



**Kenya Hotels and Allied Workers Union & another v Mayfair Holdings Ltd  
(Imperial Hotel) (Employment and Labour Relations Cause 35 of 2019)  
[2022] KEELRC 13207 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13207 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 35 OF 2019  
CN BAARI, J  
NOVEMBER 17, 2022**

**BETWEEN**

**KENYA HOTELS AND ALLIED WORKERS UNION ..... 1<sup>ST</sup> CLAIMANT**

**DANIEL OCHIENG OGAYI ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**MAYFAIR HOLDINGS LTD (IMPERIAL HOTEL) ..... RESPONDENT**

**JUDGMENT**

1. The 2<sup>nd</sup> Claimant first lodged this suit through his Union the 1<sup>st</sup> Claimant herein, through a Memorandum of Claim dated April 1, 2019, and filed in court on April 12, 2019. An amended Claim was later filed on December 7, 2020. The Claimants claim is for payment of 4 months salary in lieu of notice, 7 months' prorated leave, 8 months salary for unfair termination, service charge, house allowance, annual leave, 15 days unpaid salary, Acting allowance and a service gratuity.
2. The Respondent entered appearance and filed a response to the statement of claim dated May 28, 2019, and upon amendment of the Claimant's claim, the Respondent filed an amended statement of response to the amended claim on December 14, 2020.
3. Parties sought time to attempt an out of court settlement that culminated in filing of a consent agreement dated August 10, 2021 and filed on August 16, 2021.
4. The 2<sup>nd</sup> Claimant herein rejected the consent and sought the setting aside of the consent order, and further that he be joined to the suit as a 2<sup>nd</sup> Claimant and have the matter proceed to full hearing.
5. The court rendered a ruling in respect of the now 2<sup>nd</sup> Claimant's application, wherein, it set aside the consent order and allowed the matter to go to full hearing.



6. The case was heard on July 7, 2022. The 2<sup>nd</sup> Claimant testified in support of his case, he adopted his witness statement and produced documents he filed in support of his case.
7. The Respondent presented one Mr Francis Banda, their finance manager to testify on their behalf. Mr Banda adopted his witness statement and produced documents filed herein, in support of the Respondent's case. Both parties closed their respective cases on the same day, paving way for filing of submissions.
8. Both parties filed submissions in the matter.

### **The Claimants' case**

9. The Claimants state that the issue in dispute before this Court is unfair dismissal and refusal by the Respondent to pay final dues and accrued benefits to the 2<sup>nd</sup> Claimant.
10. The 2<sup>nd</sup> Claimant states that he was summarily dismissed on October 8, 2018, on grounds that he was seen on CCTV accessing personal documents while on duty between the hours of 2.30 pm and 2.50 pm.
11. It is the Claimant's case that prior to his dismissal, he was suspended on September 28, 2018, and ordered to show cause within 24 hours why disciplinary action should not be taken against him.
12. The Claimant states that on October 1, 2018, he replied to the suspension/show cause letter, and without regard to the rule of natural justice, the Respondent summarily dismissed him without a hearing
13. The 2<sup>nd</sup> Claimant states that on October 18, 2018, the 1<sup>st</sup> Claimant engaged the Respondent on his behalf in a meeting to resolve this matter out of court.
14. The 2<sup>nd</sup> Claimant states that the mentioned meeting did not take place for reason that the Respondent blocked the 1<sup>st</sup> Claimant's officials from entering her premises. The 2<sup>nd</sup> Claimant further states that the 1<sup>st</sup> Claimant had no option but to report a formal trade dispute to the ministry of labour, which the Minister accepted and appointed Mr Albert Makori of Kisumu Labour Office to conciliate between the parties.
15. The 2<sup>nd</sup> Claimant states that the conciliator invited both parties to a conciliation meeting on December 18, 2018, where they discussed the matter in detail. The Claimant further avers that on December 19, 2018, the conciliator presented a report, and in his findings made recommendations that the 2<sup>nd</sup> Claimant actions did not warrant a summary dismissal, but instead, he should have been given a warning letter.
16. It is the claimants' case that the conciliator recommended that the 2<sup>nd</sup> Claimant be paid a four months salary in lieu of notice as per clause 19 (f) of the CBA, 7 months pay in lieu of leave, 8 months salary for unfair termination, and lastly that he be issued with a certificate of service.
17. The Claimants pray that this Court be pleased to find the 2<sup>nd</sup> Claimant's summary dismissal unfair and unprocedural and in breach of the law, and order the Respondent to pay him his terminal benefits, accrued rightful dues and maximum compensation for unfair loss of employment.

### **The Respondent's case**

18. The Respondent states that the 2<sup>nd</sup> Claimant, Mr Daniel Ogayi, accessed personal documents on the company's computer at work hours and was thus considered to have been doing personal work during working hours.



19. The Respondent states that when the 2<sup>nd</sup> Claimant was asked what he was doing, he opened a totally different document and showed it to the director.
20. It is the Respondent's case that their director asked the 2<sup>nd</sup> Claimant to wait for him in his office as he requests the IT manager to check what the Claimant was up to, and that the IT manager confirmed that the 2<sup>nd</sup> Claimant had been looking at something else from what he showed the director.
21. The Respondent states that when the director confronted Claimant and told him what had happened, the Claimant admitted to wrong doing and apologized.
22. The Respondent states that during a meeting held on October 4, 2018, 2<sup>nd</sup> Claimant was asked once again if he accessed personal documents and but that he categorically denied, and that only when evidence was produced that he changed his explanation and admitted having accessed the documents.
23. It is the Respondent's case that the 2<sup>nd</sup> Claimant had a meeting with their managing director, and he offered to resign from employment. the Respondent further states that the 2<sup>nd</sup> Claimant promised to tender his resignation letter on 5<sup>th</sup> October, but failed to do, and instead requested that the managing director should terminate his employment.
24. The Respondent state that the actions of the 2<sup>nd</sup> Claimant of accessing personal documents during working hours, and lying to the management amounted to gross misconduct hence his summary dismissal. The Respondent further states that the termination of 2<sup>nd</sup> Claimant was lawful and fair.
25. The Respondent submits that it had valid reason(s) to terminate the services of 2<sup>nd</sup> Claimant since the company reserves the right to terminate employment at any time without necessarily giving reasons thereof. The Respondent further states that the 2<sup>nd</sup> Claimant agreed to this term as provided for under his contract of employment dated January 5, 2007.
26. The Respondent further submits that the Claimant is not entitled to any payments as claimed, since the contract of employment clearly states that once the employment is terminated for reasons of indiscipline, unsatisfactory work, refusal to obey management as directed or breach of routine rules and regulations of the company, one is entitled to one month's statutory notice and not 4 months' as claimed by the 2<sup>nd</sup> Claimant.
27. The Respondent submits that it made submissions to the Claimant's conciliator when they had a conciliation meeting on December 18, 2018. The Respondent then wrote to the Claimant informing them that they were dissatisfied with their recommendations and requested for a review, which the Claimant did not respond.
28. The Respondent states that the Claimant was in fundamental breach of his contract which warranted termination, therefore, he is not entitled to the relief sought.

### **The Claimant's Submissions**

29. The 2<sup>nd</sup> Claimant submits that the Respondent has not established any valid proof that the reasons leading to his dismissal were valid and fair hence contravening section 43 of the [Employment Act, 2007](#)
30. The 2<sup>nd</sup> Claimant states that the Respondent relied on hearsay without proper evidence from the IT manager, who purported to investigate his activities on the Respondent's computer on the material day of the false accusation, as admitted by the Respondent's witness in court.
31. The 2<sup>nd</sup> Claimant states that the Respondent did not avail the CCTV footage that prompted the managing director's allegations. The 2<sup>nd</sup> Claimant further submits that in the absence of the footage,



the Respondent's decision to dismiss him was unjustified and unprocedural. The Claimant called to his aid the case of [\*Pbelista Mukamu Makau v Elizabeth Kanini Mulumbi \(2015\) eKLR\*](#) to support this position.

32. The Claimant submits that section 28 of the [\*Employment Act, 2007\*](#) grants him leave as a statutory right of employment. The Claimant further submits that the collective bargaining agreement in force at the time of his termination, provides for 26 days leave and payment in lieu, in the event the leave it is not granted and thus contends that he is eligible to the leave compensation as prayed.

### **The Respondent's Submissions**

33. The Respondent submits that it did terminate the 2<sup>nd</sup> Claimant's employment in accordance with fair procedure. The Respondent further submits that the 2<sup>nd</sup> Claimant in his examination-in-chief, admitted that he was issued with a letter to show cause, and later summarily dismissed vide the letter dated October 8, 2018.
34. The Respondent submits that during cross examination, the 2<sup>nd</sup> Claimant confirmed that he had a discussion with the director and the group general manager of the Respondent, whose agenda was the 2<sup>nd</sup> Claimant's disciplinary matter, and which in their view constituted a disciplinary hearing given his admission to the charges.
35. The Respondent further submits that the 2<sup>nd</sup> Claimant having admitted the allegations on misconduct, made it the employer's duty to exercise discretion of his retention, which discretion was exercised in the negative.
36. The Respondent submits that service charge, as was held in [\*Alexander Mbugua Gitabi v Jacaranda Hotels Ltd \[2022\] eKLR\*](#), is a discretionary payment made to employees generally in the hospitality sector as part of the monthly earning and is generally not a fixed payment. It is our he Respondent submits that this being a discretionary payment, the Claimant is not entitled to service charge as of right. The Respondent sought to rely on [\*Joseph R Matoka v severin Sea Lodge \[2016\] eKLR\*](#) to buttress this position.

### **Analysis and determination**

37. I have considered the pleading, the parties' oral testimonies and the written submissions by both parties. The issues that fall for determination are:
- i. Whether the 2<sup>nd</sup> Claimant's summary dismissal was unfair and wrongful; and
  - ii. Whether the 2<sup>nd</sup> Claimant is deserves the reliefs sought

### **Whether the 2nd Claimant's summary dismissal was unfair and wrongful**

38. To establish the fairness of a dismissal, the court's role is to examine the employer's adherence to the provisions of sections 41, 43, 45 and 47(5) of the [\*Employment Act, 2007\*](#). These provisions obligate an employer to abide by the tenets of both procedural and substantive fairness.
39. The 2<sup>nd</sup> Claimant was dismissed summarily for allegedly accessing a personal document on the company's computer during work hours. The Respondent's assertion is that this act amounted to doing personal work during the employer's time, and which the Respondent interpreted to constitute gross misconduct as to warrant summary dismissal.
40. The 2<sup>nd</sup> Claimant deemed this reason unfair and an unjustified reason to dismiss. The Claimant also contended that he was not given a hearing prior to the dismissal, while the Respondent asserts that a



discussion took place between one of their director, the group's general manager and the Claimant, which the Respondent considered to be a disciplinary hearing.

41. The Respondent further case is it had valid reason(s) to terminate the services of 2<sup>nd</sup> Claimant since the company reserves the right to terminate employment at any time without necessarily giving reasons and that the 2<sup>nd</sup> Claimant agreed to this term as provided for under his contract of employment dated January 5, 2007.
42. The 2<sup>nd</sup> Claimant admitted receipt of a show cause letter. There is however no evidence to show that he was heard in relation to the charges leveled against him before he was summarily dismissed.
43. Section 41 of the *Employment Act*, 2007, requires that an employer, before terminating/dismissing an employee on the ground of misconduct, poor performance or physical incapacity, explains to the employee in a language the employee understands, the reasons for which the employer is considering termination.
44. The hearing of an employee before termination, is both a statutory and a constitutional requirement. In *Postal Corporation of Kenya v Andrew K Tanui [2019] eKLR*, the Court of Appeal stated:

' Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct. The court stated that four elements must be discernable for the procedure to pass:

  - a. An explanation of the grounds of termination in a language understood by the employee;
  - b. The reason for which the employer is considering termination;
  - c. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
  - d. Hearing and considering any representation by the employee and the person chosen by the employee.'
45. The law demands that employers demonstrate compliance with these bare minimum standards of fair hearing before a termination or dismissal can be deemed fair.
46. The purported discussions between two employees of the Respondent and the 2<sup>nd</sup> Claimant, cannot in my view meet the fairness test. The discussion was more a coercion to make the Claimant admitted being on the wrong than it was a disciplinary hearing. The Claimant had no witness/representative present and nor was he informed to appear for hearing with one, contrary to the requirements of section 41 of the *Employment Act*. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR* the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
47. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited (2017) eKLR* the court expounded on the provisions of Section 41 as follows: -

' To satisfy the requirements of section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.



27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms'.
48. The Claimant was not accorded a hearing and nor was he represented in the so-called discussion with the Respondent's director prior to the summary dismissal. The dismissal no doubt failed the procedural fairness test and I so hold.
49. Section 43 of the *Employment Act*, on the other hand, obligates an employer to establish a valid reason that would cause a reasonable employer to terminate/dismiss an employee so as to render the dismissal or termination fair. In *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR* it was held that the Court looks into the validity and justifiability of the reasons for termination.
50. Reasons for termination/dismissal have generally been agreed to be matters the employer at the time of termination/dismissal, genuinely believed to exist, and which caused the employer to terminate the employee. (See *Charles Musungu Odana v Kenya Ports Authority [2019] eKLR*)
51. In my view, the Respondent's reason for dismissing the Claimant are neither fair reasons nor are they justified. Accessing a document from an employer's computer is not in my view a ground for summary dismissal or for termination at all. The summary dismissal was too harsh a penalty in a job scarce economy, and for which a warning would have been sufficient as recommended by the conciliator.
52. I find and hold that the Respondent's reason for dismissing the Claimant is neither valid, fair nor justified.
53. The dismissal failed both the procedural and the substantive fairness tests. The dismissal is unfair.

#### **Whether the 2nd Claimant is deserves the reliefs sought**

54. The 2<sup>nd</sup> Claimant's prayers before this court are for payment of 4 months salary in lieu of notice, 7 months' prorated leave, 8 months salary for unfair termination, service charge, house allowance, annual leave, 15 days unpaid salary, acting allowance and a service gratuity.

#### **Salary for unfair termination**

55. The Court having found that the Claimant's dismissal fell short of both the procedural and the substantive fairness tests, entitles him to compensation in accordance with sections 49 and 50 of the *Employment Act*, 2007.
56. In making such an award, the court is guided by the 13 grounds set out under section 49 (4) of the Act. In *Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR* the court pointed out that a maximum award must be based on sound judicial principles, and that the trial judge must justify or explain why a Claimant is entitled to the maximum award.
57. The Claimant was in the service of the Respondent from January, 2005 to October, 2018. In *Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR* the Court held that in granting 12 months of salary compensation for unfair termination, it considered the Claimants long service.
58. The Claimant gave the Respondent 13 years of service, which in my opinion justify a maximum award. The Claimant however sought an award of 8 months as compensation for the unfair dismissal, and for reason that parties are bound by their pleadings, he is awarded 8 months' salary equivalent as compensation for unfair dismissal.



#### **4 months salary in lieu of notice**

59. The Claimant's appointment letter states that termination will be handled in accordance with the Collective Bargaining Agreement (CBA). The CBA, provides a notice period of four months and the Claimant is thus awarded a four months salary in lieu of dismissal notice.
60. The claim for 7 months' prorated leave, service charge and house allowance were not proved and are hereby dismissed.
61. The prayer for payment for annual leave was likewise not prove and is dismissed and so is the claim for 15 days unpaid salary and Acting allowance.
62. The Claimant was a member of NSSF, and he together with the employer/Respondent, made their respective contributions in this respect. Further, neither his employment contract not the CBA carried a provision for service gratuity. The claim fails and is dismissed.
63. In sum, I make the following orders:
  - i. That the Respondent pays the 2<sup>nd</sup> Claimant 8 months' salary as compensation for unfair dismissal at Kshs 278,400/-
  - ii. Four month's salary in lieu of notice at Kshs 139,200/-
64. Costs of the suit and interest until payment in full.
65. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF NOVEMBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Daniel Ochieng Ogayi the 2nd Claimant present in person

N/A for the 1st Claimant

N/A for the Respondent

Ms. Christine Omollo - C/A

