



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 29 OF 2013

EMMAH NJERI..... CLAIMANT

v

SAROVA WHITESANDS BEACH RESORT & SPA.....RESPONDENT

JUDGMENT

1. Emmah Njeri (Claimant) was employed by Sarova Whitesands Beach Resort & Spa (Respondent) as a Bar-Lady with effect from 14 September 2009.
2. On 1 November 2012 the Respondent suspended the Claimant from duty for 4 days to facilitate investigations of a variance revealed by a stock take of 13 bottles of Mara Nyeupe wine and shortage of 1 bottle of Moet Chandon wine. The suspension letter instructed the Claimant to report to the Human Resource office on 7 November 2012.
3. On 7 November 2012 the Respondent extended the suspension by one more day and informed the Claimant to report on 8 November 2012 for further instructions. The suspension was extended for a further one day through a letter dated 12 November 2012. Through a letter dated 20 November 2012 the suspension was yet again extended for two more days until 22 November 2012. On 22 November 2012 it was extended until 23 November 2012.
4. On 23 November 2012, the Respondent issued the Claimant with a summary dismissal letter on the ground of gross misconduct. The Claimant was aggrieved and on 12 February 2013 she lodged a Statement of Claim stating the nature of claim as *compensation for wrongful summary dismissal*.
5. The Respondent was served and it filed a Reply to the Statement of Claim on 19 March 2013.
6. On 10 October 2013, the Court granted leave to the Claimant to file and serve an Amended Claim and an Amended Statement of Claim was filed on 5 November 2013. Although the Respondent had been granted corresponding leave to amend its Response, it did not. The Cause proceeded to hearing on 21 July 2014.

Claimant's case

7. The Claimant's case is that she was employed by the Respondent in 2009 and that she was wrongfully suspended over false and unfounded allegations and ultimately dismissed in disregard of her rights as envisaged under the Employment Act, 2007. It was pleaded the dismissal was without a lawful cause.
8. The Claimant testified. She stated that on 30 October 2012 while on off duty she was called to go and see the Chief Security Officer. She stated that the Chief Security Officer asked her to write a statement concerning a Moet Chandon wine which was missing. After writing the statement, she was suspended.
9. The Claimant also stated that on 8 November 2012 she appeared before a panel comprising of the

- Respondent's Chief Security Officer, Human Resources Coordinator, Restaurant Manager, Chief Financial Controller and Human Resources Manager.
10. She stated that although she had not been informed in advance what the meeting was about, she was asked about the bottle of Moet Chandon which had been found in the Dispense Bar, and she gave explanations.
 11. The Claimant further stated that later the same day she appeared before a panel of three and repeated her explanations in the presence of another employee called Mutunga, after which her suspension was extended until 13 November 2012 when she was instructed by Respondent's Human Resources Officer, Dorcas Waweru to go back to work and wait for a warning letter.
 12. The Claimant stated that she worked until 19 November 2012 when the Respondent's Chief Security Officer told her she would be on suspension for two days and that on 20 November 2012 she appeared before a panel made up of the Respondent's Chief Security Officer, Financial Controller and Human Resources Manager and was eventually dismissed on 23 November 2012.
 13. On the reasons for dismissal, the Claimant stated that on 22 October 2012 there was a change of wine list and she had issued a request for new wines and that because the wines were many she took time to sort them out. In the course of that day, a Stephen Mutunga who served as a storekeeper brought to her a bottle of Moet Chandon wine and told her she had forgotten it and when she asked him about the receiving documents he told her he had booked it in the system but there was a system failure and so the document was not ready. (She stated that there had been a system upgrade running over two months).
 14. The Claimant further stated that she kept the wine in the fridge and that it was eventually found unopened.
 15. The Claimant also explained the system put in place for getting stores. She would make a requisition to a senior officer. After approval, it would be posted in the system at which the request would be available to the Storekeeper. She would then go to the stores to collect the items and sign a document to confirm receipt. And to ensure that the items came from the Respondent, they would be stamped and signed. She also stated that stock taking would be done every day by a Controller.
 16. The Claimant stated that it was irregular for the storekeeper to take the bottle of wine to her.

Respondent's case

17. The Respondent called one witness, Winstone Omollo. On the process followed before dismissing the Claimant the witness stated that all the three employees concerned were summoned and asked to make written statements. Thereafter they were suspended to facilitate investigations.
18. He also stated that the Claimant was called to a disciplinary hearing and that he (witness was present in the first hearing) and that the panel did not agree with the Claimant's explanations. Investigations were conducted by the Chief Security Officer who advised that the Claimant be issued with a warning.
19. On the substantive reasons for dismissal, the witness stated that the Claimant was dismissed because of a missing bottle of Moet wine. The Respondent had carried a stock take 30 October 2012 and discovered that a bottle of Moet was missing. The bottle had been issued but this was not reflected in the system. A physical stock take revealed an extra bottle of Moet in the Dispense bar.
20. The witness stated that the Claimant when asked to explain stated that it was the storekeeper who had taken the wine to her between 22 October 2012 and 24 October 2012 and that the Claimant received the wine without signing the relevant documents. There was no authority from the Head of Department and so the Claimant flouted the Respondent's procedures.
21. According to the witness, the dismissal was not harsh.

Issues arising

22. This being a complaint relating to unfair dismissal, the questions arising for determination are primarily two, whether the dismissal was unfair, and if so, appropriate remedies.
23. The Court has considered the written submissions and authorities filed by the parties in reaching its conclusions.

Whether the dismissal was unfair

Procedural fairness

24. The evidence before Court is that the Claimant was called while off duty and requested to report to the Chief Security Officer. She did and on 1 November 2012 she was suspended from duty. The suspension letter informed the Claimant of the reason for the suspension-*to facilitate investigations over 13 bottles of Mara Nyeupe and a Moet Chandon wine*. The letter did not inform the Claimant that her termination was under consideration.
25. On 7 November 2012 the suspension was extended and on 8 November 2012 the Claimant appeared before a panel composed of Respondent's senior employees. The Claimant confirmed she appeared before the Panel twice.
26. The minutes, if any of the meetings were not produced. Both the Claimant and Respondent's witness agree on the fact that the Claimant was asked to explain about the moët wine.
27. The Claimant's unchallenged evidence was that she was not informed in advance of the purpose or reason for the appearance before the panel of 5 on 8 November 2012.
28. The Respondent did not inform the Court whether the meeting held on 8 November 2012 was an investigative hearing or a disciplinary hearing. There is nothing placed before the Court to show that the Respondent had informed the Claimant that the termination of her services was being contemplated and she should defend herself.
29. The Claimant made another appearance before a panel of 3 on 22 November 2012. Similarly, there is nothing placed before Court to demonstrate whether this was an investigative or disciplinary hearing. The letter dated same day extending the suspension would suggest otherwise as it refers to further investigations.
30. This Court has in the recent past attempted to make a distinction between an audit/investigate hearing and a disciplinary hearing in the case of *Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Ltd* (2014) eKLR. In that case, I observed that

38. In my view, an audit or investigation within the employment relationship is to gather the facts to establish whether there are grounds for a disciplinary action and after the facts have been established the employer should inform the employee of the allegations or facts and give the employee time to make a response.

39. The purpose of a disciplinary hearing on the other hand is to objectively enquire whether an employee is guilty of *misconduct, poor work performance* or has some *incapacity* that lessens his ability to perform the job functions to the employer's standard, and for which a sanction such as a warning, suspension or dismissal may be given.

40. To my mind, an audit or investigation, like the one carried in the instant case cannot substitute a disciplinary hearing contemplated by section 41 of the Act because an employee normally does not have the right to bring a colleague/union representative to an audit/investigative interview.

31. An employee is entitled to be informed in clear and unambiguous language that termination is being considered and of the reasons or charges. In the instant case, the suspension letter and the letters extending it dated 20 November 2012 and 22 November 2012 were all clear that the suspension was to enable (further) investigations to be carried out. The Court is not convinced that the meeting held on 8 November 2012 was a disciplinary hearing as opposed to an investigation to establish facts.
32. The Respondent has not met the threshold expected of it by section 41 of the Employment Act, 2007 that it complied with the procedural fairness safeguards. The dismissal was unfair.
33. Because of the conclusion reached and further in light of section 45(2)(c) of the Employment Act, the Court deems it unnecessary to discuss the substantive fairness of the dismissal.

Appropriate relief

Unpaid salary upto 23 November 2012

34.The Claimant was dismissed on 23 November 2012. The Respondent had agreed in the dismissal letter to pay the wages up to 23 November 2012. There is no basis in contract or law to deny her the earned wages up to time of dismissal. The Court finds she is entitled to the Kshs 13,722/- as shown in Final Dues Workings.

One month salary in lieu of notice

35.The Court has reached a conclusion the dismissal was unfair. The Claimant did not directly produce any evidence as to her monthly earnings but according to the Final Dues Workings by the Respondent at time of dismissal she was earning a basic salary of Kshs 12,066/- and house allowance of Kshs 5,898/- making a total of Kshs 17,964/-. Pursuant to sections 35 and 36 of the Employment Act and clause 3 of the letter of appointment the Court finds in favour of the Claimant and awards Kshs 17,964/- as one month salary in lieu of notice.

Accumulated and pro-rated leave days

36.This head of claim was admitted as indicated in the dismissal letter and the Claimant is awarded Kshs 9,377/-.

Service charge for October and November 2012

37.Clause 4 of the letter of appointment made provision for payment of service charge. The Respondent did not challenge this head of claim and indeed the dismissal letter indicated she would be paid service charge. The Claimant is awarded Kshs 27,504/-.

Damages for wrongful termination and exemplary damages

38.The Claimant did not make a case for this two heads of claim and they are dismissed.

Damages for unfair termination

39.The Claimant sought the maximum twelve months gross wages as compensation for unfair termination. The remedy is discretionary and under section 49(4) of the Employment Act, 2007, the Court is enjoined to consider any, some or all of the factors listed.

40.The Claimant was dismissed in November 2012. By January 2013 she had secured alternative employment. She had served the Respondent for about 3 years.

41.Considering the above enumerated factors, the Court would award her the equivalent of three months gross wages as compensation which is assessed at Kshs 53,892/-.

Costs

42.The Claimant incurred expenses as a result of the unfair dismissal. The Court awards her costs of the Cause.

Conclusion and Orders

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

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|--|---------------|
| a. Unpaid salary upto 23 November 2012 | Kshs 13,722/- |
| b. One month salary in lieu of Notice | Kshs 17,964/- |
| c. Accumulated/prorated leave days | Kshs 9,377/- |
| d. Service charge | Kshs 27,504/- |
| e. 3 months gross wages compensation | Kshs 53,892/- |

f. TOTAL

Kshs 122,459/-

44.The claims for damages for wrongful termination and exemplary damages are dismissed.

45.Costs to the Claimant.

Delivered, dated and signed in open Court in Mombasa on this 9th day of September 2014.

Radido Stephen

Judge

Awards (a),(c) and (d) as indicated in the judgment having already been paid to the Claimant, the same should be deducted from the judgment sum of Kshs 122,459/-.

Dated and signed on this 9th day of September 2014.

Radido Stephen

Judge

Appearances

For

Claimant

Mrs. Nyange instructed by Sherman Nyongesa & Co. Advocates

For

Respondent

Mr. Sitonik instructed by Ndegwa Muthama Katisya & Associates Advocates