



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 186 OF 2015

(ORIGINALLY NAIROBI CAUSE NO. 1819 OF 2011)

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS &
ALLIED**

**WORKERS
.....CLAIMANT**

V

**KAREN BLIXEN COFFEE GARDEN &
COTTAGES.....RESPONDENT**

JUDGMENT

1. The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (Union) commenced legal proceedings against Karen Blixen Coffee Garden & Cottages (Respondent) in Nairobi on 1 November 2011. The issue in dispute was stated as *unfair summary dismissal of Miss Rose Atieno Omiti* (Grievant).
2. The Respondent filed a Response on 4 May 2012 through the firm of Lunani Mangerere & Co. Advocates.
3. Documentation in support were also filed.
4. The Cause was called out before me for hearing on 8 November 2012, and the Grievant and the Respondent's Human Resources Manager both testified.
5. At the end of the hearing, the Court directed the parties to file written submissions before 18 November 2012, and a mention was set for 19 November 2012 to fix judgment date.
6. In the intervening period, I was transferred to Mombasa and the Cause appears to have gone stale until 15 June 2015 when Wasilwa J directed that the file be placed before me in Nakuru to prepare a judgment.
7. The Cause was therefore placed before me on 22 July 2015, but because the parties were not represented, I directed the Deputy Registrar to notify the parties to appear for directions on 28 October 2015.
8. The Deputy Registrar sent out the notices on 27 July 2015 but come 28 October 2015, only the Union sent a representative. Mr. Kiget who represented the Union informed the Court that the parties were waiting for delivery of judgment.
9. The Court therefore set 12 February 2016, as judgment delivery date.

Union's case

10. The Grievant's testimony was that she was employed by the Respondent in 2001 as a temporary worker. She was issued with a contract expiring on 1 March 2002. Later on, she was issued with a contract as housekeeper on 1 January 2010.

11. In 2010, she was promoted to Assistant Housekeeper but on 7 February 2011, she was served with a dismissal letter and the reasons given were poor performance, insubordination and attitude problem.
12. The Grievant stated that prior to the dismissal, she had been issued with a warning on 23 January 2011, and at the same time, she was suspended for 7 days.
13. On the immediate circumstances surrounding the dismissal, the Grievant stated that on 6 February 2011, a guest had checked in but on 7 February 2011, the Respondent's Director alleged that the room was in disarray and dismissed her without explaining to her the reasons for the dismissal.
14. The Grievant also stated that after the dismissal, she reported to the Union which in turn reported a dispute to the Minister for Labour. A conciliator was appointed and he gave his report on 21 May 2011.
15. On why she was impugning the dismissal, the Grievant stated that the Respondent did not comply with the procedures provided for in a collective bargaining agreement between the Union and the Union of Hotelkeepers and Caterers Association of which the Respondent was a member.
16. She contended that there was no hearing.
17. In cross examination, the Grievant stated that although she was a member of the Union, she had not informed the Respondent of her membership of the Union. She also confirmed that she had resigned from the Union on 1 March 2010 (but after being asked by the Respondent).
18. The Grievant also stated she did not take leave for 2009 to 2011 and she worked during public holidays from 2008 to 2010, but was not paid.

Respondent's case

19. The Respondent's Human Resources Manager testified and stated that the Grievant was a housekeeper.
20. On the circumstances surrounding the dismissal, she stated that the Grievant had a confrontation with her and that prior to the confrontation, the Respondent's Director had discussed with the Grievant about her conduct and performance. She had been issued with warning letters but had not improved.
21. On the immediate cause of the dismissal, the witness stated that the Respondent had found that the Grievant had not cleaned a room and a decision was taken to dismiss her.
22. According to the witness, the dismissal was justified.
23. On Grievant's entitlements, the witness confirmed that the Grievant had 22 accrued leave days, 29 public holidays and 7 days wages for February 2011.
24. The witness also stated that the parties went through conciliation but the Respondent did not agree with the recommendations of the Conciliator.
25. The Court has considered the pleadings and the evidence and identified the issues for determination as, *whether the summary dismissal of the Grievant was unfair and appropriate remedies/orders including entitlements not dependent on dismissal.*

Whether dismissal was unfair

26. It is clear that the Grievant had a troubled relationship with her employer and colleagues.
27. The immediate cause of her summary dismissal was the failure to clean/prepare a guest's room.
28. On this particular issue, no hearing was held prior to the decision to dismiss the Grievant.
29. Pursuant to section 41 of the Employment Act, 2007, a hearing is mandatory if the reasons for dismissal relate to *misconduct, poor performance or physical incapacity*. The reason given here falls under performance, and therefore a hearing ought to have been held.
30. Because no hearing was held, the Court finds the summary dismissal procedurally unfair. It is therefore not necessary to determine whether the Respondent has proved and proved as valid and fair the reasons for the dismissal.

Appropriate remedies/orders/entitlements

4. *months pay in lieu of notice*

31. With the conclusion reached on the fairness of the dismissal, the Grievant is entitled to 4 months wages in lieu of notice pursuant to clause 9(c) of the collective bargaining agreement (Grievant's basic wage at dismissal was Kshs 16,000/-).

Accrued leave

32. The Respondent's witness testimony that the Grievant had 22 days accrued leave was not challenged. The Grievant is entitled to pay in lieu of the leave days.

33. The Respondent should calculate the same and pay.

Public holidays

34. The Respondent admitted the Grievant was owed pay equivalent to 27 days. She is entitled to the same which the Respondent should compute and pay.

Wages for February 2011

35. This was also admitted and the Grievant is entitled to the same.

Gratuity

36. The Grievant is entitled to gratuity in accordance with the provisions of the collective bargaining agreement.

Service charge

37. Respondent's witness testimony that service charge was paid upto January 2011 was not challenged. This head of claim is declined.

Certificate of Service

38. This is a statutory right and the Grievant should collect the same as one dated 10 February 2011 was exhibited and is waiting her collection.

Compensation

39. This is not an appropriate case to award compensation, which is a discretionary remedy.

Conclusion and Orders

40. The Court finds and holds that the summary dismissal of the Grievant was procedurally unfair and awards her and orders the Respondent to compute and pay her

- a. 4 months wages in lieu of notice Kshs 64,000/-
- b. Accrued leave
- c. Public holidays
- d. 7 days wages for February 2011
- e. Gratuity.

41. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 12th day of February 2016.

Radido Stephen

Judge

Appearances

For Union Mr. Njiru Secretary General, KUDHEIHA

For Respondent Ms. Lunani instructed by Lunani & Mangerere Advocates

Court Assistant Vincent