



REPUBLIC OF KENYA



KENYA LAW
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**Kisai v Boma Hotel (Cause 1315 of 2017)
[2022] KEELRC 3941 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3941 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1315 OF 2017
MA ONYANGO, J
SEPTEMBER 20, 2022**

BETWEEN

VALERIE KUSIDI KISAI CLAIMANT

AND

BOMA HOTEL RESPONDENT

JUDGMENT

1. By her statement of claim dated July 10, 2017, the Claimant avers that the Respondent unfairly terminated her employment. She seeks the following remedies: -
 - a. A declaration that the Respondent's dismissal of the claimant from employment was unlawful, unfair and inhumane and the Claimant is entitled to payment of her terminal benefits and compensatory damages.
 - b. Payment of the Claimants terminal benefits and damages totalling to Kshs.799,454/- as tabulated here under:-
 - i. One month's salary in lieu of notice Kshs.52,235
 - ii. Service charge for the month of July Kshs.18,206
 - iii. 15 days of leave not taken Kshs.26,117
 - iv. Salary for month of August Kshs.53,235
 - v. Service charge for the month of August Kshs.22,841
 - vi. Compensatory Damages for the wrongful unlawful and unfair dismissal calculated at 12 months gross salary being (Kshs.52,162 x 12 months) Kshs.626,820



Total claim Kshs.799,454

- c. Interest on (b) above from date of filing suit until full payment
 - d. Costs of this Claim.
2. The Claimant was employed by the Respondent, a five-star hotel, as a waitress from January 21, 2013. She was summarily dismissed from employment by letter dated August 26, 2016. The grounds for dismissal were that she delayed service to guests to a point where the guests complained to the general manager. The Respondent considered this as careless and improper performance of her duty and therefore gross misconduct justifying summary dismissal.
 3. In her claim, the Claimant avers that she worked diligently and to the satisfaction of the Respondent, that the Respondent conducted a sham hearing and she was not accorded sufficient time to prepare for the hearing. That during the hearing the Respondent did not substantiate the allegations against her. Further that she lodged an appeal that the Respondent failed to acknowledge or act on.
 4. In the statement of response dated May 9, 2018, the Respondent denies the averments in the statement of claim and states the dismissal of the Claimant was fair and procedural. It avers that the Claimant was properly notified of the hearing by letter dated August 23, 2016 and accorded enough time to prepare for the hearing which took place on August 25, 2016.
 5. The Respondent avers that during the disciplinary hearing the Claimant contended that she was not well equipped to offer successful service to the guests.
 6. The Respondent contends that the Claimant had on several occasions prior to the dismissal been cautioned on her working habits as is evident from letters annexed to the statement of response.
 7. At the hearing of the Claim, the Claimant testified on her behalf while the Respondent called Mohamed Welly, its Human Resource Officer who testified on its behalf. Parties thereafter filed and exchanged written submissions.
 8. I have considered the evidence on record and the submissions. The issues arising for determination and the following:
 - i. Whether the termination of the Claimant's employment was unfair;
 - ii. Whether the Claimant is entitled to the reliefs sought.

Unfair Termination

9. It was the Claimant's evidence that the reason for termination of her employment was that she refused to serve customers, that this was not true. She testified that she was issued with the letter dated 23rd August 2016 notifying her of the disciplinary hearing on the day of the hearing. That she was called from home to collect the letter and informed about the hearing. That she was not able to prepare a witness.
10. Under cross examination, she stated that she reported for work late once and was called and gave an explanation. She stated she was aware that the rules and regulations provided that staff should not use phones at work. She denied that the union officials talked to her about her performance at work.
11. The Claimant further denied having been issued with any letters of caution. When shown letters at pages 19 to 22 of the Respondent's bundle she admitted having received them. Page 19 is a show cause letter dated May 4, 2016 for reporting to work late. Page 21 is a show cause letter dated March 1, 2016



for reporting to work late and lying that she was at the Human Resource office. Page 22 is a caution letter dated 8th February 2016 for using her phone at work.

12. The Claimant states that she was issued with a show cause letter dated 22nd August 2016 which accused her of failing to serve guests. She stated it was only one guest whom she did not serve. She stated that she responded to the show cause letter and was invited for a disciplinary hearing which she attended on 25th August 2016.
13. The Claimant testified that after receiving the letter of dismissal, she did not clear because she lodged an appeal. She however stated she did not have any proof that she had lodged the appeal.
14. For the Respondent, RW1 testified that the reason for termination of Claimant's employment was two complaints from clients who had an early airport pick up but were neglected by the Claimant. RW1 testified that the Claimant had other warnings relating to performance of her work. That the Human Resource Officer had even requested the Union's Food and Beverage Works Committee Representative to talk to the Claimant over her behaviour and performance of her duties but she did not change.
15. RW1 testified that before termination the Claimant was invited for a disciplinary hearing where she was asked to bring any witnesses. That she was represented by three union officials at the hearing.
16. RW1 testified that the Claimant did not file any appeal. That when RW1 issued her with the dismissal letter she told him that they would meet in Court. That the Claimant had not cleared or collected her terminal benefits.
17. It is the Respondent's submission that the Claimant carelessly and improperly performed her duties and was therefore guilty of gross misconduct justifying her summary dismissal.
18. The Respondent submitted that before the dismissal it complied with requirements of fair procedure as set out under Section 41 and there was valid reason as per Section 43 of the *Employment Act*.
19. The Respondent relied on the case of *Walter Ogal Anuro v Teachers Service Commission* where the Court held that for termination to pass the fairness test it must be shown that there was not only substantive justification for the termination but also procedural fairness.
20. The Respondent further relied on the decision in *Said Ndege v Steel Makers Limited* [2018] eKLR where it was held that –

“The Claimant was correctly summarily dismissed, for an employment offence, which he owned up to having committed. Once an Employee has conceded to wrongdoing, latter-day complaints about lack of valid reason and fairness of procedure, in the process of termination, can only be of academic value....”
21. From the proceedings of the disciplinary hearing held on August 25, 2016 as annexed at page 25 of the Respondent's bundle of documents, it is evident that the Claimant was taken through a disciplinary hearing where she was represented by three union representatives. She admitted at the hearing that she did not handle the guests well because she was not well equipped on that date as the equipment, the coffee making machine, failed. She attributed this to the fact that she was on night shift for the first time. She also admitted that she did not report to the Night Manager that she was experiencing any challenges.
22. Section 41 and 43 of the *Employment Act* are clear on the procedure before termination of employment. The Respondent complied by issuing to the Claimant a notice to show cause which she responded to, she was invited for a disciplinary hearing which she attended and was found guilty



of misconduct. Her performance before the termination was questionable as she had received four warnings and caution letters between February and May 2016 before the incident that led to her dismissal which occurred in August 2016.

23. I find that the dismissal was in compliance with the law.

Remedies

24. The Claimant is not entitled to pay in lieu of notice as her dismissal was not unfair. She is also not entitled to compensation for wrongful or unfair termination for the same reason.

25. The Claimant is entitled to salary and other terminal benefits as set out in her letter of dismissal, being salary up to August 26, 2016, service charge and leave days earned up to the date of dismissal. The Claimant is also entitled to a certificate of service.

26. Other than the terminal dues and certificate of service, the claim is without merit and is dismissed with no orders as to costs.

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

