



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 960 OF 2017

JOSEPH IGAMBA MWAURA.....CLAIMANT

VERSUS

RESORT KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant instituted the matter herein vide a claim dated 23rd May, 2017 through which he avers that he was unfairly terminated from employment in that he was not given an opportunity to defend himself. The claimant prays for an order declaring his termination unlawful and for compensation in the sum of Kshs 574,800/=.

2. The claim was defended vide a response dated 29th June, 2017 through which the respondent states that the claimant was taken through a disciplinary process and that the ensuing proceedings were in accordance with the legal requirements set out in the Employment Act.

3. The matter proceeded for hearing on 8th August, 2021 when the claimant took the stand to testify in support of his case. Upon close of the claimant's case, the matter was adjourned for defense hearing which took place on 16th September, 2021.

Claimant's case

4. The claimant adopted his witness statement together with the bundle of documents which were filed together with the claim and asked the court to adopt the same as part of his evidence in chief.

5. He told court that he was employed by the respondent as a gaming dealer with effect from 20th February, 2003 until 8th December, 2016 when he was summarily dismissed from employment. That at the time of his dismissal, he had risen in rank, to the position of gaming inspector.

6. It was his testimony that he was falsely accused of soliciting for a commission from a customer and for failing to intervene when a dealer who was working under his supervision, advised a customer to put token chips in an ashtray as a tip, instead of following the stipulated procedure of declaring the tip and dropping it in the box.

7. He stated that he was not issued with a notice to show cause and that he was only served with a letter dated 2nd December, 2016, through which he was advised of a hearing that was scheduled to take place on 5th December, 2016. That the hearing was later postponed to 7th December, 2016. He averred that the hearing notice did not disclose the name of the dealer and the customer who were the subject of the disciplinary proceedings against him.

8. He averred that at the said hearing, he was not given an opportunity to express himself and/or present his defense. That he was later issued with a termination letter hence the instant suit.

9. During cross examination, he admitted that he had previously been issued with 2 warning letters on account of absenteeism. He also admitted receiving his terminal dues but added that he was not satisfied with the same.

Respondent's case

10. On its part, the respondent called one witness, Mr. Paul Mbugu Kamau, who testified as RW1. He identified himself as the respondent's Human Resource Manager.

11. At the outset, he adopted his witness statement dated 12th August, 2021 as well as the bundle of documents filed on behalf of the respondent. He prayed that the same be adopted to constitute part of his evidence in chief.

12. RW1 averred that in the past, the claimant had had disciplinary issues hence had been issued with warning letters to that effect. He averred that the claimant was invited for a disciplinary hearing to answer to allegations of soliciting for a tip from a customer on 29th November, 2016. That at the hearing, it was established that the claimant had indeed solicited for a tip from a customer and had failed to intervene when a dealer working under his supervision advised a customer to put token chips in an ash tray contrary to the laid down procedure. That the allegations leveled against the claimant amounted to breach of the respondent's policies thus warranting disciplinary action.

13. He averred that the claimant's termination was therefore lawful and procedural and that at the point of exit, he was paid all his terminal dues hence is not entitled to the prayers sought in the claim.

14. During cross examination, RW1 admitted that the name of the customer from whom the claimant is alleged to have solicited for a tip was not mentioned in the notification for hearing of 2nd December, 2016. Similarly, he confirmed that the dealer who is alleged to have misadvised a customer as regards the token chips was not mentioned in the said notification for hearing.

Submissions

15. Both parties filed written submissions after close of the hearing. The claimant submitted that the respondent did not prove that it had valid reasons to terminate his services. He sought reliance on the case of **Daniel Kiplagat Kipkeibut vs Smep Deposit Taking Micro Finance Limited (2016) eKLR**. The claimant further submitted that he was not accorded a fair hearing as he was not issued with a notice to show cause. He also challenged the legitimacy of the disciplinary hearing and pointed out the fact that there were no minutes presented before Court to back up the respondent's assertions. To buttress his submissions, he cited the case of **Liz Ayany vs Leisure Lodges Limited (2018) eKLR**.

16. On its part, the respondent, submitted that it had discharged its burden under section 43 of the Employment Act by proving that it had reasons to terminate the employment of the claimant. It placed reliance on the case of **Kenya Power & Lighting Company Limited vs Aggrey Lukorito Wasike (2017) eKLR**. The respondent further submitted that it complied with the requirements of fair hearing in handling the claimant's disciplinary case and that during the disciplinary hearing, he did not present any evidence in his defence. On this issue, the respondent cited the case of **Michael Muli Muinde vs G4S Kenya Limited (2012) eKLR**.

Analysis and determination

17. Arising from the issues raised in the pleadings, the rival submissions as well as the documentary and oral evidence, the Court is being called to determine the following twin issues;

a. Was the claimant's termination unfair and unlawful?

b. Is the claimant entitled to the reliefs sought?

Was the claimant's termination unfair and unlawful?

18. The claimant has alleged that his termination was unfair. He contends that the respondent did not adduce valid reasons to justify his termination and neither did it comply with the requirements for fair hearing in so doing.

19. In order to prove fair termination under the Employment Act (Act), an employer must satisfy that there was substantive justification to warrant termination of an employee and that it observed the requirements of procedural fairness in so doing.

i. Substantive justification

20. The Act addresses substantive justification under **Section 43(1)** which requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further, **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 is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. The burden of proof in this instance, lies with the employer.

21. This position has been reaffirmed through case law over and over hence I will not belabour the issue. Case in point is the holding by the Court of Appeal in **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, where the Learned Judges rendered themselves thus;

“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”

22. The reason advanced by the respondent in terminating the services of the claimant is that; on 29th November, 2016, the claimant solicited

for a tip from a customer and failed to intervene when a dealer working under his supervision, advised a customer to put token chips in an ash tray instead of following the stated procedure of declaring the tip and dropping it in the box as a tip.

23. It is therefore, imperative to dissect the reasons advanced by the respondent and apply the same on the of set of facts and circumstances pertaining the case herein.

24. The claimant contended that he was not given the identity of the customer from whom he solicited a tip, as well as the dealer who is alleged to have misadvised a customer as regards the procedure of declaring tips.

25. One of the initial steps required to prove substantive justification, it is crucial for an employer to sufficiently inform an employee of the charges he/she is required to answer to. It is not enough to spell out the allegation without particulars. Therefore, the charges against an employee ought to be substantiated.

26. In the instant case, the allegations against the claimant were very vague and did not contain any particulars. It merely mentions a “customer” and a “dealer”. It is noteworthy that the identities of these two persons was at the center of the disciplinary action against the claimant. RW1 in his testimony before court stated that the respondent did not want to drag its customers into its internal affairs. Be that as it may, nothing stopped the respondent from spelling out the allegations against the claimant in a manner that was more specific. Further, the respondent has not stated why it did not disclose the identity of the “dealer” who presumably, is its employee.

27. The Court of Appeal in the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR**, found that the allegations against the respondent were too general hence termed his termination as unfair. The learned Judges rendered themselves thus;

“As also rightly found by the learned trial Judge, no evidence was placed before court to show that the respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing. Going in for the hearing, it is discernable from the record that the respondent only knew in general terms, the allegations he was to face and counter. That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair.” Emphasis mine

28. I fully adopt this position. Nothing would have been easier than for the respondent to avail more particulars as regards the allegations against the claimant and more specifically, the identity of the “customer” and the “dealer” who were at the heart of the disciplinary case.

29. In addition, the respondent was required to prove the substance of the allegations against the claimant. In this case, the respondent did not produce evidence to substantiate the charges against the claimant. No documentary or oral evidence was tendered in that regard. The respondent merely preferred the allegations against the claimant and left it that.

30. Besides, the respondent did not indicate how it became aware of the allegations against the claimant. Was there a complaint from the customer? Was there an eye witness account? Nothing was documented at all. Simply put, the allegations against the claimant were not corroborated either through evidence in whatever form and nature.

31. It behoved the respondent to provide some form of evidence against the claimant so as to prove the allegations against him. This it failed to do. In order to commence disciplinary action against the claimant, there must have been some substantive evidence to implicate him. None was tendered at all either by way of documentary evidence or oral evidence.

32. In light of the foregoing, I find that the respondent did not satisfy the requirements of section 43(1) read together with section 45(2) (c) of the Act and as such, it has not proved that there was substantive justification to warrant termination of the claimant.

33. Having found that the respondent has not proved substantive justification, I would have stopped there but I find it imperative to analyse the fairness of the disciplinary process against him, so as to arrive at a reasoned determination.

ii. Procedural fairness

34. **Section 45(2) (c)** of the Act provides that for termination to be fair, it ought to be in line with fair procedure. More importantly, **section 41(1)** of the Act requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.

35. The claimant has contended that he was not issued with a show cause letter. This is not entirely true. The allegations against the claimant were spelt out in the “notification and hearing” letter issued to him. Thus, in my view, that letter served two functions; firstly, it notified the claimant of the allegations against him; and secondly, it notified him of the hearing date of his disciplinary case.

36. In any case, the Act does not provide for the format to be adopted in presentation of charges against an employee. Rather, the main point of consideration ought to be whether the entire process was conducted in line with the requirements of fair hearing.

37. It is therefore not in dispute that the claimant was notified of a disciplinary hearing which he admits attending, but whose legitimacy he has questioned. In this regard, he contends that he was not given an opportunity to speak or explain himself at the hearing. On its part, the respondent has maintained that the disciplinary hearing indeed took place and that the claimant was accorded an opportunity to present his case. What is before me is therefore a credibility contest.

38. Despite the assertion by the respondent that it undertook a hearing that was in line with the statutory requirements, it did not tender any evidence to rebut the allegations by the claimant.

39. The claimant having attacked the legitimacy of the disciplinary hearing, it was prudent on the part of the respondent to avail the necessary evidence in the form of disciplinary proceedings/minutes to support its averment.

40. Under **section 45 (2) (c)** of the Act, the respondent bears the burden of proving that the termination of the claimant was in line with fair procedure. RW1 in his testimony confirmed that there are no minutes of the disciplinary hearing before court. Above and beyond providing proof of notification and hearing, the respondent was required to prove that the disciplinary hearing indeed took place, and that the same fair. This it has failed to do hence I find that it did not discharge the burden as by law required.

41. In totality of the foregoing, I find that there was no substantive justification to warrant the claimant's termination, and that he was not accorded procedural fairness. This fell short of the requirements stipulated under section 45 of the Act hence his termination was unfair and unlawful.

Reliefs

42. Having found that the claimant's termination was unfair, I will award him four (4) month's salary as compensatory damages. This award has taken into consideration the length of the employment relationship.

Orders

43. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

a. A declaration that the claimant's termination by the respondent was unfair and unlawful.

b. The claimant is awarded compensatory damages in the sum of Kshs 191,600/= which sum is equivalent to 4 months gross salary.

c. The claimant shall have the costs of the suit.

d. Interest on the amount in (b) at court rates from the date of Judgement till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Rakoro

For the Respondent Mr. Omulama

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 15th March 2020 and subsequent directions of 21st 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