



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 266 OF 2018**

**SHIBEDI ZEBEDEE ACHESA.....CLAIMANT**

**VS**

**KENGA EQUATORIAL HOTELS T/A MOMBASA**

**CONTINENTAL RESORT.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Shibedi Zebedee Achesa, the Claimant in this case, was an employee of Kenga Equatorial Hotels, trading in the name and style of Mombasa Continental Resort. Achesa brought this claim pursuant to the termination of his employment on 26<sup>th</sup> December 2016.
2. The Claimant states his claim in a Memorandum of Claim filed in court on 24<sup>th</sup> April 2018. The Respondent's response is by way of a Memorandum of Response dated and filed in court on 13<sup>th</sup> March 2019.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its General Manager, Mary Stevens.

**The Claimant's Case**

4. By letter dated 15<sup>th</sup> December 2009, the Claimant was employed by the Respondent in the position of Cook. The Claimant rose through the ranks to the position of Senior Sous Chef from 7<sup>th</sup> December 2013.
5. On 13<sup>th</sup> October 2016, the Claimant was sent on a two weeks' suspension, without pay, and on 5<sup>th</sup> November 2016, he was demoted.
6. By letter dated 12<sup>th</sup> December 2016, the Claimant was sent for a further suspension for 14 days and on 27<sup>th</sup> December 2016, his employment was terminated.
7. The Claimant's case is that his suspension and subsequent termination were unlawful and unfair. He therefore claims the following:

- a. 12 months' salary in compensation.....Kshs. 780,000
- b. Annual leave dues for 3 years.....165,750
- c. Salary during suspension.....37,912
- d. Costs plus interest

**The Respondent's Case**

8. In its Memorandum of Response dated and filed in court on 13<sup>th</sup> March 2019, the Respondent denies that the termination of the Claimant's employment was unlawful or unfair.

9. The Respondent avers that the Claimant had a series of disciplinary cases, including but not limited to numerous complaints from guests and staff, ranging from poor hygiene, poor guest service, boring food (lack of creativity which made guests to opt to eat out), poor food storage, poor staff coordination and general lack of enthusiasm in his work.

10. The Respondent states that the Claimant was warned several times on the issue of poor performance and non-performance of his duties but he did not heed the warnings.

11. The Respondent maintains that it followed due process in terminating the Claimant's employment; specifically, the Claimant was issued with several warning letters and finally a notice to show cause.

12. The Respondent adds that in his response to the show cause letter, the Claimant blamed other people and appeared not to appreciate his responsibilities.

13. The Respondent avers that the Claimant was paid all his terminal dues made up of salary up to and including 12<sup>th</sup> December 2016, 1 month's salary in lieu of notice, service & gratuity for 7 years, 5 off days and 4 public holidays.

#### **Findings and Determination**

14. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

#### **The Termination**

On 27<sup>th</sup> December 2016, the Respondent wrote to the Claimant as follows:

"Dear Mr. Achesa,

#### **RE: TERMINATION OF EMPLOYMENT**

Following corrective measures issued to you on 22<sup>nd</sup> October 2016 and another one on 13<sup>th</sup> of December 2016 for failure to perform your duties diligently, your services are hereby terminated with immediate effect.

On obtaining a dully filled clearance form, the Chief Accountant is requested to pay your final dues as below:

- Salary up to and including 12<sup>th</sup> December 2015
- 1 month Notice of termination as per your appointment letter
- 7 years service
- Gratuity for 7 years (paid at one-third of one month's salary and house allowance at the rate applicable at the time of separation for very complete year of service)
- 5 off days and 4 public holidays

LESS

Any advance, loans or shortages owed to the company

Any statutory deductions that may be lawfully effected.

We would like to take this opportunity to thank you for your service to the company over the years and wish you well in your future endeavors.

Yours sincerely,

For and on behalf of,

**Mombasa Continental Resort**

(signed)

**Mary Stevens**

**General Manager”**

16. A reading of this letter discloses that the reason advanced by the Respondent for termination of the Claimant’s employment was poor performance.

17. The proper procedure for handling cases of poor performance at the work place has been severally restated. In **Kenya Science Research International Technical and Allied Workers Union (KSRTAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause no 273 of 2010)** the Court stated the following:

**“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”**

18. This position was reiterated by this Court in its decision in *Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR*.

19. If indeed the Claimant’s performance had fallen, the question to ask is whether he was duly notified of his shortcomings and given an opportunity to improve. From the record, the Court found that prior to the termination, the Respondent had taken antecedent disciplinary action against the Claimant as follows:

- a. On 13<sup>th</sup> October 2016, the Claimant was sent on two weeks’ unpaid leave on account of non-performance of duties;
- b. On 5<sup>th</sup> November 2016, the Claimant was demoted from the position of Head Chef to one of the cooks;
- c. By letter dated 12<sup>th</sup> December 2016, the Claimant was suspended for 14 days, without pay on the basis of substandard service to guests.

20. The suspension letter dated 12<sup>th</sup> December 2016, instructed the Claimant to report to the Operations Manager’s Office on 27<sup>th</sup> December 2016, which is the day he was issued with a termination letter.

21. The two suspensions without pay as well as the demotion were punitive disciplinary actions. It follows therefore, that before taking these actions, the Respondent ought to have availed the Claimant the procedural fairness safeguards set by Section 41 of the Employment Act. The Court did not see any evidence of compliance in this respect, thus rendering the said suspensions and demotion unlawful.

22. The Claimant accused the Respondent’s General Manager, Mary Stevens of pursuing personal vendetta against him. In addition, the Claimant alluded to systemic failures caused by unmitigated reduction of staff, especially in the production department. The Respondent did not respond to the Claimant’s allegations and the Court was left to second guess as to whether the alleged poor performance was attributable to the Claimant or to overall management lapses.

23. It is on record that prior to 2016, the Claimant had performed fairly well, earning himself promotions and commendation. So what went wrong? An objective performance appraisal would have answered this question. Unfortunately, no such appraisal was conducted.

24. Rather than follow due process, the Respondent embarked on unjustifiable disciplinary actions against the Claimant, which actions smacked of harassment. How could an employee facing such a hostile work environment be expected to improve? He had no chance and at the end, he was shown the door.

25. The upshot is that the allegations of poor performance levelled against the Claimant were not proved and the termination of employment on this ground was substantively and procedurally unfair. The Claimant is therefore entitled to compensation.

**Remedies**

26. In light of the foregoing findings, I award the Claimant ten (10) months’ salary in compensation. In arriving at this award, I have considered the Claimant’s length of service, coupled with the Respondent’s unlawful conduct in executing the termination.

27. Following my finding that the Claimant’s suspension was unlawful, the claim for salary during suspension is allowed.

28. According to leave records filed by the Respondent, the Claimant took his leave for 2015/2016. I will therefore only allow prorata leave for 6 months in 2016.

29. In the end, I enter judgment in favour of the Claimant and against the Respondent as follows:

- a. 10 months’ salary in compensation.....Kshs. 650,000
- b. Salary during suspension (28 days).....60,667
- c. Prorata leave pay for 6 months (65,000/30x1.75x6).....22,750
- Total.....733,417**

30. This amount will attract interest at court rates from the date of judgment until payment in full.

31. The Claimant will have the costs of the case.

32. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF MARCH 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Shibedi Zebedee Achesa (the Claimant in person)

Mr. Ojwang h/b for Mr. Oluga for the Respondent