



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oguma v Nairobi Gymkhama (Cause 1099 of 2018)  
[2022] KEELRC 4862 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4862 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1099 OF 2018  
MN NDUMA, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**ALICE ANYANGO OGUMA ..... CLAIMANT**

**AND**

**NAIROBI GYMKHAMA ..... RESPONDENT**

**JUDGMENT**

1. The suit was filed first on 24<sup>th</sup> June, 2018 and was amended on 25<sup>th</sup> January, 2019 and further amended on 3<sup>rd</sup> February, 2021.
2. C.W.1 the claimant testified that she was employed by the respondent on contract in the year 2013 and was later employed on 14<sup>th</sup> January, 2014 as a steward on permanent basis. That she was upgraded to a waitress.
3. At the time the employment was terminated, the claimant earned Kshs 43,533 having started on a salary of Kshs 21,000.
4. C.W.1 testified that on 27<sup>th</sup> April, 2018, she was given a show cause letter to explain why she overcharged a member for a bottle of wine. That she responded to the notice to show cause on 18<sup>th</sup> April, 2019. The notice and response were produced before Court.
5. C.W.1 testified that she did not overcharge the member as narrated in the letter dated 28<sup>th</sup> April, 2018. C.W.1 testified that as a waitress she was not allowed to handle cash and the only persons who could do so were supervisors as per the respondent's policy. That her supervisor Mr. Steve Mutichi was paid for the respective bills since C.W.1 was busy serving other clients but the supervisor did not consult C.W.1 to verify the sum payable.
6. C. W1 stated that on 25<sup>th</sup> March, 2018, the following day, the barman called her and informed her that she had pending bills for three beers. C.W.1 enquired from the supervisor about the bills but he was



- very uncooperative. The member came back the day that followed and when C.W.1 enquired about the unpaid three beers the member confirmed they had cleared all the bills and had paid the money to the supervisor. That the supervisor then later alleged that C.W.1 had overcharged the bottle of wine with Kshs 550 without proof and in bad faith, C.W.1 testified.
7. That C.W.1 was forced to pay Kshs 570 for the three beers despite the supervisor having taken the money from the customers.
  8. C.W.1 testified further that on 28<sup>th</sup> May, 2017, she was unfairly summarily dismissed on grounds that she had overcharged a member.
  9. That her testimony was disregarded by the respondent yet Mr. Mutichi admitted having been paid by the member on the material day.
  10. C.W.1 stated that her dismissal was unlawful and unfair and was not for a valid reason. C.W.1 testified that she had a loan of Kshs 105,000 which she took on 29<sup>th</sup> August, 2017. That she was unable to repay as a result of the dismissal.
  11. That she claims maximum compensation for the unlawful dismissal, payment of service gratuity for 5 years served; three months' salary in lieu of notice in terms of the Collective Bargaining Agreement; payment of loan arrears in the sum of Kshs 149,572.25 and refund of unlawful payment and deductions of Kshs 1,120,000 from her salary. The claimant also seeks costs of the suit and interest. C.W.1 testified that she was still unemployed and had obtained an 'O' level certificate which she had been unable to collect due to fees arrears. C.W.1 testified that she now lives with her grandfather.
  12. Under cross-examination, C.W.1 explained that the waiters used Captain Order Book. That it is in triplicate for the client/barman and file copy.
  13. C.W.1 stated that one Justus Moreka, served the wine in question.  
That Kshs 550 was deducted from the salary in respect of the wine. She had also repaid the 3 beers. C.W.1 stated that she received gratuity for two years instead of five (5) years. C.W.1 stated she was paid in lieu of leave days not taken. C.W.1 denied she had received gratuity every year adding that she only received gratuity once for two (2) years.
  14. C.W.1 denied she was rude to any person. C.W.1 added that her advocate wrote a letter of demand to the respondent.
  15. C.W.1 added that she was unlawfully accused since her Supervisor had made out the bill to the member on the material day and had received payment in her absence. That this was on Saturday 24<sup>th</sup> May, 2018.
  16. C.W.2 was David Munyao, a Co-worker of the claimant. C.W.1 testified that he worked at Central restaurant in Gymkhana and knew the claimant since the year 2016. C.W.2 said he served food to the same couple. C.W.1 sold drinks to them on 24<sup>th</sup> May, 2018. C.W.2 said he saw the supervisor getting paid for the drinks by the same couple. That the couple paid cash. C.W.1 could not collect cash. Only the supervisor was authorized to take cash. C.W.2 said the supervisor had collected the money in the absence of C.W.1. C.W.2 said he was surprised that C.W.1 was surcharged for that bill and later summarily dismissed.
  17. C.W.2 said he was not called to the disciplinary hearing.

### **Defence case**

18. R.W. 1 Stephen Mutichi relied on a witness statement dated 30<sup>th</sup> July, 2018 and filed on 7<sup>th</sup> August, 2018 which he adopted as his evidence in Chief. R.W.1 testified that C.W.1 was dismissed from work



- for overcharging a customer. He stated that he was called on 24<sup>th</sup> March, 2018 at Banda Section since he worked at Poolside. The receptionist said that a customer had a complaint at Banda tw0 (2). The customer had bills in his hand and was complaining. R.W.1 was asked the price of beer and told the customer it was Kshs 115. That the bill was reading Kshs 120. That C.W.1 had been allocated to serve Banda 2 by R.W.1. R.W.1 testified that he called C.W.1 and asked about the matter and C.W.1 answered that it was a mistake and matter ended.
19. R.W.1 added that on the following day, 25<sup>th</sup> March, 2018, the customer who sat at the poolside at 11 am went without paying for 3 beers. R.W.1 asked the customers who said, they had paid for the drinks and had no pending bill.
  20. That the customer ordered a bottle of Four (4) Cousins wine. That the Bar man Ben Musili billed the customer and kept the bill there. The Bill was for Kshs 900. The customer then asked if the wine was cheaper at the poolside bar since he had paid Kshs 1,450 for the same wine the night before at the Banda Restaurant. The customer went to Banda where C.W.1 was and asked for the wine bill on 24<sup>th</sup> March, 2018. C.W.1 told him that if he wanted her to pay the bills for him, she would do so with her salary. That C.W.1 was rude to the customer. The customer wrote an email complaining about C.W.1. The complainant went to the Human Resource Manager who called C.W.1 to explain but she declined.
  21. The disciplinary committee summoned C.W.1 who appeared with a union secretary Mr. Justus Murega. R.W.1 stated that a disciplinary hearing took place. C.W.1 was asked to provide a copy of the Captain's Order since each order had 3 copies. R.W.1 testified that the foil copy for the wine was not there. C.W.1 was found guilty and dismissed for stealing from a customer.
  22. R.W.1 explained that every waiter had a captain's order book which they keep. That the book is numbered in series. When the book is full, it is then changed. That customers pay for drinks by members' card. The waiter is allowed to take cash to load the card at the reception which is a 100 metres away.
  23. R.W.1 testified that C.W.1 was paid cash since the said member had no card on that day. The member paid Kshs 1,450 but the said amount was not in the Club's record.
  24. Under cross-examination, R.W.1 stated that he was called by one Alex, a waiter to resolve a customer complaint. That the bill had an error which was then corrected. R.W.1 stated that only a bar man could handle cash but not a waiter but a waiter could take cash to load in a member's card. R.W.1 said that all other bills were there in C.W.1's Captain Order Book but the book copy for the wine order of Kshs 1, 450 was missing from the book. R.W.1 denied that he is the one who was paid cash for the wine and other drinks on 4<sup>th</sup> March, 2018. R.W.1 insisted that C.W.1 had overcharged the customer for wine and that C.W.1 had plucked out the book copy of the wine order.
  25. The Barman and the customer did not also produce their receipts. The customer said he had left the receipt behind. R.W.1 said they relied on the customer's word against that of C.W.1 since the C.W.1 was obliged to keep the book copy of the Captain Order but had plucked the same in violation of the club directive. R.W.1 testified that the barman was paid cash by C.W.1 to release the wine. R.W.1 stated that the barman did not testify at the disciplinary hearing nor in Court.
  26. R.W.2 Lydia Odhiambo testified that she was the Human Resource and Administration Manager of the respondent since August, 2018. R.W.2 said she was not working for the respondents when C.W.1 was dismissed from employment. That she only relied on the club's records including the employee file. R.W.1 stated that C.W.1 had filled leave forms for 28 working days per year. That C.W.1 and all employees went on leave and the records show that clearly. That C.W.1's payslip show that she was paid leave travelling allowance. That C.W.1 was paid service pay before every new contract and the payslips



show that. That payslips for May,2018 show that C.W.1 was paid final dues including basic pay; house allowance; leave pay for 4 months worked in 2018, over time and service pay for two years. That salary arrears in respect of Collective Bargaining Agreement increment was also paid. C.W.1 was paid Kshs 225,934.38 gross pay upon her exit and that service pay for the period 2014/2015 had also been paid. That C.W.1 was subjected to a fair hearing.

27. That a certificate of service was prepared and is ready for collection by the C.W.1. R.W.2 stated under cross-examination that from the records C.W.1 was validly dismissed for stealing from customer by over-billing him. That she had been given cash to fill temporary card at the reception. R.W.2 insisted that C.W.1 had destroyed the Captain's Order.
28. R.W.1 and RW2 denied that the cash had been paid to RW.1 for the wine as alleged by C.W.1.

### **Determination**

29. The parties filed written submissions and the Court has delineated issues for determination as follows: -
  - (i) Whether the termination of C.W.1's employment was for a valid reason following a fair procedure.
  - (ii) What remedies if any is C.W.1 entitled to.
30. Upon a careful consideration of the testimony by C.W.1, C.W.2, R.W.1 and R.W.2 the facts established before Court are that on 24<sup>th</sup> March, 2018, C.W.1 served a club member who did not at the time have in his possession a member's card, a bottle of Four Cousin's wine. C.W.1 testified that the member paid C.W.1 the bill for the day in cash whereas R.W.1 testified that C.W.1 had received Kshs 1,450 from the member for the wine to load a temporary card to be used to pay for the wine since members could not pay for drinks in cash directly to the waiters. C.W.2 testified that he was present when the member paid the bill on 4<sup>th</sup> March, 2018 and that he had paid R.W.1 directly since R.W.1 being a barman he was authorized to receive cash unlike a waiter.
31. In this trial on this contested issue, it was the word of C.W.1 against that of R.W.1. R.W.1 told the Court that at the disciplinary hearing they had relied on an email complaint of the member. That the member did not produce the alleged bill of Kshs 1,450 nor did R.W.1 produce the third copy of the impugned bill which he was supposed to keep.
32. It is also common cause that C.W.1 did not produce the book copy of the impugned bill of Kshs 1,450. The respondent accused C.W.1 of having plucked the bill whereas C.W.1 stated that she had not used her order book for that particular order since the book was full and that payment was made directly to the barman. R.W.1 admitted that the barman on 4<sup>th</sup> March, 2018 did not testify at the disciplinary hearing.
33. It is the Court's conclusion that there was no cogent evidence at the disciplinary hearing and before Court to contradict the testimony by C.W.1 that the barman was paid directly for the wine and that she had not received any payment in cash for the wine in the sum of Kshs 1,450. Neither the barman nor the member was called to rebut the testimony by C.W.1. C.W.2 collaborated the evidence by <sup>th</sup> March, 2018.  
C.W.1 that he saw the barman receive payment in respect of the wine and beers on 4
34. Neither R.W.1 nor R.W.2 witnessed that transaction but only received a report a day later in respect of the matter. R.W.1 and R.W.2 only relied on the records of the matter years later.



35. In terms of Section 43(1) and (2) of the *Employment Act*, 2007, the employer must prove on a balance of probabilities that it had a valid reason to terminate the employment of the employee. The employee carries the evidential burden of rebuttal in terms of Section 47(5) that the alleged reason relied upon by the employer was not valid. Over all however, the employee has to prove its case as pleaded in terms of Section 107, 108 and 109 of the *Evidence Act*, Cap. 80 Laws of Kenya sufficiently for the Court to find in his/her favour.
36. In the present case, only C.W.1 and C.W.2 had direct evidence on the happenings of the 4<sup>th</sup> March, 2018.
37. R.W.1 and R.W.2 relied on secondary evidence and there was no explanation why the barman and the affected members did not testify at the disciplinary hearing and before Court on matters that they were directly involved.
38. To this extent, the Court finds that the claimant discharged her onus to show that the respondent did not have a proved valid reason to dismiss her from employment.
39. The Court also finds that failure by the Respondent to summon available primary witness, was a substantial flaw in procedure which denied C.W.1 the chance to question her accusers.
40. Accordingly, the dismissal of the claimant from employment violated Sections 41, 43, and 45 of the *Employment Act*, 2007 and was therefore unlawful and unfair for lack of a valid reason to dismiss the claimant from her employment.
41. The claimant is entitled to compensation in terms of Section 49(1) (c) read with 49 (4) of the *Employment Act*, 2007.
42. The claimant had served the respondent for a period of five (5) years. The claimant had been paid gratuity for the period she had served the respondent in addition to other terminal benefits she received upon dismissal in the sum of Kshs 225,934.38. The claimant is a young employee who lost prospects of continued employment for many years and career progression with the club, on the basis of unfounded accusations. The claimant's salary was unlawfully deducted in the sum of Kshs 1,120 on unproven allegations of overcharging followed by a dismissal.
43. The claimant was not compensated for the unlawful and unfair loss of her employment to her loss and detriment.
44. The claimant was not paid in lieu of three month's salary in terms of the Collective Bargaining Agreement between the union and the employer. The Court finds that the claimant is entitled and she be paid three months' salary in lieu of notice in the sum of Kshs 130,599.00. This had been denied to her on the basis that she was summarily dismissed.
45. The Court finds that the respondent did not sufficiently prove that the claimant had contributed to her summary dismissal by not calling crucial witness to be challenged by the claimant at the disciplinary hearing and before Court.
46. The Court relies on the case of: -
  - (i) Liz Ayany versus Leisure Lodges Limited ELRC No.2210 of 2014
  - (ii) Dorcas Kemunto Wainaina versus PAS (2018), eKLR



to award the claimant the equivalent of three (3) monthly salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs 130,599.00

47. In the final analysis, Judgment is entered in favour of the claimant against the respondent as follows: -

- (i) Kshs 130,599 in lieu of three (3) months' notice.
- (ii) Kshs 130,599 being the equivalent of three months' salary in compensation for the unlawful and unfair dismissal of employment.  
Total award Kshs 261,198.
- (iii) Interest at Court rates from date of judgment till payment in full.
- (iv) Certificate of Service to be given to the claimant within 14 days of this judgment.
- (v) Costs of the suit.

48. The claim for payment of Loan arrears is bad in law, has not been proved and is dismissed it being a personal loan to the claimant who must bear full responsibility for its repayment.

**DATED AND DELIVERED AT NAIROBI (ONLINE) THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Claimant in person

M/s Ateko Ingati for Respondent

Ekale – Court Assistant

