



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 542 OF 2012

ELVIS K. LIKOBELE.....CLAIMANT

VERSUS

KENYA AIRPORTS AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 2nd April 2012 and in his Memorandum of Claim averred that he was employed by the Respondent as a security warden through a letter of appointment dated 15th January 2007. The Claimant pleaded that he was trained at the Kenya Wildlife Service Training School for 3 months and was deployed to Jomo Kenyatta International Airport. He was earning a salary of Kshs. 8,340/- a month and as at September 2011 was earning Kshs. 58,095/- and was pensionable and entitled to other benefits. He averred that he was diligent and obedient in his work and was not given any notice or warning in respect of his duties. He averred that he received a show cause letter on 3rd October 2011 and was required to respond to the show cause letter on the same day. He pleaded that the show cause letter was in respect of an alleged act of sexual harassment alleged to have happened on 4th June 2011. He averred that he had no knowledge as to why the Respondent did not inform him of the alleged sexual harassment immediately upon the happening of the alleged sexual harassment act. The Claimant further averred that there was no statement recorded by the alleged victim on 4th June 2011. The Claimant averred that he was summarily dismissed by the Respondent without proof in respect to the alleged sexual harassment. The Claimant averred that his dismissal was illegal, fraudulent and void *ab initio*. He averred that the dismissal was meant to deny him his benefits as provided for in the law and sought future earnings for 39 years - Kshs. 27,188,741/-, 3 months notice Kshs. 174,286.80, severance pay at rate of 15 days for each completed year Kshs. 145,239/-, costs of the suit, interest on the sums claimed and any other relief this Court may deem fit to grant.
2. The Respondent filed a Memorandum of Defence on 24th July 2012 and in the defence, the Respondent admitted that the Claimant was employed as a security warden trainee on 17th January 2007 at a salary of Kshs. 8,340/- plus a house allowance of Kshs. 7,600/-. The Respondent averred

that on 8th June 2011 it received a complaint from an employee of Tamasha Afrika Limited regarding sexual misconduct/ harassment. In their complaint, Tamasha Afrika indicated that their client sent an email concerning the matter. The Respondent averred that the complaint was that on 4th June 2011 at the British Airways counter at around 1.30 pm a lady passenger of Japanese origin approached the Claimant seeking directions to the washrooms and the Claimant offered to escort her and on reaching the entrance the Claimant asked for a hug and on coming out the complainant found the Claimant waiting for her and that he again asked for a hug and a kiss but the complainant refused and when she attempted to pass by him he blocked her and forcefully pulled her into the cleaners store next to the washrooms, ordered the cleaner to leave and forcefully hugged and kissed her. The complainant managed to free herself and she informed her colleague with whom she was travelling back to Japan and the colleague informed the tour guide John Nestor. The Respondent averred that the incident was reported to the security supervisor who attempted to resolve the issue and have the Claimant apologise to the complainant as she was travelling. The Respondent averred that it launched investigations into the incident and recorded statements from parties involved and the statement of John Nesta indicated that the complainant had been forcefully kissed by the Claimant and he reported the incident to the airline security and in his statement narrated what had happened to the passenger. The Respondent averred that the Claimant recorded a statement on 6th July 2011 where he alleged inter alia that he had only shaken hands with the complainant. The Respondent averred that on 3rd October 2011, following a meeting with the disciplinary committee, the Claimant was asked to show cause why disciplinary action should not be taken against him for sexually harassing a passenger on 4th June 2011 and the Claimant responded vide a letter of 3rd October 2011 and stated that he only directed a lady passenger to the washroom by show of hands and after they shook hands. The Respondent pleaded that on 2nd November 2011 a disciplinary hearing was convened whereat the Claimant was represented by Union officials. The Respondent averred that the case was not recorded anywhere in the occurrence book and this was suspicious and that it was clear that there was an attempt to cover up the incident. On 29th November 2011 the Claimant was dismissed from service with effect from 3rd October 2011 and that the dismissal was lawful and fair in accordance with the Employment Act. The Respondent averred that the Claimant was paid his terminal benefits amounting to Kshs. 163,450/- and that there was no other amount due. The Respondent thus sought the dismissal of the suit.

3. The Claimant testified on 14th October 2014 and stated that he was at his work station in a sterile area of the airport. He was screening passengers and staff to ensure only those passengers with boarding passes and staff with proper identification tags proceeded beyond his desk. He testified that he was approached by two Japanese ladies and from the body language understood that they were looking for the ladies washrooms. He stated that he directed them to the washroom by a show of hands and that after some time continued with his work. He stated that his supervisor Madam Bulinda assigned someone else to take over his counter and he went to the office of the station manager where a tour guide complained that one of the passengers had been harassed. The tour guide said that the passenger had complained she had been hugged. He testified that he did not know the passenger and that he did not know who hugged the passenger. He testified that he had not seen any of the passengers again until he was at the station manager's office. He denied hugging any one of them. He stated that he had been trained in customer care and is required to greet passengers by saying "Jambo. Hi. Can I see your boarding pass" and that at the time they shook hands she did not have a problem. He testified that the passenger said that a man in a black jacket had hugged her and she had no complaint against him and it was on this basis that the passengers were allowed to proceed to board the Emirates flight. He stated that if there was a complaint it would have been formalized and the airline involved. He stated he was not aware of the complaint by the lady. He went back to his work station and later received a show cause letter on 26th August 2011 and he was accused of sexually harassing a passenger on 8th June 2010. He sought to have the suspension lifted stating that he was not on duty on 8th June 2010 but this was not done. He received a letter on 30th September 2011 to appear and show cause on 3rd October 2011. He stated that the letter seeking him to show cause was served on 3rd October 2011 and he

was to respond to the letter by the close of business that day. He responded to the show cause letter and attended the subsequent disciplinary hearing where a union representative was present. He stated in his response that he was married and that the airport was manned 24 hours by CCTV cameras. He stated that if the passenger took the handshake as sexual harassment then he apologized for the handshaking. He stated that when he went to the supervisors office the passenger was there and she stated that she was hugged by a person wearing a black jacket and she did not identify him as that person. He testified that he was not issued with any letter of complaint from the passenger. He noted that there was a complaint from Tamasha Afrika in the Respondent's response and he assumed it was from the passenger. It was undated and he had not been issued with this letter at the time of the disciplinary meeting. He stated that the letter was in two languages and he could not tell what the other script was in. He testified that he was not issued with a certificate of translation. He stated that JKIA is manned by CCTV cameras and personnel 24 hours a day. He said that he knew Christine Bulinda who was his supervisor on duty that day. He stated that he was not charged for harassing the passenger and that the Court should compel the Respondent to pay him damages as per the claim.

4. In cross-examination by Miss Kamau for the Respondent, he testified he has had a lot of contact with foreigners and travellers in the unit where he worked. He confirmed that he had contact with the two ladies and that when they first came by he thought they had checked in. He testified that when the ladies came he took it as emergency and he greeted them and the lady expressed herself by holding her hands between her knees. He stated that it was after greeting that she did the body language and that she went and never came back to say thank you. He testified that he was summoned by the station manager who asked the two ladies if they had a complaint and that is when he knew why he was there. He confirmed that he received a show cause letter and wrote in reply. He stated that he received a letter with the allegations and that he was not given ample time to respond. He testified that he received two show cause letters. He stated the other was with his advocate and that he had not attached it to his claim. He testified that he was not given reasons for the termination and on being shown the letter of termination stated that the termination was for gross misconduct. He stated that he had 2 disciplinary hearings and in the second disciplinary hearing he had union representation and that he had responded to the show cause letter and the Respondent did not share the outcome of the disciplinary meeting with him. He appealed against the wrongful termination. He denied that he was heard and given a chance to appeal. He stated he would have worked till retirement. He testified that his supervisor Bulinda inquired into the matter and called someone else to stand in for him and they went to the station manager's office. He was trained in chain of command and he did not know if the supervisor took it to the next level. He apologized for the handshake because he thought that in her culture it was wrong. He apologized because that was the only contact he had. He stated that at the meeting there was a tour guide who was translating. He stated that he had seen the letter from Tamasha Afrika copied to Kenya Association of Tour Operators (KATO), Ministry of Tourism, Kenya Tourism Board.
5. In re-examination by Mr. Onindo he testified that the physical contact he had with the passenger was the handshake. He stated that the complainant did not refer to any sexual harassment and she only referred to a hug. He testified that he had spoken of chain of command and that it was not his duty to initiate the investigation.
6. The defence sought an adjournment and hearing aborted on two subsequent dates when the Respondent's counsel was unwell or unavailable. The Respondent finally called their witnesses on 4th February 2015 and the first was John Nesta Francis Mwalago a Japanese speaking tour guide. He testified that he had come with two clients from Maasai Mara and he let them check for seats on Emirates and as he had other passengers arriving went to arrivals to see if the other two had arrived. He returned to find one lady and on enquiring where the other lady was he was told she had gone to the toilet. He stated that she came back looking distraught and he thought she was sad to be leaving for Japan. He testified that she said that someone had hugged and kissed her without her consent and she said it was a person in yellow. He tried to look but could not see the person and he tried to get the help of a supervisor and a person from the immigration gate came and sought to know what had happened. He stated that someone had hugged and kissed the lady and

- he was advised to leave the issue alone as it lead to someone being sacked. He testified that he was told that the person was just joking and was ready to apologise. He went and asked the lady if she would accept the apology and the ladies refused the apology. The person came and tried to shake their hands. The passenger was in tears and refused to shake hands, the person apologized and did not state what he was apologizing for. To him, it seemed that he was apologizing for kissing and hugging her. He reported to Tamasha and was asked to report to Kenya Airports Authority which he did the next day. He testified that when the person came to apologise he was in a black blazer but the yellow could be seen inside. The conclusion seemed to be that he had not reported early enough. He stated that it would be costly for the passenger to save money and travel to Kenya.
7. In cross-examination by Mr. Onindo he testified that he was not aware if the Respondent had tried to call the passenger to come to testify in court and that it was only his presumption that the complainant could not afford to come here. He stated that the yellow colour was part of the uniform of the Respondent and that other employees wore the uniform and he did not see the kissing. He testified that the passenger said she had been hugged and kissed without her consent. He stated that she told him that the very day it happened and she was crying and holding her suitcase. He testified that he did not think it was that serious and that he had been told it was a hug and a kiss. He stated that she wrote a statement to his company and referred to the attachment Appendix 4 which was a letter on Tamasha Afrika letterhead and it indicated an email from the complainant. He translated that the letter in the last paragraph was “he asked me for a hug and a kiss and he would not let her go”. He stated that he went to complain to the Respondent and the staff did not cooperate with him and they all seemed to be protecting the Claimant and they told him if he was not satisfied he could go to a higher office.
 8. In re-examination by Miss Kamau, he testified that he was asked by the Claimant to leave the matter to rest when he went back to the passenger she identified the Claimant as the perpetrator. He said he did not know the issue was serious and noted her red ears and her crying. He testified that the Respondent called him to record a statement and Tamasha Afrika had complained to Kenya Tourism Police and the Kenya Tourism Board. He was not assisted by the Respondent’s staff who had taken the issue lightly.
 9. Further defence hearing was on 21st April 2015 where Carol Chibutsa the HR officer manager of the Respondent testified. She testified that the Claimant was employed by the Respondent on 17th January 2007 and was no longer an employee. She stated that the Respondent received a complaint from a stakeholder that one of their clients had been molested by this employee of the Respondent. The client had been harassed and could recognize the person. The Respondent followed up the complaint and investigated and recorded statements from Ernest Mchube, Christine Bulinda and Daniel Musonye. The email was translated and a report compiled. The Respondent notified the Claimant of the accusations and served him with suspension notice and notice to show cause. She testified that the Claimant replied and did not admit and a disciplinary committee was constituted. She stated that the Claimant was given an opportunity to defend himself and he was represented by union officials Robert Gichoro, Benjamin Kisango, Daniel Yatch, Derrick Masiga, Loyford Ngonge, Edwin Wakoli and Jackson Wanyonyi. She testified that the Claimant was given opportunity to defend himself and the recommendation of the committee was that it was a gross mistake and recommended that the Claimant be dismissed. The dismissal letter was issued on 21st November 2011 and he was paid Kshs. 163,450/-. She stated that he is not entitled to future earnings and in her opinion one could die or leave for greener pastures. She testified that on dismissal one is entitled to leave payment and pension but no other payments. She stated that the Claimant was dismissed and there was no other payment.
 10. On cross-examination by Mr. Onindo for the Claimant, she testified that she had worked for the Respondent for the past 19 years and came to know the Claimant when the matter came up. The reason for the dismissal was the complaint that one of the clients of Tamasha Afrika had been harassed by the Respondent’s staff. She testified that the complaint was not made directly but through the tour company handling her. She testified that the document filed by the Respondent was an email and when referred to it confirmed that it did not show where the email came from or

the date it was sent and the person to whom it was sent. She stated that what she could see is that they annex the email from the client but the details from the email are not brought out. She testified that there was a complaint from Tamasha and not from the passenger and the Respondent never called to seek the availing of the passenger for questioning. She testified that the colleagues were questioned and from statements there was a cover up. The supervisor did not enter it on the occurrence book and on reporting to the Duty Security Officer (DSO) he too did not book it. She testified that the statements of the two did not implicate the Claimant. She testified that Bulinda still worked for the Respondent and was disciplined and dealt with internally as she could not explain why the incident was not recorded per procedure. She testified that the complaint was criminal to an extent and the client was almost boarding a flight and therefore did not have time to go to the Police. This was not the first complaint received and complaints are even received through the Embassy. She stated that the Respondent found there was collusion among its staff and the Claimant as they should have booked the complaint. From the statements the Claimant says he only shook hands and that is also what the supervisor Bulinda says. She testified that the Respondent received a complaint and investigations were carried out before dismissal. She confirmed that CCTV footage was not produced in the case and that any incident however small should be recorded in the occurrence book.

11. The witness testified in re-examination that the complaint should have come from the supervisors and the investigations came after Tamasha's complaint. She stated she was not privy to all aspects of the investigations.
12. The Claimant and Respondent were to file written submissions and the Claimant filed submissions on 26th May 2015 while the Respondent filed its submissions on 22nd May 2015. In the submissions by the Claimant, he submitted that the complaint was not proved as there was no complaint from the passenger alleged to have been harassed. The Claimant submitted that the dismissal of the Claimant was on account of the complaint from Tamasha Afrika. The Claimant submitted that there was no proof that the matter was investigated by the Tourism Police and there was no evidence that Tamasha Afrika followed up on the complaint. The Claimant submitted that the Respondent dismissed the Claimant in order to please their client Tamasha Afrika Limited. The Claimant submitted that the passenger and Mr. Ojwang of Tamasha Afrika should have been called to testify in this case. The Claimant submitted that there was no CCTV footage availed during the disciplinary hearing and none was adduced before Court to prove the allegations against the Claimant. It was the Claimant's contention that he only greeted the passenger and shook her hand and thus did not hug or kiss her. The Claimant submitted that the reason why the passenger was allowed to fly out was that there was no complaint. The Claimant relied on the case of **Ayub Akoth Nyawara v Ashut Engineers Limited** for the proposition that the summary dismissal requires willful conduct. Relying on the case of **Shankar Saklani v DHL Global Forwarding (K) Ltd** the Claimant submitted that the circumstances of the case were not obvious to entitle the Respondent to summarily dismiss the Claimant and that the Respondent contradicted itself when its officers on the scene allowed the passenger to leave the country without lodging a formal complaint but later rely on a complaint lodged through Tamasha. The Claimant submitted that if there was a procedural lapse on part of senior officers of the Respondent the same cannot be blamed on the Claimant. The Claimant thus sought the grant of prayers as per his claim together with 12 months damages as was held in the case of **Shankar Saklani v DHL Ltd**.
13. The Respondent submitted that the Court should dismiss the Claimant's case and uphold the decision to terminate as lawful. The Respondent submitted that the dismissal was on account of sexual harassment of a passenger who was using the Respondent's facility and this was based on a complaint by Tamasha Afrika Limited addressed to the Tourism Police Unit and copied to the Respondent. The complaint was that the passenger, while waiting for a flight out of the country sought the assistance of the Claimant to locate the washrooms and he instead of guiding her accordingly led her to the washrooms and requested for a hug and she conceded being unsure of the customs of the host country. On exiting the toilet she found the Claimant waiting for her and he requested for a hug and a kiss and she tried to avoid his advances but he blocked her path, grabbed her into a cleaners cubicle where he forcefully hugged and kissed her before she managed

to free herself. The passenger reported the incident to her tour guide John Nesta and he had testified before the Court in detail. The Respondent submitted that this was also in her statement/email to Tamasha Afrika Limited. The Respondent submitted that John Nesta testified that the passenger identified the Claimant and also how distraught she was about the incident and how his attempts to seek reprieve for the passenger were thwarted by individuals who ought to have promptly assisted him and his guests. The Respondent submitted that there was procedural fairness in the dismissal of the Claimant and that he was asked to show cause and appeared before a disciplinary committee of the Respondent and having failed to exonerate himself from the charges leveled against him he was dismissed from employment and paid his terminal dues. The Respondent submitted that the Claimant appealed the decision to terminate his services and the appeal was considered and the Respondent decided to uphold the termination. The Respondent relied on the case of **Simon Patrice Matianyi v G4S Security Services** where the Court held that for the Court to award future earnings there must be a legal underpinning. The Respondent submitted that the Claimant, a security guard placed in a position of trust under a mandate to ensure the safety and wellbeing of travellers, instead of serving with integrity and diligence proceeded to assault the very people he had pledged to secure. The Respondent submitted that the fact that the passenger did not testify did not overshadow the gravity of the uninvited intrusion the passenger received. The Respondent submitted that it had no obligation to prove the criminal nature of the Claimant's gross misconduct beyond reasonable doubt but to take action against the employee where there were grounds to do so.

14. The case revolves around sexual harassment of a female passenger within the Respondent's facility. The behaviour was from the accounts of the witnesses of the Respondent not acceptable to the passenger and her reactions were clearly not in keeping with someone who had had her privacy invaded with her consent. The Claimant asserts that there was no sexual harassment and that all he did was shake hands with the passenger. The Respondent on the other hand asserts that the Respondent's officers on duty on the material day failed to adhere to procedures and did not book the incident relating to the passenger. This was stated to have been in cover up for the Claimant. Sexual harassment includes many things and may include any or a combination of any of the following:-

- a. Actual or attempted rape or sexual assault.
- b. Unwanted pressure for sexual favors.
- c. Unwanted deliberate touching, leaning over, cornering, or pinching.
- d. Unwanted sexual looks or gestures.
- e. Kissing sounds, howling, and smacking lips.
- f. Neck massage.
- g. Touching a person's clothing, hair, or body.
- h. Hanging around a person.
- i. Hugging, kissing, patting, or stroking.
- j. Touching or rubbing oneself sexually around another person.
- k. Standing close or brushing up against a person.
- l. Staring at someone.
- m. Facial expressions, winking, throwing kisses, or licking lips.
- n. Making sexual gestures with hands or through body movements.

15. The Claimant is alleged to have subjected the passenger to number of the elements of sexual harassment above. Even in some contexts, shaking of hands can amount to sexual harassment.

16. The Claimant was accorded some modicum of procedural fairness from all accounts. He was issued with a notice to show cause and the notice bore the accusations he faced. He states that the notice was too short but nevertheless managed to respond to the notice in writing. He was asked to appear before a disciplinary committee and was represented by union officials. He was subsequently dismissed and appealed the decision. The Respondent upheld the dismissal. In the Employment Act Section 41, dismissal is permitted but the dismissal must accord with the law. The procedural fairness was adhered to as far as the evidence shows. The Claimant asserts there was no basis for the dismissal. From the Respondent it is asserted there was basis. When the

Claimant met the passenger he says that she had her hands between her knees and was in body language communicating a need to use the washrooms. If that was the case, how then did he manage to get her to shake his hand? Why was it necessary to shake hands in any event, having greeted them verbally and ascertaining the need to indicate the location of the facilities that the passenger was in need of? The evidence of the Claimant as well as the Respondent's witnesses points at something that was untoward. The fact that the officials of the Respondent did not book the incident corroborate the narration by John Nesta about the insinuations that if the matter went any further, someone would lose their job. It is thus my finding that though the Respondent has not made out a case that suggests guilt beyond a reasonable doubt, there is evidence on a balance of probabilities that the Claimant was guilty of sexually harassing the female passenger who was a guest of Tamasha Afrika Limited. The company did actually complain. The complaint was what stirred the Respondent's management to undertake an investigation and through the investigations established the failure of its officials to record the incident and the cover up the supervisor of the Claimant and the Duty Security Officer consequently made. The Constitution of Kenya provides under Article 28 that every person has inherent dignity and the right to have that dignity respected and protected. The actions of the Claimant were in contravention of various international instruments on the rights of women as well as the provisions of Section 6 of the Employment Act when read in light of the rights to dignity that the persons we interact with are entitled to.

17. The Claimant's dismissal was fair and just in the circumstances and he has no claim against the Respondent. The only aspect that is worth mentioning is that the termination was stated to be effective from 3rd October 2011 while the letter communicating this was issued on 29th November 2011. This is not as it ought to be. His dismissal was effective the 29th November 2011 and as such the Respondent must process his salary for November 2011 as he was in their employ up until the letter of dismissal was issued. The Claimant was hugely unsuccessful against the Respondent and the suit thus is dismissed and save for the payment of one month salary he is not entitled to any payments from the Respondent. I make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of July 2015

Nzioki wa Makau

JUDGE