



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 41 OF 2018

GEORGE MURANGIRI CHABARI.....CLAIMANT

VS

MALINDI MANAGEMENT STRATEGY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. George Murangiri Chabari, the Claimant in this case, was an employee of Malindi Management Strategy Limited, the Respondent herein. He brought this claim following his summary dismissal on 17th August 2016. The claim is documented by a Memorandum of Claim filed in court on 9th April 2018.

2. The Respondent’s defence is contained in a Statement of Response dated 16th July 2018 and filed in court on 23rd July 2018. The matter came up for hearing on 6th December 2018, when the Claimant testified on his own behalf and the Respondent called its General Manager, Michael Gichohi.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent initially as a security guard on a 6 months’ contract from 1st April 2007. He rose through the ranks to the position of Security Team Leader earning a monthly salary of Kshs. 25,000 as at July 2016.

4. On 13th August 2016, the Claimant was issued with a suspension letter dated 12th August 2016. By the same letter, he was required to attend a disciplinary meeting on 15th August 2016. In the meeting, the Claimant was informed that he had been suspended for allowing prostitutes into the Respondent’s compound. He was advised to go home and report back on 17th August 2016, on which date he was summarily dismissed.

5. It is the Claimant’s case that his dismissal was unlawful and unfair. He therefore claims reinstatement without loss of benefits or seniority or in the alternative:

- a. 1 month’s salary in lieu of notice.....Kshs. 25,000
- b. Service pay for 9 years and 5 months.....129,808
- c. Compensation for unfair termination.....300,000
- d. Damages for loss of employment.....300,000
- e. Costs plus interest

The Respondent’s Case

6. In its Statement of Response dated 16th July 2018 and filed in court on 23rd July 2018, the Respondent admits having employed the Claimant but states that he was summarily dismissed for negligence of duty. The Respondent avers that the Claimant was accorded a fair hearing and paid all his dues, which he duly acknowledged.

7. The Respondent adds that the Claimant was approached by the Head of Department for disciplinary action but he refused to either record a statement or sign the disciplinary recommendation. Instead, the Claimant hurriedly opted to resign with immediate effect but the Respondent declined.

8. The Respondent further states that on 15th August 2016, the Claimant was summoned to defend himself before the Disciplinary Committee of seven members. He opted not to bring a witness and admitted that he had not performed his duties as required. The Respondent denies that the Claimant was unfairly terminated.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a. Whether the Claimant has made out a case for wrongful dismissal;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

10. The Claimant was dismissed by letter dated 17th August 2016 stating as follows:

“Dear George,

RE: SUMMARY DISMISSAL

On 12th August 2016 while executing your duties, you have not been (sic) alert to pay full attention and concentration to your work.

Further to that, on the said date while on duty at the parking, you allowed two Lamu road ladies (prostitutes) to hang around the parking area. Therefore, disturbing our clients who were moving in and out from the Casino.

The above portrays a clear case of negligence in your duties hence the management is totally dissatisfied with your work.

In addition to that, you were approached by your Head of department for a disciplinary action, which you are fully aware of as a procedure. But you refused to neither record down (sic) a statement of that incidence nor did you sign the disciplinary recommendation. Instead, you hurriedly opted to resign with immediate effect in that night at around 11:55pm with reasons best known to you.

On 15th August 2016 you were summoned to defend yourself before the disciplinary committee of seven members and you admitted that you did not perform your duties as expected.

In view of the above offence, we hereby invoke **Part VI section 44 (c) of the Employment Act 2007**, which clearly states that **“an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly”** is liable for summary dismissal. Therefore you are hereby summarily *dismissed with effect from 15th August 2016 for neglecting to perform your duties.*

Your final dues have been calculated as follows:

1. 27 days worked from 16th July to 12th August 2016.
2. 16.8 accrued leave days to end of July 2016.
3. Kshs 1938/- prorata Leave Travelling Allowance.
4. *Less any outstanding advances and shortages.*

The above payments shall be net of statutory deductions loans and advances that may be outstanding. However please read and make any claims that you may have as no claims shall be entertained once payment is made.

You are kindly required to return all company property in your possession and finally let me thank you for the period you have worked with us and wish you success in your future endeavors.

Yours faithfully

(Signed)

Geoffrey Kitsao

(Signed)

Michael Gichohi

Personnel Manager

General Manager”

11. Prior to the dismissal, the Claimant had been suspended by memo dated 13th August 2016 in the following terms:

“SUBJECT: SUSPENSION NOTICE

This is to inform you of your suspension notice w.e.f 12th August 2016, awaiting to be heard on the disciplinary meeting on 15th August 2016. You are also asked to come with one witness of your choice to accompany you, during the hearing.

Thank you

(Signed)

Kitsao”

12. The Claimant told the Court that he declined to record a statement as instructed by the Head of Security, Richard Gatumo because he had not been told what his mistake was. A further reason given by the Claimant for failure to record a statement is that he had already been suspended anyway.

13. The Claimant attended the disciplinary meeting convened by the Respondent but chose not to be accompanied. He also did not sign the disciplinary advice.

14. Section 47(5) of the Employment Act, 2007 states as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

15. From the evidence on record, the Claimant was accused of negligence of duty leading to entry of unwanted persons into the Respondent’s premises. Negligence of duty is a recognizable administrative offence which must however be proved through a disciplinary process on the shop floor.

16. It is not in contest that the Claimant was confronted by his Head of Department on the night of 12th August 2016 and asked to record a statement regarding the incident which eventually led to his dismissal. The Claimant declined to record a statement and instead chose to resign with immediate effect, a move that was rejected by the Respondent.

17. The question is whether it was reasonable to require the Claimant to record a statement. The answer to that question is in the affirmative; I say so because a statement from the Claimant was central in determining what really had transpired. The reasons given by the Claimant for his refusal to record a statement were invalid and the Court finds and holds that the Claimant’s behaviour did not aid the disciplinary process.

18. In *Mary Wagikuyu Komu v The Kenya Hospital Association T/A The Nairobi Hospital [2016]* this Court held that an employee is not at liberty to decline to participate in a disciplinary process. The Court went further to hold that if the employee has any issues regarding the process, they must raise them directly with the employer.

19. Employees must understand that discipline at the work place is an employer’s prerogative and the Court cannot condone a situation where an employee frustrates a disciplinary process only to question that same process before the Court. I have said before and it is worth repeating that the role of this Court is to review the disciplinary process for lawfulness and fairness; it is not to replace the employer’s action with its own, if the law is followed and the decision is reasonable in the eyes of a reasonable employer on the shop floor, the Court will not interfere.

20. It is therefore always in the interest of the employee to fully participate in the disciplinary process so that the Court has something to review. In the instant case, the Claimant thwarted the disciplinary process from the word go and instead chose to resign. He cannot therefore be heard to say that he was subjected to an unfair process.

21. At any rate, the Claimant did attend a disciplinary meeting on 15th August 2016 and the Court did not find any evidence that he was denied any of his rights under Section 41 of the Employment Act.

22. In the end, the Court finds and holds that the Claimant has failed to establish a case of wrongful dismissal and his claim for compensation must therefore fail. The same verdict applies to the claim for one month’s salary in lieu of notice.

23. No basis was laid for the claim for service pay which also fails and is dismissed.

24. Ultimately, the Claimant’s entire claim fails and is dismissed with costs to the Respondent.

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Mwabonje for the Claimant

Miss Nthiga for the Respondent