



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 428 OF 2013**

**COSMAS MWENDWA MAITHYA**

**CLAIMANT**

**v**

**ENASHIPAI RESORT & SPA**

**1<sup>ST</sup> RESPONDENT**

**JOHN MWANGI**

**2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Claimant was dismissed by the Respondent through a letter dated 16 July 2013. The dismissal letter made reference to section 44(4) of the Employment Act, 2007 and the contract of employment, and to the fact that investigations had revealed that the Claimant had interfered with food meant for a guest.
2. The Claimant was not satisfied and on 9 December 2013, he lodged a Memorandum of Claim in Court against the Respondents stating the issue in dispute as *wrongful termination of Cosmas Mwendwa Maithya*.
3. In the Memorandum of Claim, the Claimant sought some Kshs 541,272/15 being notice pay, annual leave, days worked, overtime, service charge, house allowance for July 2013, compensation and lost income.
4. The Respondents filed a Response on 10 February 2014.
5. On 23 June 2014, the parties consented to allow the Claimant file an Amended Memorandum of Claim and an Amended Memorandum of Claim was filed on 10 July 2014.
6. The Respondents filed an Amended Response on 21 July 2014 and the Cause was heard on 23 March 2015.
7. The Claimant filed his submissions on 13 April 2015, while the Respondent's submissions were filed on 5 May 2015 outside the agreed timeline of 28 April 2015.
8. The Court has considered the pleadings, evidence and submissions on record and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies*.

**Fairness of dismissal**

9. The Claimant was suspended through a letter dated 9 July 2013. The suspension was to allow for investigations into allegations that the Claimant had interfered with food for a guest. The Claimant was instructed to report back on 16 July 2013 for further directions.
10. In his testimony, the Claimant stated that on 9 July 2013, the Respondent's General Manager requested him to make a statement but because he did not know what the statement was about, he

- was sent to see the Human Resources Manager for further details, who in turn gave him a suspension letter.
11. He also stated that when he reported back as instructed on 16 July 2013, the General Manager referred him to the Human Resources Manager where he was given a termination of employment letter dated the same day, but which was not signed.
  12. On realising the omission, he went to the General Manager and he was given a signed copy of the termination of employment letter on 20 July 2013.
  13. The Claimant stated that he was not given notice before the termination nor was he afforded an opportunity to be heard before the dismissal, and further that the suspension letter referred to an incident which allegedly took place on 17 June 2013, while the dismissal letter referred to an incident on 27 June 2013.
  14. Lilian Njoroge, a Human Resource Assistant testified on behalf of the Respondent. She stated that a guest complained of food interference (some portion of chicken was missing) on 26 June 2013, and that the Claimant was among the employees on duty that day. The other employees who were on duty implicated the Claimant.
  15. The witness also stated that the Operations Manager and Human Resources Assistant called the Claimant on 9 July 2013, and asked him to write a statement but he refused and therefore he was suspended to facilitate investigations.
  16. She stated that after the investigations, the Claimant was found culpable and his services were terminated.
  17. During cross examination, the witness stated that she was employed by the Respondent in September 2013, after the Claimant had been dismissed but maintained that the Claimant was given an opportunity to make representations before the dismissal.
  18. She further stated that she did not have any records of a disciplinary hearing.
  19. The Claimant was dismissed summarily. The reason for dismissal falls under the category of misconduct. Section 41 of the Employment Act, 2007 requires an employer to comply with the rules of natural justice before taking a decision to terminate the services of an employee. In employment law, natural justice has been referred to as procedural fairness.
  20. The ingredients of procedural fairness are similar to those of natural justice or the *audi alteram partem* rule.
  21. The employee should be notified of the allegations to confront. He should be afforded an opportunity to make representations. He is also entitled to be accompanied by a colleague or union representative, if he is a member of a union.
  22. In the instant case, the process followed by the Respondent was not fully documented. The suspension letter informed the Claimant of the allegations against him but it was categorical that the suspension was to allow for investigations.
  23. The purpose of such an investigation is to establish the facts upon which to commence disciplinary action proper against an employee. After the finalization of such investigations, an employer may have facts upon which to take disciplinary action or may decide the facts are not sufficient.
  24. Where the facts are established to take disciplinary action, the employer is enjoined to comply with the statutory requirements of procedural fairness. These include a hearing.
  25. It is generally accepted that the hearing contemplated by section 41 of the Employment Act can be through correspondence or through face to face meeting.
  26. Where the process is not documented fully as herein, an employer should at least disclose who informed the employee of the allegations, when the hearing was conducted, who was present and the outcome.
  27. The Respondent's witness was not present when the process of dismissing the Claimant was initiated and concluded. She did not produce any minutes.
  28. The persons who were involved (General Manager and the then Human Resources Assistant) were not called. The failure to call them was not explained.
  29. The Respondent had attempted in its pleadings to advance a contention that the dismissal was in accordance with the terms of the contract and that pay in lieu of notice was paid.
  30. But the statutory framework now requires that an employer must have fair and valid reasons to dismiss an employee.
  31. In this regard, contractual provisions providing for termination on notice or pay in lieu of notice

- without cause or valid and fair reasons would be invalid for falling below the minimum protection given to employees by section 45 of the Employment Act, 2007.
32. Under these circumstances, the Respondent has failed to discharge the burden placed upon it by section 41 of the Employment Act, 2007.
33. The Court therefore reaches the conclusion that the summary dismissal of the Claimant was procedurally unfair.

### **Appropriate remedies**

#### ***One month pay in lieu of Notice***

34. The Claimant was paid 1 month pay in lieu of notice and this head of relief does not lie.

#### ***Annual leave***

35. The Claimant sought Kshs 25,743/30 on account of leave for 2013. In testimony, he stated that he took leave in 2011/2012 but not 2013.
36. The dismissal letter advised the Claimant that he had 31 days leave pending for which he would be paid.
37. In its pleadings, the Respondent stated that the Claimant was paid Kshs 20,666/67 on account of leave up to 16 July 2013.
38. The Court finds this head of claim does not lie.

#### ***Wages up to 16 July 2013***

39. The Claimant was equally advised he would be paid wages up to 16 July 2013.
40. According to the Response, the Claimant was paid Kshs 10,666/67 as wages up to time of dismissal.

#### ***Double shift***

41. Under this head of claim, the Claimant sought Kshs 129,547/-. In evidence, he stated that according to the muster roll he had 156 days. This testimony was not challenged or rebutted. The Claimant would be entitled to the same as it was not part of the entitlements included as due in the dismissal letter.

#### ***2 years 9 months***

42. The Claimant did not lay any evidential, contractual or statutory basis for this head of claim. He did not even clarify what this claim was or related to.
43. If by this claim the Claimant was seeking service pay, he is not entitled to the same as the pay slip produced indicates he was a contributor to the National Social Security Fund. The relief is declined.

#### ***Service charge***

44. The Claimant sought Kshs 20,000/- as service charge for July 2013. He was paid Kshs 13,464/76 as service charge for June 2013.
45. He worked for nearly half the month of July 2013 and pursuant to the contract he was entitled to the portion of that month's service charge.
46. The letter of appointment provided for payment of service charge and in this regard, the Respondent's submission that service charge was gratuitous has no merit.
47. Because the Respondent did not challenge the computation, the Court finds the Claimant entitled to Kshs 20,000/- July 2013 service charge as sought.

#### ***Compensation***

48.The Court has reached a conclusion that the dismissal of the Claimant was unfair. Compensation is one of the primary remedies where the Court finds unfair termination.

49.But the remedy is discretionary and the Statute has provided the factors the Court ought to consider.

50.The Claimant served for about 3 years. He is a chef and his chances of securing alternative employment are above average.

51.Considering these 2 factors, the Court would award him the equivalent of 3 months gross wages as compensation. The same is assessed as Kshs 100,392/- (based on gross wage comprising Kshs 20,000/- per month and Kshs 13,464/- service as shown in final dues schedule).

### ***Payment for period out of employment***

52.The Claimant did not lay any contractual or statutory basis for this claim. It is therefore untenable.

### ***House allowance***

53.The Claimant sought Kshs 4913/- on account of house allowance for July 2013. The Respondent's witness however testified and was not challenged that the Claimant was provided with housing accommodation. The claim for house allowance is therefore declined.

### **2<sup>nd</sup> Respondent**

54.The Claimant did not prove that the 2<sup>nd</sup> Respondent breached any of his legal rights or is in any way liable to him.

### **Conclusion and Orders**

55.The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and awards him and orders the 1<sup>st</sup> Respondent to pay him

- |                                      |                |
|--------------------------------------|----------------|
| a. Double shift                      | Kshs 129,547/- |
| b. Service charge July 2013          | Kshs 20,000/-  |
| c. 3 months gross wages compensation | Kshs 100,392/- |

TOTAL                      **Kshs 249,939/-**

56.The heads of claim for one month pay in lieu of notice, annual leave, 2 years and 9 months, house allowance and pay for period out of employment are dismissed.

57.Claimant to have costs of Kshs 75,000/-.

**Delivered, dated and signed in Nakuru on this 29<sup>th</sup> day of May 2015.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant            Adv. Olonde instructed by K.N. Nyamweya & Co. Advocates

For Respondent        Adv. Maina instructed by Kagucia & Co. Advocates

Court Assistant        Nixon