



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2267 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

NJOKI JANE NYAMBURA.....CLAIMANT

VERSUS

YONG LI CASINO.....1ST RESPONDENT

ESPERIA TOURIST DEVELOPMENT INVESTMENT LIMITED....2ND RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim dated 7th November 2016 on 8th November 2016 against the Respondent alleging that he was unfairly terminated by word of mouth on 23rd July 2016 by the Human Resource Manager of the Respondent, Mr. John Masika. The Claimant prays for;

- (a) 12 months' salary compensation for unfair termination Kshs.145,200
- (b).. One month's salary in lieu of notice..... Kshs.12,100
- (c) Service gratuity
- (d) Prorate leave
- (e) Certificate of service
- (f) Costs of this suit
- (g) Interest on (a), (b), (c), (d) and (f) till payment in full.

2. The Respondent was served and filed its response to the claim dated 1st December 2016 on 15th December 2016. The Respondent denied that the Claimant was its former employee and prayed for dismissal of the suit with costs.

Claimant's Case

3. The Claimant avers that she was employed by the Respondent in January 2016 as a waitress at a monthly gross salary of Kshs.12,100 and served the Respondent for a duration of about 6 months. That she served diligently, competently and was a loyal employee with a clean record.

4. The Claimant further avers that on 22nd July 2016 while at work at the Respondent's casino, she received a tip by way of a chip or casino token worth Kshs.10,000 from a patron for her good service which she could redeem for a cash equivalent. That the procedure for redeeming casino tokens or chips at the Respondent's casino was that the waiter/waitress had to forward the token to the Supervisor on duty for confirmation and in the absence of the Supervisor to the Manager who would confirm the same using the CCTV cameras in the casino.

5. That on 22nd July 2016, the Supervisor was not in and the Claimant forwarded the token to the Manager who upon confirmation of the tip gave her the equivalent in cash.

6. The Claimant contends that on 23rd July 2016 she was summoned by Mr John Masika, the Human Resource Manager who dismissed her from employment by word of mouth without notice or hearing her explanation. That she was told to leave the premises.

7. That the termination was actuated by malice since it was effected after the Human Resource Manager learnt that she had received a tip from a patron and had received cash in exchange. That the termination caught her off-guard due to its abruptness and was inhumane since it was not conducted in accordance with the provisions of the Employment Act and was not only inconsiderate but illegal and unfair.

Respondent's Case

8. The Respondent avers that the Claimant was on probation from the date of employment to the date she left employment and had not been confirmed. That the event narrated in paragraphs 6 and 7 of the memorandum of claim are true namely the Claimant had indeed received a tip from a patron and the procedure necessary to receive the cash equivalent but denies the allegations on dismissal of the Claimant.

9. It is further averred that the Respondent did not dismiss the Claimant that she absconded duty and only came back to collect her salary which was handed over to her less the advance she had taken.

10. Finally, the Respondent denies that the Claimant is entitled to damages for wrongful dismissal as claimed.

Evidence

11. CW1 adopt the written statement and told the Court that she was employed by the Respondent in January 2016 at Kshs.12,100 per month and served diligently. That on 22nd July 2016 she was given a casino token by a patron in appreciation of her good services which she handed over to the Manager for confirmation and received Kshs.10,000 the cash equivalent. The she was verbally dismissed by the Respondent's Human Resource Manager on 23rd July 2016 by being told to vacate the premises. Neither reason for termination nor a notice was given.

12. On cross examination, the Claimant confirmed that she knew Mr. Masika, the Respondent's Human Resource Manager, and that she was out of employment for about 9 months after the dismissal but was now employed. She denied that she was employed soon after dismissal by the Respondent. That her request for an appointment letter from Mr. Masika was not honoured.

13. She further confirmed at the Respondent's place of business, waiters/waitress only handled casino chips or tokens if given as a tip by a patron or customer. That she was given a token worth Kshs.10,000 by a patron unknown to her though regular and it was common for patrons to give tips by way of tokens. She denied having stolen the chip in question. That the Manager on duty on that day one Mr. Chacha cashed the token for her and the chip did not occasion any disciplinary proceedings. That she was never summoned or asked to return the chip. She denied having absconded duty.

14. The Claimant also confirmed that she was instructed by Mr. Masika to go home, that she had been dismissed and was not given a termination letter and was entitled to one month's notice of the termination.

15. On re-examination, the Claimant confirmed that she followed due process to receive the Kshs.10,000 and Mr. Masika did not provide the reason(s) for termination.

16. RW1 adopted the written statement on record and testified that he was the Human Resource Manager at the Respondent which opened a casino business on 22nd January 2016 and hired staff including the Claimant on 2nd January 2016.

17. He testified that the Respondent offered all employees a probationary period for 6 months followed by an offer for a renewable contract for a period not exceeding 1 year. During probation either party could terminate the contract by giving the other 7 days' notice. That no staff member was allowed to handle tokens worth of more than Kshs.1,000. This was intended to prevent theft. He testified that the tokens were kept on the gaming tables operated by dealers.

18. He further testified that the Claimant refused to explain how she had obtained the token. That the Claimant confirmed in the presence of one Mr. Musembi that she had the token but did not disclose the name of the patron. He also testified that they needed to confirm the facts from the CCTV footage but did not.

19. That there was no Manager by the name Chacha and the token was never cashed at all. That he sent the Claimant home to bring the token, came after 2 days demanding the balance of her salary for the month and was paid. That the Claimant left on her own accord and was not terminated and had worked for about 6 months.

20. On cross examination, the Respondent confirmed that although he employed the Claimant, in January 2016, he did not give her a letter of appointment and that she did not complete her probationary period for confirmation.

21. He also confirmed that he had no record on how long the Claimant worked for the Respondent. He also confirmed that the Respondent's casino had tokens of different denominations used by players who were served by waiters and players often gave tokens to waiters as tips.

22. That he was on duty on the day the Claimant received a token from a patron, he received information from the Mr. Musembi and summoned a meeting the following day.

23. He also confirmed that tokens given as tips were not supposed to be given to him and more importantly, the CCTV footage was

supposed to be reviewed before the cash equivalent was given. That there was no other policy on the cashing of tokens. That Mr. Chacha was one of the owners of the casino and used to frequent the casino from time to time. He also confirmed that the casino had many CCTV cameras and it was difficult to trace the event in question.

24. That the Respondent did not write or contact the Claimant for absconding duty or issue a notice to show cause.

25. On re-examination, RW1 confirmed that the Respondent did not review the CCTV footage for the details and finally information on employment was displayed on the Respondent's notice board.

Claimant's Submissions

26. The Claimant identified two issues for determination:

- (a) Whether the Claimant's termination was substantively and procedurally fair;
- (b) Whether the Claimant should be compensation for summary dismissal.

27. On termination, Counsel relied on Section 45(2) of the Employment Act on the reason(s) and procedure for termination. Section 47(5) of the Act was also relied upon for the burden of proof of the employer and employee.

28. It was contended that the Claimant was terminated for having received a tip from a Client yet the prescribed procedure of cashing the token/chip had been complied with and the Manager on duty confirmed through the CCTV. RW1 confirmed that it was not unusual for waiters to receive tips from patrons in the form of chips or tokens.

29. That RW1 had demanded the chip from the Claimant yet it had already been cashed. The Respondent did to confirm with the CCTV whether the chip was stolen or given as a tip. Relatedly, the Respondent did not confirm with Mr. Chacha who had cashed the chip on 22nd July 2016.

30. It is further submitted that since the RW1 did not confirm the circumstances in which the chip was obtained he had no reason to send the Claimant home which in fact confirms the Claimant's testimony that she was unlawfully terminated.

31. Counsel cited Section 41 of the Employment Act on the employee's right to be informed of the reason for which the employer is considering termination and fair hearing. That the Respondent did not comply with Section 41 of the Act. Counsel relied on the decisions in **Mourine Achieng Madagow & another v African Banking Corporation Ltd [2020] eKLR** as well as **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR**.

32. Reliance was made on the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** for the proposition that –

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason of the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

33. Finally Counsel relied on the Section 45(4) of the Employment Act on unfair termination.

34. On compensation for summary dismissal, Counsel for the Claimant submitted that Section 49(1) of the Employment Act provides the remedies available to a person who is unfairly terminated and relied on the Supreme Court decision in **Kenfreight (EA) Ltd v Benson K. Nguti [2019] eKLR** for the guiding principle that –

“When giving an award under Section 49 of the Employment Act, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.”

35. Finally reliance was made on the Court of Appeal decision in **CMC Aviation Limited v Mohammed Noor [2015] eKLR** which the Supreme Court cited with approval in **Kenfreight (EA) Ltd v Benson K. Nguti (supra)**.

Analysis and Determination

36. I have carefully considered the pleadings, evidence on record and submissions by Counsel and the issues for determination are;

- (a) Whether the Claimant was on probationary contract;
- (b) Whether the Claimant's termination was fair;
- (c) Whether the Claimant is entitled to the reliefs sought.

37. On probation, Section 2 of the Employment Act, 2007 provides that probationary contract “**means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period;**”

38. In this case the Respondent's witness, Mr. John Masika testified that although he employed the Claimant in January 2016, he did not give her a letter of appointment. He also alleged that the Claimant had not been confirmed because she was still serving on probation and left while still on probation. However the Respondent had no document to establish that the Claimant was on probation and for how long.

39. It is trite law that a probationary contract must be in writing and must expressly state that it is a probationary contract. In sum, the Respondent failed to establish that the Claimant was on probation.

40. On termination, Section 35 of the Employment Act, 2007 provides for termination notice which is mandatory or payment in lieu of notice under Section 36.

41. Sections 41, 43, 44 and 45 of the Act on the other hand prescribe various aspects of termination and in particular the substantive and procedural requirements for a termination is to pass the fairness test.

42. Section 45(2) of the Employment Act, provides that –

(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 employee's 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.

43. Section 41 provides that –

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) 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.

44. In **Kenafic Industries Ltd v John Gitonga Njeru [2016] eKLR** the Court of Appeal held that;

“Section 43 of the Act makes it mandatory that where such termination is contested, the employer must prove that valid reason(s) in support of the termination exists; a position reiterated under Section 45(2). In addition, even where the termination is on account of misconduct, Section 41 requires the communication of these reasons to the worker, coupled with giving him an opportunity to be heard in response thereto prior to termination of his engagement.”

45. In **Naima Khamis v Oxford University (EA) Ltd [2017] eKLR** the Court expressed that as follows;

“From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.

In a claim for unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer (section 47(5) of the Act).”

46. In this case, the statement of claim faulted the termination on the ground that the Human Resource Manager Mr. John Masika terminated the Claimant without notice and ordered her to leave the Respondent's premises without any justification. That the termination was verbal without any invitation or notification for a hearing. That the termination was laced with malice and bad faith in its abruptness and the inhuman manner in which it was executed. That the Respondent did not consider the faithfulness and diligence with which the Claimant served.

47. Conversely, the Respondent washed its hands stating that the Claimant left employment on her own accord after being requested to bring the token she allegedly had, an allegation she denied. According to the Claimant she had already received the cash equivalent of the token.

48. Whereas the Claimant alleged that she was dismissed by word of mouth on 23rd July 2016 by the Respondent's Human Resource Manager, the Respondent alleged that she absconded duty following the drama on the casino token allegedly stolen on 22nd July 2016. The Claimant confirmed that she was given the token by a patron and the same was cashed by Mr. Chacha after reviewing the CCTV. It was confirmed that the Claimant signed no document on receipt of the cash.

49. The Respondent's witness testified that the Claimant was found with a casino token with cash equivalent of Kshs.10,000. That the Claimant admitted that she had the token but refused to explain how she got it. That the admission was made in the presence of one Mr. Musembi and 8 other waitresses. Neither Mr. Musembi nor any of the other waitresses testified to reinforce the Respondent's testimony, which the Claimant denied. More importantly, the Respondent's witness admitted that the casino had CCTV cameras but they did not confirm the occurrence though it had been captured.

50. Similarly, although RW1 denied that there was a Manager by the name Chacha, he admitted that a Mr. Chacha was one of the owners of the casino and frequented the casino. Could this be the person the Claimant referred to as the Manager who cashed the token on 22nd July 2016? It would appear logical to surmise so.

51. For unexplained reason, the Respondent had no time to review the CCTV footage yet it was claiming that the Claimant had stolen a casino token.

52. As to how the Claimant obtained the casino token, RW1 testified that the casino had value tokens of different denominations equivalent to cash. That players used the tokens and were served by waitresses and it was not uncommon for players to give tokens to waitresses as tips and there was a prescribed procedure to claim the cash equivalent.

53. In the absence of confirmatory evidence that the Claimant obtained the casino token in a manner otherwise than she had explained, the Court is satisfied that her account of the events of 22nd July 2016 germane to the token remain uncontroverted.

54. On the verbal termination, although the Respondent denied that it dismissed that Claimant and alleged that she left employment on her own accord, RW1 confirmed that he sent the Claimant home. In addition, the Respondent adduced no evidence of the steps it took to bring the issue to closure. RW1 confirmed on cross examination that he did not call or contact the Claimant after she left on 23rd July 2016. He also confirmed that he did not issue a notice to show cause for absconding duty nor did he issue a termination letter thereafter.

55. Courts has consistently held that whenever an employer relies on the defence of absconding duty, it must adduce evidence to show the reasonable steps it took to contact the employee in order to understand the reason(s) for abandonment of work and if no explanation is provided, issue a show cause letter and subsequently a termination letter. These steps are necessary to bring the issue to closure.

56. Finally, the dismissal by word of mouth is believable because the Respondent demonstrated it was averse to documentation. From engagement to termination, it produced not a single document in court. RW1 confirmed on cross examination that he had no record on how long the Claimant worked for the Respondent, the fact that he was the Human Resource Manager notwithstanding.

57. As submitted by the Claimant, the decisions in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** and **Kenfreight (EA) Ltd v Benson K. Nguti [2019] eKLR** are relevant in this matter.

58. From the evidence on record, it is clear that the Respondent had no valid reason to dismiss the Claimant on 23rd July 2016 and did not take her through any disciplinary hearing as required by Section 41 of the Employment Act.

59. In sum, the irresistible conclusion is that the Claimant's dismissal on 23rd July 2016 was unfair for want of substantive and procedural fairness. The Respondent had no valid reason to terminate the Claimant and did not follow the prescribed procedure.

60. I now turn to the reliefs prayed for.

(a) Kshs.145,200 being 12 months' salary compensation for wrongful, unlawful and unfair termination.

61. The remedy of compensation under Section 49(1)(c) is discretionary. The Court is enjoined to exercise its discretion against the background of the factors set forth in Section 49(4) of the Employment Act. The Court has taken into account the fact that the Claimant served for 6 months only and wished to continue and did not contribute to the termination of employment, coupled with the fact she secured employment within a year of termination. In the premise, the equivalent of two (2) months' salary is fair **Kshs.24,200/=**.

(b) Kshs.12,100 being one month's salary in lieu of notice

62. Having found that the Claimant was terminated by word of mouth, the Claimant is entitled payment in lieu of notice which the Court hereby awards **Kshs.12,100/=**.

(c) Service gratuity

63. Gratuity is a contractual claim and the Claimant led no evidence of entitlement to service gratuity. The claim is declined.

(d) Prorata leave

64. The Respondent confirmed on cross examination that the Claimant worked for 7 hours a day and had not taken leave. Her leave entitlement under Section 28(1)(a) was 21 days per year. Prorated for the duration of 6 months served is 10½ days which translates to **Kshs.4,232/=**.

(e) Certificate of service

65. Certificate of serve to issue in favour of the Claimant.

66. **In conclusion judgment is entered for the Claimant for the sum of Kshs.40,532/= with costs.**

67. **Interest at Court rates from the date of judgment till payment in full.**

68. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF NOVEMBER 2021

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE