



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 85 OF 2019**

**STANLEY ONZERE MUGE.....CLAIMANT**

**VERSUS**

**KENYA SAFARI LODGES & HOTELS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> May, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 18.11.2019 through Waithera Ngigi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's services was unprocedural, unfair, wrongful, unlawful and unjustified.
- b) Kshs. 3, 647, 471.50 being the claimant's terminal dues and compensation for unlawful termination from employment.
- c) Costs of the suit.
- d) Interest on b and c above at court rates until payment in full.
- e) An order that the respondent do issue a certificate of service to the claimant. Any other relief that the Honourable Court may deem fit to grant.

The Kshs. 3, 647, 471.50 as prayed for is claimed and particularised as follows:

- a) 3 months' salary in lieu of notice Kshs.378, 753.00.
- b) 30 outstanding leave days Kshs.126, 251.00.
- c) 56 outstanding off days Kshs.235, 668.50.
- d) Entertainment allowance March 2016 to February 2019 Kshs. 280, 000.00.
- e) Outfit allowance 20018 -2019 Kshs. 25, 000.00.
- f) Leave travel allowance Kshs.25, 0000.00
- g) Unpaid transfer allowance Kshs.28, 476.00.
- h) Unpaid annual basic salary increment Kshs.415, 352.00.
- i) Unremitted or unpaid pension contributions Kshs.617, 959.00.
- j) Compensation for unfair termination (12 months) Kshs. 1, 515, 012.00.

The claimant's case is pleaded as follows. He was employed by the respondent on 16.09.2013 as Assistant Manager at the respondent's Mombasa Beach Hotel and transferred to Ngulia Safari Lodge and later to Voi Safari Lodge. He was promoted to Unit Manager. Further he

was dismissed from employment by the respondent's letter dated 19.02.2019 and it is his case that the dismissal was unprocedural, unfair wrongful, unlawful and unjustified because:

- a) He was dismissed upon charges for which no notice to show-cause was issued.
- b) He was not given chance to defend himself against all the allegations in the dismissal letter.
- c) He was not given adequate notice of the allegations.
- d) The respondent delayed delivery of decision for 6 months in respect of some of the charges in the dismissal letter.
- e) The claimant was denied expeditious, reasonable and procedurally fair disciplinary process.
- f) The respondent did not consider the claimant's explanations in arriving at its decision.
- g) The dismissal was unjustified or unwarranted as was without valid reasons.
- h) The claimant was intimidated and threatened during disciplinary hearings which prejudiced him greatly and denied him just and due process.
- i) The respondent's decision was actuated by malice and bias.

The claimant stated that at termination he earned a gross pay of Kshs. 126, 251.00 per month. Further, he was a member of the respondent's retirement benefits scheme per contract but the respondent failed to remit the monthly pension contributions from January 2016 up to the date of termination being 57 months for Kshs. 617, 959.00. Further he worked for 5 years effective September 2014 without being given the agreed salary increment. The claimant further pleaded that he was entitled to the other allowances as claimed but which the claimant failed to pay.

The respondent filed the statement of response and counterclaim on 22.01.2020 and through Munyao, Muthama & Kashindi Advocates. The respondent admitted that it employed the claimant and as at termination the claimant served as Unit Manager at Voi Safari Lodge. The respondent further pleaded as follows. The claimant engaged in financial improprieties in breach of the respondent's policies. As Unit Manager in charge of Voi Safari Lodge he exposed the respondent to financial losses. On 19.07.2015 he was surcharged Kshs. 407, 720 on account of allowing a client one Faith Ongachi to lodge and leave without paying for services offered. On 05.04.2018 the claimant transferred the respondent's Safaricom Bonga Points from mobile No. 0722 223184 to a personal mobile No.0726 722911 without respondent's authority. The Bonga Points were later withdrawn and utilised on mobile phone No. 0729 409015. The claimant received payments due to the respondent through his mobile phone and distributed the payments to several staff occasioning accounting challenges.

The respondent further pleaded as follows. The letter to show cause dated 13.06.2018 related to the Bonga Point issue and the claimant replied unsatisfactorily on 26.06.2018 and summoned to Board meeting on 27.07.2018 and he attended. It emerged that the claimant had allowed use of unauthorised receipt books at the Voi Safari Lodge and further investigations followed; and it was found that he extended credit facility to customers contrary to respondent's credit policy so that the respondent lost income. Thus a letter to show cause dated 30.11.2018 issued and the claimant unsatisfactorily replied on 04.12.2018. Interdiction letter dated 20.12.2018 followed. Investigations followed and on 21.01.2019, the claimant was invited for disciplinary hearing but despite receiving invitation, he failed to attend. He stated by email that the notice was short and the respondent invited him to appear on 06.02.2019 but which date was notified to the claimant to have been varied to 13.02.2019. The claimant attended. Thereafter, it was resolved to dismiss the claimant from employment and the matter referred to the Ethics and Anti-Corruption Commission for further investigations and action. On 19.02.2019 the dismissal letter was issued and the claimant asked to pay all misappropriated respondent's funds and outstanding liabilities.

The respondent's case is that the claimant was duly informed of the allegations levelled against him, he was invited for disciplinary hearing and he was afforded an opportunity to defend himself. There was no delay in delivery of final decision and the claimant was aware of the further investigations in issue. The claimant was never intimidated at the disciplinary hearing as alleged and no threats issued. It was admitted that the claimant was a member of the retirement benefits scheme and all due amounts were credited to the claimant's benefit. Further, salary increments were discretionary and based on reviews and no statutory provision existed to justify the claim for salary increments.

The respondent counterclaimed that it employed the claimant as a Unit Manager in Voi Safari Lodge and the claimant engaged in financial improprieties leading to loss of revenue. Further, a special audit and investigation found the claimant culpable of violating respondent's credit policy, breaching respondent's financial policy, breaching internal fundamental accounting and control procedures, and, receiving and fraudulently transferring of cash receivables owed to the respondent to staff members. The respondent states that it thereby incurred losses including:

- a) Surcharged amount on Faith Ongachi having lodged between 18.03.2015 to 16.05.2015 making Kshs. 407, 720.00.
- b) Breach of internal revenue control procedures occasioning a loss of Kshs. 1, 334, 640.00.

The respondent prayed for:

- a) The claimant's suit be struck out or dismissed with costs as frivolous and lacking in merits.

- b) The claimant to pay the claimant a sum of Kshs. 1, 742, 360.00.
- c) The claimant to pay the respondent the loss particularised in the counterclaim due to blatant breach of respondent's financial and credit policy.
- d) Interest on b and c at Court rates.
- e) Any other relief that the Honourable Court may deem fit to grant.

The claimant filed on 20.02.2020 the reply to response and defence to counterclaim. The claimant denied that he allowed Faith Ongachi to lodge and leave without paying for services offered. He stated that he compelled the said Faith to pay but she refused and she was arrested and charged with a criminal offence. Further after the disciplinary hearing of 27.07.2018 he was not required to substantiate any issues and he took it that he had been cleared by the respondent. He denied engaging in financial improprieties as was alleged for the respondent. He stated that the respondent knew that Voi Safari Lodge had been understaffed and operational systems were therefore not smooth. Further, the accountants and not the claimant were responsible for accounts and finance under segregation of duties. Further the respondent was responsible for weak internal control systems and inadequate internal audit at the Lodge. Thus, the claimant never breached the policies as was alleged and he stated that he was not served with the internal audit report and investigation prior to disciplinary hearing on 13.02.2019. He denied misappropriating respondent's funds and owing as was alleged. The respondent had surged and recovered the sum of Kshs.407, 720 claimed and the same was not recoverable. The claimant prayed that the counterclaim be dismissed with costs and judgment be entered in his favour as prayed for in the memorandum of claim.

The Court has considered the pleadings, evidence and final submissions on record. The Court makes the following findings.

To answer the **1<sup>st</sup> issue** for determination the Court returns that there was no dispute that the parties were in a contract of service as pleaded for the claimant and admitted for the respondent.

To answer the **2<sup>nd</sup> issue** for determination there is no dispute that the respondent terminated the contract of service by the letter of summary dismissal dated 19.02.2019.

The **3<sup>rd</sup> issue** for determination is whether the summary dismissal was unfair. The letter of summary dismissal dated 19.02.2019 listed the following grounds or reasons for dismissal:

- a) Use of personal Safaricom line no. 0721 993 852 to transact company business via Mpesa leading to loss of lodge funds.
- b) Misappropriation and conversion of Voi Safari Lodge cash collections to personal use.
- c) Violation of company credit policy.
- d) Usage of duplicated serialised receipt books and exposure of VSL operations to fraud and malpractice.
- e) Fraudulent transfer of VSL Safaricom GSM line 0722 223184 Bonga points to an individual staff mobile line 0726 722911.
- f) Abuse of office – by use of personal mobile phone to transact business exposing the respondent to losses.

While testifying and submitting that the issue of Bonga Points and Mpesa transactions came as a surprise at the disciplinary hearing and letter of dismissal, the Court finds that as per the respondent's case, the issues had been raised in the letter of 13.06.2018 and claimant's reply of 26.06.2018 and the claimant was heard on the issues at the meeting of 27.07.2018. In particular, it was found that the Bonga Points had been transferred from the respondent's phone as now pleaded in this case and the claimant admitted that Mpesa transactions took place and he received the respondent's money on his phone. Taking into account that hearing, the Court finds that the claimant's alleged surprise in that regard will collapse. The Court finds that looking at the entire proceedings and history of the dispute, the claimant's case that the issue of Bonga Points and Mpesa transactions amounted to reasons for dismissal for which no notice to show-cause had been given was unfounded because those were already established misconducts per earlier meeting of 27.07.2018 and the further investigations had resulted in the further allegations in the show-cause letter of 30.11.2018. The letter to show cause alleged use of unauthorised and unauthenticated receipt books and, unauthorised credit facilities. The claimant testified that on both allegations he gave no evidence to exculpate himself at the disciplinary hearing and he had not received complaints. His reply to the letter to show cause was dated 04.12.2018. He denied to have authorised credit business and he requested for an internal audit in that regard. He replied that the custodian for the receipt books was the Assistant Accountant and issue of receipt books fell in the Assistant Accountant's docket. Further the receipt books were authentic and genuine because they came from prequalified suppliers and were requested for and approved for issue in both lodges. He also replied that most of the times the receipts were used he was on leave or on off days or on official duty.

The disciplinary hearing was held on 13.02.2019. The claimant denied violation of credit policy and the claimant denied giving any one credit facilities. He further denied that he had never seen the Credit Policy (and despite being the Unit Manager). He admitted receiving respondent's payments on his personal number but had transferred all payments to the respondent's bank account. The minutes of the disciplinary hearing state that the board reviewed the claimant's written and verbal submissions and made findings as follows:

- a) The claimant used his mobile phone to transact respondent's official business contrary to respondent's financial policy. The Court finds that the claimant's written replies and the minutes of disciplinary hearing support that finding and that reason of dismissal is found by the Court to have existed as at the time of dismissal.

b) The minutes of the disciplinary hearing state that the respondent had three methods for receiving payments namely Bank accounts, Visa Credit Card and cash remittance at the front office. The minutes of the hearing state that the use of personal phone diverted sales receipts to personal use of the claimant amounting to Kshs. 1, 334, 640.00. The Court finds that the particulars and the evidence of the alleged conversion of Kshs. 1, 334, 640.00 is not stated in the report and the Court finds that as at termination, that alleged reason for termination had not been established.

c) The minutes of the hearing state that the claimant had allowed unsupported unpaid bills amounting to Kshs.7, 068, 157.50. The Court finds that similarly the particulars and evidence was not set out in the record of the minutes and the claimant having denied the allegation, the same cannot be said to have existed as at the time of termination. Further, while the claimant denied knowledge of the credit policy, it was not shown when such policy may have been brought to his attention and allegations of the violation are found not to have existed as at the time of the termination especially that the policy statement was not stated and the particulars of the alleged violations elaborated at the disciplinary hearing.

d) On use of duplicated receipt books, the Court has considered the claimant's reply that the same was in the docket of the Assistant Accountant and mostly used when the claimant was on off or leave. The disciplinary hearing found that the claimant had failed on his managerial oversight role in the use of the duplicated receipt books and the Court returns that the said reason for termination has been shown to have existed as at termination because the claimant did not deny knowledge of the books and he is found to have failed on his managerial oversight role – he knew the books had been supplied and they were in use but he took no action.

The Court therefore returns that as submitted for the respondent, the claimant was accorded due process and the reasons the Court has found existed as at the time of termination justified the termination as not unfair. To that extent and as submitted for the respondent, the dismissal was not unfair in terms of section 41 on due process of notice and a hearing and, section 45 on fair reason and due process. The claimant's case for unfair termination and compensation in that regard will collapse.

The 4<sup>th</sup> issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court has already found that the claimant is not entitled to a declaration that the termination was unfair and unlawful and compensation in that regard has been found unjustified. With respect to the other prayers the Court makes findings as follows:

a) The claimant has prayed for 3 months' salary in lieu of notice Kshs.378, 753.00. As the summary dismissal was found not to have been unfair, the Court finds that the respondent was entitled to dismiss with a lesser notice than the contractual or statutory one and the prayer will fail.

b) The claimant prayed for 30 outstanding leave days **Kshs.126, 251.00**. By consent at the hearing on 23.03.2021, the parties agreed to the prayer and it was granted.

c) The claimant prayed for 56 outstanding off days Kshs.235, 668.50. The claimant by his evidence replied to the respondent that the duplicated receipt books were used mostly on occasions he was on off days or leave. By that reply and in absence of material and relevant evidence to establish details of the claim, the Court returns that on a balance of probability, the claimant took off days, and, the prayer will fail.

d) The claimant gave no evidence or submissions to justify the claim for entertainment allowance March 2016 to February 2019 Kshs. 280, 000.00 and the prayer is declined. In any event, and as submitted for the respondent, the payslips exhibited for the claimant show the allowance was paid.

e) As submitted for the respondent the claimant offered no evidence to support the prayer for outfit allowance 2018 -2019 Kshs. 25, 000.00. The prayer is declined.

f) The claimant gave no evidence and justification for leave travel allowance Kshs.25, 0000.00 and as submitted for the respondent the same is declined.

g) The claimant gave no evidence and submissions to justify unpaid transfer allowance Kshs.28, 476.00 and the same is declined.

h) The claimant at the hearing surrendered the prayer for unpaid annual basic salary increment Kshs.415, 352.00 and the surrender applies accordingly.

i) As submitted for the respondent the retirement benefits statement shows full remissions and the prayer for unremitted or unpaid pension contributions Kshs.617, 959.00 is declined as unjustified.

The respondent made no submissions to support the counterclaim and the same is deemed abandoned. The Court has already found that the respondent failed to establish the matters in the counterclaim during the disciplinary hearing in issue. Further and as submitted for the claimant, the audit report was never served upon the claimant prior to the disciplinary hearing and evidence to establish the counterclaim has not been provided. The counterclaim is declined.

The Court has considered the parties' margins of success and each party will bear own costs of the claimant's suit and the respondent's counterclaim.

In conclusion judgment is entered for the parties for:

a) The respondent to pay the claimant the sum of **Kshs.126, 251.00** by 01.07.2021 failing interest to be payable thereon at Court

rates from the date of filing the suit till the date of full payment.

b) Dismissal of the counterclaim.

c) Each party to bear own costs of the claim and counterclaim.

**Signed, dated and delivered by video-link and in court at Mombasa this Friday 21<sup>st</sup> May, 2021.**

**BYRAM ONGAYA**

**JUDGE**