



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 416 OF 2017

PHILIP MATAZA SHIDA.....CLAIMANT

VS

ISINYA RESORTS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Philip Mataza Shida against his former employer, Isinya Resorts Limited. The claim is contained in a Memorandum of Claim dated 15th May 2017 and filed in court on 18th May 2017. The Respondent filed a Response on 12th June 2017.

2. The matter came up for mention on 20th November 2017 before my brother **Makau J**, when the parties agreed to proceed by way of written submissions. Only the Claimant complied.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent and deployed as a Front Office Porter at Bliss Resort, sometime in 2015. The Claimant further states that on 19th December 2016, he was wrongfully accused of theft upon which he was arrested and detained at Bamburi Police Station.

4. The Claimant avers that upon his release from police custody, he reported to work but was advised to stay away until further communication from the Respondent’s Management. The Claimant adds that upon further inquiry in the months of January and February, he was issued with a letter dated 17th March 2013, notifying him that his employment had been terminated, effective 19th December 2016.

5. It is the Claimant’s case that the termination of his employment was unlawful and unfair. He therefore claims the following:

a) Pending leave.....	Kshs. 16,000
b) Balance of salary for December 2016.....	4,266
c) Salary for January 2017.....	16,000
d) Salary for February 2017.....	16,000
e) Salary for March 2017.....	16,000
f) One month’s salary in lieu of notice.....	16,000
g) Pending days contract (4).....	1,855
h) 12 months’ salary in compensation.....	278,121
Less amount paid.....	(241,281)
Total.....	253,840

i) Certificate of service

The Respondent's Case

6. In its Response dated 12th June 2017 and filed in court on even date, the Respondent admits that the Claimant was its employee from 1st December 2015 until 18th December 2016.

7. The Respondent states that on the night of 18th /19th December 2016, the Claimant was on duty when the Resort lost client's property worth Kshs. 376,549. Being one of the suspects, the Claimant was arrested and booked at Bamburi Police Station.

8. The Respondent denies the Claimant's claim of unlawful termination and states that he was terminated on the ground of absenteeism from duty. The Respondent denies the Claimant's averment that he was instructed not to report to work. The Respondent states that the Claimant was afforded an opportunity to be heard but he refused to cooperate.

9. The Respondent goes on to state that after termination of his employment, the Claimant failed to clear.

10. The Respondent considers the Claimant to have resigned without notice and therefore claims from him Kshs. 13,900 being one month's salary in lieu of notice.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

12. On 28th December 2016, the Respondent wrote to the Claimant as follows:

"Dear Sir

SUMMARY DISMISSAL

On 19th December 2016, you were arrested for cognizable offence punishable by imprisonment and since then, you have not reported to work. You therefore deserted duty and/or resigned without notice.

Your deserting duty and/or resignation without notice for now over seven (7) days is gross misconduct and cannot be tolerated.

Your services are therefore terminated instantly. You will be entitled to the following:

- 1. Days worked up to and including 18th December 2016.*
- 2. Your outstanding pro-rata leave for the completed months of service earned but not taken up to and including 18th December 2016.*
- 3. Less one month's basic pay in lieu of notice.*
- 4. Certificate of service.*

From the date of this letter, you have a right of appeal to the undersigned within three (3) days. If we will not have received your appeal by 30th December 2016, then we will assume that you have exercised your right not to appeal and we will consider your services to have been rightfully terminated instantly, without notice.

You will be required to clear with your department and the Resort to enable our Finance Department to process your final dues. You will be issued with a Terminal Dues Worksheet and your final dues will be ready for collection upon your clearance with your department and the Resort.

Yours faithfully,

for: ISINYA RESORTS LIMITED

(Signed)

JANE KENDERS

Human Resources Officer

13. Thereafter on 15th February 2017, the Respondent issued the Claimant with what was referred to as an 'offence sheet'. The Claimant was also issued with a show cause letter of the same date stating inter alia:

"We hereby organize a Disciplinary Hearing Committee on 29th February 2017 where you will be required to Show Cause why we should not maintain our summary dismissal to you as per our summary dismissal letter to you, dated 28th December 2016."

14. On 17th March 2017, the Claimant was issued with another letter referenced 'Termination' which confirmed the termination of his employment, effective 19th December 2016.

15. What emerges from the foregoing correspondence is that the Respondent first dismissed the Claimant before affording him an opportunity to be heard. This procedure which is unknown in law, amounts to declaring an employee guilty and then asking them to exculpate themselves. What is clear is that the charges against the Claimant were not tested at the shop floor and were therefore not proved. The resultant dismissal was therefore substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

16. In light of the foregoing, I award the Claimant three (3) months' salary in compensation for unfair termination. In making this award, I have considered the Claimant's length of service as well as the Respondent's conduct in the termination process. The rest of the claims were not proved and are dismissed.

17. The counterclaim by the respondent was also not proved and is dismissed.

18. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 48,000, being 3 months' salary in compensation for unfair termination of employment.

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

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

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF MARCH 2018

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JUDGE

Appearance:

Mr. Mwanyale for the Claimant

Mr. Lucas Otieno(HRM for the Respondent in person.