



Mwamburi and Mwalasha – As administrators of the estate of Hannah Kche Mwalasha (Deceased) v Resort (Cause 41 of 2018) [2022] KEELRC 1367 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1367 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 41 OF 2018**

**B ONGAYA, J
JULY 8, 2022**

BETWEEN

**JOSEPH MWALASHA MWAMBURI AND SHARON MUMBI MWALASHA –
AS ADMINISTRATORS OF THE ESTATE OF HANNAH KACHE MWALASHA
(DECEASED) CLAIMANT**

AND

LEISURE LODGE RESORT RESPONDENT

JUDGMENT

1. The claimant (Deceased) filed the memorandum of claim on 02.02.2015 through Stephen Oddiaga & Company Advocates. The claimant pleaded as follows. That the respondent employed her on February 28, 1986 as a Shop Sales Girl and she worked for 27 years until November 12, 2013 when she received a letter of summary dismissal. On November 12, 2013 she appealed against the summary dismissal but the appeal was rejected. As at summary dismissal she earned Kshs. 16, 511.00 per month. Her case is that the summary dismissal was unfair because she had committed no wrong at her place of work and she was never given an opportunity to be heard before being dismissed. Her further case is that the respondent had refused to or ignored to pay her terminal dues and no tabulation had been done to show whatever was due. She claimed for:
 - a. Salary up to October 30, 2013 Kshs. 16, 511.00.
 - b. House allowance up to October 30, 2013 Kshs. 6,000.00.
 - c. Service charge up to October 30, 2013 Kshs. 9, 500.00.
 - d. 7 days of pending accrued off days Kshs. 4, 445.00.
 - e. 18-days accrued leave up to October 30, 2013 Kshs. 24, 767.00.
 - f. Gratuity for 27 years at half monthly salary plus house allowance Kshs. 384, 912.00.



- g. Prorate leave travelling allowance for 18-leave days Kshs.24, 767.00.
 - h. General damages for wrongful dismissal 16, 511 x12 Kshs. 198, 132.00.
 - i. Total claim Kshs. 669, 034.00.
2. The claimant prayed for payment of the money, costs of the suit, plus interest.
 3. The respondent filed the response to the memorandum of claim on April 16, 2015 through Wanja & Kibe Advocates. The respondent admitted employing the claimant as pleaded for the claimant but denied that the summary dismissal had been unfair. The respondent pleaded that the summary dismissal was on account the claimant's failure to carry out the assigned duties and failure to obey a proper command from her immediate manager and contrary to section 44(4) (a) and (e) of the Employment Act, 2007 and, the provisions of the collective bargaining agreement (CBA). Further she was accorded a hearing per the letter dated 09.11.2013, her appeal was fairly considered and, dismissed for lack of merits per the letter dated 18.11.2013. Further the claimant cleared, her dues were calculated per the CBA per statement of final dues dated 28.05.2014, and the letter dated 14.12.2013 invited the claimant to collect the final dues but, she failed to collect the same. The tabulated dues were Kshs.172, 949.00 which the respondent was willing to pay and the claimant is not entitled to any further payment beyond that computed sum. The respondent pleaded that the suit was premature for want of compliance with the CBA provisions, the claimant having been a member of the trade union KUDHEIHA. The respondent prayed that the suit be dismissed with costs.
 4. The claimant died on January 18, 2016 and an application for her substitution was filed on July 26, 2016. The application was allowed by consent order on 10.10.2016.
 5. The claimant's witness was Joseph Mwalasha Mwamburi (CW). He testified on February 17, 2020. His evidence was that the claimant (deceased) was his wife and he had been granted leave to prosecute the suit in her behalf. He further stated that he fully relied upon the witness statement the claimant had filed as attached on the memorandum of claim. He urged the Court to grant the prayers. He testified that he was not conversant with the circumstances of the summary dismissal and he did not know if the claimant had been taken through the disciplinary procedures.
 6. The respondent's witness (RW) was Jackson Nzioki Mutiso. His evidence was as follows:
 - a) The respondent employed the claimant (deceased) as a Shop Sales Girl effective February 1, 1986. she was terminated when she absconded duty without any excuse or leave. Her manager conducted her on phone and asked her to resume duty to perform assigned duties to do stock taking at the shop as it was urged but she failed to resume duty. Her conduct therefore amounted to gross misconduct per section 44(4) (a) and (e) of the Employment Act and the provisions of the CBA.
 - b) He relied on the exhibited letters. The letter of summary dismissal is dated November 9, 2013. the letter refers to the claimant's absence from duty on 31.10.2013 without lawful reasons and the subsequent hearing on 08.11.2013 in presence of the Chief Accountant, HR manager, and the works committee chairman. The letter states that the hearing had confirmed that the claimant had left her place of duty without completing the prescribed leave forms and her direct manager had not approved her absence. On October 30, 2013 her supervisor had assigned her to finish certain duties with consignment goods on the October 31, 2013, the effective date of her absence. The letter states that she had not let her supervisor know that she would not report on duty on October 31, 2013 until later that date when she was discovered to be absent. When the supervisor's secretary called the claimant on phone on October 31,



2013the claimant replied that she was travelling. The letter stated that while the claimant argued that she was due to take her off effective October 31, 2013, she proceeded without realigning the arrangement mutually with her manager and there was no approved document on the days she was to be away on off duty. The letter states that by her conduct she was thereby negligent, insubordinate, and absconded from work leading to poor service delivery by her department. The letter states she was culpable of gross misconduct by reason of absence from duty without due leave or lawful cause and, she failed to obey her supervisor's lawful command in breach of section 44(4) (a) and (e) of the Employment Act, 2007. The letter stated that the claimant was thereby dismissed and her dues would be calculated in line with her years of service, accrued wages, leave or off days, any allowances due, less statutory deduction and monies owed to the respondent.

- c) The letter dated November 18, 2013shows that the claimant appealed against the summary dismissal by her letter dated November 12, 2013but the appeal was disallowed on the grounds no new material had been urged to justify the setting aside of the summary dismissal.
- d) In the letter of appeal dated November 12, 2013the claimant indicates that she had 7 pending leave-days annual leave of 18 days. The leave form was ready, she was given, and she signed it, and took it to the chief accountant for approval but who said he was not going to sign the form at that time until evening at 5pm. She then replied, "Yes Sir" and left work the office. The letter further states that at a few minutes past 5.00pm the boss came and asked her if she had finished taking the stock of the items in the shop and she replied that the consignment items had not been packed. She was asked if she could extend the hours but the claimant replied that she came from far and so she could not extend the hours upon which the boss stated that is the work was not done then the claimant should report at work the following day to finish the consignment on 31.10.2013 which was to be returned to the owners. The letter states that later at around 6pm, the claimant handed the keys to Henry (the boss) and she left (that was on the evening of October 30, 2013). The appeal letter further states that on October 31, 2013Monica telephoned the claimant to inform her that Henry was looking for her but unfortunately, the claimant was travelling to Nakuru. On November 6, 2013Monica again telephoned her and conveyed that the HR Manager wanted to see the claimant on 08.11.2013 and the claimant confirmed to attend at 2.00pm on that date. The claimant stated in the letter that she had a clean record of over 27 years of service and was being sacked on account of summary dismissal to have gone out without permission and without a warning letter. She requested the management to reconsider the summary dismissal.
- e) The letter dated December 14, 2013was addressed to the claimant by the respondent on terminal dues. The letter confirmed that the claimant's final dues would be calculated as follows:
 - i. Salary up to including October 30, 2013.
 - ii. House allowance up to October 30, 2013.
 - iii. Service charge up to including October 30, 2013.
 - iv. 7 days pending offs or holidays accrued up to including October 30, 2013.
 - v. 18 days accrued leave up to and including October 30, 2013.
 - vi. Gratuity (27 years at ½ basic salary and house allowance for each completed year of service)



- vii. Prorate leave travelling allowance 18 days.
 - viii. Less any other monies owed to the respondent.
- f) The claimant's final dues calculations were computed as dated May 24, 2014 as follows and with a base of basic salary of Kshs.16, 511.00.
- i. Salary up October 30, 2013 Kshs.0.00.
 - ii. House allowance up to October 30, 2013 Kshs. 0.00.
 - iii. Gratuity Kshs. 16, 511 x 27-years x ½ Kshs. 222, 898.50.
 - iv. Service charge up to October 30, 2013 paid.
 - v. 18-days accrued leave 18x 542.82 Kshs. 9, 770.76.
 - vi. 7 days accrued holidays 7x542.82 Kshs.3, 799.74.
 - vii. Leave travel allowance (LTA) for 18-days/26 x 4400 Kshs. 3, 046.15.
 - viii. Gross pay Kshs. 239, 515.15.
 - ix. Less advances/ loan consignment sales Kshs. 66, 566.00.
 - x. Net dues payable Kshs. 172, 949.00.
- g) By the letter dated 13.01.2015 the respondent conveyed to the claimant that her final dues had been calculated at Kshs. 172, 949.00.
- h) RW testified that the claimant had been paid her salary for October 2013 per pay slip exhibited on the claimant's bundle at page 17. However, he had no evidence of the payment to the claimant such as relevant bank slip or statement. On house allowance RW confirmed the pay slip showed no payment of house allowance but testified that she was housed at the hotel. However, no evidence was provided for allocation of a house to the claimant but RW referred to the letter of appointment which stated that the wage was Kshs.1, 120 plus accommodation. RW testified that service charge for October 2013 had been paid per the exhibited payslip at Kshs.9500.00. On 7 days pending holidays, RW testified the same was due as computed in final dues payable. Similarly, accrued leave was due for 18 days as computed in final dues. Gratuity was also due as computed in final dues just as prorated leave.
7. Final submissions were filed for the claimant but none were filed for the respondent. The Court has considered the material on record and returns as follows.
 8. To answer the 1st issue, there is no dispute that the respondent employed the claimant as pleaded. She served for 27 years.
 9. To answer the 2nd issue, the Court returns that the contract was terminated by summary dismissal as conveyed to the claimant in the letter dated November 9, 2013. The claimant appealed but the respondent disallowed her appeal.
 10. To answer the 3rd issue the Court returns that the termination was not unfair. Prior to the summary dismissal and in reference to the dismissal letter, the claimant did not deny that she was invited to a disciplinary hearing in presence of the chairman of the works committee and she was heard in self exculpation. The Court finds that the procedure adopted substantially complied with section 41 of the Employment Act, 2007 on hearing. Further, the allegations were about gross misconduct and under



section 44 of the Act, the Court finds that the respondent was entitled to summarily dismiss the claimant with no or shorter notice as was contractually anticipated.

11. On the reasons for termination, the claimant's own appeal letter must be trusted as a true account of the circumstances of the summary dismissal. It was on the evening of 30.10.2013. The claimant had requested to go on some leave or offs effective October 31, 2013. She had completed the relevant leave forms but her supervisor had not approved. It appears the supervisor desired she completes the work particularly on certain consignments prior to approving the leave. By close of normal working hours on October 30, 2013 the work had not been completed. The supervisor asked the claimant to do an extension in working hours that evening (so as to start her offs the next day) but she declined stating that she came from a distance. She then left in circumstances that the supervisor had asked her to report the following day to complete the assignment in issue or to do the extension. It turned out that she did not report on October 31, 2013. The Court finds that first, on 31.10.2013 the supervisor had not approved the claimant's absence from duty effective that date, and, second, the claimant had failed to perform her supervisor's lawful instructions about the work relating to the consignment in issue on October 30, 2013. The Court finds that the claimant was culpable as was levelled against her. The reason for termination was genuine per section 43 of the Act and it related to the claimant's conduct, compatibility and capacity as well as the respondent's operational requirements as envisaged in section 45 of the Act.
12. While making that finding the Court has considered section 28(4) that the employer and employee agree on how to utilise any excess leave days. It was therefore, in the opinion of the Court, important that the parties agree on the claimant's taking of her accumulated off days or leave days. It appears that the claimant was not willing to strike a reasonable or any compromise but to force her way. In particular, the supervisor offered that she extends on 30.10.2013 in lieu of reporting on October 31, 2013 to complete the work but she, without a reasonable compromise, opted not to extend and not to report the following day. It appears that after she left on 31.10.2013, she was contacted but she never offered mitigating circumstances or explanation and, she continued on leave without approval by the supervisor until she was summoned on November 6, 2013. The Court finds that the conduct amounted to gross misconduct as was levelled by the respondent against the claimant.
13. The answer the 4th issue on remedies the Court finds as follows:
 - a) Salary up to October 30, 2013 Kshs. 16, 511.00 is found due. Despite the pay slip having been issued, RW provided no evidence that indeed the claimant was paid. The claim is justified.
 - b) House allowance up to October 30, 2013 Kshs. 6,000.00 is declined. The basis of this claim is not established at all. The contract was that the claimant was to be paid the monthly wage plus accommodation. The agreement was well within provisions of section 31 of the Act that an employer at all times provides reasonable housing accommodation to the employee. No grievance is shown to have existed about the housing as may have been provided. The claim is declined.
 - c) Service charge up to October 30, 2013 Kshs. 9, 500.00 is awarded per the last payslip but RW having failed to provide evidence that the same had been paid.
 - d) 7 days of pending accrued off days Kshs. 4, 445.00 is allowed at Kshs. 3, 799.74 as computed for the respondent in final dues calculations as based on last monthly wage.
 - e) 18-days accrued leave up to October 30, 2013 Kshs. 24, 767.00 is allowed at Kshs. 9, 770.76 as computed by the respondent in the final dues calculations.



- f) Gratuity for 27 years at half monthly salary plus house allowance Kshs.384, 912.00 is allowed at Kshs. 222, 898.50 as computed by the respondent based on the last monthly pay.
 - g) Prorate leave travelling allowance for 18-leave days Kshs.24, 767.00 is awarded at Kshs. 3, 046.15 as computed by the respondent in the final dues calculations.
 - h) General damages for wrongful dismissal 16, 511 x12 Kshs. 198, 132.00 are declined as not justified as the termination has been found not to have been unfair.
14. RW offered no testimony about the Kshs. 66, 566.00 deducted as per the respondent's final dues calculations. The narration suggests it was a loan or advance or consignment sales. However, no pleading or evidence was offered to justify the deduction and the amount found due will be payable without such deduction. In any event, that amount has not been shown to have been an issue at the disciplinary hearing. Its deduction is suspect and unjustified. The Court finds that the claimant (now deceased) was entitled to a sum of Kshs.265, 526.15. The claimant has substantially succeeded but the Court has also considered the respondent's willingness to pay the final dues but for the few differences in computation as established in this judgment. The Court returns that to balance justice for parties the respondent will pay 50% claimants' costs of the suit, plus, interest in terms of the final orders to issue and as may become due.
15. In conclusion judgment is hereby entered for the claimants against the respondent for orders:
- 1) The respondent to pay to the claimants Kshs.265, 526.15 by 01.08.2022 failing interest to be payable thereon at Court rates from the date of filing of the suit till full payment.
 - 2) The respondent to pay the claimants' 50% costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 8TH JULY, 2022.

BYRAM ONGAYA

JUDGE

