



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 44(B) OF 2018

ALFRED MSINDAH NGOWA.....CLAIMANT

VS

MALINDI GOLF AND COUNTRY CLUB.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 16th April 2018 and filed in court on 18th April 2018, the Claimant has sued the Respondent for unlawful termination of employment, discrimination on religious grounds and failure to pay accrued dues.
2. The Respondent filed a Statement of Defence on 20th June 2018 but did not call any witness. A subsequent application seeking orders to reopen the case was not prosecuted.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a security personnel on 1st May 2017. He earned a basic monthly salary of Kshs. 11,280.
4. The Claimant further states that he entered into an oral agreement with the Respondent’s Captain, Mr. Eastwood to change his rest day from Thursday to Sunday, to enable him attend Church.
5. On Sunday, 24th September 2017, the Claimant proceeded on his off day as agreed with the Captain. On reporting to work on Monday, 25th September 2017, the Respondent’s Manager accused him of absconding duty.
6. The Manager told the Claimant to report back to work after two weeks. Upon reporting back, the Claimant was informed that the Respondent had no work for him.
7. The Claimant’s case is that the Respondent discriminated against him and unfairly terminated his employment on religious grounds. He adds that he was not paid house allowance and his salary for September 2017 was unlawfully withheld.

8. The Claimant now claims the following:

- a) Salary for September 2017.....Kshs. 12,972
- b) House allowance for 4 months.....6,768
- c) Notice pay.....12,972
- d) 12 months’ salary in compensation.....155,664
- e) Damages for discrimination on religious grounds.....2,000,000
- f) Certificate of service

g) Costs plus interest

The Respondent's Case

9. In its Statement of Defence dated 19th June 2018 and filed in court on 20th June 2018, the Respondent admits having employed the Claimant as a guard, initially on contract from 1st May 2017 to 28th September 2017.

10. The Respondent states that from the date of employment, the Claimant took his off day on Thursdays. The Respondent adds that the Claimant's request to change his off day from Thursday to Sunday was granted but the change was to take effect in the month of October, in order to organise work schedule as discussed by the Captain, Manager and Grounds Supervisor. In the meantime, the Claimant was allowed two Sundays off in a month.

11. The Respondent avers that the Claimant left without permission and upon inquiries by the Manager and Supervisor he stated that he had secured another job. The Respondent therefore maintains that the Claimant left employment on his own volition.

12. On 30th September 2017, the Respondent wrote a dismissal letter to the Claimant, based on his absence from work, without permission, for more than three days. The letter and the Claimant's final dues were delivered at the Labour Office for the Claimant's collection.

13. The Respondent denies that the Claimant was sent away by the Respondent's Manager and asked to report back after two weeks. The Respondent avers that the Claimant was given a chance to report back to work despite having been absent without permission for ten days but he declined. The Respondent accuses the Claimant of rudeness and unruliness.

14. The Respondent states that it went out of its way to accommodate the Claimant's request to have his rest day changed from Thursdays to Sundays to enable him to attend Church as he had requested.

Findings and Determination

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

- a) Whether the Claimant has made out a case of wrongful dismissal;
- b) Whether the Claimant has proved a case of discrimination;
- c) Whether the Claimant is entitled to the remedies sought.

Wrongful Dismissal?

16. The Respondent filed a dismissal letter dated 30th September 2017, addressed to the Claimant as follows:

"Dear Alfred,

RE: ABSENTISM (SIC) FROM WORK

We note from our records that you have been absent from 22.09.2017

As per clause 8 of your Contract of Employment and Section 44(g) of the Employment Act, you have committed a gross misconduct against the employer and the management has no choice than to dismiss you from employment with immediate effect.

Please ensure that you clear as per company procedures and collect your dues which will be paid (sic) as follows;

- *Salary for days worked up to and including 21.09.2017*
- *Leave days and off days earned and not taken*
- *Certificate of Service*

We wish you all the best in your future endeavours.

Yours faithfully,

(Signed)

Hellen Sidi

Manager

Malindi Golf and Country club

17. According to this letter, the Claimant was dismissed for absenting himself from work from 22nd September 2017. At paragraph 6 of its Statement of Defence dated 19th June 2018 and filed in court on 20th June 2018, the Respondent accuses the Claimant of absenting himself from work for three (3) unspecified days. At paragraph 8 of the same Statement of Defence, the Respondent states that the Claimant had been absent without permission for ten (10) days.

18. From this mix, the Court could not tell the actual dates when the Claimant is said to have absented himself from work, thus rendering himself liable to summary dismissal. In his witness statement dated 16th April 2018 and filed in court on 18th April 2018, the Claimant states that in the month of September 2017, he asked and was allowed by the Club Captain, Mr. Eastwood to take his off day on Sundays so as to go to Church. On the strength of this, the Claimant took his off on Sunday, 24th September 2017.

However, upon reporting to work the following Monday, the Claimant was sent away by the Club Manager for a period of two (2) weeks.

19. If indeed, the Claimant had absented himself from work without permission as alleged by the Respondent, the correct procedure would have been to summon him to respond at the shop floor as required by the procedural fairness requirements set by Section 41 of the Employment Act, 2007.

20. In the final submissions filed on behalf of the Claimant on 3rd June 2019, reference was made to the decision in **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** where my brother **Radido J** summarised the procedural fairness requirements to include notification to the affected employee as to the exact nature of the charge(s) against them and a proper opportunity to prepare and present a defence.

21. It is evident that no charge was presented to the Claimant for his response prior to dismissal. In light this and the equivocating nature of the accusations made against him, the charge of absenteeism was not proved to the standard required by Section 43 of the Employment Act.

22. For the foregoing reasons, the Court finds and holds that the Claimant's dismissal was substantively wrongful and procedurally unfair. As a result, I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's short stint in the Respondent's employment but also the Respondent's conduct in the dismissal transaction.

23. Additionally, I award the Claimant one (1) month's salary in lieu of notice.

Discrimination?

24. The Claimant accuses the Respondent of discriminating against him on account of religion. In particularising this accusation, the Claimant states that he was denied an opportunity to worship on Sunday as he was required to be at work. The Claimant relied on the decision in **Prisca Kemboi & 2 others v Kenya Post Office Savings Bank [2014] eKLR** where this Court declared a human resource policy requiring employees to work on every day of worship unreasonable, unconstitutional and unlawful.

25. **Prisca Kemboi** (supra) remains good law. However, in the case now before me, there is evidence that the Respondent made reasonable adjustments to accommodate the Claimant's religious needs. Indeed, the Claimant himself told the Court that the Club Captain allowed him to change his off day from Thursday to Sunday.

26. It would appear therefore that once the Claimant made his needs known to his employer, positive action was taken and the Court finds no basis for the accusation of discrimination. The claim for damages thereon is therefore without basis and is disallowed.

Other Prayers

27. The Claimant further asks for house allowance. Section 31(1) and (2) of the Employment Act provides as follows:

31. (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).

28. The Claimant's letter of appointment dated 1st May 2017 did not provide for house allowance and the Respondent did not provide the Claimant's payslips. The Claimant's claim that he was not paid house allowance was therefore unassailed. Consequently, I allow the claim for house allowance at 15% of the basic salary and adopt the resultant figure of Kshs. 12,972 as the Claimant's monthly salary for purposes of tabulating this claim.

29. The Claimant told the Court that he was paid salary for days worked in September 2017. The claim thereon is therefore without basis and is dismissed.

30. Finally, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....	Kshs. 38,916
b) 1 month's salary in lieu of notice.....	12,972
c) House allowance for 4 months (1,692x4).....	<u>6,768</u>
Total.....	58,656

31. This amount will attract interest at court rates from the date of judgment until payment in full.

32. The Claimant will have the costs of the case.

33. Orders accordingly.

DATED SIGNED AND DELIVERED MALINDI THIS 14TH DAY OF OCTOBER 2019

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JUDGE

Appearance:

Mr. Odhiambo for the Claimant

Miss Lughanje for the Respondent