



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 335 OF 2013

ALI (alias) ALVIN SAFARI NGALA .....CLAIMANT

VERSUS

GLORY CAR HIRE & SAFARIS MSA LTD .....RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimants claim is contained in the Amended Memorandum dated 5/3/2014. It seeks to recover accrued employment benefits amounting to ksh.738013 plus compensation for unlawful and irregular termination of employment by the respondent on 23/6/2012.
2. The respondent's defence is contained in the amended response dated 21/3/2014. The respondent has denied liability and averred that the claimant was dismissed lawfully and regularly for gross misconduct after the reason and grounds for the same were explained to him.
3. The suit was heard on 25/9/2014 and 28/10/2014 when the claimant testified as CW1 and the respondent called Riazzi Nooran, Imtiaz varvan, Santa Morris Katana and Daniel Maliku as Rw1, 2,3,and 4 respectively. After the hearing both parties filed written submissions through their respective counsel.

CLAIMANT'S CASE

4. CW1 was employed by the respondent as a Receptionist at the glory Grand Hotel starting with a salary of ksh.4000 and ending with ksh.10387 per month. On 23/6/2013 at 11pm he left the reception for the restaurant and left Mr. Saidi and Boniface at the reception. While CW1 was at the restaurant, Mr. Noor brought a visitor to the hotel and were served by Mr. Saidi. When CW1 returned to the reception, Saidi told him that the guest chose room 13 and he was answering a call of nature and came shortly to the reception to bring his identification documents and check in. Saidi further told him that he was given a deposit of ksh.2500/ which CW1 never saw.
5. In the meanwhile RW1 and RW2 came to the reception and enquired on the booking of room 13 of which CW1 explained that Mr. Noor was with his visitor there and he (CW1) was waiting for them to return to the reception to formally check in. According to CW1, it was normal for a customer to see the room before formally checking in. RW1 insisted that CW1 should have Registered the guest immediately he chose room 13. RW1 then ordered Mr. Noor to come to the reception and also pressed alarm to call security company. Without enquiring anything from Mr.

Noor or Saidi RW1 told the security guards that CW1 collected money from guest without registering the booking and he asked them to teach CW1 a lesson.

6. The guards then beat up CW1 without any evidence of theft and escorted him to the police where he was locked up and charged in court. On 25/6/2012, CW1 was released on bond and reported back to work but he was denied entry on ground that he was a thief. Thereafter, CW1 continued with his trial until he was acquitted for lack of evidence and immediately reported back to work but again he was not accepted back by the respondent. CW1 then sought legal advice and served a demand letter on the respondent but his demand was declined.

7. CW1 prayed for Ksh.3114 being salary for 9 days worked in June 2012, ksh.10387 being one month salary in lieu of notice, Ksh.705888 being overtime for 4 hours per day for 9 ½ years, 24 leave days from 2012 plus 15 holidays for 2011 and 2012 totalling to ksh.10320 plus 12 months salary as compensation for unfair termination. He also prayed for certificate of service for the 9 ½ years served.

8. On cross examination by the defence counsel, CW1 maintained that he had no other disciplinary issue with the respondent until the alleged theft on 23/6/2012. He admitted that he used to sign leave forms confirming that he had no pending claim. He maintained that the procedure for checking in a guest is that the guest first inspects the room and if satisfied, he returns to the reception for registration. He explained that on 23/6/2012, the guest came with an employee of the respondent Mr. Noor and went with Mr. Saidi to check room 13 and Saidi left the two in the room because the guest was answering a call of nature then came to the reception to bring identification documents for registration. CW1 maintained that the reason for not registering the guest was because he had not yet received identification documents from the guest.

9. CW1 maintained that RW1 did not allow him explain the delay in registering the booking of the guest and instead called in security guards who also did not listen to him. CW1 denied ever throwing any money in the underground tank and maintained that the tank was sealed. He further maintained that after his acquittal from the theft charges he went back to work but General Manager Samiya Salim refused to reinstate him on ground that the offence allegedly committed by CW1 was serious. CW1 however maintained that he never committed any offence and contended that the guest was dealt with by Mr. Saidi who said he was given money of which CW1 never signed but only believes Saidi was paid. CW1 explained that he never got any off days for 2011 and 2012. He however admitted that in mid June 2012 he was paid salary advance of ksh.5000 but thereafter worked for 9 days for which he was not paid his salary after the dismissal.

#### DEFENCE CASE

10. RW1 is the Managing Director(MD) of the respondent. He confirmed that CW1 was employed by the respondent as a receptionist between 3/12/2002 and June 2012. He explained that on 23/6/2012 the respondent's Workshop Manager Mr. Noor reported to him that he brought a guest to the hotel and paid to CW1 ksh.2500 but no receipt was issued to him. RW1 called RW2 to accompany him to the hotel and on arrival he checked the register and did not see Mr. Noor's visitor registered. RW1 called Texas Security guards who came and enquired from CW1 about the money paid. In response according to RW1, CW1 removed money from his pocket and threw it into a well at the reception. RW1 denied that the well is sealed and maintained that it is only covered with a wire gauge with open spaces and the flower vessel on it does not cover it completely.

11. He further contended that CW1 went for all his leave days which were extended to cover the off days and holidays. He explained that from 7/2011 and 7/10/2011, CW1 went for 31 leave days instead of 24 leave days. He admitted that CW1 was charged and acquitted of the charge of theft.

12. On cross examination by CW1's counsel RW1 admitted that he did not state in his written

statement filed in court on 19/9/2014 that Mr. Noor told him that he gave CW1 the money for the room. He further admitted that he had no proof that Mr. Noor gave CW1 any money. RW1 insisted that he gave CW1 a chance to explain the whereabouts of the money paid by Mr. Noor before summoning the security guards. He denied ever beating him.

13. RW2 is the respondents Transport Manager and the supervisor of the hotel receptionists. He confirmed that CW1 was receptionist at the Nyali branch of the hotel. He explained that the procedure for checking in guest at the hotel was by first getting his identity documents and then issue a receipt after payment for accommodation.

14. On 23/6/2012, at 11.30pm, he was called by RW1 with instructions to go the hotel immediately. On arrival, RW1 told RW2 that there was a guest in the hotel whose booking was not registered. According to RW2, CW1 first denied that the money had been paid but later when they called the customer, he said that he had paid ksh.2500. RW2 then called the security guards who questioned CW1 about the money. When CW1 denied receipt of the money the guards removed CW1 from the reception and in the process CW1 removed money from his pocket and threw it into a well. They then took CW1 to the police. RW2 explained that Saidi was a cleaner on duty at the hotel on 23/6/2012. RW2 admitted that CW1 was charged and later acquitted of the offence of stealing the money.

15. On cross examination by CW1's counsel, RW2 admitted that he did not state in his statement filed on 19/9/2014 that he asked Noor whether he gave room money to CW1 or Saidi. He maintained that it is him (RW2) who pressed the alarm to call the security guards. RW2 could not tell how much money was thrown by CW1 into the well. He just saw noes.

16. RW3 is a security guard employed by Texas Alarms Security (K) Ltd as Security Alarm Response. On 23/6/2012 he received a signal form the respondents hotel and rushed there in 3 minutes time where he was told that somebody had stolen money. While still enquiring, RW3 CW1 removed money from his pocket and threw it in the well. Rw3 did not know how much money was thrown into the well. He then escorted Cw1 to the police.

17. On cross examination by the CW1's counsel, Rw3 maintained that he saw Cw1 remove money from his pockets and throw it into the well outside the reception.

18. RW4 also works for Texas alarms Security (K) Ltd as a car commandant. On 23/6/2012, he received a radio call to go top the respondent's hotel. On arrival the manager told him that an African employee sold a room and failed to record the money. Immediately the African employee removed money from his pocket and threw it into a well near the reception. He then arrested the African employee and took him to the police.

19. On cross examination by CW1's counsel, RW4 admitted that he could not remember the events of 23/6/2012 because it was long time. He maintained that the African employee threw money in the well at the reception. According to Rw4, the well was deep and not covered.

#### ANALYSIS AND DETERMINATION

20. There is no dispute that CW1 was employed by the respondent as a receptionist between 2002 and June 2012. There is no dispute that on 23/6/2012 Cw1 was arrested on allegation that he stole money collected from a guest as rent for the hotel accommodation. There is also no dispute that Cw1 was charged, released on bond and later acquitted for lack of evidence. There is also no dispute that he was not allowed back to work after being released on bond or even after his acquittal. The issues for determination are whether his dismissal was unfair and whether the reliefs sought should be granted.

#### **Unfair termination**

21. Under Section 45, of the Employment Act, termination of employment is deemed unfair unless the employer proves that it was grounded on a valid and fair reason and further that it was done after following a fair procedure. Fair procedure for dismissal for misconduct is prescribed under Section 41 of the Act and it involves explaining to the employee the reason for which dismissal is intended and thereafter giving him a chance to defend himself. The foregoing is what is now called disciplinary hearing and it must be done in a language of the employees understanding and in the presence of another employee of the accused employee's choice.

22. In the present case CW1 was dismissed for misconduct namely stealing by servant. The procedure followed was to have him arrested and charged and thereafter deny him the right to return to employment. No written communication except verbal rejection by the General Manager madam Samiya Salim who told CW1 that he was not allowed back because he had committed a serious offence. That procedure for terminating CW1's employment was in breach of Section 41 of the Act and therefore rendered the dismissal of CW1 unfair within the meaning of Section 45 *supra*. In addition to the foregoing procedural unfairness, the court is satisfied that the respondent did not prove that CW1 did steal from her on 23/6/2012 as alleged. One would have expected that an eye witness like Mr. Noor, his guest and Saidi would be called to testify but that never happened. What remained was therefore hearsay evidence on what RW1,2,3 and 4 were told by persons who never testified and therefore the defence did not prove substantive fairness. Consequently the court believes the evidence of Cw1 that he was unfairly dismissed without following the law.

#### RELIEFS

23. Under Section 49 of the Employment Act on unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. In this case CW1 is awarded ksh.10,387 being one month salary in lieu of notice. He will also get ksh.2963.50 being salary arrears for the 23 days worked in June 2012 after receiving ksh.5000 as mid month salary advance. He will also get overtime for the period between October 2010 and October 2013 but I dismiss the rest of the claim for overtime for being time barred. This claim was not contested by the defence in evidence. He will therefore get 4 hours per day for 6 days in a week for October 2010 to 23/6/2012. That is about 21 months (2184 hours overtime) for consideration for which CW1 is awarded ksh.94521.70. The claim for leave and holidays worked is dismissed because the uncontested records produced by the defence. The claimant will also get ksh.124,644 being 12 months gross salary as compensation for unfair termination. The reason for the maximum award is because the unfairness was both procedural and substantive.

In addition the possibility of the claimant getting an alternative employment was reduced by the criminal charges he was facing for almost a year and also the fact the alleged misconduct would discourage potential employers from hiring CW1. Lastly Cw1 will get certificate of service.

#### DISPOSITION

24. For the reasons stated above, judgment is entered for the claimant in the sum of ksh.232,515.20 plus costs and interest.

**Dated, signed and delivered this 13<sup>th</sup> February 2015.**

**O. N. Makau**

**Judge**