



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 356 OF 2013

PATRICK GATHENYA

CLAIMANT

v

MERICA HOTEL LTD

RESPONDENT

consolidated with

CAUSE NO. 357 OF 2013

ESTHER WANGANGA

CLAIMANT

v

MERICA HOTEL LTD

RESPONDENT

JUDGMENT

1. Patrick Gathenya (1st Claimant) and Esther Wanganga (2nd Claimant) separately sued Merica Hotel Ltd (Respondent) on 23 October 2013 and they stated the issue in dispute as *unfair and unlawful dismissal of the Claimant(s)*.
2. The Respondent filed separate Responses on 18 February 2014.
3. Pursuant to an application by the Respondent, Ongaya J ordered on 19 February 2014 that the 2 Causes be consolidated.
4. On 15 July 2014, both Claimants filed Amended Memoranda of Claim. The Respondent did not amend its Response(s).
5. The 1st Claimant testified on 5 March 2015, while the 2nd Claimant's testimony was taken on 28 October 2015. The testimony of the Respondent's witness was taken on 21 January 2016 in Cause 356 of 2013 and because the facts constituting the claim arose out of the same incidents, the testimony was adopted in the case of the 2nd Claimant.
6. After close of the Claimants case(s) and more specifically on 24 July 2015, the parties' counsels on record indicated to the Court that they had reached out of court settlement in respect of some of the issues.
7. Despite the Court directing the parties to file a written consent, no such consent was filed.
8. The Claimant filed his submissions on 8 February 2016, while the Respondent's submissions were filed on 15 March 2016.
9. The Court has considered the pleadings, evidence and submissions and adopted the issues for determination as outlined in the Claimants' submissions.

Fairness of the disciplinary process

10. In testimony, the 1st Claimant stated that he was dismissed on 24 September 2013 and that prior to the dismissal, he had appeared before a Disciplinary Committee on 20 September 2013 where he made representations.
11. The 2nd Claimant also confirmed in her testimony that she was summoned by the Respondent's General Manager and asked to explain what had happened and that she was also requested to tender a written explanation which she did after which a hearing was held on 20 September 2013.
12. The Respondent's witness, Kibet Kipseba confirmed that a hearing was held. Minutes of a hearing held on 20 September 2013 were filed in Court.
13. The basic requirements as to procedural fairness are set out in section 41 of the Employment Act, 2007. The basics do not require an employer to conduct a mini-court with the strictures and formalities of the Courtroom.
14. That the Claimants were aware of the subject of the hearing is not in doubt though they suggested in the submissions that they were not informed of the rules they had violated.
15. The Claimants in testimony confirmed that they were made aware that some products meant for the beauty shop had disappeared and that they made representations. The minutes corroborate that a hearing was held.
16. The Court is satisfied that the Respondent was in substantial compliance with the statutory elements of procedural fairness.

Substantive fairness

17. The reason given for the dismissal of the 1st Claimant was that

you were part of the group that received all the products as per the delivery note and invoice. From your statements, you received less one product and you went ahead to receive them without raising any alarm or reporting the anomaly to the concerned parties. This is gross negligence from your part.

18. The reason given for the dismissal of the 2nd Claimant was that

it was evident that you received all the products as per delivery note and invoice. You denied having received all the products yet did nothing to alert the sender of the product that you received less product but instead informed her of the extra products.... This amounts to dishonesty from your part and makes it difficult for management to trust you further.

19. Pursuant to sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to prove the *gross negligence* and *dishonesty* on the part of the Claimants, and that these were valid and fair reasons to dismiss the Claimants.

Validity and fairness of reasons/dismissal

20. Gross negligence and dishonesty would be valid reasons to summarily dismiss an employee as they are recognised in section 44 of the Employment Act, 2007, if proved.
21. The Respondent's witness informed the Court that there were written procedures for receipt of products. Such written procedures were not produced in Court.
22. He also stated that products were received by 4 people (guard, representative of user department, stores representative and a controller).
23. An invoice filed with the Court and to which references were made indicate that the guard at the material time (Nyambane) indicated in the invoice during receipt of the products that there was 1 product missing (shower gel).
24. The 1st Claimant's testimony that they noticed anomalies during the delivery of the products and that they called a director of the Respondent was not challenged nor the director called to deny receiving such a call.
25. Even the 2nd Claimant's testimony that it is the guard who had the invoice and was verifying the

- products was not challenged.
26. Considering that the anomaly was noted at the point of receipt of the products coupled with the fact that a call was made to one of the directors, the Court is of the considered view that the Respondent did not have valid and fair reason to dismiss the Claimants.
27. The Court therefore finds that the dismissal was substantively unfair.

Appropriate remedies

Unpaid off day

28. The 1st Claimant sought Kshs 18,898/- on account of 53 off days. His testimony in this regard was not controverted and the Court finds he is entitled to pay in lieu of the off days but as computed by the Respondent.

Wages for September 2013

29. Both Claimants testimony that they were not paid wages for September 2013 was not rebutted and they are entitled to the wages as of right.

Unpaid leave

30. The 1st Claimant testified that he had 30 days accrued leave at time of dismissal. He quantified the cash equivalent as Kshs 10,697/- and there being no rebuttal, the Court awards him the head of claim.

Unpaid service charge

31. Under service charge, the 1st Claimant sought Kshs 18,000/- and the head of claim also not being controverted, the Court awards the same (pay slips filed with Court show an element of service charge).

Leave allowance

32. The Respondent had admitted to owing the 1st Claimant leave allowance of Kshs 6,000/-.

Pay in lieu of notice

33. Clause 9 of the 1st Claimant's letter of appointment provided for 30 days' notice or pay in lieu of notice, while the 2nd Claimant's provided for 15 days' notice (this is below the statutory minimum provided for in section 35(1)(c) of the Employment Act, 2007 and therefore invalid as this Claimant was paid by the month).
34. The Claimants are therefore entitled to 30 days wages as pay in lieu of notice.

House allowance

35. The contracts of employment of both Claimants indicated that they were on consolidated salaries and therefore the house allowance claim cannot be sustained.

Underpayments

36. The Claimants did not prove that they were underpaid for the period they served the Respondent or that they were unionisable to be entitled as of contract, to the benefits in the collective bargaining agreement between KUDHEIA and the Union of Kenya Hotelkeepers and Caterers Association.
37. Further, there was no proof that the Respondent was a member of the Association.

Statutory damages

38. The Claimants served the Respondent for about 5 years and considering the length of service, the Court awards them equivalent of 5 months gross wages as compensation (pay slip for August 2013 show gross wage of Kshs 30,491/- for 1st Claimant while August 2013 pay slip for 2nd Claimant show a gross wage of Kshs 42,232/-).
39. The Court has taken note of the dues admitted by the Respondent in the pleadings.

Conclusion and Orders

40. The Court finds and holds that though the dismissal of the Claimants were procedurally fair, the Respondent has failed to prove the reasons as valid and fair, and the Court awards them

1st Claimant

a. September wages	Kshs 13,846/-
b. Pay in lieu of notice	Kshs 15,000/-
c. Unpaid leave	Kshs 10,697/-
d. Leave allowance	Kshs 6,000/-
e. Service charge	Kshs 17,000/-
f. Unpaid off days	Kshs 30,577/-
g. Compensation	Kshs 152,455/-
TOTAL	Kshs 245,575/-

2nd Claimant

a. Commission for September	Kshs 31,000/-
b. September 2013 wages	Kshs 27,692/-
c. Salary in lieu of Notice	Kshs 20,000/-
d. Accrued leave	Kshs 70,385/-
e. Compensation	Kshs 211,160/-
TOTAL	Kshs 360,237/-

41. If the Respondent deposited the terminal dues indicated in its letter dated 1 November 2013 with the Labour Office, the same should be deducted from the awards herein.
42. Claimants to have costs.

Delivered, dated and signed in Nakuru on this 3rd day of May 2016.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Githui instructed by Githui & Co. Advocates
For Respondent Employers	Mr. Masese, Senior Legal Officer, Federation of Kenya
Court Assistant	Nixon