



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 942 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th October, 2019)

TITUS WAMBUA MWENDWA.....CLAIMANT

VERSUS

ELSA'S KOPJE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the instant Claim on 3rd June, 2015, through the firm of E. K. Mutua & Company Advocates seeking damages for wrongful, unjust and unlawful dismissal from his employment by the Respondent and refusal to pay terminal dues owed to him.
2. The Claimant states that he was employed by the Respondent as a room steward in its camp lodge in Meru earning a net salary of Kenya Shillings Eighteen Thousand Three Hundred and Fifty Only (Kshs. 18,350/-).
3. The Claimant contended that he performed his duties diligently and to the Respondent's satisfaction until 21st April, 2015 when the Respondent Summarily dismissed him without giving him any reason for his termination
4. The Claimant contends that prior to his summary dismissal he had sought an apology from one of the Respondent's clients having been accused of theft of USD 700, which allegation was later on retracted after it was established that the said amount was actually not lost.
5. The Claimant further contends that his summary dismissal was unfair, unlawful and illegal as he believed that the same was due to the fact that he demanded an apology for being wrongfully accused of theft by the said client. Further, he averred that he was not accorded a fair hearing prior to his termination which is a breach of the employment laws in Kenya.
6. Being aggrieved by the decision by the respondent to unfairly terminate his services the Claimant filed the instant Claim seeking for Judgment to be entered in his favour as against the Respondent for:-

1. 1 month's salary in lieu of notice at Kshs. 18,350/-

2. Service pay for 2 years at Kshs. 36,700/-

3. Maximum compensation for unfair termination at Kshs. 18,350/- per month for 12 months totalling to Kshs. 220,200/-

4. General damages for discrimination and being subjected to human indignity.

5. Costs of the suit

6. Any other relief deemed fit by the Court.

7. The Respondent in its Reply to the Memorandum of Claim dated and filed in Court on 26th June, 2015, in which the Respondent admits having engaged the Claimant as alleged. It however, denied that the Claimant was unlawfully and unfairly terminated stating that it dismissed the Claimant's services for gross misconduct following an incident that occurred in November 2014 when one of its guests reported a loss of USD 700.

8. That after this incident the Claimant through his advocates demanded an apology from the customer. Following this exchange the Respondent did proceed to suspend the Claimant from duty and issued him with a notice to show cause why disciplinary action should not be taken against him for improper conduct of communicating with guests on matters not raised with the management.

9. The Respondent further averred that the Claimant was duly accorded a hearing and that he failed to show that the management or the Respondent's guest did refer to him as a thief prompting the Respondent's decision to terminate his services.

10. The Respondent contended that it had reason to terminate the Claimant's services and that due process was followed. The Respondent avers that it has duly paid all dues owing to the Claimant at the time of separation and that he confirmed having no other claim with the Respondent as per Annexure 5, the signed discharge. The Respondent urged this Honourable Court in the circumstances to dismiss the Claimant's Memorandum of Claim with costs.

11. The matter was later fixed for hearing on **1st April, 2019**, when the parties hereto agreed to proceed with the matter by way of written submissions.

Submissions by the Parties

12. The Claimant submitted that he had a right to seek an apology after it became apparent that the Respondent's client had wrongfully accused him of theft of USD 700 the client having found the said money in his wallet.

13. The Claimant further submitted that the Respondent failed to adhere to the tenets of procedural fairness as required under Sections 41, 42, 43 and 46 (h) of the Employment Act while dismissing the Claimant from duty.

14. To fortify this argument the Claimant cited and relied on the cases of **Angela Wokabi Muoki Vs Tribe Hotel Limited (2016) eKLR** and **Evans Kamadi Misango Vs Barclays Bank of Kenya Limited (2015) eKLR**.

15. The Claimant further submitted that due process having not been followed he is therefore entitled to the reliefs as sought in his Memorandum of Claim.

Respondent's submissions

16. The Respondent on the other hand submitted that it did accord the Claimant herein a fair hearing prior to his termination as it did invite him for a disciplinary hearing to show cause why disciplinary action should not be taken against him. The Respondent further submitted that the Claimant failed to give good reason thus the Respondent's decision to terminate his services.

17. The Respondent further submitted that it did communicate the reasons for his termination in the Claimant's letter of termination as required under Section 43 of the Employment Act, 2007. To buttress this argument the Respondent cited and relied on the decision in **John Otieno Mukabi Vs Kenya Builders & Concrete Company Limited (2014) eKLR** where it was held:-

“In my view, an employer is required to provide the reasons for termination of employment of an employee in the course of the internal disciplinary process which is triggered by a notice to show cause. Once an employer decides to take the ultimate disciplinary action of terminating the employment of an employee, the reason for the termination must be clearly stated in the letter of termination.”

18. From the foregoing, the Respondent submitted that its letter of termination clearly indicates the reason behind the Claimant's termination.

19. The Respondent further submitted that the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim as it has been shown that at the time of separation the Claimant was paid all his dues and signed a discharge after receiving Kshs. 57,074/= and confirmed that he had no other claim against the Respondent herein.

20. In conclusion, the Respondent urged this Honourable Court to dismiss the Memorandum of Claim with costs to the Respondent.

21. I have examined all the evidence and submissions of both Parties. From the letter dated 21.4.2015, the Claimant was summarily dismissed on account of having instructed his Counsel to write to a guest who had reportedly referred to the Claimant as a thief in November 2014.

22. Following this incident, the Respondent decided to terminate his services because the Respondent found that his continued employment in the camp was detrimental to the camp and well being of the other staff.

23. Before this dismissal, the Claimant avers he was not subjected to any disciplinary hearing but was suspended on 18/3/2015.

24. From the Respondent's documents, the Claimant was actually taken through a disciplinary process and the minutes of the process were attached to the Respondent's documents.

25. From the Respondent's documents, the Claimant was given a fair hearing before the termination.

26. The Respondent are however expected to prove that they had a valid reason to terminate the services of the Claimant.

27. The Claimant has submitted that he was just trying to defend his name after being branded a thief, which is his constitutional right.

28. Section 43 of Employment Act states as follows:-

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".

29. Indeed the reasons that would warrant dismissal summarily as granted under Section 44(4) which states as follows:-

"(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

c) an employee wilfully 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;

d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

30. The Claimant never committed any of the above acts and even demanding an apology from a guest who he perceived had referred to him as a thief cannot be of such magnitude as to warrant summary dismissal.

31. This Court finds that there were no valid reasons to warrant summary dismissal of the Claimant. In view of this position, this Court finds the dismissal of the Claimant was unjustified. I therefore find for Claimant and I award him as follows:-

1. 1 Months' salary in lieu of notice = 18,350/=.

2. Maximum compensation equivalent to salary for the unjustified termination = 12 x 18,350= 220,000/=.

Total = 238,380/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

Dated and delivered in open Court this 15th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi holding brief Ombati for Respondent – Present

Mungania holding brief Mutua for Claimant – Present