



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 823 OF 2010

JANE SAMBA MUKALA CLAIMANT

VERSUS

OL TUKAI LODGE LIMITED RESPONDENT

JUDGEMENT

The claimant Jane Samba Mkala filed this claim on 23rd July 2010 claiming that she was unfairly terminated from her employment by the respondent Ol Tukai Lodge Limited. The respondent in their defence filed on 17th August 2010 admitted that the claimant was their employee but was terminated and given the reason for it and thus deny the claim. The claimant gave her sworn evidence while the respondent called Francis Kingoo in support of their evidence. At the close of the hearing both parties filed their written submissions filed on 16th and 17th September 2013 respectively.

In the claim, the claimant stated that on 30th June 2006 she was employed by the respondent as a Restaurant Manager at their Ol Tukai Lodge in the Amboseli Park where she served with diligence and received letters and certificates of commendation in appreciation of her work. On 15th March 2010 the respondent gave her two weeks' notice to terminate the employment effective on 31st March 2010 on account of what the respondent said was poor performance on the part of the claimant. On 24th May 2010 the claimant disputed the reason for termination as she never received any warning or performance appraisal. The respondent replied and reinstated that the claimant had been terminated due to incompetence and that there was an audit that disclosed the claimant to have committed fraud. This audit was never brought to her attention before the termination or given a hearing. She was terminated on 31st May 2010.

The claimant further stated that the respondent's action in terminating her employment was in breach of natural justice on the reasons that the basis of poor performance was not given, the alleged fraud and the audit were never brought to her attention, she was never given a hearing and she was never allowed to have any other dispute settlement mechanisms available before termination. She was of outstanding performance and the claim that she had performed poorly was not a fair reason to terminate her and thus unfair and unprocedural. Her claim is for a declaration that she was unfairly terminated, general damages for the unfair termination and costs of the suit.

In evidence the claimant stated that from 2006 she was working for the respondent at their Ol Tukai Lodge in Amboseli as the Restaurant Manager with duties to ensure provision of food and beverages to customers to their satisfaction. That her performance was never appraised throughout her service. On 15th May 2010 she was issued with a termination letter which was black without a logo or signature and was addressed to her and given to her by the Assistant Manager. She was accused of poor performance. She

went to the human resource manager and denied the allegations and in response she received an email where she was accused of fraud but the particulars were not given. She was never given an opportunity to defend herself. She was never charged with fraud or any criminal activity. She is now unable to get another job as her integrity has been questioned. Her claim is for compensation for the unfair termination.

Upon the respondent filing a Supplementary List of Documents, which contained a warning letter and an audit report, the claimant was recalled for more evidence in chief. She stated that the warning letter submitted by the respondent was not signed and the same was only produced in court after she gave her evidence. The two issues in the letter alleging that guests at the restaurant were not recorded is not true as the practice at the respondent Lodge was that once guests arrived they were recorded at the reception and not at the reception as the claimant was only overseeing the restaurant as the manger and gave the staff there guidance. All records were with the receptionists where all transaction was made and the front office staffs were aware of this procedure. On the second issue relating to the audit report, the claimant stated that this was never brought to her attention and the respondent left it for over 4 ½ years before showing the claimant. She was also never issued with any warning letter relating to any fraud until she filed this claim.

In cross-examination, the claimant confirmed that her role was not to record guests at the restaurant; she was given a naming list from the front desk with booked guests and ensured that those who came to the restaurant were served well. The 2009 audit was done while she was still employed by the respondent; she saw the Auditor Mr. Kingoo come in just like any other guest and never directed any questions to her with regard to the restaurant records or any inconsistencies.

In response, the respondent stated that the claimant was expected to perform her duties with the requisite degree of competence to the standards acceptable to the respondent and that the letter issued to the claimant in commendation related to a specific task as opposed to her general performance. The reason for termination was valid and justified as given in the letter of termination dated 24th May 2010. That on various occasions the claimant was notified of her poor performance and fraudulent acts which she continued to do unabated. The claimant was paid all her terminal dues and thus her claim that natural justice was breached is not a valid claim and all claims should be dismissed.

In evidence the respondent called Mr. Kingoo Francis an Auditor who works for the respondent since 2009 with duties to set policies and procedures, evaluate performance and investigate fraud as directed by management and to advice the Board on general management policies. In this case he investigated and did an audit of the Lodge where the claimant was working. This was routine done from time to time.

That the claimant as the restaurant manager, her duties were crucial to the respondent as she had to make sure all guests were satisfied and was to keep all records of such guests and the service rendered. The respondent being a hotel, accommodation, food and entertainment services were crucial. That from his investigations, he discovered that on 26th July 2009, some guests were attended at the respondent but were not recorded anywhere. He reported to the Operations Manager who instructed him to undertake more investigations as to how this had arisen. He found the records of the guests were missing and noting that for all the guests at the respondent lodge had to come into contact with Front Desk and Restaurant, there was a book kept to record all meals taken and placed at the restaurant noting the date, room number and any other detail to enable management identify the guests. That for 26th July 2009, the record had been removed.

He did an audit report and submitted to management in July 2009 and the gist of it was to inform management the lack of oversight in record keeping in the claimant's department. The report also covered other areas and not just the claimant's department. In the report findings, it is indicated that there were no records with regard to some guests and this was due to lack of control as no one had checked the record through it was the duty of the restaurant manager to keep this record as failure to keep it meant that the respondent was losing money. The guests were not charged and their presence was not recorded yet the claimant had to ensure proper tracking and recording of all guest activities. He reported the matter to the next in rank as part of management and the comments made in the audit report were directed to the person responsible to undertake that duty, which in this case was the claimant.

Mr. Kingoo further stated that he discussed the report with the claimant and she failed to explain as to why the record was missing. The General Manager, Mr. Gacheru also discussed the report with the General Manager who took it to the Directors where the witness appeared together with the Operational Manager, Mr. Kumar and discussed the report as the directors wanted a presentation from the heads of department.

That the audit details were not discussed with the claimant as audit rules dictate that it cannot be discussed with the affected person before the Heads of Departments had been consulted. It was however not a secret report and before the witness could make a report and presentation on it, he had to ensure that his facts correct and hence called the affected parties; the claimant included and interviewed them.

In cross-examination the witness confirmed that his report to respondent management is the one dated 16th June 2009 which is not signed but that he is the one who wrote the report and that it was more than just a report as it was 'special' as it was also an investigation to establish if on 24th July 2009 there were guests who were at the respondent lodge and their contact with several department. From his findings, he established that on this day of 24th July 2009, there were guests but they did not pay. Some guests are recorded at the reception for two nights on a full package but from the cashier's record, some did not pay yet they had not pre-paid before their visit. However the record indicating the guests who were booked and the ones who paid was not in court.

Assessment

The claim herein is based on unfair termination of the claimant by the respondent. The termination of the claimant instigated these proceedings. The termination notice submitted before court as issued to the claimant dated 15th May 2010 read in part as follows;

May 15th 2010

Christine Muhenge

P.O. box 45403-00100

Nairobi

Dear Miss Muhenge

REF: TERMINATION FROM EMPLOYMENT

We regret to inform you that your employment with Oltukai Lodge Limited is being terminated, effective 31 May 2010. Your termination is the result of your poor performance.

You have been warned on several occasions to improve in your performance by your immediate supervisor but all has been futile. Your failure to do so is the result to your termination.

...

This letter was directed to Miss Christine Muhenge. The claimant herein is Jane Samba Mkala. However from the statement of defence filed by the respondent they do not challenge this document and in paragraph 5 admit that the claimant's description of events that she was given a termination notice is correct and that they indeed received the claimant's letter dated 24th May 2010 disputing the termination. I take it then, the fact of termination of the claimant is agreed, the reasons for the termination related to the claimant's poor performance as under paragraph 6 of the defence and further to this poor performance was the reasons of fraudulent acts committed by the claimant.

In the event there was an error as to which termination notice related to the claimant, the duty rested on the respondent to provide the notice they did issue to the employee. The responsibility to keep work records for every employee is on the employer as under section 74 of the Employment Act.

Where the termination of an employee is based on the reasons of poor performance, the employer must comply with the provisions of section 41 of the Employment Act which require that such an employee should receive an explanation as to such a reason in the presence of another employee of their own choice.

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. [Emphasis mine].

This is important to note as where poor performance is shown to be a reasons for termination, the employer is placed at a high level of proof as outlined under section 8 of the Employment Act to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5 (8) (c) further outline the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.

Therefore it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee.

Where this procedure as set out under section 41 of the Employment Act is not followed, then a termination that arises from it will be procedurally flawed. It is procedurally irregular. this holding was as similarly held in the case of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration & others* (2006) 27 ILJ 1644 (LC) that when an employee is charged with poor performance, it must be clearly set out and differentiated between what is a misconduct and incapacity both conceptually and practically.

In this case, there are two intertwined issues that the respondent in their evidence seem to have against the claimant, that of poor performance and that of fraud. These reasons do not form what was brought to the notice of the claimant before her termination. The respondent witness stated that the records regarding the alleged fraud on the part of the claimant and that comprised his report to the Directors and the audit report could not be disclosed to the claimant as audit rules do not allow such disclosure. This evidence was neither here or there, if indeed the respondent officers noted that the claimant had committed any acts of fraud, and this being a very serious omission, they should have been guided by the applicable law in dealing with the issue and before the very harsh sanction against her, that of termination. Even with this not having been complied with, there is no indication or evidence submitted before this court that the respondent had taken any measure to fairly evaluate the claimant based on a policy document or any other practice that they had adopted to arrive at the decision that the claimant was of poor performance.

The respondent having no evaluation measure for performance, then cannot be said to apply a measure for

the same in this case. It has no basis. Majority of employers have now adopted various tools for performance appraisal every year to address matters of employee performance. This is set out as an elaborate system where an employee is given a chance for self evaluation, then peers are invited to evaluate and a supervisor is given a chance to give their evaluation and comments. Where there are weak areas identified following this evaluation, the employee is given work target with a time plan on how to address these weaknesses. A follow up review is done and where such an employee is still found to be below the set criteria, then a warning and eventual termination may arise. Where such an employee show improvement, they are given a chance to demonstrate that indeed given time and the necessary support, they can give their best. This would constitute what is procedurally and substantively fair to an employee.

In this case, the respondent failed to consider or apply the appropriate test for judging the procedural and substantive fairness of a poor work performance termination with no objective criteria that provided for dismissal or termination as a reasonable sanction for failure to meet performance standards where the employee had been made aware of the standard and was given a reasonable opportunity to improve. No appraisal system was demonstrated to exist. There respondent did not have a criteria to use on any employee to assess their performance.

Beyond these processes, the mandatory requirement to inform the claimant about the reason or reasons for her termination in the presence of another employee of her own choice was not complied with. This then renders the procedure used by the respondent to terminate the claimant procedurally unfair.

Where an employee is unfairly terminated, this court will award compensation.

Remedies

The respondent in their submission stated that under the claimants employment contract there was a provision that upon successful completion of the probation period and confirmation of employment, either party could terminate the contract by way of notice or by payment in lieu of such notice. This is position does not affect the compensation due to the claimant in the finding that the procedure used in her termination was fundamentally flawed and therefore unfair. I note the claimant served the respondent for over 4 years and had there been a fair system to address any poor performance she would have had a fair chance in keeping in employment. The claimant was paid all her dues save for the unfair termination. She has been out of employment since June 2010, she has not secured alternative employment and in assessing the compensation due, I will put these into consideration. I will award compensation at 10 months' salary based on the claimant's last salary as noted on her pay slip being kshs.50,833.77 all amounting to Kshs. 508,337.70.

In conclusion, judgement is hereby entered for the claimant as against the respondent in the following terms;

- 1. A declaration that the termination of the claimant was procedurally unfair;**
- 2. Compensation awarded at Kshs.508, 337.70;**
- 3. The respondent to meet 50% of the claimant's costs.**

Delivered in open Court this day of 30th September 2013.

M. Mbaru

Judge

in the presence of:

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