



**REPUBLIC OF KENYA**

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

**CAUSE NO. 128 OF 2014**

**ROBERT OTIENO OCHIENG**

**CLAIMANT**

**v**

**HOTEL CATHAY LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Robert Otieno Ochieng (Claimant) was employed by Hotel Cathay Ltd (Respondent) as a DJ through a letter dated 27 September 2008. The contract was for 6 months.
2. On 11 November 2010, the Respondent offered the Claimant another 6 month contract.
3. The Claimant served the Respondent until 16 September 2013, when he was summarily dismissed. Being aggrieved with the dismissal, the Claimant commenced legal action against the Respondent and he stated the issues in dispute as

1. Unfair termination.

2. Annual leave for five and a half years.

3. Contracts.

4. 700CDS.

4. The Respondent filed a Reply to the Claim on 29 May 2014 and the Cause was heard on 9 March 2015. The Claimant filed his submissions on 23 March 2015 while the Respondent filed its submissions on 13 April 2015.
5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair, whether Claimant has accrued leave and appropriate remedies.*

**Whether dismissal was unfair**

6. The Claimant's case is that on 31 August 2013, he reported to work late and was stopped by a security guard at the gate and the Respondent's Managing Director came to the gate and asked him why he was late and that he explained he was not feeling well. The Managing Director then dismissed him and directed him to go home.
7. The Claimant stated that he was not given notice of termination of employment and denied receiving the warning letters dated 31 August 2012 and 21 August 2013.
8. The Claimant also denied getting the summary dismissal letter dated 16 September 2013, which he was shown in Court.
9. In cross examination, the Claimant admitted that he had been warned in 2010, and that his

- employment had earlier on been terminated on 12 October 2010, but he was taken back after writing an apology letter and making a fresh application for employment.
10. The Claimant further stated that he showed the Respondent's Managing Director a note from a doctor on 31 August 2013, but he threw it away.
  11. He confirmed that he used to sign an attendance register.
  12. The Respondent on its part pleaded that the Claimant's performance was not according to schedule/guidelines and that the Claimant used to report late to work leading to losses, as clients deserted and that the Claimant was issued with warning letters on 31 August 2012 and 21 August 2013.
  13. The Respondent called a Supervisor to testify on its behalf. He stated that the Claimant had a habit of absenteeism (attendance register extract produced) and would at times sneak out of the workplace and return at closing time (disco).
  14. The witness also stated that he gave the Claimant a final warning on 21 August 2013 and that the dismissal letter dated 16 September 2013 was posted to the Claimant.
  15. The witness stated that he was present when the Claimant was dismissed. In the same breath he stated that the Claimant closed the disco on 31 August 2013, and left never to return again.
  16. Before terminating the employment of an employee, an employer is under a statutory obligation to inform the employee of the reasons for the contemplated dismissal and hear any representations the employee may wish to make.
  17. It is the duty of the employer to prove in Court that it complied with the procedural fairness requirements of section 41 of the Employment Act.
  18. The Respondent's witness account was that the Claimant left on 31 August 2013 and he did not report back to work and thereafter the dismissal letter was prepared and sent to the Claimant through the post.
  19. The summary dismissal letter on its face does not have a postal address. The person who posted it was not named. The reason given in the letter was absenteeism for more than 7 days.
  20. Dismissal for absence without permission or lawful cause is a ground for summary dismissal under section 44 of the Employment Act, 2007. But even dismissal on this ground is subject to the procedural fairness requirements of section 41 of the Employment Act. The Respondent was under a statutory obligation to ask the Claimant to show cause why he should not be dismissed on the basis of the absence.
  21. The Respondent did not demonstrate that it required (or made any attempt) the Claimant to explain the absence and afforded him an opportunity to be heard. It did not disclose whether a hearing was conducted and when and where. The identities of those who were present were not disclosed.
  22. In the view of the Court, it is unlikely that the hearing contemplated by section 41 of the Employment Act, could have been held at the gate.
  23. The Court finds that the Respondent has failed to establish that it complied with the statutory requirements of procedural fairness and thus the dismissal of the Claimant was procedurally unfair.

### **Whether Claimant has accrued leave**

24. The Claimant contended that he did not go on leave for the 4 years he served.
25. The Respondent's witness stated that the Claimant applied and went on leave in 2008 and 2009 and that after 2010, the Claimant worked only 4 days in a week and did not go on leave.
26. The Claimant was on a new and distinct contract from 11 November 2010.
27. Pursuant to section 28 of the Employment Act, 2007, the Claimant was entitled at least 21 days annual leave with full pay for each completed year of service under the new contract.
28. The 21 days annual leave is an employee's statutory minimum right. The Court sees nothing in the contract signed by the Claimant which would disentitle him to the statutory leave just because he was working 4 days a week.
29. The Court therefore finds that the Claimant was entitled 21 days leave as of October 2011, another 21 days as of October 2012 and 19 days pro rata leave as of September 2013.

### **Whether Respondent has Claimant's 700 CDS**

30.The Claimant contended that the Respondent remained with his 700 music compact discs. The Respondent's witness vehemently denied the contention.

31.Based on the material placed before Court, the Court is unable to find in favour of the Claimant.

### **Appropriate remedies**

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

32.Pursuant to section 35(1)(c) of the Employment Act, 2007 and the finding that the Claimant's dismissal was unfair, he is entitled to one month pay in lieu of Notice.

33.The Claimant produced his January and March 2013 pay slips. The basic pay in March 2013 was Kshs 21,000/-. He is entitled to an equivalent as pay in lieu of notice.

#### ***Accrued leave***

34.The Claimant sought Kshs 97,769/- on account of leave for 4 years. The Claimant was on a distinct contract from November 2010. He would be entitled to about 2 and a half months wages as leave upto September 2013.

35.The basic wage as of November 2011 was Kshs 24,000/-. No pay slips for 2012 were produced while in March the wage was Kshs 21,000/-

#### ***Compensation***

36.The Court has reached a conclusion that the dismissal of the Claimant was procedurally unfair. Considering the length of service, the Court would award him the equivalent of 3 months gross wages assessed as Kshs 63,000/-.

#### ***Certificate of service***

37.A Certificate of Service is a statutory right of an employee on separation.

38.The Respondent should issue one to the Claimant within 7 days hereof.

#### ***Conclusion and Orders***

39.The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

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|--------------------------------------|---------------|
| a. 1 month wage in lieu of Notice    | Kshs 21,000/- |
| b. 2.5 months wages in lieu of leave | Kshs 52,500/- |
| c. 3 months gross wages compensation | Kshs 63,000/- |

TOTAL	<b>Kshs 136,500/-</b>
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40.Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 15<sup>th</sup> day of May 2015.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Claimant Ms. Ndeda instructed by Ndeda & Associates

For Respondent Mrs. Kairo instructed by Sheth & Wathigo Advocates

Court Assistant Nixon