



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1278 OF 2012**

**RICHARD WAINAINA GICHOHI ..... CLAIMANT**

**VERSUS**

**SAMUJA QUALITY WINES & SPIRITS**

**T/A SHERATON ARCHADE CLUB ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MWANGI WAMBU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

This is a claim dated 26<sup>th</sup> July 2012 by the claimant Richard Wainaina Gichohi for unlawful termination and failure to pay terminal dues by the respondents herein. The respondents filed their response dated 7<sup>th</sup> November 2012 where they admit that the claimant was their employee but he was dismissed due to theft and other malpractices while in their employment. Both parties were heard with the claimant giving his own sworn evidence and the respondents called the 2<sup>nd</sup> respondents in evidence together with Nancy Gakuru. Only the respondents made their written submissions dated 3<sup>rd</sup> July 2013.

In the claim, the claimant stated that he was employed by the respondents in March 1998 as a barman at a salary of kshs.4, 000.00 per month and this was increased to kshs.8, 500.00 but no contract or letter of appointment was issued to him. That on 5<sup>th</sup> April 2012 he was terminated from his employment. That he had served for 14 years without any prior record of indiscipline or warning. That at the time of termination, he was not given a hearing and when he went to the labour officer his case was not resolved and the respondent refused to attend.

The claimant also stated that before his termination, he was not given any reason and thus the same was unlawful and he was not paid his dues relating to leave days taken and that despite being in the employ of the respondent, he was not registered as a member of NSSF and NHIF and thus claim service pay. He also claims reinstatement or compensation for unfair termination, notice pay, service, leave and housing allowance.

In evidence the claimant stated that he had worked for the respondents well until 5<sup>th</sup> April 2012 when he was called to the office and he was terminated without prior warning, notice or being given the reason or reasons for this termination. That his benefits were also not paid. The claimant confirmed that he is not desirous of pursuing the claim for reinstatement but wish to have his benefits paid. He thus claim notice pay, service pay, leave allowances and house allowance.

In cross-examination the claimant confirmed that he received payment vouchers for his salary and that on

6<sup>th</sup> July 2009 there was a memo relating to his duties on cash deficits where he had used respondent money for his own use without authorisation and that there was a verbal communication from the respondent before any letters or memo were issued.

He also admitted that on 28<sup>th</sup> November 2009 he received a letter relating to a bill of kshs.3, 473.00 that he was required to pay and he explained this as arising due to some customers taking alcohol and never paid their bills. That the manager thus issued the notice/letter to this effect. The claimant also confirmed that on 28<sup>th</sup> November 2011 he received another letter that noted that he had sneaked in a bottle of alcohol from outside the respondents business and that he failed to report to work in an issue that created conflict of interest which the claimant stated to have been false as he did not undertake anything that was in conflict with the respondents business.

However upon further examination, the claimant admitted that he operated another pub called Mooks Pub as its director and that this pub was adjacent to the respondents business and that whenever he was not on duty, he would drink at this pub and to him this was not in conflict with his employment nor was it theft.

That he was served with a letter of summary dismissal but he did not agree with it and therefore refused to accept it. That he was told to sign the letter as it would have amounted to a resignation. The claimant denied that he would siphon alcohol from Mooks Pub to the respondent business to make sales and noted that he only bought the business after he was terminated by the respondent and previously, he only went there as a customer since he was not allowed to drink while at work with the respondent.

In defence the respondents stated that the claimant was their employee but failed to work faithfully and diligently and that his employment was characterised by acrimony, unfaithful dealings and theft. That a similar claim was filed by the claimant before the labour officer, it was dismissed and the claimant appealed which appeal was dismissed for want of prosecution. That the respondents was unaware of the businesses that the claimant had established as a competitor while still being their employee and thus the claim herein is misplaced and lacks merit. That before his termination, the claimant was given notice, a hearing and thus not entitled to his claim.

In evidence the 2<sup>nd</sup> respondents stated that he is a director of the respondent and conversant with the issues herein. That the 1<sup>st</sup> respondent business was operated from Eastleigh but later moved to Zimmerman and in the process the respondents lost most of their documents which included the claimant contract and other records, of which the claimant had copies. That the respondents have 25 to 26 employees and all have letters of contract.

That the claimant had been served with several warning letters as he had opened a new business similar to the business of the respondent. He was called and this was addressed and resolved since this business was away from the respondent premises, and a warning was found to be enough. That later the respondent discovered that the claimant had opened another business adjacent to the respondent's premises, which business was similar to that of the respondents. That the respondents called the claimant to address this issues and a memo issued to him and other staff. That the same memo was pinned to the notice board.

That the respondent's manager Mr. Macharia had occasionally reported low sales especially when the claimant was on duty. The hard liquor was not selling and it was discovered then that the claimant had opened a bar, Mooks Pub next door to the respondent. That when the claimant was asked about this, he admitted that whenever he was off duty, he would be at Mooks Pub as a customer since he was not allowed to drink while at work with respondent. as a result the respondents did a memo to all his 3 barmen to the effect that they were not suppose to open business similar to that of the respondents as this would create a conflict of interest. That this memo was also circulated in meetings with all staff and the 2<sup>nd</sup> respondent got minutes of these meeting where it was noted that this memo was addressed as an agenda.

That on 6<sup>th</sup> July 2009 he wrote a warning to the claimant on missing cash after investigations revealed that that he had taken the cash for his own use. That his explanation that some customers had failed to pay

their bills was not plausible as he was aware of the respondent's policy that no customer was to take any drinks without payment.

Another letter was issued to the claimant addressing conflict of interest. That the respondents noted in this notice that the claimant was free to resign to attend to his private business but not run it while in the employment of the respondent as this would create a conflict of interest. That after these warnings the claimant was caught bringing in contraband materials for sale within the respondent business and when he realised that he had been noted by a colleague, he sneaked out and put his phone off and thus a warning letter was issued to him.

That on 5<sup>th</sup> April 2012 the 2<sup>nd</sup> respondent called the claimant to his office to address the fact that he was operating Mooks Pub a business in competition with the respondent and thus a conflict of interest that the claimant protested. He was warned but remained adamant and was thus dismissed. He refused to acknowledge the summary dismissal and the next he heard from the claimant was the summons to attend hearing before the labour officers where his case was dismissed and the subsequent appeal dismissed as well.

That the act of selling contraband and other liquor from outside the respondents business was theft as this affected the sales and there were losses every time the claimant was on duty. That this was noted and the claimant informed but he persisted and refused to change. He was issued with warning but failed to heed.

Nancy Gakumo, the respondents Supervisor also gave evidence and stated that the claimant was her colleague and since she was the one responsible for giving and recording leave due, she has had the records relating to the claimants. That the claimant had no outstanding leave days. The witness also stated that she noted that there were several complaints against the claimant after he opened Mooks Pub. That whenever the claimant was on duty, sales were low and he had been observed siphoning wines to the respondents business. That the claimant was called and verbally warned. That there were staff meetings where different memos and agenda were addressed especially the one on conflict of interest. The witness also stated that she noted that there were several warning regarding the claimant's performance, these warning letters were written from the respondent head office, delivered to the witness who ensured as the supervisor that they were delivered to the claimant.

Subsection 44(2) of the Act provides that subject to provisions of Section 44 of the Act which provides for summary dismissal, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee was entitled to by any statutory provision or contractual term. Summary dismissal is lawful only where the employer has complied with the provisions of Section 44 of the Act. Under Subsection 44(3), summary dismissal is tenable only where the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. Such conduct on the part of the employee is called gross misconduct under the provisions of Section 44(4) of the Act. If the ground or reasons for removal of an employee amount to gross misconduct, then the employer is entitled to dismiss the employee without giving a notice and a hearing as envisaged under Section 41 of the Act. However, if the reasons for removal are not proved to amount to gross misconduct, then the provisions of Section 41 of the Act will have to apply and the employee is entitled to the full protection of the Section. Thus, disputes of summary dismissal will always be subjected to the test of Section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct.

Accordingly, the court has taken the view that employers must stand advised that the discretion to terminate contracts of service on account of gross misconduct stand on a thin line and it is safer for the employer to follow the wider path of due process of notification and hearing under Section 41 of the Act to avoid the price of unfair termination just in case the reasons for removal do not crystallize into gross misconduct.

Under section 43 of the Act it was the obligation of the Respondent to prove that the reasons for terminating the employment of the Claimant amounted to gross misconduct. If the Respondent fail to discharge this obligation, then the court will make a finding that the termination was unfair.

I have carefully considered the pleadings, the evidence on record and submissions by the respondent and note the respondents notice to the claimant dated 7<sup>th</sup> May 2012 on summary dismissal which notes that;

***Re: Summary Dismissal.***

***In reference to several earlier warnings dated 6<sup>th</sup> Feb 2012 and 28<sup>th</sup> Nov 2011, you have continued to operate your @Mooks pub' business which we are aware you are using to conduct theft of stock from our bar counters where you have been assigned to by transferring your stocks to our counters and collecting money from our sales.***

***This is direct theft and conflict of interest and do hereby dismiss you summarily with effect from today 7<sup>th</sup> May 2012. You are requested to hand over all company belongings to the duty manager immediately.***

***We wish you all the best in your endeavours.***

...

I note the claimant has not contested this summary dismissal in any material way. His only issue was that he refused to take this letter since he did not agree with it. This in essence then is an indication that he read the letter of his dismissal, he understood it and since he was not in agreement, he decided to challenge it and thus proceeded to file his claim before the labour office and then in Court.

I note there are few instances where the Employment Act, 2007 allow summary dismissal. As noted above these are the grounds as noted under section 44;

**44. (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.**

...

Under section 44 (4) (g);

**(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.**

Therefore, on good grounds as set out above, an employer can summarily dismiss an employee. It was the evidence of the 2<sup>nd</sup> respondents that on several occasions the claimant was warned of his conduct, there were meetings as confirmed by the respondent witness Supervisor with the last warning issued to the claimant dated 6<sup>th</sup> February 2012. I note also that by the claimant admitting that on his days off he used to be at the Mooks pub as a customer, this could have created concern to the respondent. As a reasonable measure, the respondents addressed the issue of conflict of interest with the claimant and other employees. The fact that the claimant, soon after his termination he had purchased this new business is confirmation that the respondents suspicions and warnings were justified.

This does not mean that an employee cannot own a private business. Not at all. But the same cannot be done to the detriment of the current employer or in competition with the employer particularly where it is a term stipulated under the contract as between the parties noting the nature of employment. An employee who fails to give dedicated service to their employer due to other business interest is not stopped from tendering a resignation to take up this new employment. Otherwise, continued running of a separate business away from the employer is tantamount to breach of contract.

On a case for summary dismissal, notice pay is not dues and due to the breach of a fundamental part of

the employment contract as under section 44 of the Employment Act, service pay does not arise. These claims will therefore be declined. The respondent witness Nancy Gakumo confirmed that leave days were granted and the evidence before court confirm this. I will not grant in this regard. The claim for housing allowance only relates to 3 years, this is not outlined as to how it arose and for which years the claim is based on. This court will not be speculative and therefore not grant.

**I therefore find, on the basis of the summary dismissal, the claim has no basis and will dismiss the same with costs to the respondents.**

Delivered in open court this 10<sup>th</sup> day of July 2013.

**M. Mbaru**

**Judge**

In the presence of

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