



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 77 OF 2012

DICKSON NYILI & 3 OTHERS .....CLAIMANT

VERSUS

ALI BARBOUR'S RESTAURANT LTD .....RESPONDENT

**J U D G M E N T**

The claimants have sued the respondent, their former employer, claiming terminal benefits for wrongful and unfair termination of their services in February 2012. The 1st, 2nd and 4th claimants were engaged on a one year term contract while the 3rd claimant was on permanent contract of service. The respondent denied the allegation of wrongful termination of employment and instead justified the reason for termination as and the procedure followed in dismissing them. The case was heard on 23/4/2013, 14/5/2013 and 13/6/2013 when 1st to 4th claimants testified as CW1 to CW4 respectively and Catherine Robertson represented the respondent as RW1.

CW1 was employed on 1/3/2006 as a waiter and was terminated on 8/2/2012. His salary was ksh.7370 plus house allowance of ksh.1160 per month and he was a contributor of NSSF. On 8/2/2012 he was arrested by police while in duty on allegation of theft, detained in police for the night and was never charged in court. He denied the alleged stealing.

On class examination he confirmed that before the termination he was serving one contract from 1/4/2011 which provided one month notice prior to termination His claim for the dues as calculated by the labour officer of ksh.96,718.60.

CW2 was employed as a waiter in May 2011 and his salary was ksh.6500/- plus house allowance of ksh975. He worked until 10/2/2012 when he was dismissed. On the said day he reported to work and after one hour the RW1 called him to the bosses office and told him that he had stolen and took him to police to Ukunda. That on reaching the police station RW1 told the OCS to enjoin him with the other claimants but the OCS released him and the RW1 gave him fare back to work. That he worked for 3 more days after which he was denied entry to the work place and his staff card taken away.

That when he went for his salary at the end of month he was denied and told that he had a police case. He prayed for terminal dues as tabulated in the claim according to calculation by the Labour officer at ksh.70,650.80.

On cross-examination he confirmed that he was never given any appointment letter to show that he was on one year contract. He maintained that the contract was breached because he was never given a notice. He maintained that he worked upto 13/2/2012.

CW3 was in permanent employment starting on 1/5/2005 and was terminated on 8/2/2012. His salary of ksh.7370 plus house allowance of ksh.1106/. That on 8/2/2012 he was arrested violently by plain clothed police while at work and detained overnight at the police station. That he was released on bond and went back to work but he was not allowed in. Instead he was ordered to write resignation letter to facilitate withdrawal of the police case. That when he refused he was send away. He prayed for his dues amounting to ksh.104,581.40/.

On cross-examination he claimed for 3 months notice pay. He denied the possibility of the waiter or cashier to delete an order by their cards. He maintained that a waiter's card could only place an order while the cashier's card could only generate a bill.

CW4 was employed on 1/1/2009 and worked without any letter until 1/5/2011 when he was given a formal contract for one year. That on 8/2/2012 he was arrested by police while on duty and detained over night on allegation that he had stolen money from the respondent. After release on bond he returned to work but was not allowed in. Instead he was ordered to sign a resignation in order for the police case to be withdrawn. That he reported the case to the labour office and dues were calculated for him. He prayed for Ksh.70,650.80/.

On cross-examination he confirmed that his salary was ksh.7000 plus house allowance of ksh.1050/ plus service charge. That he never went for any leave and the termination was without one month notice. That his contract was due to expire in 3 months time. He denied the alleged theft and maintained that only the manager's card could delete or alter any entries in the computerized system.

RW1 is a Manager of the respondent together with another person. She admitted that all the claimants were former employees of the respondent and were all terminated in February 2013 for stealing respondent's money.

That in April 2011, she computerized the sales in the business making all the transactions automated. That in October 2011 she discovered on her own that ksh.90,300/- had been stolen. That she then asked the supplier of the system to investigate the theft and give her a detailed report. That in February 2012, the problem started again and the supplier of the computer system gave her another report which showed that theft was being done through the password of her colleague manager who was then away from duty.

She went to to the video camera (CCTV) which was at the cashier's point to verify. That the camera showed that the cashier was using the manager's password. That the cashier acted in collusion with the claimants and shared the money. That the 2nd claimants was brought by the CCTV on 1/2/2012, 4th claimant on 4/2/2012, 3rd claimant on 5/2/12 and the 1st claimant on 7/2/12. That her report on the CCTV investigation was produced as exhibit 2 for the defence. That she reported to her husband who in turn reported to the police and thereafter the claimant were arrested. That they were released on bond pending the advise from the Attorney General In the meanwhile she dismissed the claimants and they never returned to collect their dues.

According to her the claimants lawful dues are contained in her letter dated 4/5/2012 to the labour office produced as respondent exhibit 1. Thus 1st claimant is entitled to ksh.9313, 2nd claimant to ksh.4992, 3rd claimant ksh.10743 and 4th claimant ksh.8144. She maintained that the respondent lost about ksh.100000/ through the claimants dishonesty and thereby lost trust in them and that was a reason enough to warrant their dismissal.

She confirmed that she told the 3rd respondent new employer that he had a police case but clarified that she did so after the said employer called her to enquire about the reason for his departure from the respondent. She maintained that the 1st and 4th claimants were on one year contract while the 2nd and 3rd claimants were casual and permanent workers respectively. She admitted that all the claimants contract required one month notice before termination except for the 2nd claimant who was entitled to one weeks notice.

On cross-examination she confirmed that a waiter can place an order but cannot close the bill. That a

cashier's card can only generate a bill but cannot close bills. That the person swiping the card had his name registered in the system that the manager's card can do all the functions of the cashier and the waiter. That she also gave the claimants option to admit the theft and sign a resignation to end the criminal process but they refused. She admitted giving 2nd claimant fare back to work after the police released. She also agreed that salaries were paid by payslips.

She confirmed that once a transaction is deleted by the manager's card it is completely removed from the system. She also admitted that CCTV cameras cannot identify bills. She contended that the claimants might have stolen the password from the manager because her investigations report showed that the claimants stole the money.

She admitted that the 3rd claimant and the cashier went to her office after release from the police and she told them to go home and wait until the investigations were over. She however did not know whether the police released the claimants and returned their bonds because the police had told her that the police file was still open.

She further admitted that before the claimants went home daily they first passed through her office or that of the other manager to verify if there were unpaid pending bills and if any was found, the waiter was made to pay or the same was debited against his service charge. According to her the theft occurred between 1st and 7th February 2012 and was done through closed bills and not pending bills. The stealing was for already paid bills whose money never reached the system. She admitted that the claimants were never given verbal or written warning before their dismissal.

After the close of the hearing the parties filed written submission. I have carefully read the pleadings and considered the evidence adduced plus the closing submission filed. The jurisdiction of the court over the dispute herein is not indispute because all the parties admitted that they were engaged in contracts of employment. The issues for determination are:

- 1. whether the claimants services were terminated wrongfully or unfairly by the respondent.**
- 2. Whether the reliefs sought ought to issue.**

In answer to the first issue the claimants allege unfair termination because the respondent did not prove the reason for their termination which was stealing of money. That they were never given a hearing before the termination and they were never paid their terminal dues. As a result they say that their prospects of future employment was prejudiced including the 3rd claimant whose new employment was terminated on ground of the alleged theft.

The respondent on the other hand alleged that she did investigations and discovered that the claimants were stealing money from the business. As a result she told her husband who caused the police to arrest the claimants. That her report was from CCTV camera in the business. She did not however replay the videos as evidence to the court. She did not also call any expert to confirm her investigations and the police did not act on the alleged theft case to prefer charges against them.

In my view the evidence of RW1 was not enough to prove the alleged theft. In her evidence, the claimants did not manipulate the system but the cashier who shared the money with the waiter. There was no expert evidence called to confirm RW1's evidence that the password alone without the manager's swipe card could manipulate the billing and payments on the system.

In my view the RW1 did not prove the reason for dismissal under Section 43(1) of the Employment Act. Even evaluated against subsection (2) of the foregoing section, which provide for subjective test of existence of a reason to dismiss to the individual employer, in my view that test has to be evaluated against the objective standard of a reasonable employer in the respondents circumstances. Thus a reasonable employer is expected to act in good faith and conscience.

It is that good faith and conscience that warrants an employer to follow fair procedure before terminating an employee's employment even on occasions where the law permits summary dismissal. Section 41 of

the Employment Act provides for the procedure to be followed before terminating an employee's service for misconduct. The employer must explain the reason for the intended termination to employee in the presence of a fellow worker or shop floor union representative of the employee's choice. That after the explanation the employer then gives the employee and his colleague of his choice accompanying him to make their defence which must be considered before the termination of the employment.

In this case that was never done. The RW1 did secret and layman's investigations only understood by alone and caused the arrest of the claimants and when they were released she just dismissed them without hearing their side of the story. To that extent this court finds and holds that the termination was substantially and procedurally unfair. The termination was also wrongful for being breach of the employment contracts because it was done without prior notice.

Having assessed the first issue in the affirmative, I now proceed to answer the issue of the reliefs sought. I will consider the law and the calculations made by the labour office as well as the respondent. I award the claimant prayer for notice pay only for one month based on their salary contained in their payslip produced as exhibits. The 1st and 4th claimants contract letters provided for one month notice or salary in lieu. The 2nd claimant was a casual for over two months and under Section 37 of the employment Act his contract required one month notice period before termination under Section 35 of the Employment Act. He pleaded and testified for one year contract but the respondent did not produce employment records to disprove that allegation. I will believe the claimants that they agreed on one years contract starting 1/5/2011.

The 3rd claimants contract did not provide for a notice period but I find that one month notice period reasonable to terminate his contract or salary in lieu. The claimants are also entitled to the 8 days worked in February 2012 before dismissal as prayed

I will also award the leave days as prayed and confirmed by exhibit 1 for the defence which showed that the 1st claimant has 20 accrued leave days, 2nd claimant 4 days, 3rd claimant 24 days and the 4th claimant 16 leave days. The claimants however maintained that they never went for leave for 2011 while some said they never went for any leave at all in their service. The burden to keep leave records and to produce them when challenged in court proceedings lies on the employer as per Section 74 of the Employment Act. Nothing was produced by her to prove leave application and approval with respect to the claimants. I will therefore reject the details of leave days as per the said defence exhibits and proceed to award the 28 days (4 weeks) leave for the year 2011/2012 period of the employee contracts.

I will also award the claimants the service charge due to them at the end of January 2012 at the rate of ksh.3700/ as indicated in the defence exhibit 1. I also award them overtime as prayed based on the calculations by the labour officer in his letter dated 6/6/2012. The defence did not deny the allegations that the claimants worked overtime.

I will not however award the claim for holidays and rest days worked for lack of particulars or the actual dates and days alleged to have been the rest or holidays worked. That claim is too general. I also find it irrational for some one to have worked for a whole year without rest day or holiday. If at all they did, it must have been voluntarily service of which it is unfair to raise the issue after the dismissal.

I will however award the compensation for wrongful and unfair termination. In so doing I will award the lost salary to the claimants who were serving on fixed term contract and order compensation of 6 months salary for the permanent employee (3rd claimant). I have awarded six months based on his own evidence. Whereby he told the court he had secured another waiter's job even before 12 months expired but was terminated due to reports from RW1.

In summary therefore, I enter judgment for the claimants against the respondent as follows.

**FIRST CLAIMANT**

- 1. one month pay salary in lieu of notice .....ksh. 8,476.00**

2. salary for 8 days worked ..... 2,260.00
3. 28 days leave for 2011/2012 ..... 7,910.95
4. overtime 26 hours per month X 10 months .....17,032.90
5. service charge ..... 3,700.00
6. lost income for the unexpired period of thereafter

contract upto 31/3/2012 ..... 14,409.20

53,789.05

**2ND CLAIMANT**

1. one month salary in lieu of notice ..... 7,475.00
2. salary for 8 days worked in February 2012 ..... 1,993.60
3. Accrued leave for 2011. 21 days ..... 5,232.50
4. Overtime for 26 hours for 9 months .....13,520.00
5. service charge for January 2012 ..... 3,700.00
6. lost income for the unexpired contract period ..... 19,933.30

58,267.75

The above compensation could have been higher had the claimant not insist that his contract was one year because the court could have awarded him 12 months gross salary for unfair termination.

**THIRD CLAIMANT**

1. one month salary in lieu of notice .....8,476.00
2. 8 days salary for February 2012..... 2,260.00
3. accrued leave for 2011 (28 days) ..... 7,910.95
4. overtime of 26 hours for 12 months ..... 20,439.60
5. service charge for January 2012 ..... 3,700.00
6. 6 months gross salary for unfair termination ..... 50,856.00

93,642.55

**FORTH CLAIMANT**

1. one month salary in lieu of notice ..... 8,050.00
2. 8 day salary for February 2012 .....2,760.00
3. 28 days leave for the contract period ..... 7,513.33
4. overtime of 26 hours for 9 months .....14,560.00
5. service charge for January 2012 ..... 3,700.00
6. lost income for the unexpired contract

period upto 30/4/2012 ..... 21,466.40

58,050.00

In total the respondent is ordered to pay a total of ksh. 263,749.35

The claimants will also have costs and interest.

Orders accordingly.

**Signed dated and delivered this 31st July 2013**

**ONESMUS MAKAU**

**JUDGE**