



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 205 OF 2018

JOHN NGODA MBASHU.....1ST CLAIMANT

HAGGAI OKETCH.....2ND CLAIMANT

VS

LOTUS HOTEL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The issues in dispute in this case are unfair termination of employment and non-payment of terminal benefits. The Claimants state their case in a Memorandum of Claim dated and filed in court on 5th April 2018.
2. The Respondent filed a Memorandum of Response on 30th April 2018.
3. At the trial, the Claimants testified on their own behalf and the Respondent called its Executive Director, Rahab Waithera Nderu.

The Claimants' Case

4. The Claimants were both employees of the Respondent, the 1st Claimant, John Ngonda Mbachu working as a Cashier, from 2nd October 2015 and the 2nd Claimant, Haggai Oketch working in the position of Accountant, from June 2008.
5. The Claimants claim that they worked for the Respondent until 18th September 2017, when their employment was terminated, without prior notice.
6. The Claimants earned monthly salaries of Kshs. 15,000 and Kshs. 19,000 respectively. They claim that they were not paid house allowance.
7. The Claimants state that they were charged with the offence of stealing by servant and on 14th June 2017, the charges were withdrawn under Section 87(a) of the Criminal Procedure Code.
8. The Claimants aver that the charges brought against them were in bad faith, malicious and meant to injure their reputation.
9. The Claimants further aver that the termination of their employment was without justifiable cause and in violation of due process.
10. The Claimants' respective claims are as follows:

1st Claimant: John Ngoda Mbashu

- a) One month's pay in lieu of notice.....Kshs. 15,000
- b) Leave pay for 3 years.....31,500
- c) Years of service and house allowance.....540,000

d) Compensation for unfair termination.....180,000

2nd Claimant: Haggai Oketch

a) One month's pay in lieu of notice.....Kshs. 19,000

b) Leave pay for 9 years.....119,637

c) Years of service and house allowance.....2,052,000

d) Compensation for unfair termination.....228,000

11. The Claimants also claim compensation for malicious prosecution, certificates of service, costs plus interest.

The Respondent's Case

12. In its Memorandum of Response dated and filed in court on 30th April 2018, the Respondent denies terminating the Claimants' employment, without notice.

13. The Respondent states that on 28th July 2016, it discovered some theft had taken place in its business, in which the Claimants were suspected of having been involved.

14. The theft was reported to the Police who began investigations. In the meantime, the Claimants were asked to proceed on leave as there were genuine fears that they could interfere with the records and jeopardise the investigations.

15. The Respondent states that the leave was limited to the period of investigations upon the conclusion of which the Claimants were to resume duty.

16. Upon conclusion of investigations, the Claimants were charged in ***Mombasa Criminal Case No 1504 of 2016***.

17. The Respondent avers that it held several meetings with the Claimants during which the Respondent made it clear to the Claimants that their employment had not been terminated and that they were at liberty to resume duty. However, despite having been freed on bond, the Claimants did not resume duty.

18. The Respondent further avers that on 30th August 2016 and 9th September 2016, the Claimants and the Respondent's officers met and the Respondent once again explained to the Claimants that their employment had not been terminated and that they should resume duty.

19. The Claimants requested the Respondent to withdraw the complaint so that the charges against them could be dropped to enable them resume duty. The Respondent asked the Claimants to put their request in writing.

20. On 12th September 2016, the Claimants wrote to the Respondent asking that the charges against them be withdrawn and the matter be settled out of court.

21. The Respondent states that it acceded to the Claimants' request in good faith and in the hope that the Claimants would resume duty.

22. The criminal charges against the Claimants were subsequently withdrawn by the Director of Public Prosecutions on 14th June 2017.

23. It was however not until 23rd August 2017 when the Claimants reported on duty upon which they were issued with letters dated 24th August 2017 asking them to show cause why their services should not be terminated for absconding duty without lawful cause.

24. The Claimants wrote their respective responses on 30th August 2017. The Respondent was not satisfied with the Claimants' written explanations and therefore invited the Claimants for oral hearing on 11th September 2017.

25. The oral hearing took place as scheduled during which the Claimants explained that they had not resumed duty even after the charges had been withdrawn because of lack of 'a return to work formula.'

26. Further, the Claimants set what the Respondent considered to be unjustified conditions for resuming duty to wit; that they be paid for the period they had been away from work and that they would not be victimised.

27. The Respondent goes on to state that the reason given by the Claimants for their failure to resume duty was not lawful, justified or satisfactory. The Claimants were therefore summarily dismissed on 18th September 2017, for absconding duty without just or reasonable cause under Section 44 of the Employment Act.

Findings and Determination

28. There are three (3) issues for determination in this case:

- a) Whether the Claimants' dismissal was lawful and fair;
- b) Whether the Claimants have proved a case of malicious prosecution;
- c) Whether the Claimants are entitled to the remedies sought.

The Dismissal

29. The Claimants were dismissed by individual letters dated 18th September 2017 stating as follows:

“Dear Sir,

RE: SUMMARY DISMISSAL

We refer to our show cause letter dated 24th August 2017 and the oral hearing held on 11th September 2017.

The explanation given by yourself for not reporting to work is that you were waiting for communication from the Company on a return to work formula.

As you are aware the company did not terminate your services. You were sent on compulsory leave pending investigations, which concluded before you were even charged in court. Despite being out on bond, you deliberately absconded from duty without just cause.

The company was in constant communication with you either directly or through your advocates during which it was made clear that your services were never terminated and that you should report to work. You did not do so.

Even after the criminal case against you was withdrawn on 14th June 2017, you did not report until 23rd August 2017.

*Your action to deliberately abscond from duty without just cause amounts to gross misconduct under **Section 44 of the Employment Act** and a violation of your terms of employment. The Company hereby terminates your services for gross misconduct with immediate effect.*

Kindly arrange to clear with the Company within seven (7) days from the date of receipt of this letter.

Yours faithfully,

(signed)

LOTUS HOTEL”

30. Prior to dismissal, the Claimants had, on 24th August 2017, been issued with notices to show cause requiring them to explain their absence from work between 15th June 2017 and 23rd August 2017.

31. In their identical responses dated 30th August 2017, the Claimants did not deny that they had indeed been away from work but accused the Respondent of failing to communicate with them to report to work.

32. The Claimants also asked for what they referred to as ‘a return to work formula’. They went further to state that they were willing to return to work with effect from 1st September 2017, subject to assurance by the Respondent that they would not be victimised and that they would receive their salary arrears from July 2016 to August 2017.

33. Further to their response to the show cause notice, the Claimants were, by letter dated 1st September 2017, invited to an oral hearing on 11th September 2017, which they duly attended.

34. Both at the oral hearing and in their testimony before the Court, the Claimants reiterated their conditions for resumption of duty.

35. Looking at the evidence on record, with particular focus on correspondence between the parties' Advocates, it is clear that the Respondent had, on several occasions advised the Claimants to resume duty.

36. Instead of resuming duty however, the Claimant's imposed conditions to be met by the Respondent including payment of salaries for the period they were not at work. On the whole, it seems to me that the conditions set by the Claimants were unreasonable and unwarranted.

37. By their conduct, the Claimants demonstrated that they were not interested in resuming duty. An employee who squanders an offer by

their employer to resume work cannot be heard to complain of unfair termination of employment.

38. In the fullness of the circumstances of this case, I find and hold that the Respondent had a valid reason for dismissing the Claimants as required by Section 43 of the Employment Act.

39. With regard to the procedure adopted by the Respondent in effecting the dismissal, the record shows that the Claimants received notices to show cause to which they duly responded. They were also subjected to an oral hearing. The procedural fairness requirements of Section 41 of the Employment Act were thus satisfied.

40. The Claimants' claims for compensation and leave pay are therefore misplaced and are disallowed.

Malicious Prosecution?

41. The Claimants lay a claim of malicious prosecution based on their arrest and arraignment in court on the charge of stealing by servant. They claim that the charges brought against them were in bad faith, malicious and meant to injure their reputation.

42. Apart from these general statements, the Claimants did not plead any particulars of malicious prosecution.

43. In their final submissions, the Claimants made reference to the decision in *Mbowa v Easy Mengo Administration (1972) E.A, 334* where the ingredients of malicious prosecution were laid out thus:

a) The criminal proceedings must have been instituted by the Defendant, that is, he was instrumental in setting the law in motion against the Plaintiff. It suffices if he lays an information before a judicial authority who then issues a warrant of arrest of the Plaintiff or a person arrests the Plaintiff and takes him before a judicial authority;

b) The Defendant must have acted without reasonable or probable cause;

c) The Defendant must have acted maliciously. In other words the Defendant must have acted, in instituting the criminal proceedings, with an improper and wrongful motive, that is, he must have had intent to use the legal process in question for some reason other than its legally appointed or appropriate purpose;

d) The criminal proceedings must have been terminated in the Plaintiff's favour, that is, the Plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.

44. In the absence of any particulars of malicious prosecution, the only finding to make is that this limb of the claim was not proved and is therefore disallowed.

Other Claims

45. The Claimants seek leave pay for 3 years and 9 years respectively. However, the 1st Claimant John Ngoda Mbashu told the Court that he was worked from 2nd October 2015 until 22nd July 2016. I will therefore allow leave pay for this period only.

46. The 2nd Claimant sought leave pay for 5 years, that is to say; from 2013 to 2017. He however admitted that he was not at work in 2017, his last month at work having been July 2016. He further admitted having broken his employment from April 2014 to August 2014. I will therefore allow his claim for leave pay for the period between August 2014 and July 2016 only.

47. The Claimants also claim house allowance. Section 31(1) and (2) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

48. The Court did not find any evidence that the Claimants were paid consolidated salaries, inclusive of house allowance. I will therefore allow the claim thereon at the rate of 15% of the respective basic salaries and adopt the resultant figures of Kshs. 17,250 as the 1st Claimant's monthly salary and Kshs. 21,850 as the 2nd Claimant's monthly salary for purposes of this claim.

49. The claims for years of service were not proved and are dismissed.

50. Finally, I enter judgment in favour of the Claimants as follows:

1st Claimant: John Ngoda Mbashu

a) Prorata leave pay for 9 months $17,250/30*1.75*9$).....	9,056
b) House allowance for 9 months $(2,250*9)$	<u>20,250</u>
Total.....	29,306

2nd Claimant: Haggai Oketch

a) Leave pay for 1 year $(21,850/30*21)$	15,295
b) Prorata leave pay for 11 months $(21,850/30*1.75*11)$	14,020
c) House allowance for 23 months $(2,850*23)$	<u>65,550</u>
Total.....	94,865

51. These amounts will attract interest at court rates from the date of judgment until payment in full.

52. The Claimants are also entitled to certificates of service plus costs of the case.

53. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Chamwada for the Claimants

Mr. Oluga for the
Respondent