



**Masha v Crown Hotels Limited (Cause 908 of 2016)
[2022] KEELRC 1458 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1458 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 908 OF 2016**

B ONGAYA, J

MAY 27, 2022

BETWEEN

DAVID MASHA CLAIMANT

AND

CROWN HOTELS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim on 28.11.2016 through Stephen Jumbale & Company Advocates. The claimant's case is that the respondent employed him as a cashier and receptionist on October 1, 2011 at a gross salary of Kshs. 18, 758.00 per month. On August 9, 2016 he was summarily terminated from employment without due cause and procedure. He received a show cause letter and his case is that he fully explained exculpating himself from the allegations but the respondent dismissed him. Further he was invited to a disciplinary hearing but it was not meaningful because the respondent appeared to have made up the mind to dismiss the claimant. On August 9, 2016 he was summarily dismissed contrary to article 47 of *the Constitution* on fair administrative action. The claimant's case was that he was not granted chance to argue his case, the General Manager who was the complainant was chairing the disciplinary hearing and he was a judge in his own cause, and no evidence was adduced to show that any money had been lost or wrong information had been given to the General Manager. He states that the principles of natural justice were breached as procedure on notice and hearing under section 41 of the *Employment Act*, 2007 was breached.
2. The claimant stated that as at termination he was a member of Kudheihatrade union which had a collective bargaining agreement (CBA) with the respondent and he was earning Kshs. 29, 231.00 as at summary dismissal. He claimed as follows:
 - a. Night allowance $25/100 \times 839 \times 2 \times 4 \times 12 \times 5$) Kshs. 100, 680.00.
 - b. Public holidays $839 \times 12 \times 5 \times 2$ Kshs. 100, 680.00.



- c. Gratuity $(1/3 \times 21814 \times 5) + (1/3 \times 7,417 \times 5)$ Kshs. 48,717.00.
- d. Leave allowance Kshs. 33,631.00.
- e. Two months' salary in lieu of notice Kshs. 58,462.00.
- f. 8 days unpaid Kshs. 6,712.00.
- g. Service charge Kshs. 7,500.00.
- h. Damages for unlawful termination Kshs. 350,772.00.
- i. Total claim Kshs. 707,154.00.

The claimant prayed for judgment against the respondent for:

- a. A declaration that the dismissal of the claimant from service was unfair, unjust and unconstitutional.
 - b. An order the respondent pays the contractual and terminal dues amounting to Kshs. 707,154.00 as claimed.
 - c. An order directing the respondent to issue a certificate of service to the claimant.
 - d. Costs of the suit and interest.
2. The respondent filed the replying memorandum on January 31, 2017 through John Bwire & Associates Advocates. The respondent admitted that it employed the claimant as a receptionist and cashier by the letter of appointment exhibited and commencing October 1, 2011. His monthly basic salary was initially Kshs. 13,184.00 plus a house allowance of Kshs. 5,574.00. Leave was 26 working days per annum. The respondent's further case was that the claimant owed the respondent a fiduciary duty of loyalty, trustworthiness and good faith. Further, on July 24, 2016 the claimant made a cash sale of Kshs. 2,400.00 from customers who visited the hotel for swimming. Further, with an intention to defraud the respondent, the claimant failed to capture the aforesaid sales in the respondent's automated system and proceeded to close his shift without accounting for the aforesaid money. The respondent's General Manager received the complaint and instituted relevant internal investigations. The Claimant was informed, interviewed and heard about the allegations of the theft or fraud and, explained to about the gravity of the allegations. The respondent's case is that the claimant gave a blanket denial of the allegations and in particular failed to explain the following matters:
- a. Why he made a sale of Kshs. 2,400.00 at 1300hrs and did not capture the same in the system.
 - b. Why at 1500hrs when he handed over the shift he did not hand over the said Kshs. 2,400.00.
 - c. Why he initially made wrong information to the General Manager when first confronted.
3. The claimant failed to explain himself and he was summarily dismissed by the letter dated August 9, 2016. Thus, the respondent's further case was that there were justifiable and genuine grounds for the dismissal and the claimant's case lacked merits. It was not true that he was not given an opportunity to be heard and that rules of natural justice had not been followed. The respondent denied the amount of Kshs. 707,154.00 claimed for the claimant and prayed that the suit be dismissed with costs.
4. The claimant testified to support his case while the respondent's witnesses included the General Manager John Dennis Gwaro (RW1); and, the In-Charge Swimming Pool one James Momanyi (RW2). The Court has considered the pleadings, the evidence and the final submissions filed for the parties.



5. To answer the 1st issue for determination the Court returns that the parties were in a contract of service. The claimant was employed as a receptionist and cashier by the letter of appointment as pleaded for the respondent. As at termination his monthly gross pay including house allowance and basic pay was Kshs. 29, 231.00.
6. To answer the 2nd issue, there is no dispute that the respondent summarily dismissed the claimant from employment by the letter on record and effective August 9, 2016. The letter referred to a disciplinary hearing in August 2016 attended by the claimant, his line manager, workers' committee, personnel manager and RW1. The letter stated that from the meeting it was clear that the claimant made a swimming cash sale at 1300hrs and it was not captured in the system in his shift (theft); and, at 1800hrs after his shift and in-front of others the claimant gave wrong information to the General Manager (RW1) on the clear picture of the cash sale – 4 children swimming at Kshs. 4, 00.00 per child totaling up to Kshs. 1, 200.00 when, the clear picture was five adults and 6 children totaling up to Kshs. 2, 400.00. The letter further stated that the claimant acknowledged during the meeting as follows:
 - a. He was in the 0700hrs to 1500hrs shift.
 - b. The clients came to swim on the material day.
 - c. The claimant failed to capture the cash sale into the system (theft).
 - d. The claimant gave wrong information to the RW1 at 1800hrs regarding the cash sale.
 - e. The computer system was down.
 - f. The claimant was very busy during the shift that he handed over the cash to the next shift.
7. The letter further stated, “It was evident that; the system was working – other different modes of payment like Mpesa, Visa card were captured in the system but not the said cash sale, All the said clients went to swimming pool to swim, you called the swimming pool attendant close to 1900hrs after your dubious actions were uncovered, you lied to the General Manager the actual cash sale, From the handover shit signed by both receptionists it was evident the said cash was not passed to the next shift.
8. We consider your actions above constitute a serious gross misconduct warranting a summary dismissal effective from 9th August 2016.
9. Please refer to the *Employment Act*, 2007 section 44 d, 44 g, and 44 c which justify a summary dismissal of an employee per your above actions on duty.”
10. The 3rd issue for determination is whether the termination was unfair as alleged for the claimant.
11. The claimant's case is that he was not accorded due process. His evidence was that he was told that the allegations against him were that he stole and he lied. Further he received on 27.07.2016 the suspension letter dated July 24, 2016 and he replied by his letter dated July 28, 2016. In his replying letter he stated as follows:
 - a. On July 24, 2016 he was on duty at 1300hrs when some adults and children came and wanted to swim.
 - b. The clients stated that only six children would swim and he charged them Kshs. 400.00 per child making a total of Kshs. 2, 400.00 which the clients paid in cash.
 - c. At the time of the payment the computer system was down and he could not post the transaction and the visitors left to the swimming pool.



- d. He then called the swimming pool attendant one James Momanyi and informed him that six children had paid for swimming.
 - e. Another visitor Moses Lango was checking out and he had claimed to have paid online but there was a problem ascertaining his payment and the claimant called the supervisor Chrispus Charo who took over the case and payment was made later in the evening. The case of Moses had taken claimant's considerable time so that he had not posted the Kshs. 2, 400.00 by the time his shift ended and he gave the Kshs. 2, 400.00 to his colleague Vald Mwandoe who posted the transaction.
 - f. By the time RW1 conversed about the issue the claimant was not at the cashier desk but was at the reception desk and he had already given the cash to Vald Mwandoe and no theft had occurred. Further, the claimant stated in the replying letter, "...System failure cannot be visited upon me and it is very unfortunate and demoralizing when I was doing my best to protect the interests of my employer yet I be accused of theft."
 - g. RW1 had gone to the claimant to ask about the transaction. It was strange to him that 5 adults were swimming. Further, if 5 adults and 6 children were swimming then it would not total to Kshs. 2, 400.00 but true position was that 6 children were swimming making Kshs. 4, 00.00 x 6 thus Kshs. 2, 400.00. He gave the truthful information to RW1 and the source of varying information was not known to him. He stated, "e. That in short this allegation baffles me and I would say that it is laced with malice and an attempt to tarnish my good track record." He stated that he had more than 6 years of clean record of service and he was ready for disciplinary hearing.
12. The claimant's case and his testimony was that he was not given an opportunity to defend himself at the disciplinary hearing. His testimony was that there were no witnesses and RW1 did not state and disclose how he knew that whatever the claimant told RW1 was lies.
13. The Court has considered the claimant's evidence and upholds the submissions made for the respondent that the claimant was afforded due process per section 41 of the *Employment Act*, 2007. The evidence is that the claimant was given a written notice of the allegations per the letter of suspension, he replied, and he attended the disciplinary hearing. There is no reason to doubt the testimony by RW1 that a union representative was present at the disciplinary hearing. The Court finds that the requirements for notice and hearing in presence of a union representative per section 41 of the Act was complied with. The procedure adopted by the respondent was not therefore unfair.
14. The Court finds that as submitted for the respondent, it cannot be that the claimant was not given a chance to defend himself as alleged whereas, he was given the letter to show-cause, he replied, and he attended the disciplinary hearing. The claimant testified in cross-examination thus, "...I was not given a chance to respond fairly. I was aware about the agenda. I had received suspension letter. I replied. I was heard after suspension...." The court finds the allegation by the claimant that he was not given a fair chance to defend himself as empty and not backed by evidence of what actually transpired during the disciplinary proceedings.
15. The court finds that as submitted for the respondent, the reason for termination was valid and it existed as at termination as per section 43 of the Act. While denying the allegations in his written reply to the letter to show-cause, the claimant nevertheless testified in Court thus, "Incident occurred on July 24, 2016. Some adults and children wanted to swim. Eventually only the children swam. I charged Kshs.400.00 per child, 6 of them – at Kshs. 2, 400.00. System was down. I did not capture it in the system. Rate was not fixed. I gave the money to my colleague who deposited. Page 11 of respondent's



document is posting report. It shows posting was done by the staff who came after I left. I prepared cash float handover at respondent's page 13. It does not capture the swimming amount of Kshs. 2, 400.00. I did not advise anyone to lie about the transaction. I did not advise anyone to say only children came to swim." The Court finds that by that evidence it may be that the respondent's system was low at the material time. However, by the same evidence, the claimant confirms that he prepared the cash float handover report and it does not capture the swimming amount of Kshs. 2, 400.00 – and the Court returns that the claimant failed to honestly account for the Kshs. 2, 400.00. Accordingly, the Court returns that the reason for termination existed and it was valid as at the time of summary dismissal. The submission for the respondent in that regard is upheld.

16. The Court returns that the summary dismissal was not unfair both in procedure and in substance. The prayer for compensation will collapse as unjustified.
17. The 4th issue for determination is whether the claimant is entitled to the other remedies as prayed for. The Court returns as follows:
 - a. He claims night allowance $25/100 \times 839 \times 2 \times 4 \times 12 \times 5$) Kshs. 100, 680.00. The claimant's evidence was that he worked on night shift on various days but he could not say how many of such days because he did not have a document to show the same. The Court finds that the claim is not strictly proved as required.
 - b. He prayed for public holidays $839 \times 12 \times 5 \times 2$ Kshs. 100, 680.00. The Court has considered the memorandum of claim, the claimant's witness statement, the claimant's testimony in Court and returns that there are no particulars and evidence about the days worked on public holidays and the claim will collapse as not strictly established. RW1's evidence that there was no record on the same is upheld.
 - c. He prayed for gratuity $(1/3 \times 21814 \times 5) + (1/3 \times 7,417 \times 5)$ Kshs. 48,717.00. Clause 27 (b) provides that termination gratuity is payable where an employee has served for at least 5 to 10 years or 10 years and above. In the instant case and as per submissions for the respondent the claimant worked from 01.10.2011 to 09.08.2016 which falls short of the 5 years and gratuity will not be available.
 - d. The claimant prayed for leave allowance Kshs. 33, 631.00. The basis and particulars of the claim are at large as not pleaded and not proved at all. The prayer will fail. As per RW1's evidence there was no contractual provision on the same and the claimant has not pleaded such provision.
 - e. He prayed for two months' salary in lieu of notice Kshs. 58, 462.00. The claimant's testimony was that in event of valid summary dismissal, the claim would collapse per CBA provision. The claim and prayer is therefore declined.
 - f. He prayed for 8 days worked but unpaid Kshs. 6, 712.00. RW1 testified that the claimant was not clear on the unpaid 8 days now claimed. The respondent's exhibits at page 15 show payment of Kshs. 34, 734 and on a balance of probability, the Court returns that the claimant was paid up to the date of the summary dismissal.
 - g. He claimed service charge Kshs. 7, 500.00. The particulars and basis of the claim were not pleaded at all. The claimant then testified thus, "Service charge is for July 2016. Exhibit 4 (C) is pay slip. It shows service charge for June, not July 2016." For the respondent RW 1 testified thus, "Service charge is a pool of fund distributed to staff in equal share. The period and details of claim not stated. I see page 6 of our documents he was paid service charge of Kshs. 2, 572.00 for July 2016. He was paid. In August 2016 he did not work. He is not owed service charge." The Court has considered the evidence. The claimant by his testimony claims service charge



for July 2016 but the respondent has indeed exhibited the claimant's pay slip for July 2016 showing payment of service charge Kshs. 2, 572.00. The claim will fail as unjustified.

h. The claimant has failed in his case and the respondent is entitled to costs of the suit.

18. In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 27TH MAY, 2022.

BYRAM ONGAYA

JUDGE

