



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1006 OF 2017**

**JULIUS MWANGI.....CLAIMANT**

**VERSUS**

**MERIDIAN HOTEL LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant avers that he was employed by the respondent with effect from 14<sup>th</sup> June, 1995 as a waiter. He claims that he rose in rank and by the time his services were terminated on 10<sup>th</sup> March, 2016, he was holding the position of supervisor. He claims that his termination was malicious hence seeks various reliefs including compensatory damages for unlawful termination, a certificate of service, travelling allowance, payment in lieu of leave allowance, salary for days worked in March, 2016, 2 months' pay in lieu of notice, service gratuity and unpaid overtime.
2. The respondent filed a memorandum of response in answer to the claim, through which it admitted that the claimant was employed with effect from 10<sup>th</sup> July, 1995. The respondent denied that the claimant was summarily dismissed without justifiable cause. On this issue, it averred that the claimant absconded duty for an extended period of time without any justifiable cause, neglected duty and refused to obey the lawful commands which were within his scope of his duty. That further, and following a regular audit of its accounts, the claimant together with other employees of the respondent had manipulated its accounting system.
3. The respondent further averred that the claimant was duly informed of the allegations against him. In addition, it stated that the allegations leveled against the claimant amounted to gross misconduct thus warranting summary dismissal under section 44(4) of the Employment Act.
4. The matter came up for hearing on 10<sup>th</sup> November, 2017, and the respondent was represented by Ms. Muthee who indicated to the court that she had just come on record hence sought for leave to put in her witness statements.
5. On 14<sup>th</sup> July, 2021, the matter was mentioned before the Deputy Registrar for purposes of taking a fresh hearing date. The court caused both parties to be served with the said mention notice vide their respective email addresses which were disclosed to the court for that purpose.
6. From the record, the respondent did not make any appearance on the said 14<sup>th</sup> July, 2021 hence another mention date for 26<sup>th</sup> July, 2021 was given. On 26<sup>th</sup> July, 2021, the respondent was absent yet again hence another mention date for purposes of taking a fresh hearing date was given for 4<sup>th</sup> August, 2021.
7. On 4<sup>th</sup> August, 2021, the matter was slated for hearing on 6<sup>th</sup> October, 2021 and the claimant directed to serve the respondent accordingly. On 6<sup>th</sup> October, 2021, when the matter came up for hearing, the respondent was absent from court.
8. The claimant filed an Affidavit of service sworn on 5<sup>th</sup> October, 2021 by Kirimi David, its Advocate on record. He averred that he effected service of the hearing notice electronically, upon the respondent's Advocates through the address, [Brenda@mutheeadvocates.co.ke](mailto:Brenda@mutheeadvocates.co.ke) and [Brendamuthee@gmail.com](mailto:Brendamuthee@gmail.com). It is worth noting that the respondent's Advocate on record provided the said email address in its Notice of change Advocates dated 15<sup>th</sup> February, 2018.
9. On 6<sup>th</sup> October, 2021, the matter came up for hearing and upon the court being satisfied with the return of service, directed that the matter proceeds for hearing in absence of the respondent pursuant to Rule 22 of the Employment and Labour Relations Court Rules (2016).

**Claimant's case**

10. The claimant took the stand and testified in support of his case. At the outset, he sought to rely on his witness statement and supplementary witness statement which he asked the court to adopt as part of his evidence in chief. He also produced his bundle of documents filed together with the claim, as well as the supplementary documents as exhibits before Court.

11. The claimant averred that he was initially employed as a waiter then later promoted to the position of supervisor. That as a supervisor, he would work from Monday through to Saturday. He averred that he did not report to work on 6<sup>th</sup> March, 2016 as he was unwell. That nonetheless, he was in communication with his immediate supervisor who was aware of his whereabouts. That he later reported to work on Monday but was directed to go back home. That he was later recalled and given a letter of summary dismissal. He disputed the allegations contained in the said letter.

12. He further told court that he had worked for the respondent for a period of about 20 ½ years and throughout this period, he had never been disciplined whatsoever. That he was never paid his terminal dues and when he demanded for the same, he was called by the respondent's Human Resource Manager who advised him to go and collect the said dues. That upon reporting, he was arrested by police officers who booked him at the Central Police Station. That he was locked up the entire weekend, since he was arrested on a Friday and was denied any bond.

13. It was also his testimony that he was later charged in court with an offence of stealing by servant and that the court found him innocent since the respondent never presented any witnesses. He summed up his testimony by stating that he was never taken through a disciplinary process prior to his dismissal and prayed that the court allows his claim as prayed.

### **Submissions**

14. The claimant filed written submissions through which he submitted that his employment was terminated unlawfully and unfairly contrary to the provisions of sections 45 (1) and (2) of the Employment Act. The respondent did not tender any submissions for consideration by court.

### **Analysis and determination**

15. Having considered the pleadings on record and the claimant's submissions, the issues for determination can be distilled as follows;

**i. Whether the claimant's termination wrongful and unlawful?**

**ii. Is the claimant entitled to the reliefs sought?**

### **Whether the claimant's termination wrongful and unlawful**

16. Pursuant to sections 43 (1) and 45(2) of the Employment Act, an employer must prove that there were reasons to terminate the employment of an employee and that in so doing, it complied with the requirements of fair hearing. In a nutshell, an employer needs to prove substantive justification and procedural fairness.

17. Specifically, **Section 43(1)** requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Additionally, **Section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

18. Essentially, these provisions underpin the requirements for substantive justification.

19. It is also instructive to note that the burden of proof, lies with the employer. The Court of Appeal in the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** held as much, thus; **"the burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer."**

20. The reasons for the claimant's dismissal are contained in his letter of summary dismissal dated 10<sup>th</sup> March, 2016 and which I will proceed to reproduce hereunder;

"...you failed to report to work on 6<sup>th</sup> March 2016 despite instructions from the chairman to do so to ensure proper cleaning and organisation of the conference room used on the previous day. On several occasions you (sic) immediate supervisor has reported on instances where you have failed to follow instructions given to you. You have also been involved in manipulation of the system instigating theft of Kshs 15,025 where one cheque has been posted several times on the system from the same client with the same amount. These actions portray insubordination and amounts to gross misconduct. In view of the above, we hereby summarily dismissing (sic) you under section 44 of the Employment Act clause 4(a,c,e). Therefore, your last working day will be 7<sup>th</sup> March, 2016.

In the meantime, kindly handover any company property in your possession e.g ID card, badge, uniform etc you will be informed by hr(sic) office on any payments payable to you as final and full settlement.

Yours faithfully,

Meridian hotel

Maureen Njoroge

Human Resource Manager”

21. Aside from providing reasons to justify an employee’s termination, an employer is bound to prove that the same are valid and fair. In this respect, validity and fairness of the reasons can only be established upon analysis of the evidence tendered to back up the allegations against an employee. Such evidence may be documentary or oral.

22. The respondent in this case spelt out the reasons for the claimant’s dismissal but did not support the same by evidence in whatever form or manner. The claimant was accused of insubordination, lateness to duty and system manipulation. Notably, there were no written statements from his immediate supervisor to back up the claims of insubordination or lateness to duty. Further, no evidence for instance, an attendance/clock in register, was tendered to prove the allegation of the claimant’s lateness to duty.

23. Similarly, no evidence was presented by the respondent to support the allegations of system manipulation by the claimant. It was stated in the claimant’s letter of summary dismissal that one cheque had been reposted several times in the system. However, no evidence in this regard was furnished before court.

24. Coupled with the foregoing, the respondent did not participate in the trial despite being duly served. As such, it did not present any oral evidence through witness testimony to back up the accusations against the claimant. Such evidence may have shed more light on the reasons for the claimant’s dismissal. Needless to say, the reasons for the claimant’s dismissal have not been substantiated at all and for that reason, the same cannot be determined to be valid or fair.

25. In the circumstances, the respondent did not discharge its burden under sections 43 (1) and 45 (2) of the Employment Act.

26. I would have stopped there but in order to render a reasoned decision, I will proceed to consider whether the claimant was accorded a fair hearing.

27. The requirement for fair hearing is broadly encapsulated under section 45 (2) (c) of the Act. Section 41 (1) provides for the specific requirements to be complied with by an employer. It entails notifying the employee of the allegations leveled against him or her and granting him or her the opportunity to make representations in response to the said allegations.

28. The respondent averred in its defence that the claimant was notified of the accusations against him but it failed to tender any evidence to that effect. Further, it never gave any indication whether the claimant was granted a hearing prior to being summarily dismissed. In absence of such evidence, it can only be presumed that the claimant was not subjected to a fair process prior to his dismissal.

29. It is also worth noting that the respondent has apparently implied in its defence that it was not bound by the provisions of fair procedure since the claimant was summarily dismissed. Contrary to the respondent’s assertions, section 41 (2) of the Employment Act requires an employee to be accorded a fair hearing prior to summary dismissal. It provides as follows;

**“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”**

30. In this regard, the respondent was bound to consider the representation of the claimant prior to his dismissal and since there is no evidence that it did so, the ensuing resultant disciplinary action is invalid.

31. The upshot of the foregoing is that the respondent has not proved that it had valid reasons to dismiss the claimant and further, that it did not comply with the requirements of fair hearing as by law required. Accordingly, the claimant’s termination was unfair and unlawful within the meaning of section 45 of the Act.

32. Having found as such, what reliefs avail to the claimant?

### **Reliefs**

33. The claimant has sought several reliefs some dating as far back as 2002. In the case of **Thuranira Karauri Vs Agnes Ncheche [1997] eKLR**, the Court of Appeal held that the issue of limitation goes to jurisdiction. Pursuant to section 90 (1) of the Employment Act, this court only has jurisdiction to consider and determine claims that have been brought before the expiry of 3 years from the date the same are alleged to have occurred. With that in mind, it is worth noting that the instant claim was filed on 31<sup>st</sup> May, 2017 hence the court only has jurisdiction to consider and determine claims dating back to 31<sup>st</sup> May, 2014.

### **Overtime, public holidays, leave allowance and travelling allowance**

34. These claims have not been proved hence are denied.

### **One month’s salary in lieu of notice**

35. The respondent annexed a Collective Bargaining Agreement (CBA) it entered into with the Kenya Union of Domestic, Hotels, Education Institutes, Hospitals and Allied Workers (KUDHEIHA Workers). It is worth noting that the said CBA provides for the negotiated and agreed terms between both parts.

36. I have noted from the claimant's "Further Letter of Appointment" that he was confirmed with effect from 23<sup>rd</sup> July, 1995, hence as at 10<sup>th</sup> March, 2016, he had served in the employment of the respondent for a period of about 20 ½ years prior to his termination.

37. In this context, Clause 8 of the said CBA provides for a 4 month notice period or payment in lieu thereof, in instances where an employee has served for 20 years and above continuous service as the claimant herein. Therefore, and having found that the claimant's termination was unfair and unlawful, he is entitled to payment of 4 months salary in lieu of notice.

#### **Accrued Annual leave**

38. As per the above CBA, the claimant was entitled to leave of 26 days. There was no proof that he applied for leave in 2014 and 2015 and was denied the same. As such, I will only consider leave for the year 2016. The claimant was summarily dismissed in the month of March, 2016, hence upto then and upon proration, he had earned 4.3 leave days, thus is entitled to payment in lieu thereof.

#### **Service pay**

39. The claimant has prayed for the sum of Kshs 425,770/= being service pay. Service pay is payable pursuant to section 35 (5) of the Employment Act in cases where termination is pursuant to a notice. Further and in light of the provisions of section 35(6) (d) of the Employment Act, employees who are entitled to payment of National Social Security Fund (NSSF), are not eligible for service pay. In the instant case, the claimant's pay slip indicates that he was a member of the NSSF, thus bringing him within the ambit of the exclusions under section 35(6) of the Employment Act. In the circumstances, I find that he is not entitled to service pay hence the claim fails. To this end, he may follow up for his dues from the NSSF.

#### **Salary for days worked in March, 2016**

40. The claimant has contended that he was not paid his salary for the days worked prior to his dismissal. The claimant admitted this entitlement in its defence under paragraph 8, save that it averred that the period worked is 6 days. As I have found that the claimant's absence from work was not substantiated, the court arrives at the conclusion that he is entitled to payment for the 10 days he worked in March, 2016, prior to his summary dismissal.

#### **Compensatory damages**

41. The claimant seeks maximum compensatory damages in the sum of Kshs 360,000/=. Having found that his dismissal was unfair, I will award the claimant compensatory damages equivalent to seven (7) months' gross salary. This award has been informed by the length of the employment relationship and the fact that respondent did not justify the reasons for the claimant's dismissal and failed to accord him a fair hearing.

#### **Certificate of service**

42. The employment relationship having been admitted, the claimant is entitled to a certificate of service pursuant to section 51(1) of the Employment Act.

#### **Conclusion**

43. In the final analysis, I enter judgment in favour of the claimant as follows:

- a. 7 months' gross salary in compensation.....Kshs 210,000.00
- b. 4 month's salary in lieu of notice.....Kshs 120,000.00
- c. Untaken leave days.....Kshs 4,300.00
- d. 10 days worked in march, 2016..... Kshs 10,000.00

**Total** **Kshs 236,300.00**

44. The award will be subject to interest at court rates from the date of judgment until payment in full.

45. The respondent shall also bear the costs of this claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For Claimant            Mr. Kirimi

For the Respondent    No appearance

Court assistant        Barille Sora

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**