



**Mwailinda v Chablis Limited (Cause 672 of 2016)  
[2022] KEELRC 1535 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1535 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 672 OF 2016**

**B ONGAYA, J  
JUNE 10, 2022**

**BETWEEN**

**DENIS MWANG'OMBE MWAILINDA ..... CLAIMANT**

**AND**

**CHABLIS LIMITED ..... RESPONDENT**

**JUDGMENT**

- 1 The claimant filed the statement of claim on September 15, 2016 through Apollo Muinde & Ngonze Advocates. The claimant prayed for:
  1. One-month notice payment Kshs.18, 000.00.
  2. Outstanding service pay Kshs.63, 000.00 (but by consent order at the hearing on March 22, 2022 this prayer was dropped).
  3. Maximum compensation for wrongful dismissal and unfair termination of the employment contract as per section 49 and 50 of the *Employment Act, 2007*.
  4. Any further entitlement or order the Honourable Court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the claimant submits on his final filed submissions.
  5. Costs of the cause.
  6. Interest on prayer (1), (2), and (3) above from the date of filing the cause till payment in full.
- 2 The claimant has pleaded his case as follows. He was employed continuously and uninterrupted from April 1, 2009 to July 15, 2016 under the designation of Senior Barman. Throughout the employment he earned Kshs. 18, 000.00 per month. He worked as employed and assigned until 15.07.2016 when he reported at work but was terminated without a notice. His case is that it was wrongful, unlawful and



unfair because the reasons given were not plausible to warrant the dismissal, he was not heard at all, and he had not been given prior notice of the allegations levelled against him. He alleges that section 40 of the *Employment Act*, 2007 was breached because the claimant was not prepared for the termination and applicable criteria was not followed.

- 3 The respondent filed the memorandum of response on October 18, 2016 through Robson Harris and Company Advocates. The respondent admitted employing the claimant from April 1, 2009 to July 15, 2016 under the designation of Senior Barman. The respondent pleaded that the claimant was summarily dismissed due to gross misconduct occasioned by the claimant as a result of breach of the respondent's work ethics and conduct so that he was not entitled to a termination notice. The respondent further stated that on July 11, 2016 the Stock Controller one Milda Bahati Obuya was instructed by the General Manager to conduct an emergency stock taking exercise and it was discovered that Bond 7 Whisky bottles of 250ml were in the store. The said Milda checked the requisition forms and did not see a request for the 250ml Bond 7 Whisky but that of 750ml Bond 7 Whisky. She reported her observations to the General Manager Daniela Turcanu who confirmed that she had never authorised purchase of the 250ml Bond 7 Whisky bottle as a substitute for the 750ml Bond 7 Whisky. The claimant confirmed that himself and the Store Keeper purchased the 250ml Bond 7 Whisky and emptied them in the 750ml Bond 7 Whisky bottles from a place where customers sit and served the same keeping the proceeds for themselves. The claimant had confirmed that position by voluntarily writing his statement to that effect. Further the claimant had failed to record opening and closing stocks for dry goods on various dates thus bringing his integrity into question. Also, he received less stock but never reported the same even after talks. Further, the claimant had received three warning letters on May 23, 2014, August 9, 2015 and December 15, 2015 and disciplinary advices No. 3255; 3281; and 2893 respectively. Further the respondent established a disciplinary committee to commence disciplinary hearing and the claimant was subsequently dismissed by the letter dated 16.07.2016. The termination was therefore lawful and based upon valid reasons. He had been given an opportunity to defend himself prior to the dismissal. In the circumstances the respondent urged that the claimant was not entitled to service pay because he was a member of NSSF. Similarly the summary dismissal was not unfair and notice payment and compensation were not due. He was paid Kshs. 22, 620.00 in final dues. The respondent prayed that the claim be dismissed with costs.
- 4 The claimant filed on November 4, 2015 a reply to memorandum of response. He stated that the 250ml Bond 7 Whisky was purchased with authorisation of the General Manager. Further, the warning letters did not amount to a fair hearing prior to the summary dismissal. The claimant prayed the memorandum of response be struck out with costs and judgment entered for the claimant as prayed for in the memorandum of claim.
- 5 On March 17, 2022 the respondent changed its advocates to Kilonzo & Aziz Advocates.
- 6 The claimant testified to support his case. The respondent witness No. 1 (RW1) was Milda Bahati Obuya and witness No.2 (RW2) one Dasmus Mukamba Ngao. Final submissions were filed for parties. The Court has considered all material on record and returns as follows.
- 7 To answer the 1<sup>st</sup> issue, there is no dispute that the claimant was employed by the respondent as pleaded for the claimant and admitted for the respondent.
- 8 To answer the 2<sup>nd</sup> issue for determination, there is no dispute that the claimant worked from April 1, 2009 and was summarily dismissed by the letter dated July 16, 2016.
- 9 The 3<sup>rd</sup> issue for determination is whether the termination was unfair. On procedure, the claimant confirmed that he received disciplinary advice No. 2961 dated July 16, 2016 and he signed acknowledging receipt. The allegations were stated thus, "For the last months you have failed to



sufficiently perform your duties as a Barman. You failed to open and close the stock for your dry goods on numerous dates which brings your integrity into question. Also in numerous occasions you received less from the stores than you requested and yet you failed to communicate. Even after talks you constantly request items that are not moving or needed in the bar. This cannot be tolerated anymore.” The Court finds that the disciplinary advice as received for the claimant set out allegations and it also shows that the committee meeting was held on the same 16.07.2016. The claimant signed at the space provided for employee signature and he testified as much. The Court finds that there is no reason to doubt that the claimant knew the case that confronted him and he attended the disciplinary hearing. He also testified that after the meeting he received the payment per the payslip of final dues dated July 22, 2016 and it was paid by cheque of Kshs.22, 620.25. He received it with no further claims. The Court finds that the procedure adopted by the respondent was not unfair because the claimant was given a hearing and he knew the particulars of the allegations that had been levelled against him. The misconduct as alleged amounted to gross misconduct and the respondent was entitled to act with shorter or no notice as envisaged in section 44(1) and then as read with section 41 of the [Employment Act, 2007](#).

- 10 On the reasons for dismissal, the claimant testified and confirmed that he was selling 250ml Bond 7 Whisky by emptying it in 750ml Bond 7 Whisky bottles. While alleging in his testimony that the same had been procured with the General Manager’s knowledge, the respondent’s evidence showed otherwise. In particular exhibit R 11 is the Twinkle Trading cash sale receipt on 01.07.2016 showing in July 2016 only Bond 7 of 750ml Bottles’ size had been purchased and received at stores as per local purchase order of same date at R12, delivery note at R13 and requisition at R 14. The claimant testified and confirmed that the policy was that only 750ml Bond 7 Whisky Bottles’ size is procured and sold. The claimant did not complain about the 250ml sizes to the General Manager and he continued selling the 250ml without making such reports.
- 11 As testified by RW 1 the stores and the security received the procured goods but appears the claimant significantly contributed to his dismissal when he failed to report the discrepancy. The note the claimant wrote to inform the General Manager was dated July 13, 2016 and it confirms that the discrepancy had been going on for about three months. But RW 1 testified that the reason for the dismissal was not failure to report the discrepancy to the General Manager. However, the evidence by RW2 was thus, “I was present at disciplinary meeting. Claimant was present. He was heard. He was dismissed together with purchasing officer. The two knew what was happening. Store keeper is purchasing officer issuing goods from stores.” While the reason for termination does not expressly mention the discrepancy in the Bond 7 Whisky, the claimant was clearly dismissed on account of failure to keep records about stocks at the bar and which was his responsibility – which failure appears to have made it difficult to discover discrepancies such as, that, he was selling the 250ml rather than the 750ml Bond 7 Whisky.
- 12 He was also dismissed on account of constantly receiving less items from stores than what was requested or approved and he continued requesting for unnecessary items. The Court finds that the discrepancy in the Bond 7 Whisky was such one item of negligence of duty on the claimant’s part. The claimant all along during the disciplinary process knew that discrepancy was in issue as was put to him and considered at the meeting of 16.07.2016. The Court finds that the respondent has established the reason for termination thus, “...You blatantly neglected to perform your duty in the correct manner and to inform the Administration of different challenges you were experiencing.” The claimant’s own evidence was that for three months he had noted the discrepancy and he was communicating the same to the General Manager belatedly by his note dated July 13, 2016. Thus, while reporting the inconvenience of refilling 750ml bottles with 250ml x 3 bottles in that note, he did not offer any explanation for failure to report the concern for over the previous 3 months and the Court finds that



he fully contributed to his summary dismissal. He is not entitled to compensation for alleged unfair or unlawful termination. He is also not entitled to payment in lieu of termination notice because under section 44(1) of the *Employment Act*, 2007 and as submitted for the respondent, in view of the gross misconduct, the respondent was entitled to dismiss with no or shorter notice. The Court finds accordingly.

- 13 The Court has considered all circumstances of the case including the one day in which the disciplinary process was concluded – though appropriately so under section 44(1) of the Act. It however could be that had the respondent a little more patiently walked the claimant through the disciplinary process then it would be more apparent to the claimant that he was culpable as fully contributing to his predicament. Thus, the Court returns that each party will bear own costs of the suit.
- 14 In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 10<sup>TH</sup> JUNE, 2022.**

**BYRAM ONGAYA**

**JUDGE**

