



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 380 OF 2017

BETWEEN

ANTHONY MWANGI WAMAGATACLAIMANT

VERSUS

SILVER HOLDINGS LIMITED.....RESPONDENT

Rika J

Sherman Nyongesa & Mutubia Advocates for the Claimant

K'Bahati & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 11th May 2017. He states, the Respondent is a limited liability company, which operates, among others, Voyager Beach Resort in Nyali, Mombasa, where the Claimant worked.

2. He was employed by the Respondent in December 2004 as a Receptionist on casual terms.

He was confirmed on 14th April 2005. He rose to the position of Assistant Boarding Officer, and later on 30th April 2016, became full Boarding Officer. He held this position until 18th February 2017, when his contract was unfairly terminated by the Respondent.

3. He was called, through the Human Resource Manager, to a disciplinary hearing on 31st January 2017. He was denied a fair opportunity to defend himself. The hearing changed

course, and turned out to be an investigative exercise. The Senior Management had predetermined that the Claimant's contract is terminated. He was not accorded an opportunity to appeal against the decision. His last salary was Kshs. 90,000. He prays for Judgment against the Respondent for: -

a. 12 months' salary in compensation for unfair termination at Kshs. 1,080,000.

b. Overtime of 14 months at Kshs. 630,000.

c. 1 month salary in lieu of notice at Kshs. 90,000.

d. House allowance in arrears at Kshs. 1,650,000.

e. Declaration that termination was unfair.

f. Costs.

g. Interest.

4. The Respondent filed its Statement of Response on 15th September 2017. It is conceded that the Claimant was employed by the Respondent as a Receptionist, but from 15th January 2005, not from 2004. He was promoted to Assistant Boarding Officer and

Boarding Officer as pleaded. He was required to show cause why, disciplinary action

should not be taken against him, through a letter dated 31st January 2017. He responded on 1st February 2017. He was heard, and his contract fairly terminated. He was given valid reasons for the decision. He did not work overtime. His last salary was consolidated. The Respondent prays the Court to dismiss the Claim with costs.

5. The Claimant testified and rested his Claim, on 19th September 2018. Human Resource Manager, Louis Wesutsa Nambiro, testified for the Respondent on 2nd March 2020 when the hearing closed.

6. The Claimant restated the contents of his Statements of Claim and Witness on record, a summary of which, is captured in the preceding paragraphs. He ensured guests were booked in, and looked after during their stay. He oversaw operational issues. He had taken leave of 7 days, when he was recalled by the Manager and told there was fraud which had taken place at the Hotel. 4 cashiers were being investigated. The Claimant was at Nairobi, not Mombasa, when fraud was alleged to have taken place.

7. He was called to a meeting attended by Human Resource Manager, Internal Auditor, Finance Manager, and CEO Mohammed Hersi. The Claimant was taken through the issues by Auditor. China Road and Bridge Company brought in 20 guests. The Claimant had received their payments. The Claimant handed the money to Cashier Josphat Momanyi. It was alleged that the money was not reflected in Respondent's financial system. Momanyi confirmed that the bill was cleared.

8. The 2nd issue related to booking of room Number 3220. The Claimant was alleged to have advised the Cashier to transfer the amount of Kshs. 51,146 from Zhao bookings to booking reference 805931. The system had not checked the Customer out. The Claimant had to confirm that the system matched the physical status. The Cashier, Ruwa, confirmed there was no pending bill with respect to the room. The Claimant instructed Ruwa to check out the room in the system.

9. The Claimant testified that he was given 1 ½ days to respond to the letter to show cause. He responded in 20 minutes. He was suspended for 7 days. Suspension period was extended. He attended hearing on 17th February 2017. The same persons who investigated were involved as panellists. The Claimant was not given a chance to defend. It was a fact-finding exercise. He never saw the minutes of the meeting. The only thing he signed was the attendance register. He reported at 8.00 a.m. leaving ordinarily, at 8.00 p.m. He frequently did day and night shifts. He was not advised that his salary was consolidated.

10. Cross-examined, the Claimant told the Court he failed to disclose, that he was facing a criminal trial for the offence of stealing by servant, as of the time he gave evidence before this Court. The letter of seasonal employment on record, indicates the Claimant worked from 15th January 2005. He did not have any other letter, showing he worked from an earlier date. House allowance was quoted at Kshs. 2,300 monthly. The 2nd contract was from 15th April 2005. Both contracts had house allowance and termination clauses. The Claimant was paid acting allowance of Kshs. 15,000, when he acted as Boarding Officer. He was promoted to Boarding Officer, with a consolidated salary of Kshs. 90,000.

11. He received the letter to show cause. The Respondent alleged to have lost over Kshs. 1 million under the Claimant's docket. Cashiers were partly under the Claimant. He was told that other staff adversely mentioned him in the fraud. A Cashier said the Claimant instructed him to transfer Kshs. 51,146 from one account to the other. The Claimant replied through his letter at his bundle of documents page 16. He stated that he was shown evidence by the Respondent, that the Respondent, lost Kshs. 1 million, which was regrettable. He went on to say that, the loss was occasioned through fraud. He confirmed Cashiers were partly under him. He conceded he created booking 809175 for 3 rooms for 2 nights.

12. He was served with the letter inviting him to disciplinary hearing. The accusations were laid out in the letter. He was advised to have another Employee of his choice present at the hearing. Anthony Kinyua, was his choice. He gave his side of the story at the meeting. It was decided that the Claimant's contract is terminated. He did not appeal against the decision. The Claimant had a loan with the Commercial Bank of Africa. It was agreed between the Parties that any final amounts due to the Claimant be channelled to offset the loan. The Claimant personally recorded the disciplinary hearing. He did not exhibit his proceedings as evidence in this Claim. Redirected, he testified that he seeks house allowance from the date he was promoted to Management, 1st June 2011. He was paid acting allowance, not overtime. He did not instruct anyone to make cash transfers. Issues raised at the disciplinary meeting were not in the letter of invitation. He failed to appeal because Management was biased. He would not know if a room was vacant, unless advised by the Housekeeper.

13. Nambiro testified that the Claimant was employed on 15th January 2005, not in 2004. He was initially employed as a Receptionist, rising later to Assistant Boarding, and full Boarding Officer. He was paid acting allowance of Kshs. 15,000, when he acted as Boarding Officer. He admitted in his response to the letter to show cause, that he booked a room for 2 nights. He was invited to disciplinary hearing. All his procedural rights were respected. He created reservation in the name of Gateri. This was checked by Anne Ndegwa. The reservation was used by Ajode to fraudulently post Kshs. 83,000 to clear other bookings. The Respondent lost Kshs. 83,000. He changed room booking, changing length of stay. The room was fraudulently used by Cashiers who were under the Claimant. He also, instructed Cashiers to transfer Kshs. 51,000 fraudulently. He was charged in Court for stealing by servant. His contract was terminated validly and fairly.

14. Cross-examined, the Human Resource Manager reiterated that termination was valid and fair. The Claimant was given the opportunity to appeal. He was given sufficient time to prepare for the hearing. A day was sufficient. If he required more time, he would have made a request, and the Respondent would have given it to him. The main reason for the decision to terminate, was fraud at the front office. The Claimant confirmed his password was used in the fraud, but that he did not know who used it. The criminal trial was ongoing, at the time of

giving evidence in the present Court. He did not have any valid claim for overtime. His salary was consolidated. Termination was valid. Redirected, Nambiro testified that disciplinary hearing took place on 17th February 2017, a clear 4 days, after the invitation.

The Court Finds: -

15. The Claimant was employed by the Respondent Hotel, first as a Receptionist. He later advanced his career becoming the Assistant Boarding Officer, and full Boarding Officer. He held the last position as of 18th February 2017 when his contract was terminated.

16. There is dispute on the date of employment. The Claimant pleads he was employed in December 2004, while the Respondent states the Claimant was employed on 15th April 2005. The Claimant has not given any document to support his assertion. The Respondent exhibited the initial contract affirming the 15th April 2005 as the date of employment. The Court upholds the position of the Respondent, on the date of employment.

17. There is no dispute that the Claimant was summarily dismissed by the Respondent on 18th February 2017. The letter of summary dismissal gives 3 reasons in justifying the decision: he created a reservation in the name of Catherine Gateri, which was used by Grace Ajode to fraudulently post pesapal payment of Kshs. 83, 349, which was used to clear bills in other rooms, leading to loss of Kshs. 83,349; the Claimant reduced the length of stay to a room which was then fraudulently used by Cashiers under the Claimant; and the Claimant was adversely mentioned by one of the Cashiers as having instructed the Cashier to transfer Kshs. 51,146 from one Customer to another.

18. The Claimant was issued show cause letter on 31st January 2017. He was required to give his response by 11.30 a.m. of the following day.

19. He replied as instructed, conceding that *“as per evidence produced and shown to me yesterday, the Company has lost over 1 million shillings through fraudulent transactions by the Cashiers, which is highly regrettable....”*

20. He was invited through a letter dated 13th February 2017, to attend disciplinary hearing scheduled for 15th February 2017. He was advised of his right to attend in the company of a Colleague of his choice. Hearing was deferred to 17th February 2017, a clear 4 days from the date of the invitation. The Claimant attended the hearing in the company of Anthony Kinyua, a Colleague of his choice. He made representations, as did his Colleague. A decision was made afterwards, to summarily dismiss the Claimant. He had the option to appeal to the CEO of the Respondent, but did not do so, alleging that the Respondent had prejudged him.

21. The issues are: *whether termination was based on valid ground; whether it was fairly carried out; and whether the Claimant merits the reliefs sought.*

22. There is no doubt from the summary of procedure captured at paragraph 20 of this Judgment, that the Respondent fully complied with the procedural demands of Section 41 of the Employment Act. Procedure cannot be faulted.

23. Before answering the question whether the Respondent demonstrated valid reason, justifying termination, it is prudent to look at some of the prayers which do not hinge on whether termination was based on valid reason.

24. The Claimant seeks overtime of Kshs. 630,000. He did not establish that he worked overtime of 4 hours every day for a period of 14 months. He did not establish that as a Manager, he was entitled to overtime. He did not bring to the attention of the Court, any clause in his contract; the human resource policy; the law; wage order; or other relevant wage instrument, showing that he was as Boarding Officer, entitled to overtime, and at what hourly rate. The prayer is declined.

25. He prays for house allowance in arrears, for the period worked in Management, from 1st June 2011 to 31st January 2017. He argues that he was entitled to decent accommodation around Nyali, at a rate of Kshs. 30,000 monthly. The first contract of 15th April 2005 offered the Claimant a monthly house allowance of Kshs. 2,969. On 30th May 2011, he signed what is described a Management Training Agreement. He was being inducted into Management. The document, despite the heading, is a full-blown contract of employment, restating the terms and conditions of service. It was signed by the Parties. Clause 4 of this contract offered the Claimant basic salary of Kshs. 45,000 monthly. The salary was specifically stated to be basic. There was no offer of house allowance. This was the position until 30th April 2016, when the Claimant was promoted and offered a consolidated salary of Kshs. 90,000 monthly. He is therefore entitled to house allowance in arrears, for the period 30th May 2011 to 30th April 2016. The correct rate is not Kshs. 30,000 per month as demanded by the Claimant. Wage Guidelines place house allowance at a minimum 15% of the basic salary, which would amount to 15% of Kshs. 45,000 = Kshs. 6,750 monthly. The period under review consists 59 months x Kshs. 6,750 = Kshs. 398,250.

The Claimant is granted house allowance in arrears at Kshs. 398,250.

26. Back to validity of termination reason. 3 reasons were stated in the letter of termination. It is important to note that the Claimant failed to disclose, until cross-examined, that he is facing active criminal prosecution for the offence of stealing by servant. Other important concessions made by the Claimant is that he acknowledged the Respondent lost over Kshs. 1 million through fraudulent transactions, which he attributed to Cashiers. He conceded also that Cashiers were partly under him. He agreed that a Cashier implicated him, in transfer of Kshs. 51,146 from one Customer account to another. He also agreed that he created the fraudulent booking No. 809175.

27. With these concessions, the question to be asked is not whether the Respondent proved the Claimant's guilt beyond reasonable doubt. That standard may be applicable in other proceedings, but not in a Claim for unfair termination. The question to be asked falls under Section 43 of the Employment Act. The provision states [2] *“the reason or reasons for termination of a contract are matters that the Employer, at*

the time of termination, of the contract, genuinely believed to exist and which caused the Employer to terminate the services of the Employee.”

28. The Claimant testified that it was his responsibility to ensure guests were booked in, and were cared for once in residence. He testified that Cashiers were partly under him. It was the Claimant who was charged with the responsibility of overseeing operational issues. Anything relating to guests, was his responsibility.

29. It would follow that the Claimant cannot disengage from the fraud that led to loss of Kshs. 1 million to the Respondent. If he did not participate directly in the fraud, and there is persuasive evidence that he did, most definitely he did not perform his duty properly and carefully, itself a failure which would amount to gross misconduct justifying summary dismissal.

30. Importantly, it cannot be said that the Respondent did not genuinely believe to exist, the matters over which the Claimant was accused. The Claimant buttressed this believe by his concession that there was fraud, and that the Respondent suffered loss of over Kshs. 1 million. It is fruitless, given his responsibility as a Manager, to argue that the Cashiers, not him, were the authors of the fraud.

31. ***The Court is satisfied that termination was based on valid ground.***

32. ***No order on the costs and interest.***

IT IS ORDERED: -

a. The Respondent shall pay to the Claimant house allowance in arrears at Kshs. 398,250.

a. Stay of execution allowed for 30 days.

b. Other prayers are rejected.

Dated, signed and released to the Parties under Ministry of Health and Judiciary Covid-19 Guidelines, at Chaka, Nyeri County, this 29th day of July 2020.

James Rika

Judge