



**KBM v OSH Limited (Cause 2000 of 2017)
[2022] KEELRC 13539 (KLR) (14 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13539 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2000 OF 2017
JK GAKERI, J
DECEMBER 14, 2022**

BETWEEN

KBM CLAIMANT

AND

OSH LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on 6th October, 2017 alleging unfair termination of employment as well as non-payment of dues and compensation.

The Claimant's case is pleaded as follows;

2. The Claimant avers that he was employed by the Respondent as a Waiter in August 2014 and served the Respondent diligently until he was summarily dismissed on 28th July, 2017.
3. That his monthly salary was Kshs.24,014/=.
4. He further avers that he used to work on public holidays and was not compensated.
5. That on 14th July, 2017 while in the course of his duties, he served several guests including a [Particulars Withheld] Crew who was intoxicated and who requested him to escort her to the room and assisted her to locate her room, opened the same for her and put the lights on and left.
6. That on 15th July, 2017, he was notified by the Guest Relations Officer that a [Particulars Withheld] Crew had raised a complaint of sexual harassment, claims the Claimant denied and was suspended from employment on 18th July, 2017.
7. It is the Claimant's case that he responded to the notice to show cause and handed over the same to the management.



8. That he was invited for a hearing on 21st July, 2017 which was haphazard and conducted hastily to incriminate him and was issued with a suspension letter on the same day and called back on 28th July, 2017 when a summary dismissal letter was issued.
9. The Claimant alleges that the manner in which he was dismissed by the Respondent was unlawful and in violation of *the Constitution* of Kenya, provisions of the *Employment Act*, Principles of natural justice and good labour practices.
10. That he had done nothing to warrant summary dismissal having served the Respondent for 3 years with no blemish.
11. That neither the CCTV footage nor [Particulars Withheld] Crew was present at the hearing and she had not made a signed complaint.
12. The Claimant prays for;
 - i. A declaration that the summary dismissal from employment was unfair and unlawful.
 - ii. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages.
 - iii. An order for the Respondent to pay the Claimant his terminal benefits and compensatory damages of Kshs.389,027/= comprising; One month's salary in lieu of notice Kshs.24,014/= Unpaid/untaken leave for 2017 Kshs.24,014/= Untaken/unpaid public holidays 11 per year Kshs.52,831/= 12 month's salary Kshs.288,168/=
 - iv. Costs of this suit plus interest thereon.

Respondent's case

13. The Respondent filed a Memorandum of Response on 29th May, 2018 admitting that the Claimant was indeed its employee and his monthly salary but denies that the Claimant worked during public holidays.
14. It admits that the Claimant was at work on 14th July, 2017.
15. It is the Respondent's case that after a thorough investigation backed by CCTV footage, it was confirmed that the incident occurred as reported by Ms SC.
16. That the summary dismissal was lawful.
17. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

18. The Claimant's written statement which he adopted as evidence in chief rehearses the contents of the Memorandum of Claim.
19. He testified that the Chief Security Officer did not participate in the disciplinary hearing and no CCTV footage was provided by the Respondent.
20. It was his testimony that the complaint was made on the evening of 15th July, 2017 and the complainant had been drunk and had made advances to him, kissed his arm and used seductive words such as "honey" or "sweetie".
21. That the investigation report filed by the Respondent found him not culpable due to lack of evidence.



22. On cross-examination, the Claimant confirmed that he was a Mini-Bar attendant and his duties included delivery, replacement and serving clients. That on 14th July, 2017, he was at the B5 restaurant and served the complainant with drinks and her behaviour was queer.
23. That he had requested for the CCTV footage by word of mouth during the disciplinary meeting.
24. That he did not file a complaint for the kiss on his arm.
25. He testified that he was notified of the hearing and went alone although he had been notified of the right to be accompanied and minutes of the meeting were recorded.
26. That his dues were computed but not paid.

Respondent's evidence

27. RWI, JW testified that she was the Respondent's Human Resource Manager and the Claimant was her colleague.
28. It was her testimony that the Front Office Manager received the complaint from SC. That the Claimant had no authority to offer extra services to clients which is a duty of the front office.
29. On cross-examination, the witness stated that the Claimant's principal duty was to serve clients and could only assist a guest with authority of the supervisor.
30. The witness confirmed that no CCTV footage had been provided as evidence and SC was not present at the hearing on 21st July, 2017. That there was a second hearing on 27th July, 2017 and the Claimant participated.
31. That although SC had written an email dated 26th July, 2017 she had reported the complaint orally.
32. That at the hearing, there were no witnesses.
33. According to the witness, SC reported the incident on 14th July, 2017 and the event occurred on 13th July, 2017 and she did not raise any alarm. That the complainant wrote a statement dated 20th July, 2017.
34. The witness could not tell what the Claimant had been paid for and what was outstanding but confirmed having paid for leave and public holidays but provided no evidence.

Claimant's submissions

35. The Claimant identifies three issues for determination, namely; whether termination of the Claimant's employment was fair and lawful, entitlement to reliefs and costs.
36. On the 1st issue, the Claimant's counsel submitted that the Claimant denied having sexually harassed [Particulars Withheld] Crew on 14th July, 2017 and the Respondent did not conduct any investigation to ascertain the facts. That the Respondent's witness could not explain why the complainant took long to report the alleged conduct and did not raise alarm.
37. The Claimant submitted that matters relating to sexual harassment were taken seriously.
38. That [Particulars Withheld] Crew made a complaint in a casual manner as she was checking out and made a formal written complaint on 26th July, 2017, 12 days later.
39. The documents provided by the Respondent though unsigned revealed that SC was tipsy on that day staggering, loud talking and hugging other guests. That no gross-misconduct was substantiated.



40. Reliance was made on the Chief Security Officer's report dated 17th July, 2017, wondering why [Particulars Withheld] Crew remained silent until the following day. It was submitted the complaint was an afterthought.
41. Reliance was also made on the provisions of section 43 of the [Employment Act](#) and the decision in [Walter Ogal Anuro V Teachers Service Commission](#) (2013) eKLR.
42. As regards the procedure employed by the Respondent, it was submitted that the Claimant was subjected to an unfair and unprocedural disciplinary process as the charges were unproved, no CCTV footage was provided and the alleged CCTV footage summary provided was not authenticated and had no certificate of electronic evidence as required by section 106B of the [Evidence Act](#).
43. The decision in *Samuel Kazungu Kambi v Nelly Ilongo & 2 others* (2017) eKLR was relied upon to buttress the submission.
44. That the Claimant was not present during the hearing for questioning and the Claimant's conduct was not reported to the police.
45. That during the hearing on 27th July, 2017, the Claimant was denied the right to present a witness of his choice and had no opportunity to interrogate the witnesses, if any.
46. Reliance was made on the decision in *Kenya Union of Commercial Food & Allied Workers v Meru North Farmers Sacco Ltd* to underscore the essence of section 41 of the [Employment Act](#), 2007 and urge that the Claimant was not accorded a hearing as envisioned by section 41 of the Act. See also [Boniface Musyoka Kyambo V DPL Festive Ltd](#) (2021) eKLR on the disciplinary process.
47. Finally, it was submitted that the Respondent established neither that it had a valid reason nor compliance with the prescribe procedure.
48. As regards the reliefs sought, it was urged that the Claimant was entitled to the reliefs as claimed. The decision in [Alphonse Maghanga Mwachanya V Operation 680 Ltd](#) (2013) eKLR was cited in support of maximum compensation.
49. By 4th November when the court retired to prepare this judgement, the Respondent had not filed its submissions even after having been accorded 7 days on 28th September, 2022.

Determination

50. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
51. As to whether termination of the Claimant's employment by the Respondent was unfair, the starting point are the relevant provisions of the [Employment Act](#) and case law.
52. Section 45 of the [Employment Act](#) provides that;
 - (2) A termination of employment by an employer is unfair if the employer fails to prove-
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason –
 - i. related to the employee's conduct, capacity or compatibility; or



- ii. based on operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.
53. Similarly, section 43(1) of the Act provides that;
- In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
54. Section 41 of the Act provides the mandatory process to be followed before an employee's services are terminated or a summary dismissal is carried through.
55. In a nutshell, the provisions of the *Employment Act* are unambiguous that for a termination of employment or summary dismissal to pass as fair, there must have been a valid and fair reason for the termination or dismissal and the procedure employed must have been fair.
56. This position finds support in the sentiments of Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (Supra) and the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR among others.
57. The courts are emphatic that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair.
58. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Reason(s) for termination

59. It is common ground that at all material times, the Claimant was a Waiter employed by the Respondent in August 2014 and his employment was terminated summarily on 28th July, 2017 allegedly for sexually harassment one SC, a [Particulars Withheld] Crew residing at the Respondent's hotel.
60. While the Respondent urges that the termination of employment was fair and lawful, the Claimant urges that it was not as the allegation of sexual harassment was unproven.
61. The summary dismissal letter dated 28th July, 2017 stated inter alia
- “On 14th July, 2017, a hotel in house guest ([Particulars Withheld] Crew) raised a complaint that you followed her to her room from the restaurant the previous night and sexually harassed her . . . It was clear that you left your work station without authority and suspiciously followed the guest to her room against the company policy and procedure. You were unable to explain what you were doing in the guest's room for over 5 minutes.
- The panel had reasonable grounds to believe guest narration of the events as supported by our CCTV footage. Leaving your work station without authority and sexually harassing a guest at your place of work is a serious offence and is tantamount to gross misconduct. Consequently the management has summarily dismissed you with effect from 27th July, 2017 . . .”
62. From the contents of the letter, it is discernible that the Claimant's employment was terminated for two reasons i.e leaving the work station without authority and sexually harassing a guest.
63. Instructively, there was no complaint that the Claimant had left his place of work without authority.



64. It is common ground that on the material day, one SC, [Particulars Withheld] Crew was intoxicated and appeared tipsy having consumed several glasses of wine, the loud speaking and hugging of other guests was acknowledged.
65. The divergence appears on what transpired after the drinking spree. Whereas the Respondent alleges that the Claimant followed the guest, the Claimant testified that the guest requested him to show her her room on the 4th floor, that he did and so resumed duty.
66. The Respondent relies on the CCTV footage, evidence it did not provide to the court and the witness who testified had not watched the footage.
67. An alleged summary of the CCTV footage is neither dated nor signed and is not supported by a certificate of electronic evidence as ordained by the provisions of the Evidence Act, Cap 80.
68. It is puzzling why the Respondent could not provide the footage or still pictures of the various scenes it allegedly observed.
69. The allegation that the Claimant was in the room for 5 minutes is not supported by any tangible evidence.
70. There is no evidence to prove what may have transpired in the room on that day.
71. Strangely, an unauthenticated copy of the Chief Security Officer's report on the issue concluded that there was insufficient evidence to find the Claimant culpable.
72. Relatedly, the complainant is said to have reported the incident casually on the evening of the following day. That as he was checking out, the report was made to the Guest Relations Officer and Front Office Manager who did not testify in court.
73. The only evidence of a report of the incident was SC's email dated 26th July, 2017.
74. The graphic details on what happened that night leaves one wondering whether the complainant was not an active participant.
75. If the actions mentioned were indeed true, why did the complainant not raise alarm that there was an intruder in her room who was sexually harassing her, why did the complainant not report the matter the same night and record a detailed statement the following day and had to wait for 12 days to do the same in writing.
76. Significantly, the complainant did not testify on what happened. The contents of the email were never interrogated.
77. It would appear to the court that the Respondent relied on the email hook, line and sinker and found the Claimant guilty as charged.
78. Relatedly, although RWI Testified that the Respondent held disciplinary hearings on 21st and 27th July, 2017, and the Claimant participated, it did not provide a copy of the minutes for the meeting held on 21st July, 2017 though the Claimant attended the alleged meeting.
79. Intriguingly, no witness testified during the hearings on 21st and 27th July, 2017 in support of the allegations by [Particulars Withheld] Crew. None of the persons who allegedly received the complaint testified during the disciplinary hearings or in court.
80. The Respondent's witness contradicted herself on the date of the alleged incident.



81. While the written statement states it occurred on the night of 14th July, 2017, in oral evidence she stated that it occurred on the night of 13th July, 2017. She however confirmed that the Respondent had not provided the CCTV footage and that SC did not testify before the disciplinary hearing.
82. It is unclear why the Respondent opted to rely on untested contents of an email from the alleged victim written 12 days after the alleged misconduct.
83. The court is in agreement with the Claimant's submission that sexual harassment allegations are very serious and the alleged facts ought to have been interrogated in detail to obviate the condemning of the alleged perpetrator who may have been innocent.
84. It is unclear whether the Respondent responded to the email from SC and why it did not if that was the case.
85. It was the duty of the Respondent to make SC aware that her presence was necessary in light of the grave allegations she was making against the Claimant.
86. In the absence of the CCTV footage and direct evidence of what transpired on that night, the Respondent had no ground to found its decision to dismiss the Claimant summarily other than by conjecture.
87. None of the participants in the disciplinary proceedings had first-hand information of what transpired other than the report made by the SC to the Guest Relations Officer and Front Office Manager and the email.
88. In the court's view, the finding of culpability that indeed the Claimant sexually harassed [Particulars Withheld] Crew was tantamount to overstretching imagination.
89. For the above-stated reasons, the court is satisfied that the Respondent has on a balance of probabilities failed to prove that it had a valid and fair reason to terminate the Claimant's employment.

Procedure

90. As explained by the Court of Appeal in *Pius Isindu Machafu V Lavington Security Guards Ltd* (2017) eKLR and as submitted by the Claimant, section 41 of the *Employment Act* prescribes a mandatory process to be complied with by the employer in termination of employment.
91. The Claimant faults the procedure he was subject to on the ground that;
 - i. The CCTV footage relied upon by the Respondent or the disciplinary committee was not provided during the hearing. This was an important piece of evidence for the Claimant to controvert but was not availed thus compromising the Claimant right to a fair hearing.
 - ii. The complainant, one SC did not participate in the hearing to defend her allegations and be cross-examined on them. The Respondent tendered no evidence that [Particulars Withheld] Crew member was unreachable on phone and could not participate in proceedings virtually.
 - iii. That although the Claimant had been notified of the right to be accompanied by a colleague for the hearing slated for 21st July, 2017, no such notice was given for the meeting on 27th July, 2017.
92. In the court's view, the fact that essential evidence relied upon by the Respondent was not availed to the Claimant to controvert vitiated the hearing. The minutes on record are clear that the CCTV footage was determinative yet it was neither availed to the Claimant nor the court.



93. As explained by Nderitu J. in *Boniface Musyoka Kyambo vDPL Festive Ltd (Supra)*,
- “The essence of disciplinary proceedings is to establish, with certainty, whether the employee has conducted himself in a manner that is so out of line that a disciplinary action needed to be taken against such an employee. It is wrong and unlawful for an employer to carry out disciplinary proceedings as a formality with a fixed mind of dismissing an employee. An employer should always leave that window that it is possible for an employee to prove his innocence during such disciplinary proceedings and be found innocent. Disciplinary proceedings are not and should not be used as a mechanical tool of dismissing employees.”
94. In the instant case, the Claimant’s fate was sealed by the email dated 26th July, 2017 from the complainant.
95. The meeting found the guest’s claims well “coordinated”.
96. The minutes of the disciplinary hearing are silent on how the claims were established as factual or likely or why the guest’s version was more compelling than the Claimant’s.
97. Similarly, the disciplinary hearing was also vitiated by the fact that other than the Claimant, no other principal actor participated. In other words no witness spoke directly to the allegations.
98. Finally, and contrary to the Claimant’s submission that he was not informed of the right to be accompanied by a representative during the meeting held on 27th July, 2017, the court is not persuaded that he suffered any greater prejudice as he had been notified of the same for the earlier meeting and opted to go alone.
99. In addition, the Claimant led no evidence that he had a witness he wished to call on 27th July, 2017.
100. Be that as it may, the denial of access to the evidence relied upon by the committee and absence of any evidence in support of the allegations by SC vitiated the disciplinary process irredeemably and the court so finds.
101. Having found that the Respondent had no demonstrable valid and fair reason to terminate the Claimant’s employment, and the procedure employed by the Respondent was far from fair, it is the finding of the court that termination of the Claimant’s employment by the Respondent was unfair and unlawful.
102. As regards the reliefs sought, the court proceeds as follows;
- i. One month’s salary in lieu of notice
103. Having found that termination of the Claimant’s employment by the Respondent was unfair and no notice was given, the Claimant is awarded one month’s salary in lieu of notice.
- ii. Unpaid/untaken leave
104. Neither the written statement nor the oral evidence particularise the leave days in question and why it is for one (1) year yet the Claimant’s employment was terminated on 28th July, 2017.
- The prayer is disallowed.
- iii. Untaken/unpaid public holidays
105. Analogous to the previous prayer, neither the written statement nor the oral evidence adduced in court make reference to the specific public holidays on which the Claimant worked.



The prayer is unsubstantiated and is disallowed.

- iv. 12 months compensation
106. Having found that termination of the Claimant's employment was unfair, the Claimant is eligible for the discretionary relief provided by section 49(1)(c) of the *Employment Act* subject to observance of the provisions of section 49(4) of the Act.
107. In determining the level of compensation, the court has considered the following;
- i. The Claimant was an employee of the Respondent for a duration of about 3 years and led no evidence that he wished to continue.
 - ii. The Claimant contributed to the termination of employment.
 - iii. The Claimant had no previous warnings, or misconduct or suspension.
108. In view of the foregoing, the court is satisfied that the equivalent of four (4) months salary is fair.
109. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that the Claimant's summary dismissal from employment was unfair and unlawful.
 - b. One month's salary in lieu of notice.
 - c. Equivalent of four (4) months salary.
 - d. Costs of this suit.
 - e. Interest at court rates from the date hereof till payment in full.
110. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

