIONS**

9. The Respondent submits that a perusal of the Respondent's documents shows that the Claimant was clearly not a good employee as he claims to have been and that therein includes a second warning letter cautioning him for dishonesty in his work. It also submits that the Claimant never questioned its Code of Ethics any time prior to his submissions and that it is too late for him to try to wriggle out of terms upon which he served his contract. That the Code of Ethics declares that strong ethics and good business should go together and further has a clause on fraud providing that the management will not tolerate fraud of any description. That the Claimant was aware of the said Code of Ethics because he signed it and he was thus not only required to keep off fraudulent activities but report even the suspicion of fraud.

10. It is the Respondent's submission that the Claimant's allegation that he was not given due process before termination is not borne by either facts or law. That the Court in **JOSEPH MWANGI GIOCHE V GATAMIYYU DAIRY FARMERS COOPERATIVE SOCIETY, CIVIL CASE NO. 972 OF 2013** observed that the requirement of issuance of notices to show cause and invitation to disciplinary hearing does not have to follow a pedantic and mechanical path once the court is satisfied that the employee had reasonable notice of the allegations against him, has been called to answer them, has answered, and a dismissal follows thereafter. That in the instant case, it notified the Claimant of the complaint and gave him an opportunity to respond and that he cannot thus say that he was arbitrarily dismissed without being heard.

11. The Respondent further submits that since the Claimant's case lacks merit, he is not entitled to the reliefs sought in his claim. Further, the claim for breach of contract based on the time the Claimant would have worked until retirement is not derived from any provision of the contract between parties or the law. That compensation for wrongful termination is at the discretion of court and depending on the circumstances of each case and since in this case the Claimant was part of a gang that was fleecing the Respondent, an award of compensation would not at all be justified. That the Claimant is also not entitled to the claim of service charge as he did not articulate the same and hence remains unproven.

### **DETERMINATION**

#### **12. ISSUES FOR DETERMINATION**

1. Was the claimant lawfully terminated?
2. Is he entitled to the reliefs prayed?

### **DECISION**

13. It is the claimant's case that he worked efficiently and profitably for the respondent from 20<sup>th</sup> April 2013 until 12<sup>th</sup> August 2016 when he was unlawfully terminated. He says in the meantime he was given several commendation letters and appraisals and several salary increments until as late as May 2015 when he was chosen as the employee of the month. In February 2016 he got yet another salary increment. On 12<sup>th</sup> August 2016 his services were terminated and the reasons given for the termination was drop of sales and poor performance. He was alleged to have failed to achieve the expected sale targets.

14. The established law on employment is that a valid reason must be given by the employer before terminating the employment of an employee. Section 45 of the Employment Act is mandatory that a valid reason must be established by the employer before he can terminate the employee's employment.

15. Section 41 of the same Act provide that the employer must before terminating the employment of the employee inform him in a language he understands the reason for his termination and afford him a hearing in the presence of a fellow employee of his choice or a shop floor union representative as his witness during the said explanation.

16. The respondent avers that he had a good reason to terminate the claimant as he was inefficient in his work and had integrity issues. He said he had given him notice on integrity issues but he did not change. The claimant was terminated for poor performance and integrity issues.

17. If employer alleges poor performance or even gross misconduct he must present the specific charges and allow the claimant to explain himself. This did not happen in this case.

In **THE CASE OF ODEKE VS. FIDELITY SECURITY LTD, CAUSE NO. 1998 OF 2011**, the Honourable Court observed at page 3 that:

*“An employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.....it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair.”*

18. In the case of **Jane Wairimu Machira vs. Associates ( 2012) eKLR** the court adopted the finding in the case of **KENYA RESEARCH INTERNATIONAL TECHNICAL ALLIED WORKERS VS. STANLEY KINYANJUI AND ANOTHER CAUSE NO 273 OF 2017** in which the court held that the proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give him an opportunity to improve over a reasonable length of time.

19. The court further observed that an appraisal of the performance by the employer must of necessity involve active participation by the employee and that a credible performance appraisal process must be evidently participatory.

20. As earlier pointed out it is now mandatory from myriad of case laws that a Claimant must be accorded an opportunity to explain himself before a decision is reached to terminate the claimant. Even if the Respondent in his cited authority of **JOSEPH MWANGI GIOCHE VS, GATAMIYYU DAIRY FARMERS CO.OP SOCIETY CASE NO 972 OF 2013** where court held that hearing does not have to follow pedantic and mechanical path, nevertheless from numerous authorities and sections 41 and 45 of the employment Act make it mandatory to give a valid reason to the claimant for terminating his employment and also give him a chance to explain himself.

21. The evidence given by the claimant and also his pleadings he avers he was not given a chance to explain himself or even to appeal the respondent's decision to terminate him.

In **WALTER OGAL ANURO VS. TEACHERS SERVICE COMMISSION [2013] eKLR** the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

22. Having critically analysed the evidence adduced by the parties and their submissions and authorities thereto I am persuaded the respondent did not establish he had a good reason to terminate the claimant and also did not follow the procedure provided in law. The court therefore finds the claimant's termination was unlawful as well as unfair and so enters judgement in favour of the claimant.

#### **REMEDIES AWARDED**

23. Having entered Judgement in favour of the claimant I proceed to award him the following reliefs:

1. The prayer for Damages for breach of contract as well as exemplary damages are declined as it would amount to double compensation but instead award him compensation for wrongful termination at an aggregate of 5 months considering the period he served the respondent which amounts to Kshs 22,031x5 = Kshs 110,155 /=plus interest at court rates from date of judgement till payment of the full amount.
2. Service charge is not awarded as the claimant did to prove the same was not remitted to NSSF
3. Costs follow the event and so claimant is awarded costs of the suit.
4. Orders Accordingly

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 13TH DAY OF APRIL, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

#### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**