



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 200 OF 2014

MAURICE OTUNGA.....CLAIMANT

VERSUS

NYALI INTERNATIONAL BEACH HOTEL.....1ST RESPONDENT

NYALI HOTELS INTERNATIONAL LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the Nyali Beach hotel in 1998 as an Accounts Clerk until 2003 when the hotel went into receivership. The claimant was re engaged by the Receiver until 2009 when the 1st Respondent, which is fully owned by the 2nd Respondent, was incorporated and bought the hotel. The claimant was again re employed by the 1st respondent in the same position and later rose to the rank of the Credit Controller and worked until 31.12. 2013 when he dismissed for gross misconduct. The Claimant avers that the termination was unlawful and unfair. Consequently, he prays for damages amounting to Kshs. 1,897,499 made up of four month salary in lieu of notice, salary for the 6days worked between 25th to 31st December 2013, 34 leave days outstanding service pay public Holidays between 2010 and 2013 and twelve months salary as compensation for unfair termination.

2. The 2nd Respondent admits that she had employed the Claimant from 2010 to 31.12 2013 when she terminated the Claimant's employment for gross misconduct and paid her terminal dues. She however denied that the claimant was her employee from 1998 and averred that she came into existence in 2009. It is the defence case that the said termination was warranted because the claimant had committed fraud against her and he was given a fair hearing before suspension and subsequent dismissal. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 23. 2. 2015, 4.5.2015 and 4.2.2016 when the claimant testified as CW1 and called Mary Muthoni Nganga as CW2 while the respondent called James Mwalimu Chengo as RW1. Thereafter the parties filed written submissions.

Claimant's case

4. The claimant stated in his statement that he was employed by the respondent on 1.8.1998 as an Accounts Clerk and worked until 19.12.2013 when he was suspended without pay to pave the way for

investigations into an alleged fraud. That on 24.12.2013 he was called back to work but on arrival he was arrested by two police officers and taken to Nyali Police station to record statement. The suspension was then extended till 31.12.2013 when he was served with a summary dismissal letter by the HR manager citing the reason for the dismissal as Conspiracy to deny the hotel revenue by generating fake receipt; loss of kshs.50,000; issuing fake receipt for kshs.350,000; sharing the kshs.50,000 with the Event Coordinator; and disappearance of the tkshs.240,000 and a fake receipt issued.

5. The claimant denied the validity of the alleged offences and maintained that the alleged fake receipts were signed by Mr. Bakari Kiarie. He further contended that he was not given a fair hearing before the dismissal. That his salary was kshs. 55000 as at the time of the dismissal. That, according to him the termination of his 15 years employment was not fair and he therefore prayed for twelve months salary as compensation for unfair termination and other dues totaling to kshs. 1,897,499.

6. On cross examination, Cw1 confirmed that initially he was employed by Nyali Beach Hotel from 1998 to November 2009 and then from March 2010 he was employed by the 1st respondent. He further confirmed that NSSF and NHIF contributions were deducted from his salary and remitted to the relevant Fund. He however denied that he was in charge of finance and maintained that he was only the Credit Controller doing the duty of following up debts and ensuring that there was cash flow. He contended that only the cashier was dealing with payments from clients. He however admitted that before his suspension, he was given a hearing at the board room in a meeting held on 19.12.2013 and which was attended by the Chief Accountant Miss Janisha, HR Manager Mr. Kinyanjui, and Revenue Manager and also M/s Catherine Ambuta. He explained that during the said meeting he denied knowledge of anything to do with the two receipts which were shown to him by the Revenue Manager.

7. Cw1 stated, Catherine Ambuta admitted that she was given kshs. 350,000 as deposit for a wedding event and gave kshs. 300,000 to the cashier and retained kshs.50,000. That she however falsely alleged that on 16.12.2013 Cw1 called to demand for money and she gave him kshs.50,000 out of which he shared kshs.20,000 to her and retained kshs.30,000. That she also lied that he gave her the receipts and signed but he denied all the said allegations during the said meeting. He also denied the truth of the said allegations in his testimony herein. He denied ever generating the fake receipts and maintained that the stamp used on the receipts was accessible to all the staff members.

8. As regards the claim for leave, Cw1 admitted that on 1.3.2013 his leave application forms for 33 day in respect of 2012 annual leave was approved. That as at 1.3.2013 his leave balance was 6 days and on 6.7.2013 he took one day leave.

9. CW2, Mary Muthoni Nganga, was employed by the defunct Nyali Beach Hotel then joined the 1st respondent just as the CW1. That She retired in 2013 and she was paid terminal dues for 28 years service including the period she served the defunct Nyali Beach Hotel and the Receiver. She produced documentary evidence to prove the said payment. On cross examination Cw2 stated that like all the other employees, she was not given fresh contracts by the successive new owners of the Hotel but only a letter of continuity and they were told that the terms and conditions of service remained the same. She admitted that she did not know how the claimant was dismissed because it happened after she had retired. She further admitted that she did not know the claimant's terms of contract and whether he was entitled to the same benefits as her's.

Defence Case

10. Rw1 is the 1st respondent's HR manager. He confirmed that the 1st respondent was incorporated in 2009 and is owned by the 2nd respondent which is an international company. He explained that the claimant was initially employed by Nyali Beach Hotel which was placed under receivership in 2003. That the claimant applied for and was employed by the Receiver Manager until 2009 when the Receivership ended and the 1st Respondent bought the hotel and changed the name to the current name. That Claimant among other employee were taken over by the 1st respondent from November 2009. That he was the Credit Controller and his duties were to ensure that debts owed to the hotel were paid and up to date.

11. Rw1 explained that on 3.12.2013, a client booked for a wedding reception at the hotel and agreed to pay a deposit of kshs.350,000 for the event. The agreement was done through the Hotel's Sales Representative M/s Catherine Ambuta. When the client paid the kshs,350,000, he was given a fake receipt generated from the claimants computer and Catherine paid only kshs. 300,000 to the cash office. After the wedding the client demanded back kshs.50,000 which was meant for decorations and had not been done. When the cashier explained that only kshs. 300,000 was paid the client produced the fake receipt for kshs.350,000 dated 3.12.2013. The Chief Accountant and the Revenue Manager called Catherine for an inquiry on 19.12.2013 and she confessed that the fake receipt was issued by the claimant, who promised to give her kshs.20,000 out of the kshs. 50,000. That she showed SMS correspondences between him and her which prompted them to call the claimant to explain the issue because the fake receipt was from his computer and the stamp used was from him.

12. Rw1 explained further that the claimant attended the meeting, but he violently attacked Catherine and they were told to make a written statement to explain their side of the story. The claimant wrote his statement on 19.12.2013 denying the offence. Rw1 contended that the allegations of fraud made against the claimant were true and warranted summary dismissal. The claimant was then suspended from that day and after further investigations another fraud involving kshs.240,000 was discovered in his computer. A report was made to the police and the claimant was summoned to record a statement. That he threatened the respondent's employees and even the police officers and as such a decision to summarily dismiss him was made on 31.12.2013. That after the dismissal the claimant was paid kshs. 96,238 as his terminal dues for the 3 years he had worked for the 1st respondent including salary for December 2013, gratuity for 2009-2013 and 10 days leave less statutory deductions.

13. On cross examination, Rw1 confirmed that the claimant had worked in the hotel for over 10 years and that he was suspended without pay to pave way for investigations. That after the investigations, no report was made but the claimant was dismissed for five reasons. He maintained that the claimant was called to defend himself against the allegations of fraud of kshs.350,000 and also kshs.240,000 at the police because he had become violent. RW1 however admitted that Cw1 was not a Cashier and was not supposed to issue any receipts. He further admitted that the User ID (Password) used to generate fake receipts from the claimant's computer belonged to Mr. D.K. Rono who was the cashier. Rw1 confirmed that he joined the hotel in November in November 2009

Analysis and Determination

14. After considering the pleadings, evidence and submissions, it is clear that the claimant was employed by the Respondent as Credit Controller earning 55,000 per month. It is not in dispute that the hotel ownership was hanged severally until his services were terminated by the letter dated 31.12.2013. There is further no dispute that the reason cited for termination was fraud against the employer. The issues for determination are whether the termination of the Claimant's contract of employment was unlawful and unfair, and whether the reliefs sought by the Claimant should be granted.

Unlawful and unfair termination

15. Termination of employment is unfair if the employer fails to prove that it was founded on valid and fair reasons and that it was done after following a fair procedure.

Reasons for the termination

16. The dismissal letter cited the reasons for dismissal as: Conspiracy to deny the hotel revenue by generating fake receipt; loss of kshs.50,000; issuing fake receipt for kshs.350,000; sharing the kshs.50,000 with the Event Coordinator; and disappearance of the tkshs.240,000 and a fake receipt issued. The claimant denied the fraud as alleged by the defence and further averred that the receipts used to commit the fraud were generated by him but a Mr. Rono. Rw1 on the other hand contended that the claimant was incriminated by the oral evidence by Catherine Ambuta during the inquiry before his suspension on 19.12.2013. That during the suspension of the claimant further investigations were done that revealed that the claimant had defrauded the respondent another kshs.240000 which prompted to

report the matter to the police where he was summoned to record statement.

17. After careful of the evidence presented to the court, I find that the respondent has not proved the reasons cited for the termination of the claimant's employment contract. RW1 admitted on cross examination that the fake receipt for kshs.350,000 was not generated using the claimant's User ID but that of the Cashier Mr.D.K. Rono. That the testimony of Cw1 that the stamp used on the fake receipt was not personal but one at the disposal of all the staff was not contested by the defence. Likewise, there is no evidence adduced that proves that indeed the claimant conspired with Catherine Ambuta, the event coordinator, to pay only kshs.300000 to the Cashier and hide kshs. 50000 to share with him; that indeed the claimant received the kshs. 50000 from Catherine Ambuta and shared kshs.20000 to her and retained kshs.30000; that the claimant gave the fake receipt for the kshs.350,000 to Catherine Ambuta which she handed over to the client, and that the claimant defrauded the 1st respondent another kshs.240000. The particulars of the fraud, like date and the details of the offence, have not been pleaded or substantiated by evidence yet it is alleged by the defence that the information is stored in a computer in the office. Consequently, I find and hold that the reasons cited for the dismissal of the claimant from employment were not valid and fair within the meaning of section 43, 44, 45 (2) (a) & (b) and 47 (5) of the Employment Act

Fair procedure

18. The claimant contended that he was not accorded a fair hearing before the dismissal. Rw1 stated that on 19.12.2013 Catherine Ambuta was called by the Revenue Manager and the Chief Accountant for an inquiry into the fraud of kshs.50000 after it was discovered that a client paid kshs.350000 but was given a fake receipt. That when Catherine mentioned the claimant adversely, he was called to explain the matter but he denied the fraud and he was suspended to pave way for further investigations. That while he was away serving the suspension, investigations done on his computer allegedly revealed a further fraud of kshs.240000. There is no dispute that the claimant was never given a fair hearing to defend himself before his dismissal. In my view the questioning done on 19.12.2013 before suspension did not constitute fair hearing within the meaning of section 41 of the Employment Act.

19. Under section 41 of the Act, the employer is barred from dismissing his employee on ground of misconduct before first explaining to him, in a language he understands and in the presence of Shop Floor Union Representative or a fellow employee of his choice, the reason for the intended dismissal and then accord the employee and his chosen companion a chance to air their representations for consideration before the dismissal is decided. In this case no such hearing was done at all before the termination of the claimant's services. Although one can argue that the hearing before suspension on 19.12.2013 was sufficient, I find such argument to be wrong because the provision of section 41 of the Act is coined in mandatory terms and gives no option to the employer. The statutory right of the claimant of being charged and heard orally in the presence of a Shop floor union representative or fellow employee of his choice was not granted on 19.12.2013. He was also not heard on the alleged fraud of kshs. 240000. Although Rw1 alleged that the hearing was done at the police station due to the claimant's history of violence, in my view such procedure is foreign and not provided under section 41 of the Act. Consequently, I find that the defence has failed to prove on balance of probability that she followed a fair procedure before dismissing the claimant.

20. Under section 45 (2) of the employment Act, termination of an employee's contract of employment is unfair if the employer fails to prove that the it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case the said burden of proving the substantive and procedural fairness has not been discharged on a balance of probability and consequently, I find and hold that the termination of the Claimant's employment was unfair. The first issue is therefore answered in the affirmative.

Reliefs

21. In view of the foregoing finding, I make declaration that the termination of the claimant's employment by the claimant was unfair and proceed to award him damages. The Claimant has prayed for

prays for damages amounting to Kshs. 1,897,499 made up of four month salary in lieu of notice, salary for the 6 days worked between 25th to 31st December 2013, 34 leave days outstanding service pay public Holidays between 2010 and 2013 and twelve months notice.

Notice and Compensation for unfair termination

22. The claimant has prayed for four months notice on the basis that he worked for over 10 consecutive years. The respondents have on the other denied the claim for 4 months and maintained that the claimant worked for only 3 years from November 2009 to 31.12.2013. I agree with the defence that the claimant never worked for her for over 10 years. From November 2009 to 31.12.2013 is 4 years and one month. Under clause 9 of the CBA the notice for termination for an employee of less than 5 years is two months. I therefore award him kshs 110000 being salary for two months in lieu of notice under section 49 of the Employment Act. I also award to him kshs.660000 being twelve months salary as compensation for unfair termination in consideration of the long service to the hotel though under different management. I have also considered the fact that he has not been able to secure an alternative employment since the date his dismissal. Finally I have considered the fact that no misconduct has been proved against him.

Salary for 25th-31st December 2013, 10 leave days and gratuity

23. The defence produced Final Dues Analysis as exhibit D.12 to prove that the claimant was paid all the salary for December 2013, 10 leave days and gratuity for 3 years 9 months. I have considered the said document and confirmed that the claimant was indeed paid all his salary for December 2013 being kshs.55000, 10 leave days being kshs.13333.33 and gratuity for 3 years 9 months of kshs.103125. As already stated above the total time of the claimant's service to the 2nd Respondent was less than 5 years and as such under clause 27 of the CBA gratuity was only payable to an employee who served for at least 5 years. I will therefore not interfere with the dues calculated under the said exhibit D12.

Public holidays 2010-2013 and 34 days leave for 2013

24. The claim for public holidays worked between 2010 and 2013 lacks particulars and has not been proved by evidence. It is therefore dismissed. I however grant the claim for 33 leave day in respect of the annual leave for 2013. There is no evidence to prove that the said leave was utilized or commuted except the leave application dated 6.7.2013 (exhibit D.13) which shows that only one leave day was taken in respect of the leave for 2013. I therefore award him kshs $40,000 \times 33 / 26 =$ kshs.50,769.25.

Certificate of service

25. The claim for certificate of Service is granted because it is a right guaranteed under section 51 of the Employment Act.

Disposition

26. For the reasons stated above judgment is entered for the Claimant declaring the termination of his employment unfair and awarding him the sum of **Kshs.820,769.25** plus costs and interest. He will also be issued with Certificate of Service.

Signed, dated and delivered at Mombasa this 18th day of November 2016.

O.N. MAKAU

JUDGE