



**Manegene v Mamba Group of Hotels Limited & another (Cause 211 of 2017) [2022] KEELRC 12836 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12836 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 211 OF 2017  
L NDOLO, J  
OCTOBER 13, 2022**

**BETWEEN**

**ESTHER MANEGENE ..... CLAIMANT**

**AND**

**MAMBA GROUP OF HOTELS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SIZZLING GRILLS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This dispute arises from the termination of the claimant's employment on September 5, 2015. The claimant sets out her claim in a memorandum of claim dated February 6, 2017 and filed in court on February 7, 2017. The respondents filed a joint response on March 7, 2017.
2. At the trial, the claimant testified on her own behalf. The respondent called three witnesses; Daniel Riano Oyuga, the 1<sup>st</sup> respondent's general manager, Philip Chacha who described himself as security manager and the assistant human resource manager, Ruth Kago. The parties also filed written submissions.

**The Claimant's Case**

3. The claimant states that she was an employee of the respondents having been employed verbally as a storekeeper from July 3, 2014 until September 5, 2015, when her employment was terminated. At the time of termination, the claimant earned a monthly salary of kshs 18,000.
4. Regarding the background to the termination, the claimant avers that on July 25, 2015, her brother, Tirus Thuo Manegene, who was also an employee of the respondents, was assaulted and injured by a fellow employee at the respondent's outlet, Lazarus Inn.



5. The claimant pursued justice for her brother by demanding for accountability and the arrest of those responsible for her brother's injuries.
6. On September 5, 2015, the claimant's employment was terminated. She terms the termination as unlawful and unfair as there was no valid reason for it and she was not accorded a fair hearing.
7. The claimant accuses the respondents of victimising her and now seeks the following remedies:
  - a. 12 months' salary in compensation.....kshs 216,000.00
  - b. 1 month's salary in lieu of notice.....18,000.00
  - c. Unpaid salary for 5 days in September 2015.....3,461.50
  - d. Unpaid leave for 1 year.....18,000.00
  - e. Unpaid house allowance @ 15% of monthly salary.....40,500.00
  - f. Any unremitted NSSF & NHIF dues for 2014 & 2015
  - g. Costs

### **The Respondents' Case**

8. In their joint response dated March 4, 2017 and filed in court on March 7, 2017, the respondents admit having employed the claimant but deny her claim of unlawful and unfair termination of employment.
9. The respondent states that if at all the claimant's employment was terminated, then it was done lawfully and legally as the claimant was summarily dismissed for gross misconduct and for absconding duties.
10. The respondents deny the claimant's entire claim and ask the court to dismiss it.

### **Findings and Determination**

11. There are two (2) issues for determination in this case:
  - a. Whether the claimant has made out a case of unlawful termination of employment;
  - b. Whether the claimant is entitled to the remedies sought.

### **Unlawful Termination?**

12. In her memorandum of claim and witness statement filed in court, the claimant states that her employment was terminated because she was following up a case of assault of her brother at the respondents' premises.
13. In their defence, the respondents state that the claimant herself deserted duty. The law is now settled that an employer alleging that an employee has deserted duty is required to demonstrate efforts made to reach out to the deserting employee.
14. In *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR Abuodha J held that:

“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”



15. In its decision in *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR this court stated the following:

“Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.”

16. The respondent’s third witness, Ruth Kago claimed to have called the claimant on phone but she did not tender any evidence to support her word. All she relied on was an unsigned letter dated September 7, 2015, addressed to the claimant. Kago was unable to give a credible explanation as to why the letter was unsigned. She confirmed that the letter was not served on the claimant, ostensibly because the claimant could not be reached.
17. The court was not convinced that the respondents were unable to reach the claimant. What emerges is that no efforts were made to get in touch with her.
18. Moreover, from the testimony of the respondents’ own witnesses, it appears that the respondents and their officers were preoccupied with the incident involving the claimant’s brother, Tirus Thuo Manegene. Although the dispute before me is not about Tirus, the respondents’ witnesses expended a lot of time attacking the character of Tirus and passing off the incident as attempted suicide rather than an assault. Because Tirus’ case is pending before another court, I will say no more on this issue.
19. Back to the claimant’s case; Ruth Kago told the court that around the time the claimant left employment, she was facing disciplinary proceedings on allegations of theft in the stores. Again, no evidence was adduced to support this averment.
20. Looking at this case in totality, it seems to me that the respondents were on a fishing expedition to find fault with the claimant so as to justify the termination of her employment.
21. On a balance of probability, I reject the respondents’ line of defence that the claimant deserted duty and adopt the claimants’ testimony that her employment was terminated without justifiable cause and in violation of due procedure.

## Remedies

22. Pursuant to the foregoing findings, I award the claimant four (4) months’ salary in compensation. In making this award, I have taken into account the claimant’s length of service and the respondents’ unlawful conduct in the termination transaction.
23. I further award the claimant one (1) months’ salary in lieu of notice.
24. Under section 74 of the *Employment Act*, the responsibility of keeping employment records is placed on the employer. The respondents were therefore the custodians of the claimant’s employment records including payment of her salary, house allowance component and utilisation of her annual leave entitlement.
25. The respondents did not produce any such records and the claimant’s pleadings thereon were therefore unchallenged. In the result, the claims for salary for 5 days in September 2016, house allowance and leave pay succeed and are allowed.



26. With the claim for house allowance being allowed, I load the figure of kshs 2,700 onto the claimant's salary for purposes of tabulation of her claim.
27. Regarding the claim for unpaid NSSF and NHIF dues, the only thing to say is that any such dues would be payable to the respective statutory body and not to the claimant. This claim therefore fails and is disallowed.
28. In the end, I enter judgment in favour of the claimant as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally in the following terms:
- |    |   |                       |
|----|---|-----------------------|
| a. | 4 months' salary in compensation.....         | kshs 82,800           |
| b. | 1 month's salary in lieu of notice.....       | 20,700                |
| c. | Salary for 5 days in September 2016.....      | 3,450                 |
| d. | House allowance for 14 months (2,700*14)..... | 37,800                |
| e. | Leave pay for 1 year (20,700/30*21).....      | 14,490                |
|    | <b>Total.....</b>                             | <b><u>159,240</u></b> |
29. This amount will attract interest at court rates from the date of judgment until payment in full.
30. The claimant will have the costs of the case.
31. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kandere for the claimant

Miss Wangui for the respondent

