



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

CAUSE NO.1448 OF 2013

CAROLYNE L MUSONYE CLAIMANT

VERSUS

THE PANARI HOTEL LTD RESPONDENT

JUDGEMENT

Issue in dispute – unfair termination of the Claimant.

1. The Claimant was employed by the Respondent as an Assistant Front Office manager on 15th January, 2009 and was confirmed in the position of Deputy Front Office manager on 1st October, 2008. The Claimant worked diligently earning a gross monthly salary of Kshs.75,000.00 which salary was increased to Kshs.91,000.00 by the time of termination of employment when the Claimant was by then the Front Office Manager.

2. On 10th July, 2013 the Claimant was issued with a letter of termination over unsubstantiated allegations. The Claimant was alleged to have been irresponsible and negligent in her duties and for failing to enforce the set operational procedures of the respondent. The allegations were that;

- i. The Claimant failed to ensure special care for corporate clients including but not limited to express check it;
- ii. Upgrades whenever possible;
- iii. Introducing the clients to the chef so that the chef would solicit their food preferences throughout their stay at the respondent; and
- iv Ensure their general welfare and comfort in the rooms through regular contact and ascertaining with them that all was alright.

3. The claim is that the allegations made against the Claimant did not relate to her duties as Front Office Manager and the involved factors were beyond her office. The Claimant duties included supervision of rooms allocation during reservations and upgrades when possible; guests transportation and ensuring general welfare of guests. The Respondent cited the case of a client, Multiple Hauliers whose guests were staying at the Respondent hotel and who opted to move out. The complaints received from them related to the state of facilities at the Respondent hotel which were not up to international standards. The client wrote an email complaining of the poor state of the hotel on poor refurbishment and that its guests would no longer return due to poor quality of rooms; poor state of bathrooms; and unappetising food in the main restaurant.

4. The claim is also that the allegations made against her are not true as not guest complained to her especially guest from Multiple Hauliers or make false representations to them to entice them for business with the Respondent on any refurbished room. the poor state of the facilities to the required standards is a matter the Respondent was well aware of and the guests were only giving feedback and cannot be visited upon the Claimant and allege she was negligent. The Claimant did her work as Front Desk manager by assigning guest rooms and made them comfortable and got feedback which was sent to the Respondent management. The Claimant was not the chef to organise meals; the duty to refurbish rooms were not the function of the Claimant and the state of bathrooms had been noted with the Respondent and this was not attended to.

5. The Claimant also avers that there was a monthly meeting with management where feedback was given on noted concerns from guests. The action taken or to be taken on the noted matters were beyond h claimant's control as this was with the Respondent to address. Complaints about food, bathrooms and furniture in the rooms had been noted and communicated to the respondent.

6. On 9th July, 2013 when the Claimant received an email from the managing director on the termination of her employment, she had no prior notice of the allegations against her and was also not given time to defend herself or give her defence which she had and had such defence been allowed, the Respondent would not have terminated the claimant.

7. The claim is also that the termination caused her loss and damage to her career and a chance to earn a living and thus entitled to damages. The Claimant is also seeking;

Final dues

Basic pay at Kshs.91,000.00;

Gross pay Kshs.91,000.00;

Leave pay for 2013/13 13 days Kshs.45,500.00;

Leave travel allowance 2013/14 Kshs.2,100.00;

Unpaid salary for 10 days worked July 2013 Kshs.30,333.30;

Notice pay Kshs.9,000.00; and

Damages Kshs.1,092,000.00

8. The Claimant is also seeking costs.

9. The Claimant also testified in support of her claim.

Defence

10. The Respondent admit they had employed the Claimant on 15th January, 2008 and was terminated on 10th July, 2013 in accordance with her employment contract at clause 23 and section 35(1)(c) of the Employment Act. The Claimant performed her duties unprofessionally and with negligence with regard to guest relations and warranted summary dismissal. The position held by the Claimant required her to deal with all guest relations and complaints and to ensure guest satisfaction. The Claimant as the one in charge of her team was required to ensure all aspects of her work were addressed as the overall responsible manager.

11. The defence is also that the Claimant was required to do her work well and where unable to due to any challenge especially in addressing the guest complaints to share and inform or communicate the same

to the managing director but not to abandon the guests. The Claimant thus failed to raise the concerns made by Multiple Hauliers guests with the respondents.

12. The general misfortune traceable on the wear and tear of the Respondent hotel can be read back to 2007 December and the general down turn in tourism. The Claimant as part of senior management had a duty to see the Respondent through hard business times and not act in betrayal the Claimant had a duty to ensure the guests had a comfortable time at the hotel and any concerns be escalated to the managing director. The Claimant failed the business principle that 'the guests is always right' as no hotelier can afford to put a client/guest down noting any complaints made.

13. Despite the wear and tear of the facilities, other guests were not so poorly handled by the Claimant and they understood, continued and have been using the facility save for Multiple Haulier who were not handled well by the claimant. The Claimant was therefore aware of the financial difficulties the Respondent was facing and all facilities in the hospitality industry in a critical election year and hence the difficulties in carrying out renovations.

14. Before the Claimant was terminated she was extensively engaged by the Respondent managing director and operations manager and the human resource manager in an effort to hear her defence. The Claimant only gave lame excuses. The Claimant was supervised by the operations manager who listened to her before a hearing with other senior managers. The termination was justified and was carried out in accordance with the applicable law.

15. The Respondent has admitted claims for; Basic pay;

Leave pay;

Leave travelling allowance;

10 days worked in July, 2013; and One month notice pay.

16. The claim for compensation is denied. There was no unfair termination of employment to warrant such a claim. The claim for damages should be dismissed with costs.

17. In evidence the Respondent called Samson Maina Kamau the human resource officer. Mr Kamau testified that the Claimant as ahead of front desk was the face of the business at the reception and first contact with guest while at the hotel. Had the duty to assign rooms and ensure guest welfare from the time of entry to departure. There was a feedback system when the guest were not happy this was supposed to be noted and raised with management. The Claimant was therefore required to be proactive to ensure guests satisfaction.

18. In July, 2009 the Claimant work record has complaints on her failures and her performance was poor. A guest from Multiple Hauliers made complaints and this case was discussed by the managing director and operations manager. An email was sent to the Claimant on 9th July, 2013 for the Claimant to see the witness as the human resource manager on matters that had been discussed with the Claimant by her supervisor but had been heeded to. On 10th July, 2013 he Claimant was given another hearing with top management and noting her poor work and noting her responses only shifted blame, she was issued with a termination letter.

19. The Claimant collected her termination letter on 11th July, 2013 but refused to clear and therefore has not been paid terminal dues. The termination was in accordance with the law and the Claimant had a poor work record. The Respondent was justified to use section 44 of the Employment Act provisions on summary dismissal as the Claimant had neglected her duties but this was replaced with a termination and thus terminal dues owing. The main complaint against the Claimant was negligence due to the non-performance of her duties in failing to address guest complaints.

Determination

20. At paragraph 24 of the defence/response, the Respondent has admitted owing the claimant the following;

Basic pay

Leave pay

Leave travelling allowance

10 days worked in July, 2013; and

Notice pay.

21. With such confirmation these dues are hereby confirmed as due and owing. The admitted dues are also admitted in the termination letter.

22. The only issue that is in dispute is the claim for unfair termination and the claim for damages.

23. The Respondent also admits that they employed the Claimant in different positions the first position being that of Front Desk Manager. In the confirmation letter dated 1st February, 2010 the Respondent stated that *based on your notable average performance thus confirming you to serve fully on your promoted capacity as a Front Office Manager.* However, the job duties are not assigned in this letter.

24. The Claimant testified that she had no job description. The Claimant developed her own job description but such was never discussed with the Respondent for approval and use as a tool for her assessment. The averment that the duty to look after gusset with regard to food, room satisfaction or any other matter outside the claimants job role therefore became a matter for the Respondent as the employer to prove that this was part of the claimant's duty to perform.

25. The requirement that an employer should give an employee a clear job description is not the duty of the employee. Section 10(2)(c) of the Employment Act requires an employer, while giving an employee an employment contract and giving the details of such employment or the particulars thereof to also set out the job description. Where such job description is not defined in the contract of service, the employer must state where the employee is to access such a document. Whether in the work policy, manual or any other work related rules and regulations;

(2) A written contract of service shall state—

(a) the name, age, permanent address and sex of the employee;

(b) the name of the employer;

(c) the job description of the employment;

26. When the Claimant was directed to develop her own job description, the Respondent as the employer should have signed to it and made it part of the employment contract for the same to be an applicable tool for her work assessment. To leave the Claimant at large is to make a serious omission that legally has the implication that the Claimant had no job description in terms of section 10 of the Employment Act.

27. Appendix 2 – *job description* as attached to the defence is not signed by either party. A general reading of the attachment is that it related to several officers going to the Operations Manager and the Claimant was just one of the officers in the chain. Where the Claimant failed in her duties, the responsibility had to be traced to the supervisor and operations Manager. Where there were guest complaints, the rooms were not refurbished, and the rooms were not to the required standards, even where the Claimant was part of the work performance chain, all blame and failure in the department cannot be placed on her alone.

28. On 10th October, 2012 Mr Marekia the claimant's supervisor sent an email requiring her to respond to serious issues on sales and for the Claimant to justify her absence from duty during the *BSF*.

29. It was not clarified in court as to the responses made by the Claimant on this particular email. But the Claimant admitted she took her day off despite the fact that there was an important conference on-going and the Respondent had an overwhelming number of guests visiting and residing at the facility at the time. That the guests were many to the point they had to be distributed to different hotels.

30. Prior to this date, 10th July, 2013 on 8th October, 2012 there were emails communications with regard to the Claimant handling of her duties, airport receiving of guests, check-in process at the hotel and communication to the different teams under the claimant. In the termination letter of 10th July, 2013 the Respondent gives the reasons for termination as;

.... in your specific case you were charged with the responsibility to ensure special care for corporate clients including and not limited to express check in for corporate, upgrades whenever possible and introducing the client to the chef so that he (the chef) would solicit their food preferences throughout their stay at the Panari Hotel. You were to also ensure their general welfare and comfort in the rooms through regular contact and ascertaining with them that all was alright . To our surprise and disappointment, you failed to adhere to these basic instructions to the extent that the complaining client has opted to move out from the Panari Hotel indefinitely. This is very disappointing in deed arising as a result of your irresponsibility or negligence of allocated duty that of complying and enforcing the set operational procedures as explained above.

31. In defence, the Respondent at paragraphs 17 that they were suffering financial constraints; at paragraph 12 and 14 the hotel had wear and tear as a result due to impact of elections in the hospitality industry. That in such circumstances the Claimant should have done her best to ensure client/guest confidence in the facilities. However, noting the specific complaints against the Claimant with regard to Multiple Hauliers, the alleged poor state of bathrooms, the poor quality of hotel rooms, and unappetising food in the restaurant, it is not specifically stated what exactly the Claimant was required to have done in this regard and which she failed to do.

32. As noted above, upon the claimant's confirmation in her position, no job description was agreed upon as a tool to monitor her performance. The alleged agreement setting out her duties in the letter of termination as highlighted in the above extract is not attached for the court to see what duties had been allocated to the Claimant and the parameters of the performance standards. Even where '*the guest is always right*' the Respondent had the duty to ensure that its employees including the Claimant were aware of their work duties and where in the Respondent review it was noted that such duties were not well understood, put the same in writing and ensure a performance monitoring process. To lift some activities, duties and role and cite them as having not been properly performed and that the Claimant was negligent or irresponsible in the performance of her duties is to shift blame to the wrong person.

33. Whatever reason(s) that warranted the Claimant to be disciplined, even where such fell under the provisions of section 44 of the Employment Act on summary dismissal, procedural justice required that the Claimant be accorded rights under section 41 of the Act to be given a hearing in the presence of her representative. Where the circumstances of the case did not allow for such procedural requirements to be put in place, the duty is on the Respondent as the employer to demonstrate the same. In this case, the Respondent witness testified that he was called to hear the claimant's case after the same had been addressed by her supervisor and operations manager but there is no evidence that I find directed at the Respondent following the procedural provisions of section 41 of the Act.

34. Failure to adhere to the mandatory provisions of the law renders the termination of the Respondent unfair. Even where the Claimant had been noted as having challenges in her work in terms of performance, the sanction of termination in a case of poor performance is harsh and not reasonable. An employee who is of poor performance requires support and training so as to comply to the business requirements.

35. The question of performance and negligence of duty are regulated under different provisions of the law. Section 41 and 44 respectively. The substantive reasons for each are therefore different. Poor performance of work is required to be addressed before the employer can be found to use such reason as a disciplinary matter while the question of negligence of duty is a matter so serious as it amounts to gross misconduct that warrant summary dismissal. In this case the Claimant is alleged to have been negligent for performing her duties poorly. Such juxtaposition of words does not remove the Respondent of the duty to demonstrate the reasons of termination in terms of section 41 and 44 of the Employment Act.

36. In this case, it is apparent the Respondent was undergoing financial challenges from 2007 to 2013, the admission that there was wear and tear of their facilities and that all employees had to do everything possible to ensure the guests remained at the facility is not sufficient reason to place blame on the Claimant for allegedly failing to ensure a guest stayed in a room that was of poor standards; poor bathroom and poor choice of foods. To place this on the Claimant is an unfair requirement on her job duties. Such cannot find a reasonable and fair justification for termination of employment.

Remedies

37. With the major claims admitted, it is only fair and just that the Claimant undertakes the clearance process which is to ensure that she has not liabilities outstanding with the Respondent for the payment of her terminal dues as admitted. It is a good work practice to ensure that an employee upon termination is able to go through a clearance process so that all dues owed to her can be identified and that the debts due can also be confirmed for settlement.

38. Based on the findings above that the termination was procedurally and substantively unfair, I take into account the admission by the Claimant that on 7th October 2012 there was no proper work attendance in her line of duty and those under her supervision as required under section 45(5) for such matters to be put into account in assessing the context of termination. Being absent from work when the employer has directed that there should be work attendance is a matter serious and warrant a serious sanction. Such record put into account, the Claimant is awarded compensation amounting to 6 months gross salary.

At the time of employment the Claimant last earned the sum of Kshs.91, 000.00 per month. The award is for Kshs.546, 000.00. Costs are also due to the claimant.

Dated, signed and read in open court at Nairobi this 11th day of May, 2017.

M. MBARU JUDGE

In the presence of:

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