



**Kiilu v Isinya Resorts Limited (Cause E022 of 2021)
[2022] KEELRC 13240 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13240 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E022 OF 2021
AK NZEI, J
NOVEMBER 17, 2022**

BETWEEN

PETER MUTUKU KIILU CLAIMANT

AND

ISINYA RESORTS LIMITED RESPONDENT

JUDGMENT

1. On February 25, 2021, the claimant sued the respondent vide a memorandum of claim dated February 24, 2021 and pleaded: -
 - a. That the claimant was on November 15, 2013 employed by the respondent in its finance department as an accountant earning a starting salary of Kshs 35,000, and was vide a letter dated February 19, 2014 appointed to the position of the respondent organization's Finance Controller, earning a gross salary of Kshs 63,047, which was subsequently reviewed and increased to Kshs 99,132.
 - b. That the claimant's performance was exceptional and exceeded the respondent's expectations, as a result of which the claimant was promoted to the management level and his salary was reviewed upwards to Kshs 150,240.
 - c. That on September 28, 2019, the respondent hotel's General Manager (Ms Nashita Ghai) who had been recently appointed and oriented by the claimant on the respondent hotel's controls, procedures and operations, issued the claimant with a notice to show cause regarding alleged misconduct, which included alleged failure by the claimant to be on top of finance related duties, refusal to make timely follow up on booking.com deemed to be incorrect or in dispute, resulting to delayed payment of payable booking.com commissions.
 - d. That the show cause letter was vague, in that for instance, the claimant was required to respond to the show cause letter dated September 28, 2019 by recording a statement that was required



to reach the respondent hotel's Manager by mid-day Monday September 27, 2019; and that this was despite the fact that the show cause letter was served on the claimant on September 30, 2019. The claimant acknowledged receipt of the letter (on September 30, 2019) by signing thereon.

- e. That the claimant responded to the show cause letter on 30th September 2019 and stated the correct position regarding the invoices in issue, being invoice No 1544104550 which was paid five days after it had been issued and invoice No 1544277578, which was due on October 1, 2019, while the show cause letter was written on September 28, 2019, hence making the latter invoice a subject of the notice to show cause was unwarranted.
- f. That on October 2, 2019, without any prior notice and agenda, the respondent's Human Resource Manager hurriedly convened a meeting, and that it was during the meeting that the claimant learnt that the meeting was meant to discuss the allegations made in the notice to show cause and the claimant's response thereto; and that the claimant satisfactorily explained his response to the show cause letter.
- g. That the minutes of the meeting were not signed at the meeting but at a different meeting convened later in the day (at 3.00pm) by the respondent's Group Human Resource Manager, and that the claimant noted that the following clauses had been inserted in the minutes that were dated September 2, 2019 (instead of October 2, 2019:-
 - i. The claimant had been demoted to the position of Accounts Assistant and that his assistant, Raphael Munywoki, had taken the claimant's position and the claimant would henceforth report to him.
 - ii. The respondent was concerned about the frequency of misconduct on the part of the claimant despite numerous reprimands.
- h. That the claimant was perplexed by these clauses as he knew none of the alleged misconducts on his part, and had never been given any reprimands by the respondent, either verbally or in writing, and no evidence had been produced to back up such allegations made in the minutes.
- i. That despite the claimant having stated the correct position, he was on October 2, 2019 served with a warning letter addressing the same issues that the claimant had satisfactorily addressed in his response to the show cause letter.
- j. That the claimant was aggrieved by the respondent's decision to demote him without offering any plausible explanation and he appealed to the respondent against the decision to demote him, but was informed vide a letter dated October 22, 2019 that his appeal was of no consequence as it had been filed out of time, yet the appeal had been filed within the time indicated by the respondent.
- k. That the claimant stopped receiving the benefits previously given to him by the respondent, and that this position was communicated to him vide a letter dated October 28, 2019.
- l. That the respondent's director (Mr Nish) had summoned the claimant on September 30, 2019, and it was during the meeting that the claimant was verbally informed by the said director that he (the claimant) had been suspected of calling the police into the premises to conduct a search for expatriates who did not have work permits; and that the respondent's Human Resource Manager had reported that the respondent had lost a case of unfair termination of a former employee due to the claimant's failure to give a favourable witness statement.



- m. That owing to toxic work environment occasioned by the respondent's hostility, it became impossible for the claimant to continue working, and he resigned vide a letter dated November 2, 2019.
 - n. That the respondent issued the claimant with a certificate of service indicating that the claimant had been employed by the respondent as an Accountants Assistant instead of Finance Controller, the actual position held by the claimant before he was constructively terminated.
 - o. That the claimant's services were unfairly and constructively terminated through the respondent's actions that denied the claimant an opportunity to carry out his duties and that the claimant's terminal dues were never settled fully.
 - p. That termination of the claimant's employment was unfair, unlawful, without justification and that the claimant was not given an opportunity to be heard before his services were terminated.
2. The claimant set out his claim against the respondent as follows:-
- a. A declaration that termination by the claimant's employment was unfair.
 - b. One month salary in lieu of notice.....Kshs 150,240
 - c. Gratuity pay not fully settled (352,028-274,354).....Kshs 77,954
 - d. 12 months compensation for unlawful termination.....Kshs 1,802,880
 - e. Certificate of service.
 - f. Costs of the claim and interest at court rates.
3. The claimant filed his written witness statement dated February 24, 2021 and a list of documents evenly dated, listing some eighteen documents, all of which accompanied the statement of claim. The listed documents included the claimant's employment letter dated November 15, 2013, a letter of appointment dated February 19, 2014, salary increment letter dated November 1, 2014, minutes of a meeting held on September 2, 2019, a show cause letter dated September 28, 2019, , a letter dated September 30, 2019, a warning letter dated October 2, 2019, a resignation letter dated November 2, 2019, a certificate of service dated November 4, 2019, the claimant's payslips, a copy of booking.com screen shot and gratuity computation, among others.
4. The respondent entered appearance on March 18, 2021 and subsequently filed a statement of reply on May 18, 2021, denying the claimant's claim. The respondent further pleaded:-
- a. That on September 28, 2019, the respondent issued the claimant with a notice to show cause, and that on September 30, 2019, the claimant responded to the notice to show cause and admitted the misconduct/omissions stated in the notice to show cause, and requested the respondent to quantify the resultant loss arising out of the claimant's misconduct for remedy, and left the issue to the respondent to apply the disciplinary measures it deemed fit.
 - b. That upon holding a meeting on October 2, 2019, the respondent resolved to demote the claimant to the position of Accounts Assistant while one Raphael Munywoki was to be promoted to the position of Finance Manager.
 - c. That as a way of taking disciplinary action against the claimant, the claimant was on October 5, 2019 issued with a warning letter dated October 2, 2019 in which the Respondent officially addressed the reasons leading to the demotion of the claimant.



- d. That the claimant was given five days to appeal but only wrote a letter on October 11, 2019, purporting the same to be an appeal.
 - e. That the claimant was duly notified that refusal to take up the position of Accounts Assistant would amount to gross misconduct.
 - f. That after the claimant ceased to be the Finance Manager, the airtime allowance previously paid to him was paid to the current Finance Manager.
5. The respondent filed some eight documents along with its statement of reply, which included the claimant's resignation letter dated November 2, 2019, the show cause letter dated September 28, 2019 and received by the claimant on September 30, 2019, the claimant's response to the notice to show cause dated September 30, 2019, minutes of a meeting held on September 2, 2019, among others documents.
 6. On June 9, 2021, the claimant filed reply to the Respondent's response to the claim.
 7. On September 13, 2021, the respondent filed a witness statement by Otieno O Lucas and a list of the aforementioned documents. The respondent filed a further witness statement by Avril Mbulwa on December 3, 2021.
 8. When trial opened on March 8, 2022, the claimant adopted his filed witness statement and produced in evidence the documents referred to in paragraph 3 of this judgment. Cross-examined, the claimant testified that the meeting held on October 2, 2019 was held in the morning, but the minutes were brought at 3.00pm for signing. That the claimant signed the same to acknowledge that he was part of the meeting, but not the contents. That upon realizing that a clause had been inserted, the claimant wrote a letter dated October 11, 2019, which was also an appeal against demotion. The letter reads in part:-

“I refer to the meeting we held on the morning of October 2, 2019 for which we were given a copy of minutes to sign at around 3pm the same day, and the subsequent letter of warning I received on October 5, 2019.

As I stated, I am not aware of the frequency and nature of misconducts that I committed as referred.

Despite asking for specific reference, I was not given any specific offence, misconduct and nature of misconduct. As stated also, I am not aware of the “express and unwritten reprimands” referred.

.....further to that, I was issued with a letter of warning on October 5, 2019, that still referred to the tendency and frequency at which I have been causing the company loss and consequences (not specified) and in the light of the same I cannot be trusted and have been demoted.

In view of the above, having not committed any offence or misconduct that warrants a demotion, I consider the demotion unfair and I will not be able to take the position offered...”
 9. The claimant maintained that the appeal was within the five days given by the respondent to appeal in view of the fact that October 6, 2019 and October 7, 2019 were on Saturday and Sunday respectively, and that those were not working days, and that October 10, 2019 was a public holiday. The respondent did not controvert this assertion, but still insisted that time given for appeal had lapsed.



10. The claimant further testified that the respondent kept accusing the claimant of numerous offences without giving specifics, and that this is why he asked the respondent to quantify any losses that the claimant had caused, because he knew there were no such losses. That the claimant's resignation was not out of his own choice, but it was because he felt unwanted. That there was a lot of animosity at the claimant's work place as reflected in the respondent's letter dated October 22, 2022.
11. The claimant further testified that the commission invoices that led to the closure of the respondent's extra-net portal through which guests book the respondent hotel through the website, were a none-show as the guests who had booked through the extra-net did not show up at the hotel, hence no commission was payable to the extra-net service provider, and the commission invoices referred to by the respondent were due for rebate/cancellation, a situation which the claimant explained to the respondent. The respondent did not controvert that position.
12. The respondent called one witness, Avril Mugure Mbulwa (RW-1), who adopted her filed witness statement as her testimony and produced in evidence the documents filed by the respondents. The witness further testified that the claimant would not have signed the minutes of the meeting held on October 2, 2019 if they contained anything not discussed at the meeting. The witness, however, agreed that the minutes did not show that the claimant had been given an opportunity to be heard.
13. The witness (RW-1) did not demonstrate that the booking.com/extra-net commission invoices that the claimant had been accused by the respondent of having failed to pay in time or any of them, related to customers who had shown up at the respondent hotel and made payments.
14. Upon considering the pleadings filed and evidence adduced by both parties, issues that emerge for determination are:-
 - a. Whether the claimant was constructively dismissed/terminated by the respondent.
 - b. Whether the termination was unfair.
 - c. Whether the claimant is entitled to the reliefs sought.
15. On the first and second issues, the claimant is shown to have been served with the notice to show cause dated September 28, 2019 on September 30, 2019. The show cause letter required the claimant to show cause by sending a recorded statement to reach the hotel manager not later than September 27, 2019. The respondent did not tell the court how the claimant was supposed to show cause on a date prior to the date of the show cause letter, and why the show cause letter was not served on the claimant until September 30, 2019. Further, the claimant was not shown to have been served with a notice inviting him for the disciplinary hearing scheduled for October 2, 2019. The claimant is not shown to have been advised by the respondent to attend the disciplinary hearing in the company of a fellow employee of his choice or a union official as mandatorily required under section 41 of the Employment Act. Further, the show cause letter did not itemize the issue of the claimant's intended demotion as one of the issues on which the claimant was supposed to show cause and therefore one that would be discussed at the disciplinary hearing that was subsequently held on October 2, 2019.
16. Further, and as already stated in this judgment, the respondent did not demonstrate that the claimant was issued with a notice to attend a disciplinary hearing on October 2, 2019, and did not controvert the claimant's assertion that a meeting was hurriedly convened on October 2, 2019 without notice and without an agenda.
17. An employee is entitled to be given adequate notice to respond to a show cause letter and adequate notice to attend a disciplinary hearing/meeting. An invitation letter must always inform an employee of his right under section 41 of the Employment Act. Minutes of a disciplinary meeting must be clear on



- the issues discussed thereat, and must clearly indicate whether the employee was given an opportunity to be heard, and what representation the employee and his fellow employee or union official made.
18. Issues to be discussed at a disciplinary hearing must be the same as in the show cause letter; and minutes taken during a disciplinary meeting ought to be signed at the meeting during or in which they are taken, but not in a separate or subsequent meeting.
 19. In the present case, the issue of the claimant's demotion was not in the notice to show cause, and the minutes said to be of the meeting held on October 2, 2019 do not show how the decision to demote the claimant was arrived at, and whether the claimant was heard thereon. Demotion of an employee has the character of altering an employee's terms and conditions of service. Section 10(5) of the [Employment Act](#) provides that the terms of a contract of service cannot be altered without consultation with the employee. The claimant testified that he was not only demoted, but some allowances/benefits were taken away from him upon demotion.
 20. The respondent did not controvert the claimant's pleading and evidence that he was summoned by the respondent's director and verbally informed by the said director that he (the claimant) was being suspected of calling the police to the respondent's premises to conduct search for expatriates who did not have work permits. It was the claimant's pleading and evidence that due to the toxic work environment occasioned by the respondent's hostility, it became impossible for the claimant to continue working, and that he resigned vide a letter dated November 2, 2019, and that this amounted to constructive termination of the claimant's employment.
 21. The Court of Appeal held as follows in the case of [Coca Cola East & Central Africa Limited v Maria Kagai Ligaga](#) [2015] eKLR:

“constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct. The employer's behavior in either case must be shown to be heinous, so intolerable, that made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination.”
 22. I make a finding that the claimant's employment was constructively terminated by the respondent, and that the termination was unfair. I so declare.
 23. On the third issue, I award the claimant the equivalent of seven months' salary as compensation for unfair termination of employment. I have taken into account the circumstances in which the claimant's employment was terminated. I also award the claimant one-month salary, Kshs 150,240 in lieu of notice. The claim for Kshs 77,954 being gratuity not fully paid was neither pleaded nor proved, and is declined.
 24. The claimant produced in evidence his payslip for August 2019, and his gross salary at the time of his constructive dismissal is shown to have been Kshs 150,240.
 25. Consequently, judgment is hereby entered for the claimant against the respondent for:-



- a. The equivalent of seven months' salary in compensation for unfair termination of employment (150,240x7).....Kshs 1,051,680
 - b. One month salary in lieu of noticeKshs 150,240
- Total Kshs 1,201,920
26. The sum awarded shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.
27. The respondent shall issue a proper certificate of service to the claimant, reflecting the position held prior to the October 2, 2019, pursuant to section 51(1) of the Employment Act.
28. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 17TH DAY OF NOVEMBER 2022.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Arunga for Claimant

Ms. Mbwana for Respondent

