



**Omambia v Hotel Waterbuck Limited (Cause 15 of 2015)
[2022] KEELRC 1249 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1249 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 15 OF 2015
DN NDERITU, J
JULY 21, 2022**

BETWEEN

FRED OGACHI OMAMBIA CLAIMANT

AND

HOTEL WATERBUCK LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant commenced this cause by way of a memorandum of claim dated 16th January, 2015. However, the Claimant filed an amended memorandum of claim dated 17th October, 2017 claiming for:-

1. One month gross wages in lieu of notice
2. Normal overtime
3. Leave
4. Salary for 6 days for November 2015
5. Compensation for unlawful dismissal
6. Certificate of service
7. Cost of the suit to be borne by Respondent

Claims Arrangement

Notice.....Kshs. 10,378.00

Normal overtime.....Kshs. 101,318.80



Leave.....Kshs. 6,316.80
Salary for 6 days (November 2014)..... Kshs. 2,075.40
Compensation.....Kshs.124,536.00
Totals.....Kshs.244,625.00

2. The memorandum of claim, as expected, is accompanied with a verifying affidavit (undated), a witness statement by the Claimant, and a list of documents and copies of the listed documents.
3. The Respondent filed a reply to the memorandum of claim dated 27th February, 2015 wherein it denied each of the material aspects of the claim and prayed that the Claimant's cause be dismissed with costs. It also filed copies of documents that it relied on during the trial, and witness statements.
4. This matter came up for hearing before Mbaru J on 17th October, 2019 when the Claimant testified, was cross examined, re-examined and he closed his case. On the same date, Mathew Makori(RW1) and Pascal Barasa (RW2) testified in chief, were cross examined and re- examined, for the Respondent.
5. On 9th March, 2022 it was agreed that the matter proceeds for further defence hearing before this court from where Mbaru J had left. On that date, Debra Chelagat (RW3) testified in-chief, was cross-examined and re-examined. The Respondent closed its case at that point.
6. By consent, Counsel for both parties addressed the court by way of written submissions. Counsel for Claimant filed on 9th May, 2022 and Counsel for Respondent on 18th May, 2022.

II. Claimant's Case

7. Based on the amended memorandum of claim, the oral and documentary evidence, and the written submissions, the Claimant's case is that he was employed by the Respondent as a housekeeping steward on 30th August, 2012 but that he was unfairly and unlawfully dismissed summarily on 6th November, 2014.
8. The Claimant testified that his gross salary per month was Kshs.10,373/= as at the time of termination. He alleged that he worked for six (6) days a week from 7.00 a.m. to 6p.m. and that he was not paid for working overtime.
9. He alleged that he worked for a period of two (2) years and two (2) months and that during that entire period he only took one annual leave.
10. The Claimant testified that he had church duties and that when the Respondent allocated him duties on Sundays he was unable to attend to such duties. He alleged that the Respondent changed shifts which forced him to work on Sundays against his faith.
11. However, in cross-examination the Claimant admitted that he did not inform the Respondent at the time of recruitment and deployment that he could not work on Sundays. But he alleged that he informed the Respondent that he was a pastor when he started working.
12. He alleged that he was not given a warning for failing to report on Sundays and that he only received a show cause letter dated 5th November, 2014. He testified that he was not given a hearing before dismissal. He alleged that the Respondent refused to accommodate him as not to be working on Sundays. He admitted that he failed to attend work on several Sundays due to his pastoral work.
13. It is on the basis of the foregoing that the Claimant prayed that judgment be entered in his favour as prayed in the amended memorandum of claim.



III. Respondent's Case

14. The Respondent's case as presented in the pleadings, oral evidence of RW1, RW2 and RW3, the documents produced as exhibits, and the written submissions, is that it engaged the services of the Claimant on 1st January, 2013 on a term contract of two(2) years. A copy of the contract was produced as an exhibit to that effect.
15. The Respondent admits that as at the time of termination on 6th November, 2014 the Claimant's monthly salary was Kshs.10,378/= which the Respondent alleges was in line with Regulation of Wages(General) (Amendment) Order, Legal Notice 197 of 2013. A copy of the said Legal Notice was produced as an exhibit.
16. The Respondent denies that the Claimant was unfairly, unlawfully or unjustly treated or discriminated in his employment.
17. Through RW1, RW2, and RW3 the Respondent stated that the Claimant failed and refused to report to work on Sundays claiming that he was a pastor in full knowledge that due to the nature of the Respondent's business Sunday was a normal working day. The Respondent further posits that the Claimant did not disclose at the time of interview and recruitment that he needed to be out of work on Sundays for his alleged pastoral duties.
18. The Respondent states that the Claimant misrepresented himself as an ordinary and normal job seeker at the inception but later started demanding preferential treatment once he got the job. The Respondent displayed the Claimant's job application letter and staff recruitment form to demonstrate that no disclosure was made by the Claimant that he needed special accommodation to be absent from work on Sundays or that he indeed was a pastor in any church.
19. RW1, the Claimant's supervisor, testified that at the beginning the Claimant used to work on all days, including Sundays, but that from 3rd August, 2014 the Claimant started absenting himself from work without permission. This evidence was corroborated by RW2, the shop-steward of the union (KUDHEIHA) in which the Claimant was a member. RW1 and RW2 testified that when the Claimant refused to work on Sundays and even became rude about it when questioned, they forwarded the matter to the Human Resource (HR) department to deal.
20. RW3, the HR Manager, testified that the Claimant absented himself from work on Sundays without notice. She testified that the Respondent tried to accommodate him by allocating him duties on Sunday evenings whenever the duty roster placed him to work on a Sunday but the Claimant flatly refused to comply.
21. It is on the basis of the foregoing that the Respondent issued the Claimant with the show cause letter dated 5th November, 2014 which was produced as an exhibit by the Respondent. Further, the Respondent produced as an exhibit a print-out of the clock-in system used by the Respondent to demonstrate that from August, 2014 the Claimant severally refused and or failed to attend to work on Sundays.
22. RW3 testified that the Claimant did not respond to the show cause letter but nonetheless he was invited to attend the hearing which took place on 6th November, 2014. The Claimant attended the meeting in company of a union shop-steward, RW1.
23. The minutes of the said disciplinary meeting show that the Claimant was given an opportunity to respond to the allegations but he refused or failed to do so. He was given the choice to change shifts but again he maintained that he could not work on Sundays.



24. On the basis of the foregoing RW3 testified that the Respondent had no alternative other than to summarily dismiss the Claimant. The letter of dismissal dated 6th November, 2012, the clearance form, certificate of service, and terminal dues tabulation were all produced as Respondent's exhibits.
25. The Respondent through RW3 produced the clock-in system extracts to confirm that the Claimant did not work overtime.
26. The Respondent's case is that it accommodated the Claimant beyond limits and hence the dismissal was reasonable, fair, justified, and lawful. On the basis of the foregoing the Respondent prays that the Claimant's case be dismissed with costs.

IV. Issues For Determination

27. From the summary analysis above on the evidence adduced and positions taken by both parties, the following issues commend themselves to this court for determination:-
 - (a) Was the dismissal of the Claimant by the Respondent unfair, wrongful, and unlawful?
 - (b) Is the Claimant entitled to the reliefs sought for?
 - (c) Costs.
28. Counsel for both parties identified the above three issues for determination as well and this court shall deal with each one of the issues as hereunder.

V. Dismissal

29. Counsel for the Claimant has submitted that the Respondent failed to comply with Article 47 of *the Constitution* and Sections 41, 43, and 45 of the *Employment Act* (the Act) in dismissing the Claimant and hence the summary dismissal was wrongful and unlawful. He submits that the Claimant was not given a warning, was denied an opportunity to be heard, and that he was not afforded natural justice
30. On the other hand, Counsel for the Respondent has argued that the Respondent complied with all the provisions of the law, and more so Sections 41, 43, and 45 of the Act as well as Article 47 of *the Constitution* and the Rules of Natural Justice in dealing with the Claimant.
31. The evidence tendered by both sides in regard to this issue has been summarised in an earlier part of this judgment. When the Claimant applied for the job he did indicate that he needed any special accommodation in terms of being unavailable to work on Sundays. Likewise, upon recruitment and deployment the Claimant did not indicate that he wished to be excluded from working on Sundays.
32. It is also on record that the Claimant was warned twice, first verbally and then through a memo.
33. It is also the evidence on record that the Claimant was issued with a show cause letter which he failed, refused, or neglected to respond to. It is also the evidence on record that the Claimant attended a disciplinary hearing on 6th November, 2014, accompanied by a shop- steward of his union. In that meeting he held ground that he could not work on Sundays under any circumstances.
34. The above evidence by the Respondent has not been controverted by the Claimant in any way. It is also on record that the Claimant refused or failed to attend work on 3rd August, 2014, 19th October, 2014, and 2nd November, 2014 among other dates. He did not seek permission to be away on the said dates and he remained adamant and unapologetic to the end, even during the disciplinary hearing.



35. The Claimant was summarily dismissed on two grounds - absconding duty and failure to obey lawful orders from a person placed in authority by the employer, as per the letter of summary dismissal dated 6th November, 2014 which was produced by the Respondent as an exhibit. It is not disputed that the Claimant failed and refused to attend to duty as enumerated in the evidence of the Respondent. It is also not disputed that the Claimant remained adamant and unapologetic to the end and refused to work as directed by the Respondent.

36. Section 44(4) of *the Act* provides as follows:

- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause;
 - (a) without leave or other lawful cause an employee absents himself from the place appointed for the performance of his work.

The Claimant knew that he was supposed to be at work on the days that he absented himself. He did not communicate to the Respondent about his absence and he did not seek permission before hand.

37. RW3 explained that employees at the Respondent work in shifts and if one employee absents himself/herself such absence seriously and adversely affects the operations. She explained that every employee would have preferred to be off-duty on Sundays but that was not possible considering the nature of the business of the Respondent in the hospitality industry which ordinarily gets busy over the weekends.

38. RW1, RW2, and RW3 state that when they explained all the above to the Claimant he was rude and unapologetic and refused to obey the direction to the effect that he should always report to work as per duty roster even on Sundays when drafted to work.

39. The Claimant did not respond to the show cause letter but he was invited to a disciplinary hearing meeting which he attended on 6th November, 2014. The Claimant allegedly stated that if he was pushed to work on Sundays he was ready to quit the job as per evidence of RW2 and RW3.

40. In the entire circumstances stated above, it is the view and opinion of this court that the Respondent had good grounds for taking disciplinary action against the Claimant. In other words, the Respondent met the requirements of Section 43(2) of *the Act*.

41. The Respondent also complied with Section 45(2) (b) of *the Act* in that it has demonstrated through evidence that it had good reasons to dismiss the Claimant. The conduct and compatibility of the Claimant fell short of what the Respondent expected of him and moreso the Claimant failed to disclose material facts about his non-availability to work as and when needed, from the inception of the employment relationship.

42. This court is in full concurrence with Counsel for the Respondent who cited *Godfrey Barasa Ochieng v Security Guards Services Limited* (2022) eKLR to drive this point home. What else was the Respondent expected to do? Here is an employee who after securing a job, like the proverbial camel, takes it upon himself to dictate on when he wants to attend to work. He demanded preferential treatment even above those he found already working for the Respondent and he unapologetically declared that he could not work on Sundays. Was the Respondent supposed to sit back and take the terms as dictated by the Claimant? Certainly no!

43. In view of the foregoing this court takes the view and holds that in terms of substantive justice the Respondent had good and reasonable grounds for taking disciplinary action against the Claimant.



44. The need for both substantive and procedural fairness in termination and dismissal has been expressed by this court (ELRC) in many a decision including *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
45. The Claimant was warned verbally and in writing before the Respondent decided to take disciplinary action against him. He was issued with a show cause letter to which he refused to respond. He was invited to a hearing which he attended in company of a shop- steward of his choice from his union but he held a position that was unacceptable to the Respondent, to the effect that under no circumstances was he going to work on Sundays. It is on the foregoing basis that the Respondent took the decision to summarily dismiss the Claimant.
46. Internal disciplinary hearings and procedures are not court cases and it would be absurd for anyone to expect any employer to adhere to the strict rules of procedure and evidence that apply in courts of law. So long as an employee is informed of the charges in a language he understands, given an opportunity to respond to the charges, and allowed to attend a hearing in company of a colleague or a shop- steward of his choice, and given an opportunity to express and defend himself, in line with the rules of natural justice, then the employer shall have met the requirements in Sections 41, 43, and 45 of *the Act*.
47. An employee who fails, refuses, or neglects to take that opportunity to defend himself cannot come to court arguing that he was not heard. This court is in agreement with Counsel for the Respondent on this issue and the holding in *Jackson Batiya v Eastern Kenya Limited*.
48. This court holds that the Claimant was afforded a fair hearing during the internal disciplinary process and that the decision arrived at by the Respondent to summarily dismiss the Claimant was reasonable, fair, and just in the entire circumstances that prevailed.
49. In concluding this issue this court holds that the Claimant was served both substantive and procedural fairness leading up to his dismissal and this court cannot fault the Respondent on the reasons for dismissal and or the procedure adopted. It is so declared.

V. Reliefs

50. The reliefs sought for by the Claimant have been set out in Part I of this judgment. This court shall now consider each of the prayers as hereunder.
51. Prayer (1) is for one month’s pay in lieu of notice. This is a case of summary dismissal which dismissal was solely caused and occasioned by the Claimant. The Respondent was not obliged to keep an employee who was unwilling to work by the rules. It was under no obligation to issue a notice or pay in lieu thereof to an employee who by his own conduct was threatening the business of the establishment of the Respondent. The Respondent was under no obligation to issue notice or pay in lieu thereof to an employee who was clearly unwilling to work as lawfully directed and with no apology or remorse. This court is in concurrence with the sentiments of Onyango J in *Vincent Abuya Obunga v Mast Rental Services Limited* (2019) eKLR that no notice or pay in lieu thereof is owed to an employee who is found to have authored, caused, and occasioned his own summary dismissal.
52. Prayer 2 is for “Normal overtime”. The Respondent produced records of the employment of the Claimant in accordance with Sections 10 and 74 of *the Act* and there is no evidence that the Claimant worked overtime at any point. There is no evidence from the Claimant that he indeed worked overtime. In the circumstances this prayer must fail.



53. Prayer 3 is for leave pay in the sum of Kshs.6,316.80. In the Final Dues Form produced as exhibit 9 by the Respondent it admits that it owed the Claimant in respect of 17.5 days of leave. In the circumstances the Claimant is awarded the admitted sum of Kshs.6,316.80 in annual leave.
54. Prayer 4 is for salary for 6 days worked in November, 2014. The evidence on record is that the Claimant was in employment of the Respondent until 6th November, 2014 when he was summarily dismissed. Without splitting hairs the Claimant is awarded the claimed sum of Kshs.2,075.40
55. Prayer 5 is for compensation and the same is denied as the dismissal was found to have been fair and reasonable in an earlier part of this judgment.
56. The Respondent produced a certificate of service to the Claimant as an exhibit. The Claimant is free to collect the same if he has not done so already.

VI. Costs

57. The Claimant has only succeeded to a small extent in to this cause. The Respondent has succeeded to a large extent in its defence of this cause. In the interest of justice and fairness each party shall bear own costs.

VII. Disposal/orders

58. This court orders as follows in final disposal of this matter:
 - (a) A declaration be and is hereby issued that the summary dismissal of the Claimant by the Respondent was reasonable, fair, and lawful.
 - (b) The Claimant is awarded:-
 - (i) Leave pay - Kshs.6,316.80
 - (ii) Salary for six (6) days worked
in November, 2014 - Kshs.2,075.40
Total - Kshs.8,392.20
 - (c) The Claimant is directed to collect the certificate of service from the Respondent if he has not done so already.
 - (d) Each party shall meet own costs
 - (e) Except for what is expressly granted herein all the other prayers by the Claimant are denied and dismissed.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF JULY, 2022.

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DAVID NDERITU

JUDGE

