



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1253 OF 2013

REUBEN SHINOKO TSIMANGOCLAIMANT

v

RESORT KENYA LTD (MAYFAIR

CASINO & CLUB)..... RESPONDENT

JUDGMENT

1. For determination are the questions, *whether the summary dismissal of Reuben Shinoko (Claimant) on 7 October 2011 was unfair, whether Claimant was paid October 2011 salary, whether Claimant had accrued leave by time of separation and appropriate remedies/orders.*

2. The Cause was heard on 3 July 2018 when the Claimant and Respondent's Human Resources Manager testified.

3. The parties did not file submissions as directed. The Court has given due consideration to the pleadings and evidence on record.

Unfair termination of employment

4. On 30 September 2011, Resort Kenya Ltd (the Respondent) wrote to the Claimant to inform him that he was being suspended until further notice because of the events of 4 September 2011 and 18 September 2011.

5. The Respondent followed up on the suspension with a letter dated 7 October 2011 informing the Claimant that it had been decided to summarily dismiss him.

6. During testimony, the Claimant narrated how he was kidnapped and injured and was admitted to hospital and on resuming work he was suspended and while serving the suspension, a supervisor of the Respondent called him to go and collect a letter which turned out to be the dismissal letter.

7. The Claimant contended that because there was no hearing, the dismissal was unfair.

8. The Respondent's Human Resources Manager confirmed that the Claimant was suspended before the dismissal and that before the dismissal, he afforded the Claimant an opportunity to make representations (by recording a statement). The witness however admitted that there was no *show cause* notice.

9. Section 35 of the Employment Act, 2007 contemplates a notice of termination of employment. The notice may in general language be called a *show cause notice*. It triggers the hearing/process envisaged under section 41 of the Act.

10. An opportunity afforded to an employee during investigations to establish the facts upon which an employee may be called upon to *show cause*, do not in the view of the Court satisfy the test of notice of termination and a hearing.

11. What the Respondent did in the instant case was to have the Claimant record a statement as part of the investigative or fact establishing process and this cannot substitute the process contemplated by sections 35 and 41 of the Employment Act, 2007.

12. There being no evidence before Court that the Claimant was notified of the dismissal/(show cause) or that a hearing was held either orally or through correspondence, the Court finds that the dismissal of the Claimant was procedurally tainted and hence unfair.

13. With that conclusion, it is not necessary for the Court to examine whether the reasons for the dismissal were valid and fair.

October 2011 salary

14. The Claimant was dismissed on 7 October 2011 and would be entitled to the earned wages.

15. The Respondent produced a final dues schedule indicating that the Claimant was paid Kshs 5,005/- on account of the wages for October 2011.

Accrued leave

16. The same schedule indicated that the Claimant was paid Kshs 26,812/- on account of leave for 2010 and a further Kshs 3,790/- as leave travelling allowance. Nothing turns on this head of claim.

Appropriate remedies

Pay in lieu of notice

17. With the conclusion that the dismissal was unfair, the Court finds that the Claimant is entitled to the equivalent of 1 month's salary in lieu of notice (basic salary was Kshs 16,950/-).

Compensation

18. The Claimant served the Respondent for about 2 years and in consideration of the length of service, the Court would award the equivalent of 2 months wages as compensation (gross wage was Kshs 29,815/-).

Conclusion and Orders

19. The Court finds and holds that the summary dismissal of the Claimant was unfair and awards him

(a) Pay in lieu of notice Kshs 16,950/-

(b) Compensation Kshs 59,815/-

TOTAL **Kshs 76,580/-**

20. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 30th day of October 2018.

Radido Stephen

Judge

Appearances

For Claimant Ms. Nafula instructed by Enonda & Associates

For Respondent Mr. Njeru instructed by Muciimi Mbaka & Co. Advocates

Court Assistant Lindsey