



**Ibia v Resort Kenya Limited (Cause 64 of 2015)
[2022] KEELRC 1717 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1717 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 64 OF 2015
MA ONYANGO, J
JULY 20, 2022**

BETWEEN

JACKSON KIRAGU IBIA CLAIMANT

AND

RESORT KENYA LIMITED RESPONDENT

JUDGMENT

1. Vide his Amended Statement of Claim dated November 8, 2019 and filed in Court on November 9, 2019, the claimant avers that his employment was wrongfully and unlawfully terminated by the Respondent, a registered limited liability company.
2. He avers that he was employed by the Respondent on or about November 1, 2004 in the capacity of Dealer D earning a monthly salary of Kshs 9,300/- with a house allowance of Kshs 3,100/-.
3. That he performed his duties diligently and to the Respondent's satisfaction and as a result was promoted to the position of supervisor and his salary reviewed upwards over time to Kshs 65,000/-. That he held this position for a period of 10 years until November 7, 2014 when the Respondent unlawfully, unfairly and without just cause terminated his employment.
4. Aggrieved by the decision to terminate his employment, the Claimant filed the instant Claim and seeks the following reliefs:
 - a) Kshs 3,320,000/- together with interest, comprising of the following: -
 - i. 3 months' salary in lieu of notice Kshs 195,000
 - ii. Service pay for period worked Kshs 650,000
 - iii. Emotional distress for 1 year Kshs 780,000
 - iv. Overtime Kshs 500,000



- v. Unpaid 90 public holidays Kshs 195,000
 - vi. Unfair termination Kshs 1,000,000
- Total Kshs 3,320,000
- b) Costs of this suit
 - c) Interest on (a) and (b) above
 - d) Any other relief that this Court may deem fit and expedite to grant.
5. In response to the Claim, the Respondent filed a Statement of Defence dated and filed in Court on February 13, 2015 in which the Respondent avers that the Claimant was summarily dismissed for gross misconduct in line with the Respondent's Rules and Regulations. That its actions were within the law as it complied with the provisions of Section 44 (3) of the *Employment Act*, 2007 as read with the Claimant's Employment Agreement dated August 9, 2004.
 6. The Respondent argued that the Claimant's dismissal was lawful, all the Claimant's dues were paid to him at the time of separation and as a result he has no claim against the Respondent.
 7. The Respondent contended that the Claimant is not entitled to any compensation as prayed in his Statement of Claim. It urged this Court to dismiss the claim with costs to the Respondent.
 8. The suit was heard on November 11, 2019 and February 16, 2021 with the Claimant testifying on his behalf and the Respondent calling one witness to testify on its behalf.

Claimant's Case

9. The Claimant CW1, in his evidence in chief reiterated the averments made in his amended Statement of Claim and adopted his list of documents filed in Court on January 21, 2015 as exhibits in his Claim.
10. The Claimant denied the Respondent's contention that he had abandoned his duties to assist one of the Respondent's customers to play cards. He maintained that on the day of his summary dismissal he was assisting one of the Respondent's regular clients to hold her cards, with the knowledge and the consent of one Mr Grusel Ogretmen, one of the Respondent's managers.
11. He further testified that the customer he was assisting went on to lose and at the time he was leaving the Respondent's premises she had lost a total of Kshs 240,000/-, with the net effect that the Respondent had made a profit of Kshs 240,000/-.
12. The Claimant testified that he was invited to a disciplinary hearing on October 30, 2014. He testified that he was not accorded a fair hearing as he was just called by the Respondent's Human Resource Officer and informed to be present at the hearing with a witness. He testified that he was not informed of the reasons for the hearing prior to being invited to appear.
13. He averred that he was not aware of the Respondent's Rules and Regulations and that the same were issued to members of staff after he had ceased being a member of the Respondent's staff.
14. He maintained that he was not paid any of his dues at the time of separation. He urged this Court to find merit in his claim and allow it in terms of the reliefs sought therein.
15. On cross examination CW1 denied engaging in patronising as alleged by the Respondent and insisted that he only held the client's cards upon her request after getting approval from the Respondent's Manager, Mr Ogretmen who was present during the whole incident.



16. On re-examination CW1 stated that he requested the Respondent to avail one of its managers during the disciplinary hearing but his request was not allowed and the hearing proceeded to conclusion. That he was subsequently issued with a warning letter and a suspension letter to pave way for further investigations, then he was later issued with a letter of summary dismissal.

Respondent's Case

17. The Respondent called one witness, Paul Mbugu Kamau, RW1, who adopted his witness statement dated April 2, 2019 and filed in Court on April 3, 2019 as his evidence in chief. In his statement RW1 reiterated the averments made in the Respondent's Statement of Defence.
18. He further relied on the list and bundle of documents dated and filed in Court on February 13, 2015 as exhibits in this claim.
19. RW1 testified that the reason for the Claimant's summary dismissal was fraternisation with one of its customers which was not allowed.
20. RW1 stated that the Claimant got too close to one of the Respondent's customers and proceeded to assist her while playing. He explained that the Claimant, being the pit boss, was tasked with supervising the gamers to ensure all the rules and regulations were strictly adhered to by all the players. That the Claimant failed to carry out his tasks in the prescribed manner when he engaged in the gaming process.
21. RW1 testified that he was not present at the gaming table and could not confirm if this was what exactly happened as he was informed by one of the Respondent's managers one Mr Grusel Ogretmen. That he also viewed the CCTV footage that confirmed the events of the day.
22. RW1 further testified that he invited the Claimant to a disciplinary hearing which the Claimant attended accompanied by one Hellen Nyokabi, his colleague. He further testified that he was present at the disciplinary hearing on behalf of the Respondent alongside the Respondent's Security Manager.
23. RW1 further testified that the Claimant was informed of the reason for the hearing being that he engaged in customer relations when he decided to assist one of the Respondent's customers who had complained about loosing. He further stated that the CCTV footage was played at the disciplinary hearing which confirmed that the Claimant was indeed holding the customers cards.
24. RW1 further testified that minutes of the hearing were recorded and duly signed after which the Respondent decided to summarily terminate the Claimant's employment on the grounds of fraternising which is against the Respondent's rules and regulations. He further stated that the Respondent's rules are clearly displayed at its notice board within the premises and the Claimant cannot therefore claim not to be aware of the same.
25. He stated that the Claimant was not entitled to compensation as pleaded in his Amended Claim as the termination of his employment was lawful and procedural.
26. On cross examination, RW1 stated that the reason for the termination of the Claimant's employment was fraternising with a customer which was forbidden. He further stated that as pit boss the Claimant was expected to be playing a supervisory role that involves a lot of movement hence, he was not to be stationed at one spot as the Claimant was.
27. He testified that the Claimant's suspension and subsequent termination was as a result of his conduct. That the Claimant was given a fair chance to make his representation at the disciplinary hearing prior to the Respondent's decision to terminate his employment.



28. RW1 affirmed that whether or not the respective customer whose cards were held by the Claimant lost the game was irrelevant and that the Claimant was guilty of violating the Respondent's rules and regulations and as such the termination was warranted. He added that the Claimant did not deny the accusations levelled against him.

Submissions by the Parties

29. It is submitted on behalf of the Claimant that he was not granted a fair hearing as envisaged under Section 41 of the *Employment Act*, 2007. It was further submitted that the Claimant was issued with a suspension letter dated October 30, 2011 and a hearing notice dated the even date.
30. He submitted that the Respondent failed to call the pit boss who was on duty to attend the disciplinary hearing despite his requests to call the said manager to testify at the disciplinary hearing. He further submitted that due to this failure his summary dismissal was unlawful, wrongful and unfair.
31. The Claimant submitted that he did not violate any of the Respondent's rules and regulations by holding cards for one of the Respondent's customers who eventually lost the game. He submitted that the Respondent failed to avail its rules and regulations for inspection by this Court and can therefore not rely on the same.
32. It is further submitted that there were no valid reasons for the termination of the Claimant's employment as required under Section 43 of the *Employment Act*, 2007 and thus the termination was unfair within the meaning of Section 45 of the *Employment Act*, 2007.
33. It is on these grounds that the Claimant maintained that he is entitled to the reliefs sought in his Claim. For emphasis the Claimant relied on the Court's findings in the cases of *Nicholus Muasya Kyula v Farmchem Limited* [2012] eKLR, *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR and *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR.
34. The Claimant urged the Court to be guided by the provisions of the law and the authorities relied upon to find merit in his Claim and allow it as prayed.

Respondent's Submissions

35. The Respondent on the other hand submitted that the Claimant's termination was fair and was occasioned by a valid reason as provided in Section 43 of the *Employment Act*, 2007. To buttress this argument the Respondent relied on the Court of Appeal decision in the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR and the case of *Vincent Nyachibwede v Bob Morgan Services Limited* [2017] eKLR where the courts held that for a termination to be fair the employer must have a valid reason for the same by dint of the provisions of Section 43 of the *Employment Act*, 2007.
36. The Respondent further submitted that the Claimant's actions of abandoning his duties as supervisor was tantamount to gross misconduct contrary to the Respondent's rules and regulations and as such his summary dismissal was lawful by dint of the provisions of Section 44(3) of the *Employment Act*, 2007.
37. The Respondent maintained that having had a valid reason to terminate the Claimant's employment and having followed due process the Claimant is not entitled to the reliefs sought in his claim.
38. The Respondent submitted that the Claimant is not entitled to the 3 months salary in lieu of notice as pleaded given that he was summarily dismissed. For emphasis the Respondent relied on the Court's findings in the case of *Winnistone Ayiekba Musioni v Ereto Bookshop Limited* [2019] eKLR where the



Court held that notice pay is not payable to an employee who is summarily dismissed for justifiable reasons.

39. The Respondent further submitted that the Claimant is not entitled to service pay as he was not declared redundant in accordance with the provisions of Section 40 of the *Employment Act*, 2007.
40. The Respondent further submitted that the Claim for emotional distress cannot be awarded to the Claimant as it lacks basis given that this Court lacks the requisite jurisdiction to make such an award.
41. On the claim for overtime payment the Respondent argued that the prayer cannot be allowed by this Court for want of proof. The Respondent maintained that the Claimant failed to plead days that he worked overtime to support his Claim. For emphasis the Respondent relied on the Court findings in the case of *Jamal Noor Ramadhan v Jagged Alliance Limited* [2020] eKLR where the Court declined a similar relief for want of documentation such as attendance sheets to demonstrate that the Claimant had worked outside the official hours stated in his contract.
42. The Respondent further argued that the claim for unpaid 90 days holidays worked ought to be dismissed for want of proof. To buttress this argument the Respondent relied on the case of *Kennedy Mutuku Mwove v M-Kopa Kenya Limited* [2021] eKLR where the Court declined a similar relief for want of proof.
43. The Respondent maintained that it has demonstrated that the Claimant's termination was lawful and procedural as he was accorded an opportunity to make his representation prior to his termination and thus the claim for compensation for alleged unfair termination lacks basis.
44. In conclusion the Respondent urged this Court to find that the Claimant's termination was lawful, fair, just and met the acceptable standards as set out in the *Employment Act*, 2007 and as such should dismiss the Claim in its entirety with costs to the Respondent.

Analysis and Determination

45. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties hereto there is no dispute that the Claimant was employed by the Respondent effective August 4, 2004 to November 7, 2014. It is further not in dispute that the Claimant's employment was terminated by the Respondent on November 7, 2014.
46. The issues for determination therefore are:
 - i) Whether the Claimant's termination was valid both procedurally and substantively;
 - ii) Whether the Claimant is entitled to the reliefs sought.

Unfair termination

47. Under Section 45 (2) of the *Employment Act* termination of an employee's contract of service is unfair if his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employees conduct, incapacity and compatibility and that while arrive at the decision to terminate the services of such an employee fair procedure was followed.

Reason for termination

48. The Claimant's letter of termination dated November 7, 2014 reads as follows:

“November 7, 2014



Mr Jackson Kiragu Ibara,
Id No XXXXX, issued at Central
Position: Junior Pit Boss

Dear Sir,

RE: Summary Dismissal

The management regrets to inform you that due to a serious breach of rules and regulations of the Company and negligence in performing your duties, the company has no other choice but to summarily dismiss you.

The Fact

While on duty on October 12, 2014, you abandoned your responsibility as a supervisor and joined a customer where you personally played a card game. Subsequent to that, you were given a hearing on November 31, 2014 after which your actions were found to have amounted to gross misconduct.

Because of this you are summarily dismissed with immediate effect without benefits.

Upon returning company's property, you will be paid your dues as follows:

Bullets

* Due salaries

* Annual if any

The company reserves the right to any further legal action.

Kind Regards,

(Signed)

Mr. Paul Mbugu Kamau

Human Resource Manager”

[Emphasis]

49. From the letter of dismissal, the reason given for the Claimant's termination is abandoning his lawful duties as supervisor when he personally engaged in a card game. The Claimant testified that he did not abandon his work or play a card game with a customer.
50. The Claimant in his defence maintained that he held cards on behalf of one of the Respondent's customers who had stated she was feeling unlucky.
51. He maintained that he only held the cards with the approval of one Mr. Grusel Ogretmen. He further maintained that he did not play or assist the customer to play. That she eventually lost a total of Kshs 240,000/- to the Respondent. The Claimant maintained that he did not act in a manner to disadvantage the Respondent.
52. Section 41 of the *Employment Act*, 2007 provides for the procedure to be followed while terminating the services of an employee. The section provides as follows:

An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor 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.

53. The Claimant in evidence and submissions maintained that he was not given reasons for his termination. He however admitted having been invited to a disciplinary hearing and attending the same in the company of one Hellen Nyokabi a colleague and that the Respondent failed to avail the manager on its part despite his requests for the manager to attend the hearing.
54. I have examined the Respondent's rules and regulations attached to the List and Bundle of documents dated and filed in Court on February 13, 2015. Fraternization with customers is a ground of gross misconduct and employees found guilty are liable to suspension or summary dismissal.
55. In the instant case, the Claimant testified that he did not fraternise with the client. All he did was to hold the cards for the client as she played. To fraternise means to become familiar and friendly to an enemy or a person with whom one is not allowed to be friendly, in the present case, an employee of the casino socialising with a customer. The Respondent's rules did not prohibit merely holding cards while a customer played. Only fraternising was prohibited.
56. The Claimant testified that he first sought the approval of Mr. Grusel Ogretmen before holding cards for the customer. There was no evidence that besides holding the cards at the request of the customer with permission of Mr Ogretmen, the Claimant had any other relationship with the customer.
57. The Claimant had worked with the Respondent for a long time, over 10 years, and was expected to know the rules of the game. There was no allegation that he had ever broken the rules before. There was in fact no allegation of any history of misconduct by the Claimant.
58. I find that the Respondent did not prove that the Claimant fraternised with the client in a manner that was prejudicial to the Respondent's business. The Respondent did not deny that it failed to call a pit boss to the disciplinary hearing or that the Claimant requested for the same. A pit boss would, in the opinion of the Claimant, have clarified the issue and absolved him of any wrong doing. I thus find that there was no valid reason for termination of the Claimant's employment. The Respondent had opportunity to call Mr. Ogretmen as a witness but failed to do so even after the Court allowed him to testify virtually.
59. Having found no valid reason for termination of the Claimant's employment, the termination was unfair and I declare accordingly.

Remedies

60. The Claimant having been terminated unfairly, is entitled to pay in lieu of notice and compensation. His employment contract provided for three (3) months' notice or pay in lieu. I award him the same at Kshs 195,000/-.
61. No evidence was adduced in respect of emotional distress, overtime, public holidays and service pay. The same are rejected.
62. Having found the termination unfair and taking into account the circumstances under which the Claimant's employment was terminated which was without any fault on his part, his length of service of over 10 years with no adverse reports or history of misconduct, and the fact that he went home without any benefit, further taking into account that he earned so many promotions during his service, and all the relevant factors under Section 49(4) of the Employment Act, I award the Claimant 12 months' salary as compensation being Kshs 780,000/-.

The total award therefore is Kshs 975,000/-.*



63. The Respondent shall pay the Claimant's costs and interest shall accrue at Court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF JULY 2022

MAUREEN ONYANGO

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 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 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.

MAUREEN ONYANGO

JUDGE

