



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

**AT NAIROBI**

**CAUSE NO. 1264 OF 2017**

**(Before Hon. Justice David Nderitu)**

**WINNIE MBETE MUTUA.....CLAIMANT**

**VERSUS**

**BRACKENHURST KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. In a statement of claim dated 5<sup>th</sup> July 2017 the Claimant prays for:-

- a).. *A declaration that the termination of the plaintiff's employment contract by the defendant was unfair unlawful and unprocedural.*
- b).. *The sum of Kshs.2,750,685.00 (being one month's pay in lieu of notice and twelve months' pay for damages for summary dismissal)*
- c).. *General damages on defamation and maltreatment at the time of termination.*
- d).. *Costs of the suit.*
- e).. *Interest on (a) and (b) above*
- f) *Any other or further relief which this Court may deem fit to grant.*

2. In a statement of defence dated 4<sup>th</sup> September, 2019 the Respondent prays for dismissal of the cause with costs. The Respondent states that the Claimant was lawfully and procedurally dismissed for gross misconduct to which the Claimant allegedly admitted.

3. Together with their respective pleadings, the parties filed witness statements and bundles of documents. At the close of the pleadings, the matter was certified ripe for hearing on 4<sup>th</sup> June 2020 and the same proceeded for hearing before this Court on 29<sup>th</sup> July 2021 when each party called one witness to testify in support of their respective positions.

4. Upon conclusion of the oral testimonies it was agreed that the respective Counsel for parties address the Court by way of written submissions.

**Claimant's and Respondent's Positions**

5. The Claimant's case is that she was hired as Marketing Manager and that the terms and conditions of the said employment is contained in a letter of offer dated and executed on 17<sup>th</sup> November 2015. The Claimant stated that after completion of the probation period, she was confirmed and continued to work for the Respondent until 17<sup>th</sup> May, 2017 when she was dismissed for alleged misconduct.

6. In support of her cause, the Claimant (CW1) testified alone and relied on various documents that were produced as exhibits. According to the Claimant her dismissal was wrongful and unlawful both in substance and procedure.

7. On the other hand, the Respondent called one witness (RW1) to testify in support of their position who also relied on the similar exhibits that the Claimant produced. The Respondent's case is that the Claimant was dismissed on valid reason(s) and that the procedure adopted was lawful.

### **Issues for Determination**

8. It is not disputed that the Claimant was an employee of the Respondent for the period from 17<sup>th</sup> November, 2015 to 11<sup>th</sup> May, 2017. However, there is an issue as to the quantum of the Claimant's salary as at the time of dismissal.

9. The Claimant filed a list of issues on 1<sup>st</sup> October, 2019 dated 30<sup>th</sup> September, 2019. The counsel for the Respondent did not agree nor consent to the issues as framed by the Claimant and as such this Court shall frame the issues for determination based on the pleadings filed by both parties, oral testimonies, exhibits produced and the written submissions.

10. The Court identifies the following issues for determination:-

- (i) What was the salary of the Claimant as at the time of dismissal?
- (ii) Was the dismissal of the Claimant by the Respondent lawful, both in substance and procedure?
- (iii) If the dismissal was wrongful, what reliefs is the Claimant entitled to and in what quantum?
- (iv) Who meets the costs of this litigation?

### **Claimant's Salary**

11. The Claimant pleaded in paragraph 4 of the statement of claim that her monthly salary, on average, amounted to Kshs.211,605/=. This allegation prompted the Respondent to plead in paragraph 3 of the statement of defence that the Claimant's monthly salary was Kshs.120,000/= and not Kshs.211,605/=.

12. However, this is not a difficult issue to resolve. In all the pay slips that the Claimant produced as exhibits and filed with the list of documents, the gross pay is averaging the said sum of Kshs.211,605/=. It is the basic salary that is in the sum of Kshs.120,000/=. That is the position that this Court has established from the payslips as filed for the months of January, February, March, and April 2017. These exhibits have not been disputed or objected to by the Respondent.

13. It is therefore clear that while the basic salary of the Claimant was Kshs.120,000/= her last gross salary was Kshs.211,605/=. These are the figures that the Court shall apply in calculating any reliefs that the Claimant may be entitled to or as the case may be.

### **Dismissal**

14. The circumstances under which the Claimant was dismissed by the Respondent are rather agreed on by both parties. The issue between the parties is whether the dismissal was substantively and procedurally fair and lawful.

15. It is not in dispute that the Claimant was the overall in-charge of bookings. It was her duty and obligation to ensure that all bookings, including compliments, were fed into the system whether she did it in person or the same was entered by her junior employees who worked under her.

16. On 30<sup>th</sup> April 2017, the Claimant admittedly gave a complimentary to her relatives to spend a night at the Respondent's establishment. It turns out that this complimentary was not fed into the data entry system as expected. As noted above, it was within the mandate of the Claimant to ensure that all bookings, whether paid for or complimentary, were recorded and fed into the system for accountability. Logically, it appears that the Respondent was rightfully and regularly monitoring this data to eliminate abuse especially of the complimentary portfolio.

17. In his testimony, RW1 for the Respondent explained that compliments were meant for regular customers who had paid for bookings for a while. RW1 explained that compliments were not an open pass for anyone to be granted the same as it would affect the revenue base of the Respondent whose core business is accommodation services.

18. It is not clear from the evidence on record as to how the Respondent became suspicious that the Claimant had failed to record the complimentary that she had given to her relatives on 30<sup>th</sup> April 2017. Either way, by 5<sup>th</sup> May, 2017 the Managing Director of the Respondent requested for a record for all compliments issued in 2017 and the reasons therefor.

19. The Claimant complied but left out the complimentary issued to members of her family on 30<sup>th</sup> April 2017. This could not be accidental on the part of the Claimant. It was hardly five days after she had issued a complimentary to members of her family, yet she had failed to ensure that the said complimentary had been fed into the system. As noted elsewhere, it was the duty of the Claimant to ensure all bookings, whether paid for or complimentary, were fed into the system for purposes of accountability.

20. Even during the hearing in Court, the Claimant was not able to explain why and how the complimentary that she had issued to her relatives was missing from the system. The Court concludes and finds that the Claimant deliberately omitted the said complimentary to members of her family because she knew it was wrong to issue such a complimentary without prior approval from the Respondent. If there

was one complimentary that was and or ought to have been in the mind of the Claimant, it is the one that she had given to members of her family. The omission of the same in the system was deliberate and intended to avoid accountability on the part of the Claimant. RW1 was clear in his testimony that the core business of the Respondent is accommodation and that failure to keep proper record of all bookings and accounting for the same led to loss of revenue to the Respondent. It cannot be true that the Claimant had discretion to issue complimentary without any control or regulation from the Respondent as that would be unreasonable, illogical, and prone to abuse leading to loss of revenue.

21. Subsequently in a letter dated 10<sup>th</sup> May 2017, the Claimant admitted her mistake and misconduct and apologised to the Respondent. This letter was produced as exhibit 7 by the Claimant. In this letter, the Claimant stated that there was no policy on compliments and even undertook to meet the loss occasioned. What followed is that the Claimant was issued with a letter of summary dismissal dated 11<sup>th</sup> May 2017.

22. It is in the circumstances set out above that the Claimant has approached the Court seeking the reliefs set out at the beginning of this judgment.

### **Substantive Fairness**

23. Jurisprudence on what constitutes substantive fairness is now fairly settled. Section 44(3) of the Employment Act No. 11 of 2007 (the Act) provides that an employer may summarily dismiss an employee who by his conduct has fundamentally breached the terms of the contract of service. Section 44(4)(c) provides that an employer may summarily dismiss an employee who wilfully neglects to perform his work or carelessly or improperly performs his duties. Section 44(4)(g) provides that it is a good ground for summary dismissal where the employee is reasonably suspected to have committed an offence against the employer or actually commits an offence against the employer or employer's property to substantial detriment of the employer.

24. Section 45 of the Act provides on what constitutes unfair termination, both in substance and procedure. In summary, this Section provides that the reasons for termination or dismissal for that matter should be valid, fair, just, and equitable. Section 43 and 47 of the Act place burden on both the employer and the employee to discharge their respective burdens in cases of an alleged unlawful termination or wrongful dismissal. In **Bamburi Cement Limited v William Kilonzi (2016) eKLR**, the Court of Appeal described Section 47(5) as providing for "*shared burden, which strictly speaking amounts to the same thing*". In other words, each of the parties has to plead and prove their respective positions to persuade the Court to rule in their favour.

25. In **Postal Corporation of Kenya v Tamu (2019) eKLR** and **Puis Machafer Isundu v Lavington Security Guards Ltd (2017) eKLR**, the Court emphasized that for substantial fairness to be met the employer should have a valid reason. All the above statutory provisions and the precedents point out that for an employer to dismiss an employee, the foundation of the disciplinary action taken has to be reasonable, logical, lawful, fair, just, and equitable. It is not every misconduct that should lead to disciplinary action let alone dismissal. There are other actions that an employer may take to contain misconduct. Such actions may include warning, admonishment, surcharge, demotion, and others in accordance with human resource manuals and policies and best practice in human resource management; so long as the same are within the law.

26. Now, applying the above principles, did the Respondent have a valid reason in summarily dismissing the Claimant? There is only one ground upon which the Claimant was dismissed. On 30<sup>th</sup> April 2017, the Claimant booked her relatives into the facility of the Respondent on a complimentary. On 5<sup>th</sup> May 2017, the Respondent through the Managing Director, probably on suspicion that the Claimant was not honest in her entry of bookings, requested that the Claimant generate and supply all compliments for 2017. The Claimant submitted the said data but the complimentary to her family members was conspicuously missing. The Claimant was unable to give an explanation as to why this complimentary as missing even after probing and prompting from the Respondent. The Claimant only described the omission as "*strange*" in her explanation letter dated 10<sup>th</sup> May 2017, which she produced as exhibit 7.

27. The Respondent concluded that the Claimant was dishonest and or careless and negligent in her duties and concluded that they had no trust in the Claimant as expressed in the letter of summary dismissal dated 11<sup>th</sup> May, 2017 produced as exhibit 8 by the Claimant.

28. The evidence on record is that the Claimant did not have other disciplinary issues. However, the Respondent through RW1 testified that the misconduct on the part of the Claimant was dishonest and fraudulent and that it made Respondent to completely lose trust in the Claimant.

29. In their submissions, the Respondent are relying on Section 44(4)(c) and (g) as the basis for their valid reason to summarily dismiss the Claimant. It is not disputed that it was the duty of the Claimant to ensure that there was proper record of all bookings including complimentary at all times. The Claimant was in charge of that docket and she could do the work herself or ensure that those under her did that. It is no coincidence that the data missing is one in which the Claimant had a personal interest in that she had issued a complimentary to members of her family.

30. In the entire pleadings, oral testimony, and even the filed written submissions, the Claimant has not offered any explanation as to why that particular entry wherein she had an interest was missing. The Court concludes and finds that the Claimant deliberately and dishonestly failed and or refused to disclose that she had made a complimentary to members of her family on 30<sup>th</sup> April 2017. Further, this Court finds that the reason why the Claimant failed and or refused to disclose is because she knew that what she had done was wrong. Furthermore, that is the very reason why the Claimant apologised and undertook to meet the loss occasioned in the letter of explanation dated 10<sup>th</sup> May 2017.

31. RW1 testified that the misconduct on the part of the Claimant occasioned the Respondent a loss of over Kshs.12,000/= while the Claimant estimated the loss at Kshs.3,000/= and undertook to meet the same.

32. In view of the foregoing, this Court finds that the Claimant wilfully neglected to perform her duties and or carelessly and improperly executed her duties. This is a valid ground for summary dismissal as per Section 44(4)(c) of the Act. In addition, and or in the alternative, the Respondent had reasonable and sufficient grounds to suspect that the Claimant had committed an offence against the Respondent or the property of the Respondent as envisaged under Section 44(4)(g) of the Act. Thus as far as a valid reason for disciplinary action is concerned, this Court finds that the Respondent had a valid reason to initiate disciplinary action.

### **Procedural Fairness**

33. Having found that the Respondent had reasonably sufficient grounds to subject the Claimant to disciplinary proceedings for misconduct, the next fundamental issue is whether the Claimant was taken through a fair and just hearing in accordance with all applicable laws.

34. The starting point as far as labour relations and rights are concerned is Article 41 of the Constitution of Kenya on fair labour practices. Article 47 further expounds on right to fair hearing and due process in administrative actions. Fair hearing and due process in matters employment is further affirmed by Sections 41 and 45 of the Employment Act. Procedural fairness also comprises of hearing in accordance with rules of natural justice.

35. Over time a plethora of judicial precedents has developed on this issue of due process and procedural fairness. Examples of decisions that have dealt with this include **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR**; **Kenfreight (EA) Limited v Benson K. Ngubi (2016) eKLR** and **Loice Otieno v Kenya Commercial Bank Limited (2013) eKLR**.

36. In summary this Court considers the following to be vital ingredients for consideration in determining whether the procedure adopted by an employer is procedurally fair: -

(i) An employer must have a valid reason for subjecting an employee to disciplinary proceedings. Inasmuch as it is easy and more convenient to classify a valid reason as limited only to the substantial aspect of the disciplinary process, it is logically correct to observe that for an employee to be subjected to due process or fair hearing, the first step is to ensure that there is a valid and lawful reason in doing so.

(ii) The employee must be informed, in a language that he understands, and in precise and unambiguous terms, the allegations accusations and or charges that he is facing. This notice must be in writing.

(iii) The employee must be informed in the notice in (ii) above, to respond to the charges in writing and of his right to submit any evidence or other dispositions that he may wish to rely on during the hearing.

(iv) The notice must also give adequate time to the employee to respond thereto.

(v) Depending on the decision taken by the employer after considering the response, the employee must be promptly informed of the same. It is not every notice issued or disciplinary proceedings that must end up in a hearing. The employer may decide to issue a verbal warning or take the explanation as giving a reasonable ground of stopping the proceedings at that point without any further action.

(vi) If the employer decides to conduct a hearing, the employee should be invited for the hearing and informed of the venue and time for the hearing.

(vii) Most importantly, the employee must be informed of his right to come along with a co-worker, a witness, or an official of his Union if he is a member of a Union.

(viii) Again, the invitation to the hearing and the information in (vii) above must be in writing.

(ix) It is paramount that the employee be informed of the procedure to be adopted during the hearing and the likely outcomes and consequences of the same.

(x) Once the hearing concludes, the employee must be informed of the outcome and whatever options that may be available including avenues for internal review or appeal.

37. The above ingredients and steps are not exclusive of others that may add value to the proceedings based on rules of natural justice and rule of law. The legislature deliberately put in place the Sections of the Act and the Articles of the Constitution alluded to earlier on to ensure that an employee is not unfairly dismissed and at the same time an employer's hands are not tied to keeping an undesirable employee. It is intended to ensure that an employer does not approach such disciplinary proceedings with a predetermined mind.

38. This Court is cognisant of the fact that disciplinary proceedings by an employer are not equivalent to Court proceedings and as such the technical rules of procedure and evidence may not strictly apply in such proceedings. The Court is also fully aware of the right of an employer to discipline employees and that right must be respected. However, where an employer blatantly violates the rules of natural justice, fair hearing, and due process, the Court shall not hesitate in interfering and declaring the same a nullity or an illegality.

39. Applying the above principles to the present case, the Court has already found that the Respondent had reasonably sufficient reason(s) to taking disciplinary proceedings against the Claimant. The question now is whether the Respondent complied with the other ingredients.

40. This Court has thrashed through the pleadings, the witness statements and the documentary and oral evidence adduced from both sides and there is no evidence at all that the Claimant was issued with a written notice to show cause containing specific allegations, charges, or accusations relating to the alleged misconduct and calling upon her to respond thereto. It emerges that all that the Claimant was requested to do was to supply the list of complimentary portfolios that she had issued for 2017.

41. The Claimant was not informed that she was under investigation and no specific allegation, charges, or accusations were levelled against her at that point. It is when she was called to a meeting with the Managing Director and other senior management team members that she realized that she was under investigation for the complimentary that she had issued to members of her family on 30<sup>th</sup> April 2017.

42. Whether the Claimant admitted, accepted, and or apologised for her alleged misconduct, this Court finds and holds that the Claimant was not subjected to due process in the standards set out above. There is no record of the hearing proceedings and the correct assumption is that none exists.

43. What appears to have happened is that after the Claimant gave her apology and even undertook to meet the loss occasioned, the Respondent simply issued the letter of summary dismissal dated 11<sup>th</sup> May 2017. Even by the very minimum steps set above, this cannot be procedural fairness.

44. In view of lack of procedural fairness, this Court concludes and finds that the summary dismissal was wrongful, illegal, and unlawful.

45. RW1 testified that the misconduct had been reported at Tigoni Police Station; however, no evidence whatsoever was adduced to support that position, may it be an Occurrence Book (OB) entry or an investigations report. No matter how gross an employer considers the misconduct of an employee to be, every employee should and must be subjected to due process and procedural fairness. The Respondent failed to discharge this obligation.

### **Reliefs**

46. The reliefs sought by the Claimant have been set out in the first page of this judgment. The reliefs or remedies that this Court may grant are spelt out in Section 49 as read with Section 50 of the Act. Section 12(3) of the Employment and Labour Relations Court Act further illuminates on the remedies. This Court shall now proceed and consider each of the reliefs sought.

47. It is by now clear that the summary dismissal of the Claimant by the Respondent was unprocedural and therefore wrongful and unlawful.

48. There is no dispute that no notice was issued to the Claimant at all. This Court finds no difficulty in awarding one month's gross salary in lieu of notice in the sum of **Kshs.211,605.10**. That was the Claimant's last gross pay as per the pay slip for April 2017.

49. On the issue of compensation for wrongful dismissal, Section 49(1)(c) restricts the award to not more than twelve months' gross salary. Section 49(4) provides for a variety of factors that this Court should take into consideration in determining the quantum awardable under this head. There is no doubt that the Respondent had reasonably sufficient grounds to initiate the disciplinary proceedings. However, they did not apply the necessary due process and procedural steps in arriving at the decision of summary dismissal. It is also clear that the Claimant contributed to a great extent in the Respondent taking the disciplinary proceedings for reasons enumerated elsewhere in this judgment. Although the Claimant alleges that there was no policy or guidelines barring her from giving complimentary accommodation to her relatives, failure to disclose the same or seek approval from the Respondent was dishonest and this is a factor to be taken into consideration when making an award under this head. The Claimant worked with the Respondent for about two years and there is no evidence of how long it took her to obtain another job after the dismissal.

50. Doing the best that this Court can do and taking into consideration the entire circumstances of this cause and the law applicable and especially the factors under Section 49(4) of the Act, an award of three (3) months' gross salary would be fair compensation as herein under:

$Kshs.211,605.10 \times 3 = \mathbf{Kshs.634,815.30}$

This amount is subject to statutory deductions.

51. In the submissions filed by Counsel for the Claimant, it appears the Claimant abandoned the quest for damages for defamation. There are no particulars of the alleged defamation in the statement of claim and no evidence was tendered in support of this claim. It is not enough for a party to just plead an issue and yet fail to support the same by way of convincing evidence if the Court is to remedy the same. The Court finds that the allegation on defamation was not properly pleaded and no evidence was adduced in support thereof. The same is denied and dismissed. The claim on maltreatment was equally not proved and is likewise dismissed.

52. Costs follow event and the Claimant is awarded costs based on the award given. The said costs may be agreed or taxed.

### **Disposal and Award**

53. The court disposes of this matter by issuing the following orders: -

- (a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful and unlawful for lack of procedural fairness.

(b) The Claimant is awarded the following monetary compensation: -

**(ii).. One month's salary in lieu of**

**Notice..... Kshs.211,605.10**

**(iii). Compensation for wrongful dismissal..... Kshs.634,815.30**

**TOTAL.... Kshs.846,420.40**

(c) Costs to the Claimant.

(d) Interest on amount in (b) above shall be at Court rates from the date of this judgment till payment in full.

**DATED, VIRTUALLY DELIVERED, AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2021**

**DAVID NDERITU**

**JUDGE**