



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 122 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

TABITHA GEICHEMBA NYAOSI.....CLAIMANT

VERSUS

MASH PARK HOTEL LIMITED..... RESPONDENT

**JUDGMENT**

1. The suit commenced by a statement of claim on 24<sup>th</sup> May 2015 in which the claimant prays for a declaration that the summary dismissal was unlawful and unfair and payment of terminal benefit as set out under paragraph 7 of the Statement of Claim being:

- (a) Service pay at the rate of one month salary for every completed year of service for 15 years.
- (b) Three months salary in lieu of notice at Kshs 21,316.50 per month. Kshs 63,949.50.
- (c) Underpayments of salary in the sum of Kshs. 1,541,855.50.
- (d) House allowance at Kshs. 4,350 per month for 15 years in the sum of Kshs 783,000.
- (e) Costs and interests.

**Statement of Defence and Counter Claim**

2. The claimant denies particulars of claim and has made a counter claim and set off in the sum of Kshs 155,450 misappropriated and/or not accounted for by the claimant between the periods 23<sup>rd</sup>-27<sup>th</sup> January 2014. That the claimant absconded work upon being asked to account for the loss. That the suit be dismissed and counter claim granted with costs and interest.

**Testimony**

3. The claimant testified that she was employed by the respondent on 1<sup>st</sup> April 2000 as an accountant. That on 29<sup>th</sup> January 2014, the respondent without any reasonable cause or justification dismissed the claimant from employment. That the claimant was subjected to false accusations by the respondent that she had failed to account for bank deposits handled by one Ombaye Oyaro whom the claimant had entrusted with Banking.

4. That the respondent did not pay the claimant salary in lieu of notice, service pay and compensation for unlawful dismissal. That the claimant worked for 15 years and was underpaid and was not paid house allowance. That as at the time of dismissal the claimant earned Kshs. 21,000 per month instead of Kshs. 21,316.50 provided by the General Wage Order in respect of employees in establishments, covered by the *Hotels and Restaurants, Act, Cap 494, Laws of Kenya*. That the claimant was entitled and was not paid house allowance of Kshs. 4,350 per month for 15 years.

5. That the claimant reported a dispute to the Kisii District Labour Officer who refused to handle the case stating that the claimant had absconded work. The officer referred the claimant to the respondent to sort out the matter.

6. The claimant further testified that the Director of the respondent Esther Kerubo Manoti on 28<sup>th</sup> January 2014 informed the claimant to tell Mr. Samuel Kimei RW2, on way forward to ensure that when Ombaye Oyaro came back to work, his motor cycle be confiscated and it be used to recover the amounts not banked by him. That it is the said director, who had instructed the claimant to give Mr. Ombaye Oyaro cash to take to the bank and give the deposit slip to the director on a daily basis. That the claimant had to get permission from the said Director to

refer to the daily summaries of bankings made. That these are the daily summaries submitted by the said director to court. The claimant further testified that on 29<sup>th</sup> January 2014, the said director telephoned Mr. Ombaye Oyaro in the presence of the claimant and the said Oyaro informed the director that he had a personal problem and had used the money to solve the problem and that the other director was aware of the matter. That he needed time to pay back the money.

7. Esther then turned against the claimant and told her that she would report her to the police. The claimant was then called by supervisor James Momanya to go to Kisii police station to record statement which she did. Esther Kerubo had made a report to the police against the claimant vide OB 29/29/1/2014. The claimant produced phone records to the police between the claimant and Mr. Ombaye Oyaro and the claimant was released to go home by the police.

8. That the claimant was humiliated by Esther Kerubo Manoti the director in charge of staff and was summarily dismissed without pay.

9. That the allegations made against the claimant were false and malicious.

10. That the court to grant the claimant the reliefs sought.

11. CW2 Samuel Kipkorir Kemeli, testified in support of the claimant's case. He was a day security Guard of the respondent between September 2007 to 17<sup>th</sup> March 2014. He testified that on 28<sup>th</sup> January 2014, at around 4 pm the claimant informed him that Esther Kerubo, the Director had requested that CW2 alert the guard Mr. Japheth Moriasi to confiscate the motor cycle of Ombaye Oyaro. That Ombaye Oyaro was a close relative of the director of the respondent and they trusted him to do many tasks.

12. CW2 testified that the manager Mr. Wilson Yegon was on leave when he claimant was dismissed by Esther, the Director.

### **Defence case**

13. RW1, Esther Kerubo Manoti and RW2 Wilson Yegon testified for the respondent. RW1 testified that she was a co-director of the respondent's hotel and oversaw the general affairs of the restaurant. That the claimant was employed by the respondent as an accountant from 15<sup>th</sup> April 2000. That she fully associated herself with the testimony of RW2, Wilson Yegon who was a manager of the respondent at the material time. RW1, Wilson Yegon told the court that he was the manager of the respondent. That the claimant was employed by the respondent as the account's clerk from 15<sup>th</sup> April 2000. That the claimant had the responsibility to incur expenses, prepare bank slips, arrange banking and carry out bank reconciliation and to ensure that the funds of the respondent were properly taken care of.

14. That on or about 29<sup>th</sup> January 2014, the claimant was requested to surrender bank deposit slips for the period 23<sup>rd</sup> -27<sup>th</sup> January 2014 for reconciliation purposes. That the claimant failed to surrender the same. That the respondent sourced bank statements for the period from its banker, Co-operative Bank of Kenya Limited, Kisii Branch to ascertain whether the deposits were made for the period 23<sup>rd</sup> -27<sup>th</sup> January 2014.

15. That the respondent wrote a letter to the claimant dated 5<sup>th</sup> February 2014, asking her to surrender the bank deposits but she did not do so. The claimant was then summarily dismissed on 28<sup>th</sup> February 2014. RW2 states that the claimant had misappropriated and/or failed to account for Kshs 155,450.

16. That the claimant's dismissal was lawful and fair and the suit be dismissed with costs.

17. RW1 had also testified that Ombaye Oyaro worked at the hotel as a store man. That his work was to do purchases and control stock and that he did not work in the same office as the claimant. RW1 testified that she discovered that banking was not done for the period 23<sup>rd</sup> – 27<sup>th</sup> January 2014. She asked the claimant what had happened and that she provides the bank slips for the period. That the claimant did not explain why banking was not done. RW1 said that the money for the period had been given to the claimant by one James. That the claimant demanded to be given a suspension letter as she was being questioned by RW1. That the claimant did not report back to work from 30<sup>th</sup> January 2014. That she absconded work without notice. That time RW2 was on leave and he reported back to work on 1<sup>st</sup> February 2014. He wrote a letter to the claimant to surrender the banking slips but the same were not recovered from the claimant. The claimant was then dismissed from work on 28<sup>th</sup> February 2014. RW1 wrote the letter of dismissal. The letter was sent to her through her last known address. RW1 stated that she was not aware that the money was taken by Oyaro. That she did not give instructions to the claimant to give money to Oyaro or to call him. RW1 denied she was following the claimant because Oyaro was her close relative. RW1 said the money that should have been banked was Kshs 155,450. RW1 testified that the claimant is responsible for the loss and should account for the money.

18. RW1 denied she underpaid the claimant. That the claimant never raised the issue of underpayment at all. That her letter of appointment is in writing but RW1 could not trace her file in the office. That the claimant is not entitled to severance pay and house allowance. That the claimant was paid a consolidated salary. That her salary was reviewed every year and was not a fixed amount for the entire period the claimant worked. RW1 stated the schedule filed by the claimant is not genuine. That the claimant was paid Kshs 21,000 per month at the time she left employment. That all the claims made by the claimant have no merit and they should be dismissed with costs. That the respondent be paid the counter claim. Under cross-examination, RW1 stated that the letter of employment got lost together with the claimant's file. That the claimant was a good employee and had no issues except reporting on time, an issue she had discussed with her. That the claimant worked until 29<sup>th</sup> January 2014 at 5 pm. RW1 stated that the claimant did the banking for 28<sup>th</sup> January 2014 of Kshs. 18,340. That banking was not done for 23<sup>rd</sup> to 27<sup>th</sup> January 2014. That 29<sup>th</sup> was a Monday, 27<sup>th</sup> was a Saturday and claimant is usually on – off on Sundays. RW1 said she last saw Ombeya on 22<sup>nd</sup> January 2014 at work. RW1 denied having knowledge that Ombaye did the banking for the period in question. RW1 admitted that she had learnt that Ombaye did banking from time to time. That money was banked on a daily basis except on Saturdays and Sundays and public holidays. That money is collected by the supervisor and the manager and handed over to the claimant. Reconciliation is done after banking by the client.

19. RW1 denied having given the job of banking to Ombaye. RW1 stated that she reported the loss to the police. The supervisor recorded a statement. RW1 stated she did not know that Ombaye had a motor cycle. That the Director decided to treat the unbanked funds as a loss in the books and the matter was left at that. No internal investigations were done. That it is the claimant who stated that Ombaye did the banking. RW1 was not aware that Ombaye did banking work. RW1 stated that Ombaye absconded work from 22<sup>nd</sup> January 2014. That Mr. Ombaye was no longer an employee of the respondent. RW1 stated that RW2 did not have personal knowledge of matters that took place while he was on leave until 2<sup>nd</sup> February 2014 when he came back. Testimony by RW2 is what he was told by RW1. RW1 denied having Instructed CW2, Samuel Kipkorir to confiscate the motor cycle of Ombaye. RW1 confirmed that bank statements showed that Ombaye did the banking. That she did not know when Ombaye started doing banking. RW1 said she was not at the hotel on a daily basis. That she did general supervision of hotel operations. That work was assigned to employees by the manager not by RW1.

### **Determination**

20. The issues for determination are as follows:

- (a) Was the summary dismissal of the claimant for a valid reason and done in terms of a fair procedures.
- (b) Was the claimant entitled to the reliefs sought?
- (c) Is the respondent entitled to the counter claim?

### **Issue (a)**

21. The claimant served the respondent as an accounts clerk for a period of 15 years. From her own account and that of RW1, the claimant was a good employee and had no issues except a few lateness issues that were discussed and resolved. She had custody of hotel takings on a daily basis pending banking over the years and she had no issues arising from her handling of accounts, cash or banking.

22. The claimant told the court that a relative of the Directors of the hotel who worked as store keeper was eventually authorized to do daily banking. Bank statements produced in court confirm that indeed banking was mostly done by the said relative by the name of Ombaye Oyaró. According to the claimant, it was indeed RW1, Esther Kerubo Manoti who authorized Mr. Ombaye to do daily banking. The claimant told the court that Mr. Ombaye received money for banking for the period 23<sup>rd</sup> to 27<sup>th</sup> January 2014. It is not in dispute that Mr. Ombaye did not report to work from 22<sup>nd</sup> January 2014.

23. It was then discovered by RW1 that banking of Kshs. 155,450 was not done since no bank slips were available. According to the claimant, when she was asked by RW1 about the banking slips, she informed RW1 that Mr. Ombaye had done the banking and had not returned he slips. That she telephoned Mr. Ombaye in the presence of RW1 and Mr. Ombaye promised to come to work. That indeed Mr. Ombaye admitted over the phone that he had personal problems and had used the money and that he would refund the same. CW2, security guard told the court that the claimant had communicated to him a request by RW1 to confiscate, Mr. Ombaye's motor cycle as soon as he reported to work to use it to recover the money. Mr. Ombaye however never returned to work.

24. The claimant told the court that RW1 summarily dismissed her from work on 29<sup>th</sup> January 2014. That the summary dismissal was not preceded by a notice, notice to show cause or disciplinary hearing. That the dismissal was arbitrary, malicious and was meant to cover up for Mr. Ombaye, a relative of RW1 who had clearly failed to bank hotel money and had absconded work. RW1 maliciously proceeded to report to the police that the claimant had misappropriated hotel funds. The claimant however recorded a statement at Kisii Police station and gave telephone recordings between herself and Mr. Ombaye in which Mr. Ombaye admitted not banking the money and that he would repay the same. The claimant was not charged with any offence and was released by the police.

25. The claimant was not paid any terminal benefits upon summary dismissal. That she suffered loss and damage as a result of sudden loss of job. She suffered anguish out of false accusation that she had misappropriated money.

26. The court wholly believes the testimony by the claimant and CW2 on what had transpired. The testimony by RW1 was disjointed. It was unbelievable that her relative could have done banking for the hotel for a long time without her knowledge and authorization. CW2 confirmed that the directors trusted Mr. Ombaye a lot on all matters to do with the hotel. The court believes CW2 that he had instructions from RW1 to confiscate a motor cycle owned by Mr. Ombaye as soon as he returned to work. Mr. Ombaye however absconded from work which conduct collaborates the narrative by the claimant and CW2 that he had failed to bank the hotel money and had used it. The claimant was not to blame at all for the loss of the hotel money. The testimony by RW2 did not take the matter any further. He was away during these happenings and he admitted that his testimony was basically what he had been told by RW1 upon his return from leave on 2<sup>nd</sup> February 2014. RW2 wrote the letter of summary dismissal of the claimant. At that time however, the claimant had already been summarily dismissed by RW1 on 29<sup>th</sup> January 2014.

27. The court is satisfied that the respondent violated Sections 41, 43 and 45 of the Employment Act, in summarily dismissing a dependable employee of 15 years for no valid reason and without following a fair procedure.

28. The claimant has proved on a balance of probabilities that the summary dismissal was unlawful and unfair. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Employment Act, 2007 and the court so finds.

### **Issue (b)**

29. As to whether the claimant is entitled to the reliefs sought, the court makes the following findings of fact and law:-

### **Compensation.**

30. The summary dismissal of the claimant was unlawful and unfair. The claimant had a letter of appointment but the same was not produced in court. RW1 testified that the letter was in the claimant's personal file but the file had gone missing. The court finds that the claimant was entitled to payment in lieu of notice. In the absence of the letter of appointment, the court awards the claimant the minimum statutory notice being equivalent of 21 days notice. This translates to a full working month's salary in the sum of Kshs 21,000.

31. With regard to the claim for compensation. **The case of Peter M. Omaera vs Ewaso Nyiro South River Basin, Nakuru HCCC NO. 174 of 2004**, in which the plaintiff was unlawfully dismissed on false grounds of theft is on point. Justice Martha Koome as she then was awarded the claimant exemplary damages in the sum of Kshs. 290,000 for loss employment. The court found that the claimant had suffered immensely due to the allegations of theft and the employer did not conduct any investigations and no prosecution was instituted. The present case has similar circumstances. The claimant however suffered sudden job loss after serving the respondent faithfully for 15 years. The claimant was not paid any terminal benefits upon dismissal. The claimant was not paid any compensation for the job loss either. The claimant was falsely accused of misappropriation and handled badly by the directors. The claimant did not contribute to her loss of employment.

32. **In HCC at Nakuru. Cause No. 292 of 2005 Julius Chengor vs Postel, D.K. Maraga J. (as he then was)**, awarded the plaintiff the equivalent of 10 months salary for summary dismissal. Considering all circumstances of the case including the aforesaid, case law, the court awards the claimant the equivalent of 10 months salary in compensation for the unlawful summary dismissal in the sum of Kshs 210,000(21,000x10).

### **Underpayments/House Allowance.**

33. The claimant did not prove that the respondent under paid her. She did not also prove that she was entitled to additional house allowance. The court is satisfied that the claimant received a consolidated salary of Kshs. 21,000 a month at the time of dismissal. The claims have no merit and are dismissed.

### **Severance pay.**

34. Severance pay is paid upon an employee being declared redundant under *Section 40 of the Employment Act 2007*. The claimant was summarily dismissed for alleged misconduct. There is no claim for redundancy before court. The claim for payment of severance pay has not been proved and is dismissed.

### **Counter claim**

35. The respondent failed to bring any evidence that the claimant mis-appropriated the sum of Kshs 155,450, which the court finds was received by one Ambaye Oyaró for banking. That Ambaye Oyaró was a relative of RW1, a director of the company. That Mr. Ambaye absconded work and did not return up to the time the claimant was summarily dismissed.

36. The respondent has failed to prove the claim as against the claimant on a balance of probabilities and it is dismissed.

37. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:-

(a) Kshs. 21,000 in lieu of notice.

(b) Kshs. 210,000 being the equivalent of 10 months salary.

Total award Kshs. 231,000.

(c) Interest at court rates from date of judgment till payment in full.

(d) Costs of the suit.

**Judgment Dated, Signed and delivered this 7<sup>th</sup> day of March, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Obachi for Claimant

Mr. Ogutu Mboya for Respondent

Chrispo – Court Clerk