



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 476 OF 2018**

**JARED MARANGA OCHUNGO.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

**Introduction**

1. On 3<sup>rd</sup> August 2018, the Claimant filed a claim against the Respondent, seeking compensation for wrongful dismissal and payment of terminal dues. On 25<sup>th</sup> August 2020, the Claimant filed an amended claim.
2. In spite of due service, the Respondent did not file a response and the matter therefore proceeded *ex parte* on 10<sup>th</sup> December 2020. The Claimant testified on his own behalf and further called Dr. Charles Mwangome. The Claimant also filed written submissions.
3. In a ruling delivered on 20<sup>th</sup> May 2021, the Court disallowed the Respondent's application seeking orders to set aside the *ex parte* proceedings and re-opening of the case.

**The Claimant's Case**

4. The Claimant's case is captured in a Memorandum of Claim dated 3<sup>rd</sup> September 2018 and amended on 27<sup>th</sup> July 2020.
5. The Claimant states that he was employed by the Respondent on contracts renewed every three (3) months from 19<sup>th</sup> September 2007 until 13<sup>th</sup> November 2009, when he was transferred to Voi Safari Lodge as Departmental Head in charge of the Kitchen.
6. The Claimant further states that sometime in the year 2011, he was confirmed as Assistant Food and Beverage Manager at Mombasa Beach Hotel, earning a gross salary of Kshs. 78,620.
7. At the time of his dismissal on 4<sup>th</sup> June 2018, the Claimant was working in the position of Executive Sous Chef, earning a gross salary of Kshs. 98,813.
8. The Claimant's case is that his dismissal was unlawful and unfair as there was no justifiable reason for it and he was not accorded an opportunity to be heard.
9. The Claimant now claims the following from the Respondent:

- a. 12 months' salary in compensation.....Kshs. 1,185,756
- b. 1 month's salary in lieu of notice.....98,813
- c. Unremitted insurance premiums.....83,020
- d. Annual leave for 2017-2018.....98,813

e. Leave travel allowance.....20,937

f. Costs plus interest

### **Findings and Determination**

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

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

### **The Termination**

11. The Claimant was summarily dismissed by letter dated 4<sup>th</sup> June 2018 stating:

“Dear Mr. Ochungo

#### **RE: SUMMARY DISMISSAL-ABSENT FROM DUTY**

It has come to management's attention that once again you have been absent from duty this time from the 29<sup>th</sup> May 2018 to 4<sup>th</sup> June 2018 a duration of 5 days without any communication on your whereabouts nor consent from management. Any absence from duty or in the course of duty without permission is considered as breach of KSLH terms and condition of service. This is contrary to the laid down procedures.

In view of the above the company has no alternative but to terminate your service summarily as per KSLH terms and condition of employment clause 5.4.1.

#### **Please note:**

- I. Your dues covering all the points that need to be considered in light of the relevant terms and conditions under which you have served the company, will be processed and draft of the same given to you.
- II. You will be expected to pay the company any liabilities such as advances imprests, IOUs and balance in debtors' accounts there may be any confirmed by the Finance Manager.
- III. You will be expected to present a fully signed clearance form.

There being anything that has been left out, you may write to the undersigned.

Yours sincerely

**Kenya Safari Lodges & Hotels Ltd.**

(signed)

Victor M Shitakha

**Chief Executive Officer/GM**

12. The Claimant appealed against the dismissal vide his letter dated 8<sup>th</sup> June 2018 and by a return letter dated 11<sup>th</sup> June 2018, the Respondent upheld the dismissal.

13. The reason for the Claimant's dismissal, as communicated by letter dated 4<sup>th</sup> June 2018, was absenteeism from duty. In his testimony before the Court, the Claimant admitted being absent from work between 29<sup>th</sup> May 2018 and 3<sup>rd</sup> June 2018. He however added that he suffered from a psychosocial disease which his employer was aware of.

14. The Claimant's medical condition was confirmed by Dr. Charles Mwangome, Consultant Psychiatrist, in a report dated 26<sup>th</sup> June 2018. According to Dr. Mwangome, the Claimant suffered from 'alcohol use disorder and comorbid major depression', which the Doctor described as 'chronic relapsing brain disorders.'

15. The Respondent also appeared to have been aware of the Claimant's illness. I draw this conclusion from the Respondent's letter dated 29<sup>th</sup> December 2017, addressed to the Claimant as follows:

“Dear Mr. Ochungo

**RE: ABSCONDING OF DUTY**

The above subject refers:

Following the HR Committee meeting held with you on 20/12/2017 where the above was discussed at length and further to the Doctors letter dated 16/11/2017, it was noted that you have a Depressive illness.

*It was also noted that, as per your statement when the condition recurs you do not consider/see anything important. This is of great concern to management in that you are the chef In charge of the Mombasa Beach Hotel Kitchen operations.*

However, in effort for management to help/support you to overcome this condition which according to the Doctor is treatable it was agreed that:-

- I. You must strictly adhere to your Doctors advise.
- II. be guided that management will be following up on your progress from time to time with your Doctor
- III. That within a period of two months, from the date of receipt of this letter the committee will review your case over progress on the above recommendations
- IV. You had 4 unaccounted for days between 07 to 11/11/2017 and as is procedure, there was no sick off document from the Doctor. You are hereby required to process the necessary document to account for the 4 absent days mentioned above

It is my hope that the above is understood and abided with.

Yours sincerely

***Kenya Safari Lodges & Hotels Ltd***

(signed)

Eunice Nzilani

**Human Resources Manager**

(signed)

Victor M Shitakha

**General Manager”**

16. From the foregoing, it is clear that the Respondent was aware of the Claimant’s illness, which evidently, interfered with his work. In its aforesaid letter dated 29<sup>th</sup> December 2017, the Respondent set out a number of steps to be taken towards supporting the Claimant to recover. On the part of the Claimant, he was required to strictly adhere to his Doctor’s advice and the Court did not see any evidence of breach of this requirement.

17. In his report dated 26<sup>th</sup> June 2018, Dr. Mwangome confirmed that the Claimant’s medication compliance and weekly attendance to the outpatient clinic was good. Dr. Mwangome also confirmed that the Claimant, who had been on long term care, was noted to have made marked improvement.

18. On its part, the Respondent, in its letter of 29<sup>th</sup> December 2017, had undertaken to follow up and review the Claimant’s case. There was no evidence that this was done. In fact, the next communication from the Respondent to the Claimant was the dismissal letter dated 4<sup>th</sup> June 2018, which, according to the Claimant, was served on him on 5<sup>th</sup> June 2018.

19. This case turns on the manner in which the Respondent handled the Claimant’s case at the shop floor. Section 45(2) of the Employment provides:

**(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 employees conduct, capacity or compatibility; or**
  - ii. based on the operational requirements of the employer; and**

**c. that the employment was terminated in accordance with fair procedure.**

20. The fair procedure contemplated under Section 45(2)(c) of the Employment Act is the one set out under Section 41 of the Act. In *Alphonse Maghanga Mwachaya v Operation 680 Limited* [2013] eKLR Radido J summarised what an employer must do in order to discharge its burden under Section 41 as follows:

- a. Explain to the employee, in a language the employee understands, the reasons why termination is being considered;**
- b. Allow a representative of the employee, being either a fellow employee or a shop floor representative to be present during the explanation of the reasons;**
- c. Hear and consider any explanations by the employee or his representative;**
- d. Where the employer has more than 50 employees, it has complied with its own internal disciplinary rules, as required under Section 12 of the Employment Act.**

21. The Claimant filed a copy of the of the Respondent’s Terms and Conditions of Service, whose Clause 5.2 sets out the disciplinary procedures applicable to the Respondent’s employees. A key component of these procedures is a requirement for a written statement of charges facing an employee. The procedures also provide for a warning system.

22. As held by this Court in its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [ 2014] eKLR the procedural fairness dictates set out under Section 41 are mandatory and non-compliance with any of them renders any disciplinary action out- rightly unfair.

23. In this case, the Respondent did even bother to comply with its own internal disciplinary rules. The inescapable conclusion therefore is that the reason for the Claimant’s dismissal was not established at the shop floor and the dismissal was consequently wrongful.

**Remedies**

24. Pursuant to the foregoing finding, I award the Claimant twelve (12) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s long service with the Respondent, in addition to the Respondent’s unlawful conduct in bringing the employment to an end.

25. I further award the Claimant one (1) month’s salary in lieu of notice.

26. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

27. Since the Claimant did not actually proceed on leave for the days on account of which he claims leave travel allowance, the claim thereon is without basis and is dismissed.

28. The claim for unremitted insurance premiums was not proved and is disallowed.

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

- a. 12 months’ salary in compensation.....Kshs. 1,185,756
- b. 1 month’s salary in lieu of notice.....98,813
- c. Leave pay for 2017/2018.....98,813
  
- Total.....1,383,382**

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 22<sup>ND</sup> DAY JULY 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:

Miss Mwainzi for the Claimant

No appearance for the Respondent