



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1369 OF 2015**

**MWANGI MURAGE MWANIKI.....CLAIMANT**

**VERSUS**

**NAIROBI GLORY PALACE HOTEL LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimants’ claim brought by Memorandum of Claim dated 5<sup>th</sup> August 2015 and filed in Court on 7<sup>th</sup> August 2015 is for compensation for unfair termination of employment and payment of accrued final dues. The Respondent filed a Defence and Counterclaim on 25<sup>th</sup> August 2015.
2. When the matter came up for hearing the Claimant testified on his own behalf and the Respondent called its Managing Director, Shaukat Mohamed and Legal Advisor, David Mutua. Only the Claimant filed written submissions.

**The Claimant’s Case**

3. The Claimant was employed by the Respondent as a cleaner on 3<sup>rd</sup> November 2004. He rose through the ranks to the position of Chief Technician/Maintenance Officer.
4. On 11<sup>th</sup> June 2015 the Claimant was summarily dismissed on allegations of loss of Kshs. 32,000. He states that he was not paid his terminal dues and now claims the following:

- a) One month’ salary in lieu of notice.....Kshs. 20,000
- b) Salary for 11 days worked in June 2015.....8,800
- c) Leave pay for 2014/2015.....21,800
- d) Leave allowance.....10,000
- e) House allowance for 10 years and 6 months.....378,000
- f) Service pay.....126,000
- g) Overtime for 126 months.....764,400

- h) Public holidays.....84,000
- i) Damages for unlawful termination.....240,000
- j) Certificate of service
- k) Costs plus interest

### **The Respondent's Case**

5. In its Defence and Counterclaim dated 24<sup>th</sup> August 2015 and filed in Court on 25<sup>th</sup> August 2015, the Respondent denies the Claimant's entire claim and demands the sum of Kshs. 32,000 being rent collected and converted by the Claimant.

6. The Respondent maintains that the Claimant was summarily dismissed in accordance with the Employment Act.

### **Findings and Determination**

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

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

### **The Dismissal**

8. The Claimant was dismissed by letter dated 11<sup>th</sup> June 2015 stating as follows:

**"RE: SUMMARY DISMISSAL**

*The Company is not contended with your behavior as you were given by our clients cash amounting to Ksh 32,000. It was discovered when the clients were asked for the said amount which you accepted receiving and claimed the money got lost. You did not report to the office management or police station.*

*A 10 day ultimatum to bring the money back was issued else your services be with terminated due to breach of misconduct (sic). The company has no option but to go with the latter.*

*With Regrets.*

*Managing Director*

**MR. SHAUKAT H. MOHAMED"**

9. According to this letter, the Claimant was dismissed for the loss of the sum of Kshs. 32,000 belonging to the Respondent and failure to report the loss. While the loss itself was not disputed, there was no agreement on the circumstances surrounding it.

10. The Respondent's Managing Director, Shaukat H. Mohamed testified that he became aware of the loss in June 2015 but did not report the matter to the police until August 2015. He also denied any knowledge of the Claimant's written commitment to pay back the lost money.

11. The Respondent's Legal Advisor, David Mutua on the other hand told the Court that the loss was reported immediately upon discovery in June 2015. Mutua also admitted having received and bringing to Mohamed's attention, the Claimant's letter of commitment to repay the lost money. The Respondent's

witnesses were unable to reconcile their testimony with the entry into the police occurrence book dated 4<sup>th</sup> August 2015.

12. From the foregoing, it seems to me that there were internal discussions and agreement on how the Claimant would pay back the money lost on which the Respondent unilaterally reneged and decided to dismiss the Claimant. Having reached agreement on liquidation of money by the Claimant, the Respondent could not turn round and use the loss as justification for dismissal.

13. The Court therefore finds that the Respondent had no valid reason for summarily dismissing the Claimant as required under Section 43 of the Employment Act, 2007. Additionally, the Claimant was not subjected to the mandatory disciplinary procedure set out under Section 41 of the Act.

### **Remedies Available to the Claimant**

14. Overall, the Court finds the Claimant's dismissal substantively and procedurally unfair and awards him twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service coupled with the Respondent's conduct prior to the dismissal. I also award the Claimant one (1) month's salary in lieu of notice.

15. The Claimant also claims house allowance. Section 31 of the Employment Act provides as follows:

***31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service-***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).***

16. The Respondent did not produce any employment contract or pay slip to show the makeup of the Claimant's salary and as held by **Mbaru J** in ***Robai Musinzi Vs Safdar Mohamed Khan [2012] eKLR*** where an employer fails to document the employment of an employee, the terms are subject to interpretation by the Court. In this regard the Court did not find any evidence that the monthly salary paid to the Claimant was inclusive of house allowance.

17. I therefore allow the claim for house allowance at the rate of 15% of the basic salary and adopt the resultant figure of Kshs. 23,000 as the Claimant's monthly salary for purposes of this claim. The claim for salary for eleven (11) days worked in June 2015 also succeeds and is allowed.

18. From the evidence on record, the Claimant took his leave for 2014. I however allow prorata leave for 2015. In his testimony, the Claimant admitted that the Respondent made National Social Security Fund (NSSF) remittances on his account. He is therefore not entitled to service pay. The claims for leave allowance and overtime compensation were not proved and are dismissed.

### **The Respondent's Counterclaim**

19. The Claimant admits having lost the sum of Kshs. 32,000 belonging to the Claimant. To this extent, the Respondent's counterclaim succeeds.

### **Final Orders**

20. Finally I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....Kshs. 276,000	
b) 1 month's salary	
in lieu of notice.....	23,000
c) House allowance for 10 years and 6 months.....	378,000
d) Salary for 11 days in June 2015 (23,000/30x11).....	8,433
e) Prorata leave for 2015 (23,000/30x1,75x5).....	<u>6,708</u>
Total.....	692,141
Less amount owed to the Respondent.....	(32,000)
<b>Amount payable to the Claimant.....</b>	<b>660,141</b>

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

22. As the claim and counterclaim have both succeeded, each party will bear their own costs.

23. I direct the Respondent to issue the Claimant with a certificate of service.

24. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Oswera for the Claimant

Mr. Gichuki for the Respondent