



**Mudanya v Sarova Stanley Hotel (Cause 2080 of 2016)
[2022] KEELRC 1485 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1485 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2080 OF 2016
SC RUTTO, J
JUNE 10, 2022**

BETWEEN

GEOFFREY CHUNGULI MUDANYA CLAIMANT

AND

SAROVA STANLEY HOTEL RESPONDENT

JUDGMENT

1. The claimant avers through his claim dated October 3, 2015 that he was employed by the respondent with effect from February 18, 2009 until 4th March, 2016 when his services were terminated for no apparent reason. His initial claim was for the sum of Kshs 3,229,569.17 constituting unpaid commissions, salary in lieu of notice, service pay, unpaid annual leave, damages for breach of contract, public holidays, overtime pay, travel allowance, underpayments and mileage allowance. The memorandum of claim was later amended on 8th November, 2018, thus bringing the total claim to Kshs 43,614,271.00.
2. The respondent opposed the claim through its response dated 18th November, 2016 wherein it averred that the claimant's services were terminated after he absented himself from work for no apparent reason, having failed to take up his new posting in one of its units.
3. The matter proceeded for hearing of the claimant's case on October 28, 2021 and later on February 22, 2022 for the defense hearing. Each side presented oral evidence.

Claimant's case

4. The claimant adopted his amended memorandum of claim, witness statement, bundle of documents initially filed with his claim as well as his supplementary bundle of documents, to constitute part of his evidence in chief. The documents initially filed with the claim and the supplementary documents were also produced as exhibits before court.



5. It is the claimant's case that he was employed on July 3, 2009 as a Banqueting Supervisor and later promoted to the position of Food and Beverage Supervisor. He stated that he was an industrious employee having been congratulated by the respondent's management severally. That indeed, he was often recalled from leave early, to undertake his duties.
6. That sometimes in 2013, the respondent introduced an incentive known as Food and Beverage Incentive and which was aimed at increasing revenue in its outlets as well as rewarding all staff who were selling through commissions.
7. That in this regard, he generated business for the respondent by introducing new clients like GNLD, Redeemed Christian Church of God, Regional Aids Training Network, Polycarp Igathe and the Director of Public Prosecution. That he was paid commissions together with his salary, save for 2014 when the same were underpaid. That he made several complaints to the respondent's management but he was informed that he was not entitled to the same.
8. That due to his persistent complaints, he was transferred to Taita. He averred that he was terminated on March 4, 2016 without any notice and thrown out of the respondent hotel.
9. Upon cross examination, the claimant admitted receiving the transfer letter to Taita Hills Sarova and that he appealed against the same. He further testified in cross examination, that he had deferred his studies at the University of Nairobi at the time of his transfer, due to lack of funds.
10. In re-examination, the claimant maintained that his transfer was related to his demand for payment of the commissions he had earned.

Respondent's case

11. The respondent presented oral evidence through Ms. Petronila Omundo, who testified as RW1. She identified herself as the Human Resource Manager of the respondent. At the outset, she sought to rely on her witness statement and documents filed on behalf of the respondent, to constitute part of her evidence in chief. The documents were also produced as the respondent's exhibits before Court.
12. It was the testimony of RW1 that the claimant was employed as a Banqueting Supervisor. That his contract of employment provided that he could be transferred to any place. That in this regard, the claimant was issued with a letter dated February 4, 2016 through which he was transferred from the Sarova Stanley to Sarova Taita Hills & Sarova Salt Lick Lodge as a Restaurant Supervisor with effect from March 1, 2016.
13. That the claimant's transfer was within his contractual terms and was without any loss of benefits. That indeed, he was being promoted to head a section of the Sarova Taita Hills Lodge.
14. RW1 further stated that the claimant appealed the transfer but the same was declined vide the respondent's letter dated February 23, 2016. That the claimant further requested through his Advocate to have the transfer deferred on account of his studies. That the respondent obtained information from the University of Nairobi that the claimant last registered for units in the 2nd semester of 2013/2014 academic year. That this meant that the claimant was not studying at the university, at the time of the transfer. That the claimant was therefore informed through his Advocates that the respondent was reaffirming its decision to transfer him.
15. That the claimant declined to report to his new workstation, but instead turned up at his former work station at the Sarova Stanley, where the Operations Manager told him to report to his correct work station. That the claimant failed to report to his new work station and was unreachable. That due to



his unexplained absenteeism from work, the claimant was dismissed from employment and could not be traced before the decision was reached.

16. That subsequently, the respondent tabulated his final dues which was communicated to his advocates upon receipt of the demand letter.
17. During cross examination, RW1 denied that the claimant's transfer was related to his demand for a commission. She further admitted that the respondent did not issue the claimant with a notice to show cause.

Submissions

18. It was submitted on behalf of the claimant that he was not aware of the reasons for his suspension and termination from employment. That he was terminated before the dispute/appeal was heard and determined. Further, that he was entitled to three months' notice prior to termination.
19. It was the claimant's further submission that there was no valid reason for his dismissal as no proof was presented to prove that he had absconded duty. That there was no consultation prior to his transfer. He placed reliance on the case of *Henry Ocbido vs NGO Coordination Board* (2015) eKLR. It was further submitted that the claimant's termination was undertaken without following due process. To support this position, the claimant cited the court's decisions in *Mary Chemweno Kiptui vs Kenya pipeline Company Limited* (2014) eKLR and *Anthony Mkala Chivati vs Malindi Water & Sewerage Company Ltd* (2013) eKLR.
20. On the other hand, the respondent submitted that the decision to transfer the claimant was lawful and that he never challenged the adequacy of the notice period. The respondent fortified this submission on the case of *Anne Wairimu Kimani vs Kenya Agricultural Livestock Research Organisation (KALRO)* (2017) eKLR. It was further submitted that the refusal by the claimant to report to his new station on March 1, 2016 amounted to gross misconduct which justified his termination. To buttress this submission, the Court was referred to the authority of *Thomas Dzombo Kirunga vs Krystalline Salt Ltd* (2020) eKLR. That further, the claimant by his own conduct made it impossible for the respondent to comply with the provisions of section 41 of the *Employment Act*.

Analysis and determination

21. Upon considering the pleadings on record, the evidentiary material before me and the opposing submissions, it is evident that the court is being called to determine the following questions: -
 - i. Whether there was a valid and fair reason to justify the claimant's dismissal from employment?
 - ii. Whether the claimant was subjected to due process prior to termination?
 - iii. Is the claimant entitled to the reliefs sought?

Valid and fair reason to justify termination?

22. The fulcrum of the respondent's case is that the claimant failed to report to his new work station and thereafter absconded duty and his whereabouts remained unknown. The claimant disagrees and states that he had appealed against his transfer and there was no evidence that he had absented himself from duty. That since he had not reported to Sarova Taita Hills, he could not have absconded duty from there.
23. Section 43 (1) of the *Employment Act*, requires an employer to prove reasons for which it terminated an employee and in default thereof, such termination is deemed to be unfair. In line with this provision,



section 45 (2) (a) and (b), provides that a termination of employment is unfair if the employer fails to prove-

- a. that the reason for the termination is valid;
- b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...

24. It is not disputed that the employment relationship was severed upon the claimant being sent on transfer, which he objected to and failed to take up.
25. The claimant's transfer was effected through a letter dated February 4, 2016, which is couched as follows: -

“RE: Transfer

The above refers.

This is to inform you that, you have been transferred to the STH&SSLGL in the same capacity as a Restaurant Supervisor with effect from 1st March 2016. You shall be reporting to the F&B Manager who will give you a job description for this position upon reporting to the duty station. Your remuneration and benefits remain the same.

I wish you well as you take up this new role.

Yours faithfully,

For: Sarova Hotels Ltd.

Mwangi wa Kariuki

Director of Human Resources

Cc: GM&HRM SS, LM&HRC STH PF”

26. The claimant appealed the transfer through his letter dated February 12, 2016 on the basis that he was a student at the University of Nairobi. The claimant's appeal was considered and the respondent declined the same and notified him as much through a letter dated February 23, 2016. The claimant was further informed that he was expected to report to his new station by 1st March, 2016. The claimant has admitted that he did not report to his new work station as he continued pursuing an appeal against the transfer.
27. It is apparent that the respondent's decision was based on the communication from the University of Nairobi, to the effect that the claimant last registered for units during the 2013/2014 academic year. The claimant contested this communication in that the same was not under a letter head. Nonetheless, he admitted that he was not an active student at the material time and that he had deferred his studies due to lack of funds as well as his tight work schedule.
28. The claimant's letter of appointment dated 18th February, 2009 and which also contains his terms of employment provides as follows at clause 8: -

“Place of Work

You will initially report to Food and Beverage Manager and shall be subject to obey him through the General Manager and/or any other officer placed in authority over you. You



may be transferred to any other place the company does business whether now operational or contemplated in future subject to reasonable notice to yourself.”

29. It is therefore apparent that a transfer from one workstation to another, was part of his contractual terms. It was therefore not a new and unexpected phenomenon. Further, the claimant having worked for the respondent for close to seven (7) years was aware that it had other units in several parts of the country. A transfer to any of these units was therefore expected, subject to a reasonable notice.
30. It is notable that claimant’s transfer letter was dated 4th February, 2016 and was to take effect on 1st March, 2016. Therefore, the notice was approximately one month, hence cannot be termed as unreasonable. Indeed, upon receiving his transfer letter, the claimant had time to lodge an appeal in the ensuing period, and which appeal was considered and denied, hence he was directed to report to the new work station by March 1, 2016.
31. It is common ground that the claimant did not report to his new work station as directed in the respondent’s letter of February 23, 2016. It is no doubt that claimant’s failure to report as directed by his employer, amounted to disregard of a directive. In fact, this constituted a ground for summary dismissal under section 44 (4) (e) of the Employment Act which provides thus: -
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if-
-
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer...”
32. The transfer of the claimant was a directive from his employer regarding change of his work station. His failure to report despite being notified of the outcome of his appeal, was a clear act of disobedience against the directive of his employer and was a ground for summary dismissal under section 44(4) (e) of the Employment Act.
33. In as much as the claimant was still in the process of appealing the transfer, he had been given a directive by his employer to report to a new work station. He could have reported to the new work station then pursued his appeal from there. However, he opted to disobey the directive altogether and not report at all.
34. Accordingly, the claimant by his own actions and omission, availed the respondent a valid and fair ground to terminate his employment on account of failure to obey a lawful directive.

Due process prior to termination?

35. The requirement of due process under the Employment Act is stipulated under sections 45 (2)(c) and 41 of the Employment Act. In this regard, an employer is required to notify an employee of the reasons it is considering terminating his or her employment. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative of own choice.



36. The claimant herein has contended that he was not subjected to a fair process prior to being terminated from employment and claims that he was thrown out of the respondent's premises by the Operations Manager.
37. The respondent's defence is that the claimant left upon refusing to report to his new work station and went in comunicado and that all reasonable efforts to reach him, proved futile. That as such, it was unable to comply with the provisions of section 41 of the *Employment Act*.
38. Despite the respondent's assertions, there is no evidence of communication from its end, to the claimant, citing him for failure to report to his new work station and for absenting himself from work.
39. The respondent did not produce any evidence that it attempted to reach the claimant. Prior to his termination, the parties had been in an employment relationship for close to seven (7) years hence they had established channels of communication. Besides there are letters on record from the claimant's end, through which he was still pursuing an appeal against his transfer. Notably, the respondent did not dispute receiving the claimant's letters. This is a confirmation that the claimant was still within reach.
40. As stated herein, the respondent had all the reason to commence disciplinary action against the claimant for failure to obey its directive on transfer from Sarova Stanley to Sarova Taita Hills.
41. In this regard, the respondent if at all acting as a prudent employer, could have employed the established channels of communication and issued the claimant with a notice requiring him to explain why his employment should not to be terminated for failure to report to his new work station as directed.
42. I will hasten to add that the provisions of section 41 are mandatory hence it is not upto an employer to elect whether or not to comply with the same.
43. The Court of Appeal in *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR, amplified the mandatory nature of section 41 of the *Employment Act* as follows: -

"It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for

"Notification and hearing before termination on grounds of misconduct" in the following manner:- "(1) Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

"(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, chosen by the employee within subsection (1) make." section 42 (1) referred to in Sub-section (1) relates to employees on probation.

Four elements must thus be discernible for the procedure to pass muster:- (i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;



- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

44. The long and the short of it, is that the respondent was under an obligation to grant the claimant an opportunity to defend himself or rather give his side of the story. It was bound by the provisions of section 41 of the Employment Act and failure to do so, amounted to unprocedural termination and the respondent is at fault.
45. At the end of the day, the claimant’s termination was unprocedural and unlawful.
46. Having so found, what then are the reliefs available to the claimant?

Reliefs

47. At the outset, it is worth mentioning that the claimant has exhibited a Collective Bargaining Agreement (CBA) ostensibly entered between the Kenya Association of Hotel Workers and Caterers and Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers (KUDHEIHA). It is notable that the respondent did not object to the production of the CBA as evidence. Further the claimant’s pay slips indicate that he was contributing union dues towards KUDHEIHA. Therefore, it is presumed that the terms of the CBA apply to the claimant’s employment contract and hence will inform the reliefs he is entitled to.

Salary in lieu of notice

48. As I have found that the claimant was not terminated in line with fair procedure, I will award him three (3) month’s salary in lieu of notice. This is in accordance with clause 9(b) of the CBA referred to herein.

Compensatory damages

49. The court has found that despite the fact that the respondent had valid grounds to terminate the claimant’s termination, it did not comply with the requirements of fair process. To this end, the claimant is awarded four (4) months’ gross salary in compensation as damages under this head. This award takes into account his own contribution towards the termination of his employment.

Unpaid Commissions

50. The claimant has prayed for the award of commissions totaling the sum of Kshs 890,746.00. First, the claimant has merely listed the clients from whom the commissions relate. He has however not provided a breakdown and justification against each client. Coupled with this, there is no evidence linking the claimant to the sales invoices exhibited as evidence before court. In addition, the claimant admitted that he had been paid commission in certain instances. Nonetheless, he did not differentiate the sum he had been paid as earned commissions vis a vis what he is claiming against the invoices produced.
51. Simply put, the claim under this head, is too general and no correlation to the sales invoices has been provided.
52. To this end, the claim falls.



Service pay

53. The claimant has prayed for the sum of Kshs 306,402.00 being service pay. Section 35(6) of the *Employment Act* only provides for service pay where employees are not members of any pension scheme, provident fund or the National Social Security Fund (NSSF). From the claimant's pay slips he was contributing to the NSSF and deductions towards the fund, were being effected from his salary. In light thereof, he falls within the ambit of exclusions stipulated under section 35 (6) (d) of the Act hence the claim under this head falls.
54. Be that as it may, the Court notes that the respondent had tabulated the claimant's final dues and included a component of gratuity in the sum of Kshs 90,428.33 for six (6) completed years of service. In addition, there is also a computation of service charge for February, 2016 and prorated service charge for March, 2016 in the sum of Kshs 16,044.00 and Kshs 2,231.00 respectively. The respondent did not challenge the computations exhibited hence the claimant is entitled to the said gratuity and service charge as computed.

Overtime pay and public holidays

55. The claimant prays for the sum of Kshs 148,620.00 and Kshs 114,000.00 being compensation for overtime and public holidays worked respectively. These claims have not been particularized and proved. These being specific claims ought to have been specially pleaded and proved. In this respect, the claimant ought to have particularized the period he claims to have worked overtime and during public holidays and justified the same. In the case of *Rogoli Ole Manadiegi vs General Cargo Services Limited* (2016) eKLR, the Court expressed itself as follows: -

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

56. In the circumstances, the prayers for overtime and public holidays cannot be sustained.

Unpaid annual leave

57. The respondent has conceded this claim hence the claimant is awarded the sum of Kshs 38,775.00 under this head. As per the exhibit containing the final dues, the respondent had provided for leave travel allowance for 2015/2016 in the sum of Kshs 4,400.00 hence he is entitled to the same.

Damages for breach of contract

58. The relief under this head is denied as the claimant has been awarded compensatory damages which should be adequate to make good his loss.

Travel allowance, mileage allowance, travel allowance reimbursement to white stands

59. The claimant has not justified award of reliefs under these heads. If anything, the figures appear to have been plucked from the air hence the same are denied.



Underpayments

60. This claim is specific in nature hence ought to have been particularized. This was not the case. The period for which the claimant alleges he was underpaid was not specified. In this regard, the claim is declined.

Salary for days worked in March, 2016

61. The respondent has conceded to this award hence the claimant is awarded salary for four (4) days worked in March, 2016.

Staff welfare refund

62. The basis for this claim was not made. The *constitution* in respect of the said welfare, was not exhibited in court and neither did the claimant prove that he had made contributions to the extent claimed. As such, the claim is unsuccessful.
63. The rest of the reliefs being salary underpayment (room service head), fringe benefits of being room service head, salary arrears, unpaid income tax, HELB loan settlement and salary disparity are dismissed for lack of evidence.

Orders

64. In the final analysis, I enter judgment in favour of the claimant against the respondent. To this end, the claimant is awarded: -
- a. Three month's salary in lieu of notice, being the sum of Kshs 116,265.00.
 - b. Compensatory damages equivalent four (4) months' gross salary being Kshs 155,020.00.
 - c. Unpaid annual leave being Kshs 38,775.00.
 - d. Leave travel allowance for 2015/2016 being Kshs 4,400.00.
 - e. Service charge for February and March, 2016 being Kshs 18,275.86.
 - e. Salary for the 4 days worked in March, 2016 being Kshs 5,167.30.
 - g. Gratuity for 6 completed years of service being Kshs 90,428.33.
 - h. The total award is Kshs 428,331.49.
 - i. Interest on the amount in (h) at court rates from the date of Judgement until payment in full.
 - j. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For Claimant Mr. Mutonyi

For the Respondent Mr. Ondego



Court assistant Barille Sora

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

