



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 444 OF 2017**

**JOHN MURIITHI MURIUKI.....CLAIMANT**

**VERSUS**

**MS HAZEL HOLMES**

**MAJ. GEN. PETER M. WAWERU**

**RICHARD LUIS FERNANDES**

**GILFORD POWYS AND**

**MADAN AGGARWAL**

**(THE REGISTERED TRUSTEES OF**

**NANYUKI SPORTS CLUB).....RESPONDENT**

**JUDGMENT**

1. The Claimant union sued the Respondent seeking relief for unlawful, unfair and wrongful summary dismissal as well as violation of the Claimant's fundamental rights and racial discrimination. He averred that he was employed as an assistant manager and later served as an acting manager earning a gross salary of 79,300/- per month. He averred that he was dismissed on 21<sup>st</sup> February 2017 after the end of his leave with a backdated letter of 23<sup>rd</sup> November 2016. The Claimant asserts the dismissal was unlawful and without basis. He averred that he was paid lower than Julie Elizabeth Gill who was lackluster in her performance merely because of race. He averred the dismissal smacked of racial bias as the replacement was the same person who had failed to perform in the role of functions and events. He sought 2 months accumulated leave days – Kshs. 180,000/-, 3 months in lieu of notice – Kshs. 540,000/-, 12 months salary compensation for the unlawful dismissal – Kshs. 2,160,000/-, compensation on salary discrepancy – Kshs. 1,208,400/-, general and exemplary damages, damages for discrimination, costs of the suit and interest.

2. The Respondent in reply asserts that the Claimant was dismissed for gross misconduct after he failed to exercise due diligence or was party to a fraud which occasioned the Respondent huge financial loss and/or failed to inform the Respondent in good time or at all of the fraud. The Respondent averred that the fraud took place over a long period when the Claimant was on duty and in charge and that at no time did the Claimant act as the club general manager but that he acted as the club secretary. The Respondent denied having given the Claimant the dismissal letter on resumption of duty on 21<sup>st</sup> February 2017 but averred that it sent the dismissal letter to his last known address on 23<sup>rd</sup> November 2016. The Respondent averred that it complied with the provisions of Section 43(1) of the Employment Act by stating to the Claimant the reasons for the termination. The Respondent asserts that the misconduct that led to the dismissal of the Claimant was so gross that it deprived the Claimant of any consideration of a hitherto warning free service. It was averred that the person that Julie Elizabeth Gill replaced was Silas Owiti in the position of general manager being a position that the Claimant never held neither substantively or in an acting capacity. The Respondent averred that the said replacement for the general manager was engaged on account of her competence and skills and that she had served previously in the position of a consultant with her duties restricted to events. The Respondent averred that the Claimant was adequately compensated as acting club secretary and that the Claimant was not entitled to any of the reliefs he set out in his claim as such the suit should be dismissed with costs to the Respondent.

3. The Claimant testified as did the Respondent's witness Francis Mahinda Mathenge. The Claimant stated that he was discriminated against on grounds of colour as his replacement was paid more than he was paid purely on account of race. He testified that he was not given an opportunity to defend himself and the dismissal was thus unfair. He said that at the time he was on leave he could be reached easily as he resided near the club. He denied having received the letter stated to have been sent to his postal address in Nairobi. He testified that the email

sent indicating his dismissal was not from the club chairman and was therefore unprocedural. He thus sought the grant of the relief sought in his claim.

4. The Respondent's witness on his part testified that the Claimant was not discriminated against as Julie Elizabeth Gill replaced another manager and not the Claimant who was acting club secretary. He stated that the Claimant was guilty of failing to implement the SBA system of payment leading to loss of funds at the Respondent.

5. The parties filed submissions and in his submissions, the Claimant stated that the issues for determination were

1. Whether the Respondent had any substance and/or reason to terminate the Claimant
2. Whether the Respondent's termination of the Claimant was procedurally fair and lawful
3. Whether the Claimant was racially discriminated while at work
4. Whether the Claimant's constitutional rights to fair labour practices were violated
5. Whether the Claimant is entitled to the prayers sought

The Claimant submitted that the Respondent had been very inconsistent and contradictory on the reason for the termination. The Claimant argued that the Respondent had provided different reasons that led to the termination of the Claimant. In the termination letter the Claimant was stated to have failed to bring to the attention of the management committee of various anomalies in the SBA system while in the statement of the Respondent's witness it was asserted that the committee became dissatisfied with the Claimant's performance in general as he frequently absented himself from work, telephone costs were high, lack of control over the staff and that they took food from the main kitchen instead of the staff kitchen, paid himself a higher salary which was not authorized by the committee and his grasp of basic accounts, taxation, costing and employment and labour laws were unsatisfactory prompting the Respondent to seek to employ a club general manager. The Claimant averred that in the pleadings yet another set of reasons for the dismissal was given which was that the Claimant had failed to exercise due diligence or was party to a fraud which occasioned the Respondent huge financial loss and/or failed to inform the Respondent in good time of the fraud. The Claimant submitted that the reasons for termination should not be vague. The Claimant submitted that the termination of his services was not procedural as he was not heard before dismissal. On discrimination he submitted that he was placed in an acting capacity as the club secretary and that at the time of termination was delivering on three very important roles – food and beverage manager, assistant club secretary and club secretary (general manager) and earned Kshs. 79,300/-. He submitted that the Respondent employed a lady of caucasian origin named Julie Elizabeth Gill whose duties were typing committee meeting minutes and distribution of club newsletters and paid her Kshs. 50,000/- for working 2 days a week while he was on an inferior salary with his several managerial portfolios and that when she was taken in as the general manager in 2017 she was paid Kshs. 180,000/-. The Claimant averred that the Respondent appointed Silas Owiti and Patrick K. Sawe as general manager and F&B manager respectively in October 2016 which positions the Claimant performed but was underpaid. He submitted that he was subjected to unfair labour practices. He placed reliance on the cases of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** on the issue of unfair termination and **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR** on issue of costs. The case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** was attached to the submissions though no reference was made to it in the submissions. It is a Court of Appeal decision on terminal benefits the Respondent in that case was entitled to where the court upheld the decision of the learned judge of the superior court but ordered that statutory deduction be made on the sum falling under the head of compensation as the judge had failed to indicate as much in the award made in the judgment.

6. The Respondent submitted that the Claimant was notified of his dismissal by post and that the email to the Claimant also gave the address that the dismissal letter had been addressed to. The Respondent asserted that the letter of dismissal reached the Claimant. The Respondent submitted that it complied with the contract and gave the Claimant notice of 3 months per the contract. It was submitted that the Claimant's termination was for monetary loss incurred by the Respondent as a result of failure by the Claimant to be vigilant and failing to detect the loss and bring to the attention of the Respondent. The Respondent submitted that the Claimant was not discriminated against as Julie Elizabeth Gill and Silas Owiti were engaged at a higher position than the Claimant thus were entitled to a higher salary.

7. The Claimant was dismissed for accounting anomalies upon the review of the SBA system the Respondent was using. The letter was dated 23<sup>rd</sup> November 2016 and the notice period was to run till 21<sup>st</sup> February 2017. The Claimant also attached an email that communicated the dispatch of the dismissal letter in November 2016 through PO Box 70859 Nairobi which was the address in the appointment letter to the Claimant. It would seem therefore the letter was dispatched to the correct address and the presumption was that it was received. The reason advanced for dismissal was different in the pleadings and the statement of the Respondent's witness. The Claimant asserts discrimination but from his own evidence, both Silas Owiti and Julie Elizabeth Gill were earning Kshs. 180,000/- as general manager while he earned Kshs. 79,300/- as assistant club secretary. He acted in the capacity of general manager for some while between September 2015 and June 2016 and thus would be entitled to a salary differential of Kshs. 100,700/- per month for the period he acted. He however was dismissed for a reason that was valid and though valid, he was not given the safeguards under the law. He was not heard prior to dismissal and was thus not fairly terminated. He will recover compensation for that which I will cap at 3 months of his pay which was Kshs. 79,300/- a month. As regards the costs of the suit he will have costs and interest on the sums awarded from date of judgment till payment in full. The compensation awarded is subject to statutory deductions in terms of Section 49(1) of the Employment Act.

8. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Differential in pay for acting as general manager 9 months – Kshs. 906,300/-
- b. 3 month's salary as compensation – Kshs. 237,900/-

c. Costs of the suit

d. Interest on a) and b) above at court rates from date of judgment till payment in full

e. The sums in a) and b) above to be subject to statutory deduction in terms of Section 49(1) of the Employment Act.

It is so ordered.

**Dated and delivered at Nyeri this 25<sup>th</sup> day of February 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**