



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.123 OF 2016

NANCY NJOROGÉ.....CLAIMANT

VERSUS

FLAMINGO HILL CAMP LTD.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as a House Keeper on 1st July, 2006 and disused with letter of appointment and on 24th December, 2015 when the claimant was conducting her duties a customer by the name Mr Rarn Breedvied a guest in the respondent's hotel made a complaint that from his ksh.40, 000.00 he had lost ksh.20, 000.00 which he had left in his room. The client believed the cash had been stolen during lunch and evening hours when the claimant was on duty in the room. The claimant was called together with the security team to the manager's officer over the emitter.

On 26th December, 2015 the claimant was interrogated over the events of 24th December, 2015 at Bondeni Police station where she maintained her innocence. Similar complaints had been made in the year 2014 and someone else had accepted liability on the theft.

By letter dated 26th December, 2015 the claimant was sent on mandatory off to allow for investigations. Upon return on 1st January, 2016 the claimant was directed to write a note on the events and later she was issued with letter of summary dismissal.

Such resulted from unfair procedures as there was no due process contrary to section 41, 43 and 45 of the Employment Act.

The claim is that since her employment the claimant was working overtime and without payment. The work hours were 7am to 2pm and then 6pm to 8pm for 3 days each week and from 7am to 6pm for 3 days each week at 57 hours a week and an overtime of 9 hours each week.

The claim is that the claimant was not paid her terminal dues and is claiming the following;

- a) Unpaid leave allowances ksh.18,271.00;
- b) Overtime claims ksh.271,940.64;
- c) Compensation ksh.219,252.00;
- d) 5 off days not taken ksh.3, 045.17.

The claimant testified in support of her claims.

In defence the respondent's case is that the claimant while working for the respondent was found dishonest in her dealings in the course of performing her duties and which necessitated summary dismissal and all her terminal dues were paid and the claims made should be dismissed with costs.

The respondent also filed various work records with regard to the claimant's employment.

Mr Job Leboo testified that he is the Camp manager of the respondent and worked with the claimant but who he dismissed following an incident on 24th December, 2015 when one guest Tarn Breedveld lost ksh.20, 000.00 in his tent which the claimant was attending and because similar incidences had taken pace in the year 2014 some guest had lost their money in the tents the claimant was attending. The claimant was served with notice to show cause and she replied but this was not found satisfactory and a decision was taken to dismiss the

claimant.

Mr Leboo also testified that the claimant was paid her terminal dues less what she owed to Kentours Sacco where she was a member. The dismissal was lawful and for justified reasons.

The terminal dues included wage due in December, 2015;

January, 2016 service charge;

5 days off not taken;

One month pay for due annual leave.

Less – loan and statutory deductions.

The claimant had an unpaid loan of Ksh.164, 000.00 and her shares of ksh.128, 000.00 could not fully pay and thus had a deficit of ksh.36, 000.00 which remains unpaid. The terminal dues went into the Sacco as the respondent had a memorandum of understanding with the Sacco and with the consent of the claimant all owing dues remitted therein

Mr Leboo also testified that as a housekeeper, the claimant work hours did not allow for overtime work. The respondent is in the hospitality industry with guests attended to from 8am to 12 noon then a break to 4pm and then the next shift. There were 6 housekeeper each attending to 5 tents and from 4pm one would be left to turn-up the room each week while other would leave. In total the work hours are less than 8 hours each day. When the guests are less the employees are allowed time off with full pay and no overtime work is allowed and where such work is done there is a compensation with more time off.

From the work records, the claimant was appointed as room attendant on 1st July, 2006. She was promoted to housekeeper on 1st February, 2007. Her terms were reviewed to senior room steward on 1st March, 2013. And on 1st August, 2015 there were revision of terms to position of housekeep at a basic wage of ksh.12,867.00 and house allowance of Ksh.5,404.00 per month all being Ksh.18,271.00.

By letter dated 1st January, 2016 the claimant was dismissed by the respondent from her employment on the grounds that she had been invited to show cause why her employment should not be terminated following a case of theft from a guest Mr Tarn Breedveld on 24th December, 2015 and which matter had been reported to the police and the claimant summoned and that such incidents had been reported previously and thus by application of section 44(4)(g) of the Employment Act, 2007 summary dismissal was an available sanction.

On 1st January, 2016 the claimant wrote back to what seem to be in response to accusations against her that she was on duty on 24th December, 2015 and that she did not take any money and accusations against her were unfounded.

A summary dismissal from employment is allowed under the provisions of section 44 of the Employment Act, 2007 where the employee is found to have fundamentally breached the employment contract and where there is gross misconduct. even where the employer finds the employee to have committed acts that justify summary dismissal the due process of the law requires the employee be afforded a hearing in accordance with section 41(2) of the Employment Act, 2007.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The claimant was found to have committed acts of gross misconduct on 24th December, 2015 and the same reported with the police. Subsequent to the report she was issued with notice to show cause and she replied on 1st January, 2016. What followed was letter of summary dismissal. By being allowed to respond to the allegations made, the claimant was allowed her defence and which was found unsatisfactory.

Under the provisions of section 45 (5) the court is called to address the work history of the employee in establishing whether there was an unfair termination of employment. The respondent has attached a litany of records which speak to the claimant's tainted work records with cases of theft, insubordination and which were not challenged in any material way.

In view of the substantive reasons for summary dismissal the court finds good basis and due process was applied. There is no case of unfair termination of employment.

The claimant is seeking the payment of leave allowance, overtime and 5 days worked and unpaid.

In the payment statement for January, 2016 the claimant was paid in lieu of taking leave and which pay is premised on the basic pay which an appropriate payment.

The claimant is also paid for 5 days worked and not paid for.

On the claim for overtime pay, the basis is that the claimant would work for 9 hours each week from the year 2005 to December, 2015 and using this basis has made general claims in a standard format. The defence was that the claimant would report on duty at 8am and work until

12 noon when guest checked in and then take a break until 4pm when of all the 6 housekeepers one would be left behind to turn up the tents for guests and in total work for less than 8 hours.

The respondent's witness also gave emphasis that there was no overtime allowed and when such was done the claimant was allowed more time off to compensate. When business was low the claimant would take more time off on full pay.

First the claims are general and for 12 months not factoring the claimant took her annual leave which not claimed as part of the overtime tabulations. Secondly, the claimant admitted that of all the housekeeper one would be left back in the evenings to attend to the tents while other left for the day as it happened to her on 24th December, 2015 when she was accused of stealing from one of the tent. Invariably therefore, the court takes it that the respondent had synchronised the hours to accommodate each employee to go off and break to avoid overtime work and the evidence that when there was overtime work it was compensate with more day off when business was low was not challenged. Thirdly and more fundamentally the claimant is not seeking payment for not taking her annual leave form the year 2006 to 2014 save for the year 2015 and which has since been paid.

The court then takes it that the claims for overtime work have no basis and made as an afterthought. The evidence on record from the claimant herself does not support these claims.

The other issue which arose was the payment of the terminal dues to the Kentours Sacco to offset the loan due form the claimant. Under the provisions of section 19 allow the employer to make deductions form he dues payable to an employee at the end of employment is there is a debt and commitment to pay to a third party. In **JAVAN WERE MBANGO Versus H. YOUNG & CO. (EA) LTD [2012] eKLR** that;

Employees who out of their own free will join employees Sacco do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and for the collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, there are owed all their savings without taking into consideration the collective agreement under their Sacco and or cooperative society. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of the termination of his relationship with the principal.

The respondent had a duty in law to apply the terminal dues owing to the claimant to offset the loan owing from her at the end of her employment. Such is a legal requirement under section 19 of the Employment Act, 2007.

Accordingly, the claims made are hereby found without merit and are hereby dismissed. Each party shall bear own costs.

Delivered at Nakuru this 14th day of November, 2019.

M. MBAR?

JUDGE

In the presence of:

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