



**Mulomba v Panari Hotel Limited (Cause 1041 of 2017)
[2022] KEELRC 13301 (KLR) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1041 OF 2017
SC RUTTO, J
NOVEMBER 25, 2022**

BETWEEN

ROSE MWIKLAI MULOMBA CLAIMANT

AND

THE PANARI HOTEL LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted the instant suit *vide* a statement of claim dated June 7, 2017 through which she avers that she was employed by the respondent on September 22, 2011 as a receptionist/cashier. She states that she conducted her duties within the terms and conditions of her employment contract.
2. The claimant further avers that on February 20, 2017, she was placed on suspension. As it came to be, the suspension set in motion a disciplinary process which led to her eventual termination from employment on March 1, 2017. It is that termination which has triggered the instant suit. According to the claimant, her termination was unlawful and unconstitutional and it is for this reason that she claims the sum of Kshs 1,118,628.00 being one month's salary in lieu of notice, compensatory damages, salary for the month of February, 2017, annual leave pay, prorated leave travel allowance, gratuity and severance pay.
3. Upon being served with the statement of claim, the respondent entered appearance through the firm of Mbugua Mureithi & Co Advocates but did not file a defence to the claim.
4. On June 20, 2022 when the matter proceeded for hearing, the claimant testified in support of her case, while the respondent elected not to call any oral evidence.



Claimant's Case

5. The claimant started off by adopting her witness statement and documents filed together with the statement of claim, to constitute her evidence in chief. She proceeded to produce the said documents as her exhibits before court.
6. In her testimony before court, the claimant stated that on February 20, 2017, she received a show cause letter from the respondent's Human Resource and Administration Manager, seeking an explanation on certain unbalanced accounts on two separate transactions for figures amounting to Kshs 17,309.30. That she responded to the said letter on the same day, explaining herself and amending the irregularity thereby balancing the accounts. That, she also received a letter of suspension from duty on the same day, owing to the same unbalanced accounts. That she was perplexed since no monies were missing, with the only issue being unbalanced accounts on the system and which had since been balanced.
7. That she proceeded on suspension for two weeks to pave way for investigations. That on February 22, 2017, she received a show cause letter making inquiry into the issue. That she reiterated her earlier sentiments, and explained herself further asserting that the necessary amendments to the system had been made.
8. She stated in further testimony that the respondent convened a disciplinary meeting which was aimed at investigating the unbalanced accounts. That she was summoned for a hearing whereupon she explained the schedule of events. That at the end of the meeting, no allegations were leveled against her and no theft was insinuated by the unbalanced accounts.
9. She further stated that no finding was made to confirm the loss of any monies. That based on this finding, new allegations were leveled against her during the hearing, to portray that she had performed certain accounting malpractices from the December 8, 2016 up to January 9, 2017. That she was not aware of these facts since they were not the subject of the meeting and neither was she given an opportunity to interrogate them. That she was at a loss to explain herself and no documentation was produced to support the respondent's allegations.
10. That after the meeting, she received a letter of summary dismissal. That the respondent did not issue her with any notice prior to her termination. That the respondent gave her various recommendation letters and promotions to show that she performed duties assigned to her diligently.
11. That she was unfairly and unlawfully terminated from employment without reason, procedure or accepted practice with regards to termination and added that the respondent acted maliciously, without legal basis and in flagrant disregard of the *Employment Act*, 2007 in its decision to terminate her contract of service.
12. As stated before, the respondent elected not to call oral evidence hence the trial was marked as closed following the claimant's testimony. Thereafter, directions issued on filing of submissions.

Submissions

13. It was submitted on behalf of the claimant that there was no substantive justification for her termination and that the same was without sufficient reasons. That further, the claimant submitted that the respondent did not suffer any loss from her actions. It was the claimant's further submission that the procedure adopted in terminating her did not meet the statutory requirements provided in the *Employment Act*. In support of her submissions, the claimant placed reliance on the cases of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, *Kenfreight (E.A) Limited v Benson K. Nguti* (2016) eKLR and *Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR.



14. The respondent did not file any submissions as the same were not on the court's physical record and could not be traced on the online platform.

Analysis And Determination

15. The court singles out the following issues for determination:
 - a. Whether the respondent had a justifiable reason to terminate the claimant's employment.
 - b. Whether the claimant was accorded procedural fairness prior to being terminated from employment.
 - c. Is the claimant entitled to the reliefs sought?

Justifiable Reason?

16. Section 43(1) of the *Employment Act* (Act), requires an employer to prove the reasons for an employee's termination, and in absence thereof, such termination is deemed to be unfair. Closely related to this provision is section 45 (2) of the Act, which qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
17. Basically, these are the legal parameters for establishing substantive fairness of a termination from employment.
18. The reasons for which the claimant was dismissed from employment can be ascertained from his letter of summary dismissal which is couched in part:

“RE: Summary dismissal

We refer to the minutes of the proceedings on the disciplinary hearing which you attended with your chosen representative on March 1, 2017 after suspect transactions were discovered on the cashier's floating hand-over summary sheets for various dates (February 14, 2017; February 15, 2017; January 9, 2017; January 6, 2017; December 23, 2016; December 20, 2016; December 16, 2016; December 14, 2016; December 11, 2016; December 10, 2016 and December 8, 2016.

From your written statement dated February 20, 2017 it is evident that you willfully recorded these transactions on your issues of cashier's float as re-imbursing with full knowledge that this was contrary to the SOPs and which you have previously practiced as a cashier and then head cashier. You willfully avoided informing the duty manager or your immediate supervisor on these transactions but you concealed them until they were unearthed. The transactions enumerated above and your blatant denial on other similar transaction prior to the ones discovered for 14th and February 15, 2017 has resulted in putting into question your integrity and honesty as the head cashier/receptionist. In your position you were tasked to supervise other cashier/receptionists but you were the one abusing the set procedures.

By agreeing that you did not do what you were required to as the head cashier in reference to the discrepancies on dates noted above, it becomes clear that you carelessly and improperly performed your assigned work which from its nature you had a duty under your contract to have performed carefully and properly. For this reason, by invoking the *Employment Act*



2007 section 44(4)(c) the management had decided to summarily dismiss your employment with Panari Hotel effective March 1, 2017 subject to your right to appeal...”

19. From the claimant’s letter of termination, it is apparent that she was accused of carelessly and improperly performing her assigned work. The specific allegations against the claimant were in respect of suspect transactions which were discovered on the cashier’s floating hand-over summary sheets for various dates. The claimant was also alleged to have willfully recorded the said transactions on her issues of cashier’s float as re-imburements with full knowledge that this was contrary to the SOPs.
20. Revisiting the provisions of sections 43(1) and 45(2) (a) and (b) of the Act, the burden was on the respondent to establish the fairness and validity of the reasons advanced.
21. As stated herein, the respondent did not file a response to the claim. Therefore, it did not tender evidence in whatever form or manner to indeed prove the allegations against the claimant. On this score, it is notable that the respondent’s standard operating procedures were not exhibited so as to confirm that indeed, the claimant acted to the contrary.
22. More importantly, the respondent did not lead evidence to demonstrate the manner in which the claimant breached its accounting procedures. On this note, the respondent did nothing to counter the claimant’s assertions particularly as regards the manner in which she was required to report the transactions in question.
23. This being a case involving accounting procedures and transactions, it behoved the respondent to prove by way of cogent evidence that indeed, the claimant had acted in an improper manner. This is coupled by the fact that such accounting procedures and transactions are technical in nature.
24. It may well be said that since the respondent elected not to tender any documentary and oral evidence, the claimant’s assertions that she had balanced the accounts and made the necessary amendments to the system, largely remained uncontroverted.
25. Needless to say, the reasons leading to the claimant’s termination from employment were not substantiated hence cannot be proved to have been fair, valid and related to her conduct and performance.
26. In the end, the respondent failed to discharge its legal burden as per the requisite standard hence the claimant’s termination was unfair within the meaning of sections 43 and 45(2) (a) and (b) of the Act.

Procedural Fairness?

27. With regards to procedural fairness, section 45 (2) (c) of the Act, requires an employer to prove that it accorded an employee a fair hearing prior to termination from employment.
28. The specific requirements of a fair process are provided for under section 41 of the Act. In this regard, an employer is required to notify an employee of the intended termination, the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
29. From the record, it is apparent that the claimant was initially issued with an internal memo through which she was required to explain the cash float reimbursement discrepancy between February 14, 2017 to February 15, 2017.
30. The claimant tendered her explanation on February 20, 2017, following which she was placed on suspension to allow for more investigations. Subsequently, the claimant was issued with a letter asking her to show cause why she should not be subjected to a process before the disciplinary committee.



31. It is apparent from the record that she responded to the show cause letter on February 23, 2017 in which she tendered her defence and denied any wrongdoing.
32. She was subsequently invited to appear before a disciplinary committee on March 1, 2017 and from the minutes exhibited, she appeared with a representative by the name Peter Lolmondooni. It bears from the record that she was given an opportunity to defend herself against the charges read out to her.
33. It is the claimant's contention that new allegations were leveled against her during the disciplinary hearing. From the disciplinary record, it is evident that the claimant was required to "expound more on the identified discrepancies recorded as reimbursements on February 14, 2017, February 15, 2017, January 9, 2017, January 6, 2017, December 23, 2016, December 20, 2016, December 16, 2016, December 14, 2016, December 11, 2016, December 10, 2016 and December 8, 2016."
34. It is notable that the show cause letter which the claimant was required to respond to, was only in respect of two dates, that is 14th and February 15, 2017. Indeed, her initial explanation on February 20, 2017 was in regards to those two dates only and it is in that regard that she was placed on suspension.
35. It is therefore evident that the charges in respect of the other transactions relating to the period between December 8, 2016 up to January 9, 2017 only came up during the claimant's disciplinary hearing. As such, they constituted new charges for which the claimant was required to answer to afresh. This being the case, it was only fair that the claimant be issued with a fresh notice to show case and allowed more time to prepare her defence in respect of the new charges.
36. As a matter of fact, it was an ambush on the part of the respondent to introduce new charges during the hearing without any notice to that effect. Going in for the disciplinary hearing and having noted the charges in the notice to show cause issued to the claimant on February 22, 2017, it is more than probable that she was only ready to answer to the charges relating to the transactions of 14th and February 15, 2017. In this regard, she had no time to process the fresh charges and respond appropriately.
37. Subsequently, in as much as the respondent appeared to have complied substantially with the requirements of section 41 of the Act, upto the hearing stage, the entire process which had erstwhile seemed procedural was marred by the introduction of the new charges at the eleventh hour. In the end the outcome of the hearing was unfair against the claimant.
38. To this end, and taking into consideration all factors, I cannot help but find that the claimant's dismissal was unfair and unlawful.

Appropriate Reliefs

39. As I have found that the claimant's termination from employment was unfair and unlawful, the court awards her compensatory damages equivalent to six (6) months of her gross salary. This award takes into account the length of the employment relationship and the fact that the respondent has not laid out the basis for the claimant's termination.
40. The claimant is further awarded one month's salary *in lieu of* notice.
41. The claim for annual leave is denied as the claimant admitted during cross-examination that her letter of dismissal provided that she was to be paid leave balance of 5 ½ days. Seeing that the claimant was terminated on March 1, 2017, her annual leave days for 2017 upon being prorated comes to 3.5 days. As such what was paid out to her very well covers her leave entitlement for that year.



42. The claimant further admitted in cross examination that she received her salary for the month of February, 2017. This is also confirmed from her letter of dismissal which itemized her entitlements upon clearance. As such, the claim to that extent is disallowed.
43. The court further declines the claim for leave travel allowance and gratuity for the years served, for the reason that the same were part of the computations stipulated in her letter of summary dismissal. The same were not justified beyond what she was paid. Having admitted to receiving the sum Kshs 97,000.00, the claimant did not adduce evidence that the same was not inclusive of the items that the respondent had committed to pay her following her dismissal.
44. The claim for severance pay collapses as it is only applicable in cases of termination by way of redundancy which is not the case herein.

Orders

45. Accordingly, I enter judgment in favour of the claimant against the respondent as follows:
 - a. A declaration that the claimant's termination by the respondent was unfair and unlawful.
 - b. The claimant is awarded compensatory damages equivalent to six (6) months of her gross salary being Kshs 339,264.00.
 - c. The claimant is awarded one month's salary *in lieu of* notice being the sum of Kshs 56,544.00.
 - d. The total award is Kshs 395,808.00.
 - e. Interest on the amount in (d) at court rates from the date of judgment until payment in full.
 - f. The respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Kagoya

For the Respondent Mr. Olewe

Court Assistant Abdimalik Hussein

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 had 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.



STELLA RUTTO
JUDGE

