



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO 323 Of 2016

from the management.

Ms. Som avers that on 25th September 2015, she unsuccessfully appealed to the management against her summary dismissal as she never received a response on the same until 2nd October. She reported the matter to the claimant who engaged the Respondent and proposed a joint meeting on 9th October 2015. That is when the Respondent responded stated that the Claimant's action was premature as the appeal was still pending. The Claimant referred the matter to the Ministry of Labour and Social Security Services thereafter.

It is Ms. Som's contention that she did not proceed on her annual leave in the year 2013 and 2014 and she therefore prays for the Court to order payment of all her accrued rights, terminal benefits and be fully compensated for loss of job unfairly.

In the Memorandum of Claim dated 10th October 2016, the Claimant prays for the following orders-

1. That this Honourable Court be pleased to find that the summary dismissal of the Grievants was unfair and in breach of the law.
2. That this Honourable Court be pleased to invoke section 49 & 50 of the Employment Act, 2007 and order:
 - a. The Respondent to reinstate the Grievants back to their former occupations without loss of pecuniary benefits.
 - b. In the alternative, the Grievants be granted terminal benefits, accrued rightful dues and maximum (12 months) compensation for loss of job unfairly.
 - c. The Respondent do issue the Grievants with Certificate of Service pursuant to section 51 of Employment Act 2007.
3. That the costs of this be provided for by the Respondent.
4. That any other order the Court deem fit to issue.

The Respondent filed a Statement of Defence on 25th November 2015, wherein it denies the contents of the Memorandum of Claim and the witness statements filed therewith.

Evidence

The matter came up for hearing on 7th June 2016 on which date CW1 GORDON OTIENO OICH reiterated the contents of the Memorandum of Claim and denied the allegations in the Respondent's Defence that he got involved in cash sales. In cross-examination, he admitted that he received a letter to show cause and was suspended on 25th August 2015. That he was summoned and given an opportunity to be heard which in his view was not a fair hearing since the union was not involved to represent him. That thereafter his services were terminated summarily.

CW2 MS. LINDA ATIENO SOM adopted her witness statement and denied the Respondent's allegations as they were made after she had been terminated. That she was accused of having committed the offence in collusion with one Collins Muga, the bar man, who was also terminated and paid his dues unlike in her case where she was not paid any dues. She alleged that the mistake she was accused of was made by the barman and not by her, as she was a receptionist whose job was to deal with accommodation. That she billed the customers according to what was provided by the barman and that there was no fraud on her part. She denied being given a fair hearing.

In cross-examination, she denied having been found with anomalies relating to cash before. That the letter dated 20th October 2012 was in connection to a shortage and not a cash problem which she admitted at the time. She admitted being given a letter to show cause, attending a hearing before the committee and that she was allowed to speak at the said hearing. She however stated that the hearing was flawed for the reason that she was not allowed a union representative at the said hearing.

She also stated that her prayer for leave not taken was for the years 2013 and 2014. She denied having filled any leave forms for the said years. She also prayed for underpayment for the reason that since her promotion from waitress to receptionist she was still earning Kshs. 9,000/= instead of Kshs. 16,000 which was what was due to a receptionist.

The Respondent put up one witness one GEORGE OTIENO ASIARE, the Club Administrator overseeing both administration and operations. He stated that Gordon Oich was not dismissed unfairly as he was summoned by the management committee and the human resource committee to explain the charges against him which he failed to do and as such he was found to have committed the offence. It was also his evidence that Mr. Oich was not entitled to 2 months' salary in lieu of notice as he was summarily dismissed. Further, that Mr. Oich was not entitled to leave pay as he never applied for leave.

As for the 2nd Grievant, Linda Atieno Som, he admitted that she was employed as a housekeeper then transferred to work as a waitress and as at the time of dismissal she was working as a receptionist. That she however did not have any letter from management changing her designation. He denied that the 2nd Grievant was unfairly dismissed and stated that she was granted an appointment and she presented herself before the Human Resources subcommittee and thereafter was summarily dismissed.

In cross-examination, Mr. George Otieno stated that he was employed on 18th January 2016, that he was not in the respondent's employment at the time material to this suit and that his evidence was based on records filed in Court. He admitted that the 2nd Grievant worked for more

than two years as a receptionist. The witness was referred to document 6 in the Respondent's list of documents which showed that the captain order leading to Ms. Linda's dismissal was raised by Collins Muga and she was given cash and kept it whereas the receipt showed that the customer paid by visa.

That the Grievants were sent on suspension while investigations were ongoing and an investigation report prepared which was availed to the Grievants at the disciplinary hearing. He was not aware whether the Grievants ever took leave as he did not have any leave application forms in Court.

Submissions

The Claimant submits that the Respondent breached section 41 of the Employment Act on procedural fairness. That in a bid to give a fair hearing the Respondent convened the human resource committee to conduct hearings in the absence of the Grievants' representatives contrary to section 41(2) of the Employment Act, 2007.

Further, that section 43 of the Employment Act, 2007, provides that valid reasons must be provided by the Respondent before dismissal which in this case was not followed. That the Respondent accused the 1st Grievant of violating the sales rules without exhibiting the purported rules and sent him on suspension to conduct investigations whose outcome was not availed to the Claimant neither was it presented as evidence in Court. That the cash sale in question was between the Chef and one Nicholas who was instantly dismissed after being caught with a cash sale of Kshs. 1,000/=.

It is submitted in favour of the 2nd grievant that the issues that she was accused of through the internal memo dated 12.10.2012 were overtaken by events as the said issue had already been resolved. On the allegation that the 2nd Grievant colluded with one Collins Muga to defraud the Respondent, it is submitted that the work of issuing invoices was that of the bar section and not reception. That it was not proved that there was collusion to inflate the guest bill to cover up a shortage as the report filed in Court does not add up. That there was therefore no reason for termination of the 2nd Grievant.

That no notice of termination was given to the Grievants as is mandatory under section 35 and 36 of the Employment Act. Further that section 20 of the Hotels and Catering Trades Order Cap 229 Laws of Kenya (repealed) grants the Grievants two months' pay in lieu of notice in the event of termination without notice.

It is also the Claimant's submission that the fundamental rights to fair labour practice enshrined under article 41 of the Constitution of Kenya 2010 continue to be prejudiced by the Respondent. The claimant prayed for the Claim to be allowed as drawn.

On behalf of the Respondent it was submitted that due process was followed and the Grievants given opportunity to defend themselves, that the Respondent found that the explanations given were not satisfactory and proceeded to terminate the services of the grievants. That hearings were conducted in accordance with the law and as such the Claim should be dismissed with costs.

Determination

I have carefully considered the pleadings, evidence adduced in court and the written submissions filed by both parties. The issues for determination are whether the summary dismissal of the grievants was both substantively and procedurally fair and whether they are entitled to the remedies sought.

For a dismissal to be fair there must be both valid reason as provided in Section 43 and fair procedure as provided in Section 41. If either of the two is not complied with the dismissal is unfair as provided in Section 45(2).

Further, Section 47(5) provides that the burden for proof of unfair termination or lawful dismissal rests with the employee while the burden of justifying the grounds for termination rests with the employer.

In the present case, CW1 GORDON OICH was dismissed on grounds that he made sales in cash transactions contrary to club instructions and withheld the cash which he only posted in the system after intervention by the Club Chairman who had witnessed the incident. Gordon wrote a statement in which he stated that it was a Waiter who had collected cash for an order which had been made by a member directly with the kitchen. He stated that the member had problem with his credit card and temporary members' card which were the authorised modes of payment in the club.

No evidence was adduced by the respondent to prove that CW1 is the one who transacted in cash.

RW1 stated there was an investigation report which was not produced in court. RW1 himself was employed by the respondent in January 2016 long after the dismissal of CW1 and did not have the details of what had transpired. He stated that he relied on information in records which had been filed in court.

From the foregoing the respondent did not discharge its burden of proof.

For the case of CW2 the reason for her dismissal is that she passed a receipt which was issued to a client who paid for accommodation by VISA card to a colleague Collins Muga to add drinks to cover up for a shortage that Muga had in the bar. She was accused of collusion with the said Collins.

CW2 did not deny the respondent's averment that she admitted the charge during the disciplinary hearing. She further did not deny giving

the accommodation receipt to Muga to add drinks. All she said was that she did not add the drinks to the receipt. The copy of receipt on record clearly show that there is an alteration which is in different pen and handwriting.

I therefore find that there was valid reason for disciplinary action being taken against CW2.

Fair Procedure

The procedure for discipline as provided in Section 41 of the Act is that an employee is informed of the charges against him/her. The employee is entitled to have either a colleague or a shop floor union representative of his choice present duty the explanation and to be heard before a decision is made on dismissal.

Both CW1 and CW2 stated that they requested for representation by a union official but were denied the opportunity. The respondent did not controvert this allegation.

Having failed to allow the grievants an opportunity to be represented at the disciplinary hearing, the same was procedurally unlawful.

I therefore find that the dismissal of CW1 was both substantively and procedurally unfair while the dismissal of CW2 was substantively valid but procedurally unfair, thus making both dismissals unfair under Section 45(2) of the Act.

Remedies

The claimant prayed for a finding that the summary dismissal was unfair which I hereby do.

The claimant further prayed for reinstatement of the grievants back to their former occupation without loss of pecuniary benefits or in the alternative, payment of terminal benefits.

Reinstatement is a remedy provided for in Section 49(3)(a) of the Employment Act subject to considerations set out in Section 49(4) and the time limitation under Section 12(3)(vii) that the remedy can only be granted with 3 years of termination.

The termination of the grievants was on 21st October and 18th September 2015 and they are thus within the three-year limitation. However Section 49(4) requires the court to consider the practicability of reinstatement and the common law principle that it should only be resorted to in exceptional circumstances. The court is also required to consider the wishes of the employee among other considerations. In the present case there is no exceptional circumstances that have been proffered by the claimant or the grievants. Both the grievant did not express their wish to be reinstated during the hearing.

For these reasons I do not find reinstatement a practical remedy in his case and decline to grant the same.

The grievants prayed for terminal benefits which have been set out in their witness statements as follows –

1. Gordon Otieno Oich

i. 2 months' salary in lieu of notice = Kshs.32,000.00

ii. Salary for August, September and October 2015

16,000 x 3 months = Kshs.48,000.00

iii. Leave due (25 days)

16,000 x 25 = Kshs.13,333.00

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iv. Prorata leave for 6 months

March 2015 – September 2015

16,000 x 1.75 x 6 = Kshs.5,600.00

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v. Maximum compensation for loss of job unfairly

$$16,000 \times 12 = \underline{\text{Kshs.192,000.00}}$$

$$\textbf{TOTAL} = \textbf{KSHS.290,933.00}$$

vi. Be issued with a Certificate of service

2. Linda Som Atieno

$$\text{vii. 2 months' salary in lieu of notice} = \text{Kshs.33,744.00}$$

viii. 2 years' leave (2013 and 2014)

$$\underline{16,872} \times 30 \text{ days} \times 2 \text{ years} = \text{Kshs.33,744.00}$$

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ix. Prorata leave for 8 months (2015)

$$\underline{16,872} \times 1.75 \times 8 = \text{Kshs.7,874.00}$$

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$$\text{x. Salary for August 2015} = \text{Kshs.16,872.00}$$

xi. 18 days worked in September 2015

$$\underline{16,872} \times 8 = \text{Kshs.10,123.00}$$

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xii. Underpayment of wages from May 2010 – August 2015

May 2010 – April 2011

$$\underline{(11,944 \times 12) - (9,000 \times 12)}$$

$$143,328 - 108,000 = \text{Kshs.35,328.00}$$

May 2011 – April 2012

$$\underline{(13,437 \times 12) - (9,000 \times 12)}$$

$$161,244 - 108,000 = \text{Kshs.53,244.00}$$

May 2012 – April 2013

$$\underline{(15,197 \times 12) - (9,000 \times 12)}$$

$$182,364 - 108,000 = \text{Kshs.74,364.00}$$

May 2013 – April 2014

$$\underline{(17,325 \times 12) - (9,000 \times 12)}$$

$$207,900 - 108,000 = \text{Kshs.99,000.00}$$

May 2014 – April 2015

(17,325 x 12) – (9,000 x 12)

207,900 – 108,000 = Kshs.99,000.00

May 2015 – August 2015

(19,402 x 4) – (9,000 x 4)

77,608 – 36,000 = Kshs.41,608.00

xiii. 12 months' compensation for loss of job unfairly

16,872 x 12 = Kshs.202,464.00

TOTAL = KSHS.707,362.00

xiv. Be issued with a Certificate of service

Having found that the grievants were unfairly dismissed, they are both entitled to pay in lieu of notice, outstanding annual leave and compensation.

Gordon worked for the respondent for 7 years. His employment having been both procedurally and substantively unfair and taking into account all the circumstances of his case including the length of service, the conduct of the respondent and all the other factors under Section 49(4), it is my opinion that 7 months' salary is reasonable compensation.

In Linda's case, she had worked for the respondent for 8 years. I take into account that the termination of her employment was only procedurally unfair. I therefore award her compensation equivalent to 4 months salary taking into account all the circumstances of her case.

RW1 stated that the grievants had not proved that they applied for annual leave on which ground he stated they are not entitled to the same. Under Section 10(7) and 74(1) it is the burden of the respondent to keep records. Section 74(1)(f) specifically requires employers to keep records of an employee's annual leave entitlement, days taken and days due specified in Section 28. Section 10(3)(a)(i) requires employers to keep records including records of entitlement to annual leave "sufficient to enable the employees entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated."

It is therefore not for the grievants to prove their entitlement but for the respondent to prove the same by producing the relevant records.

According to the Regulation of Wages (Hotel and Catering Trades) Order, annual leave entitlement for employees is 24 working days per year or 2 days per month. Employees who have completed 5 years of service or more are entitled to 2 months' notice upon termination of employment.

I therefor enter judgment for the grievants against the respondent as follows–

CW1 – Gordon Otieno Oich

His last salary was Kshs.16,000.

i. 2 months' salary in lieu of notice	Kshs.32,000
ii. Salary for August and September 2015	Kshs.32,000
iii. Salary up to 21 st October 2015	Kshs.11,200
iv. Annual leave due as at January 2015	25 days
v. Annual leave from January to October 2015	20 days
vi.. Pay in lieu of 45 days leave	24,000
vii. Compensation 7 months' salary	<u>Kshs.112,000</u>

TOTAL KSHS 211,200.00

CW2 – Linda Atieno Som

i. 2 months' pay in lieu of notice based on minim gross salary of receptionist as per General Order 2015

Kshs.16,872.40 + 15% = Kshs.19,403.30

Kshs.19,403.30 x 2

Kshs.38,806.50

ii. 60 days leave from January 2013 to September 2015 Kshs.38,806.50

iii. Salary for August 2015 Kshs.19,403.30

iv. Salary for 18 days of September 2015 Kshs.11,642.00

v. Compensation 4 months' salary Kshs.77,613.20

TOTAL

KSHS.186,271.50

Underpayments

The claimant further prayed for underpayments for CW2. The respondent paid her Kshs.9,000 even though she was working as a receptionist. The respondent did not contest the tabulation of the underpayments which I have confirmed to be in accordance with the relevant Wages Order for the years during which the claimant was underpaid. I therefore award her the underpayments as prayed in the sum of **Kshs.402,544.00/=**.

Conclusion

In summary I find that the summary dismissal of the grievants was unfair and award them the following –

1. CW1 Gordon Otieno Oich – Kshs.211,200.00

2. CW2 Linda Som Atieno – Kshs.588,815.50

Respondent shall also issue a certificate of service to the grievants

I further award the claimant Kshs.50,000 on account of costs to cover reasonable disbursements for filing fees, service and associated expenses.

DATED AND SIGNED AT NAIROBI ON THIS 8TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 5TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE