

Claimant's Case

The Claimant avers that he was employed by the Respondent as a health club attendant by way of a letter dated 25th January 2014 which provided that his employment would commence on 1st February 2013 to 31st December 2013. He was later confirmed on 15th April 2013.

The Claimant avers that on 18th December 2013 he was suspended from employment on allegations of theft. On 31st December 2013 he appeared before a disciplinary committee hearing. That after the disciplinary hearing he was issued with a letter dated 31st December 2013 summarily dismissing him.

The Claimant testified that he earned a monthly salary of Kshs.37,380 and was entitled to a meal benefit of Kshs.2,912. He testified that on 17th December 2013 at around 8 pm the Chief Security together with a guest alleged that he had stolen Kshs.26,000 from the guest which according to him was not true. The Claimant testified that guests were issued with a locker and key which they retained until they checked out at the reception.

The Claimant testified that he did not keep the keys except during the weekly exercise of confirming that all keys were functional. He testified that he neither saw the Kshs.26,000 nor was the amount recovered from him.

The Claimant testified that the matter was never reported to the police, that he was not expected to carry out security checks on persons who visited the health club. He testified that he was not given an opportunity to defend himself as he was required to resign failing which he would be dismissed but he refused to resign.

In cross-examination the Claimant testified that he did not record a statement but was presented with the statement which he was expected to sign.

In re-examination the Claimant testified that there was a union representative at the disciplinary meeting whom he did not choose.

Respondent's case

The Respondent admits that the Claimant was employed as a health club attendant from 1st February 2013 earning a basic salary of Kshs.12,000 and a house allowance of Kshs.7,223. That on 17th December 2013 there was a client who had registered for the gym but did not know the directions to the changing rooms. The Claimant assisted the client to the room which they both entered. The Respondent avers that the client stated that he had lost Kshs.26,000.

The Respondent avers that it carried out investigations into the theft and that its report concluded that the Claimant was to be held accountable for the theft. The Respondent avers that the Claimant was invited to a disciplinary hearing and interrogated witnesses but the Claimant failed to exonerate himself from the charges.

The Respondent avers that the Claimant's dismissal was in accordance with justice and that it took into account the provisions of section 45 of the Employment Act.

RW1, **Robert Kibet Songok** testified that he is an Assistant Security Officer at Hilton Nairobi. That on 17th December 2013 a client reported that he had lost Kshs.26,000. They recorded statements from persons who were present with the claimant being the 1st suspect. The Claimant stated that the only time he had seen the client was when the client lodged a complaint but the guard stationed outside the changing rooms saw the Claimant ushering in the client and the client said that the Claimant had been hesitant to leave the changing room.

He testified that the Claimant was shown the CCTV footage before he recorded a statement but denied being the person in the footage. He prepared a report recommending that the Claimant is the suspect and should be dismissed from Employment. In cross-examination the RW1 testified that there were other clients who entered the changing room after the Claimant. In re-examination RW1 testified that they suspected the Claimant of the theft.

RW2, **David Olalo** testified that he is a Human Resource Co-ordinator of the Respondent. He testified that there was a preliminary report which was the basis of the Claimant's suspension as further investigations were carried out. He testified that the Claimant was invited to a disciplinary hearing after the final investigations report was prepared. There was a union representative during the hearing and the Claimant was informed of his right of representation but he did not call a witness.

RW2 testified that after the disciplinary hearing the claimant was found guilty of theft resulting to his summary dismissal.

In cross-examination RW2 testified that though it was not the Claimant's job description to issue keys at the health club, it was standard procedure that a cashier or a health club attendant would issue the keys to a client if the receptionist was not present. He further testified that the money was not recovered from the Claimant and that the client had not declared that he had that amount of money. He testified that the Claimant's union was notified of the hearing and that the Claimant did not attend the hearing with a representative.

In re-examination RW2 testified that there was evidence that the Claimant escorted the client to the changing room and that the contradiction led to the Claimant being suspected.

Claimant's Submissions

In the written submissions filed on behalf of the Claimant it is urged that the Claimant is accused of having failed to perform his work as expected under the contract of employment under section 44(4)(c) of the Employment Act. The Claimant submitted that it was not his responsibility to verify details of the Club attendees and that his job description only included cleanliness and sanitation of the health club, guest lockers, relaxation areas and treatment rooms.

The Claimant further submitted that the second ground of his dismissal was having stolen but DW2 testified that the Claimant did not take money but was suspected to have taken money.

The Claimant submitted that the Respondent had failed to demonstrate that there were reasonable and sufficient grounds to summarily dismiss the Claimant and that the dismissal was lawful. The Claimant relied on the case of **Bamburi Cement Limited v William Kilonzi [2016] eKLR** where the court held:

“We, like the trial court have come to the conclusion that although the proper procedure relating to hearing the respondent in his defence before dismissal was followed, the appellant failed to discharge its burden to demonstrate any justification in summarily dismissing him, there was no evidence of conduct on the part of the Respondent that fundamentally breached his obligations as to justify his summary dismissal. We also do find the grounds upon which the dismissal was based were unreasonable and insufficient. The dismissal, we hold was wrongful”

Respondent’s Submission

The Respondent submitted that by dint of the Claimant’s job description he had access to not only changing rooms but also the lockers. The Respondent further submitted that Clause 15 of the Claimant’s employment contract provided for amongst other grounds of misconduct, dishonesty and that its finding was that the Claimant had not only breached his contract but his actions amounted to gross misconduct under section 44(4)(c) and (g) of the Employment Act.

The Respondent submitted that the Claimant’s allegation that he was never informed of the charges levelled against him was without merit as he admitted to having signed a statement.

The Respondent further submitted that the Claimant was invited to a disciplinary hearing and was accompanied by a shop representative during the hearing. The Respondent further submitted that the allegation that a shop floor union had been selected on his behalf was an issue that was only raised after the hearing. The Respondent submitted that the minutes of the disciplinary hearing indicate that the Claimant was accorded an opportunity to call witness and that the Claimant had neither challenged the minutes nor the Respondent’s impartiality during the hearing.

The Respondent submitted that it complied with the requirements of Sections 43 and 45 of the Employment Act and that there were valid reasons for dismissal under Section 44(4)(g) of the Employment Act. It submitted that the Claimant is not entitled to the reliefs sought.

Determination

Issues for determination

- a) Whether the Claimant’s summary dismissal amounts to wrongful dismissal.
- b) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant’s summary dismissal amounts to wrongful dismissal.

The Claimant was summarily dismissed after the occurrence of a theft incident at the Respondent’s health club which was reported by one of its clients. Investigations were carried out by the Respondent and evidence it gathered implicated the Claimant to the theft of the Client’s Kshs.26,000. It is the Claimant’s case that he had not encountered the client until the client reported that he had lost some money. However, CCTV footage showed that the Claimant had assisted the client in giving the client the locker keys and had assisted him in getting to the changing room. In cross-examination the Claimant only stated that he was shown the CCTV footage for that date and that he was told that someone entered the health club. The Claimant was evasive on whether he was the one who had been captured by the CCTV footage accessing the alternate changing rooms.

The Claimant denied having recorded a statement and states that he was only given a document to sign. RW1 testified that he took the Claimant’s statement on the occurrence of the events. At the disciplinary hearing the claimant did not raise any issue in respect of the witness statement that he had recorded. The Witness Statement recorded by the Claimant is dated 17th December 2013. There is a further undated statement. In his suspension letter dated 18th December 2013 the Claimant was indeed required to record a statement with the Chief Executive Officer.

The Claimant testified that he did not keep the locker keys and it was not his job description to issue clients with access keys at the reception. The Claimant argues that his responsibility as provided in the Position Description stated –

“Primarily responsible for the cleanliness and sanitation of the health Club, guest lockers, relaxation areas and treatment rooms. This includes the distribution of linens and the maintenance of toiletries.”

In respect of the loss of Kshs.26,000 the Respondent relied on its the CCTV footage and the Claimant’s fellow employees who recorded

statements. Both evidence link the Claimant to being with the client.

RW2 testified that it was standard procedure that a health attendant or a cashier would issue keys to a client if the receptionist was absent.

In the report referred to as “*The Summary and Conclusion into the Reported Loss of Kshs.26,000 from Room 028*” prepared by RW1 on 30th December 2013 has its findings that the Claimant’s argument that at the time of the incident he was having his dinner was contradicted by the following events:

“ ...

1. *The camera footage at the pool Restaurant captures him [the Claimant] ushering Ben towards the changing room at 5.55 pm.*
2. *Ben, the complainant, confirmed that George escorted him and even entered room P028.*
3. ...
4. *George confirmed that he entered the room to do cleaning which is also supported by the security.*
5. *George was on duty at the time of the event.*
6. *No other client went to the same room after Ben.”*

From the evidence presented it is apparent that the Respondent’s investigations linked the Claimant to the loss.

The Respondent was therefore justified to terminate the employment of the Claimant as there was sufficient evidence linking him to the loss of Kshs.26,000. There was therefore a valid reason for the Claimant’s dismissal under Section 43 of the Employment Act.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the 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.

The Claimant avers that he was not given a fair hearing to explain the matter himself. During the hearing the Claimant testified that there was a union representative who was present at the disciplinary. The Respondent submitted that the issue of a union representative being present at the disciplinary hearing was an afterthought while RW2 testified that they invited the union representative to the disciplinary hearing according to the respondent’s disciplinary procedure which complied with Section 41 (1) of the Employment Act which provides –

(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.

I find that there was a disciplinary hearing which the Claimant did not object to and chose not to call witnesses. He was given an opportunity to attend the disciplinary meeting with a witness and two shop stewards were present at the disciplinary meeting.

The Claimant relied on the Court of Appeal decision in ***Bamburi Cement Limited v William Kilonzi [2016] eKLR*** in which the Court of appeal upheld the decision of the trial Court that though the disciplinary procedure had been followed the appellant had failed to demonstrate any justification in summarily dismissing him.

In the present case I find that there was valid reason to take disciplinary action against the claimant and further that the claimant was taken through disciplinary hearing in compliance with Section 41 of the Employment Act.

Having found that there was both valid reason and fair procedure, I find that the dismissal of the claimant was justified.

Remedies

The claimant prayed for pay in lieu of notice, damages and compensation for wrongful dismissal. Having found that the respondent was justified to dismiss him, he is not entitled to either pay in lieu of notice or compensation.

The result is that the entire claim collapses and is accordingly dismissed. There shall be no order for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE