



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO.87 OF 2012

(Originally Nairobi Cause No. 1587 of 2011)

SHADRACK KIOKO

CLAIMANT

v

FLORIMON LIMITED

RESPONDENT

JUDGMENT

Introduction

1. Shadrack Kioko (Claimant) was summarily dismissed by Flomiron Ltd (Respondent) through a letter dated 14 November 2006. On 22 September 2011 he filed a Memorandum of Claim praying that the summary dismissal be declared null and void and seeking, mainly 3 months' salary in lieu of notice, general damages, loss of earnings and benefits and costs.

Claimant's pleadings and case

2. The Claimant pleaded that he was employed by the Respondent on 1 May 1994 in the gaming department and that by 2006 his gross salary had risen to Kshs 18,866/-.
3. The Claimant further pleaded that the Respondent wrongfully and unjustifiably summarily dismissed him through a letter dated 14 November 2006 despite having served the Respondent honestly and diligently for over 12 years. The dismissal was actuated by malice and against the principles of natural justice and was in breach of contract as a result of which he suffered loss and damages.
4. During testimony the Claimant produced his employment letter dated April 1994 (Exh. 1) and stated that he was employed initially in Nairobi. After about 5 year's service he was suspended and thereafter transferred to Mombasa in 1999.
5. On arrival in Mombasa, the Claimant wrote a letter dated 6 May 1999 applying for employment with Florida Casino, Mombasa (Res Exh 1).
6. On 11 November 2006 at around 2.00am, the Claimant stated, while on duty he was assigned to a table as a dealer where he worked for 3 hours rather than the normal 20 minutes, unlike his colleagues. At some point the Respondent's Inspector, one Christine inquired from him why he had overstayed on the table and subsequently Christine informed a Manager called Juma who got him replaced. When he went for a break the Manager followed him and expressed his unhappiness for his complaining and took him to the Personnel Manager's office.
7. The Claimant further testified that the Personnel Manager told him he had 'found me' and I should write a statement. The Claimant wrote a statement (Exh. 2). After writing the statement the Claimant was not assigned any further duties that night.
8. In the morning the Claimant was issued with a letter dated 11 November 2006 suspending him for

- three days. When he returned after the three days suspension the Claimant was issued with the summary dismissal letter dated 14 November 2006 (Exh 4).
9. The Claimant was not happy and contacted his shop steward and discussions were held and an appeal made but the Respondent rejected the appeal and the summary dismissal was sustained.
 10. The Claimant then sought legal advice and letters were exchanged (Exhs. 10 and 11).
 11. In cross examination the Claimant admitted he was paid all his wages from 1994 to 1999, had received previous warning letters, and stated that he was not paid his November 2006 wages for 13 days worked. He further stated that he had done nothing wrong and he was forced to write a statement apologizing.
 12. The Claimant further confirmed writing an application letter for employment to the Respondent dated 1 June 1999 and receiving an appointment letter dated same day.

Respondent's pleadings and case

13. The Respondent filed a Response on 3 November 2011. In the Response, the Respondent pleaded that it employed the Claimant from 1 June 1999 and that the Claimant was summarily dismissed for gross misconduct and insubordination.
14. The Respondent further denied that the dismissal was actuated by malice or that the Claimant served it diligently with an impeccable record. It further denied breach of contract and rules of natural justice or that the Claimant had suffered loss and damages.
15. The Respondent also pleaded that this Cause was *res judicata* because of Mombasa CMCC No. 1566 of 2008 between the same parties.
16. The Respondent called one witness, Obadiah Kariuki, its Human Resources Manager.
17. The witness stated that Florida Casino Ltd is the trading name of the Respondent and that he had worked with the casino from 1982 as a dealer before rising through the ranks.
18. He further stated that the Claimant was employed on 1 June 1999 and not April 1994 and was trained in Mombasa before being posted to Nairobi in 1994 through a letter issued by the witness.
19. Previous to this he stated that the Claimant worked with Florida Casino operated by Equatorial Sun Ltd from 1994 to 1999 when he was terminated.
20. The witness termed the Claimant's work performance as fair and that he excelled in handling games. He produced Claimant's leave records from 2000 to 2006 (Respondent's Exhs. 2 to 9).
21. On the dismissal of the Claimant, the witness stated that he was dismissed on 14 November 2006. This was after he got information about the incident from the Casino Manager and received a copy of the statement by the Claimant and recommended summary dismissal of the Claimant for raising issues in the gaming room which disturbed subsequent draws where total concentration is required.
22. According to the witness, the Claimant had summoned the pit boss and complained that he had been on the table for longer than expected by the procedures. The pit boss called the Manager and an exchange of words ensued with the Claimant. Later the Claimant apologized in writing.
23. On affording the Claimant an opportunity to be heard, the witness testified that this was not done between 11 and 14 November 2006 and that meetings held between the Claimant's union KUDHEIHA and the Respondent did not solve the dispute.
24. Further the Claimant's dues totaling Kshs 16,051/- and certificate of service have never been collected.
25. The witness also stated that the Claimant's letter of appointment did not provide for termination and that the same was captured in a Collective Bargaining Agreement between KUDHEIHA and the Respondent.
26. In cross examination the witness stated that a dealer should serve a table for 20 minutes, that the Respondent is the registered name but the trading name is Florida Casino and that he trained the Claimant in 1994. He further stated he was informed the Claimant was on the table for more than an hour and that the Claimant was dismissed for not raising a complaint at the right time and place. The Claimant had not been issued with any previous warning letters.
27. The Claimant was a member of the NSSF. The witness concluded by stating that the Claim should be dismissed.
28. Claimant should have filed submissions on or before 9 August 2013. Respondent's submissions therefore should have been filed latest by 23 August 2013.

29.Submissions were not filed within the agreed timelines.

Questions for determination

30.Arising from the pleadings and evidence the questions emerging for determination are the applicable law, when was the Claimant employed by the Respondent, whether the summary dismissal was justified, whether the Claim is res judicata and if not appropriate relief.

Applicable law

- 31.The Claimant was dismissed in 2006. The primary statutes dealing with employment at that time were the Employment Act, cap. 226 and the Trade Disputes Act, cap 234 (both repealed in 2008 and 2007 respectively).
- 32.There is evidence from both sides to suggest that the Claimant was a member of Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) and that the Union and the Respondent had a Collective Bargaining Agreement.
- 33.The Union was involved in the dispute at some point. Therefore the appropriate statutory framework for dealing with the dispute should have been the Trade Disputes Act (repealed) and the elaborate mechanisms outlined therein. This was not done. Recognition agreements and Collective Bargaining Agreements also set out dispute settlement mechanisms. It appears these mechanisms were not properly or completely utilized.
- 34.Under the Trade Disputes Act (repealed), a dispute could not be referred to the Industrial Court directly by the parties. A report of a trade dispute had to be made to the Minister within certain timelines.
- 35.Following upon the parties failing to invoke the dispute resolution mechanisms in the Trade Disputes Act (repealed) and the Collective Bargaining Agreement, this claim falls for determination under the Employment Act, cap 224(repealed).
- 36.The Employment Act (repealed) did not incorporate the rules of natural justice as part of an employment contract. The parties desiring the rules of natural justice had to expressly make it part of the contract. This was not the case in the claim under consideration and therefore I will not determine the claim on the basis of breach of rules of natural justice.
- 37.Section 17 of the repealed Employment Act provided for summary dismissal and under what circumstances an employee could dispute whether the facts relied on could justify summary dismissal.
- 38.I will therefore determine this Cause primarily by placing reliance on section 17 of the repealed Employment Act, the contract itself and principles of common law developed in cases of breach of employment contract.

When was Claimant employed by Respondent

- 39.The Claimant asserted he was employed by the Respondent in 1994 and produced a letter of appointment dated April 1994 on the letter head of Florida Casino, Nairobi to confirm this.
- 40.The Respondent's case was that it employed the Claimant effective 1 June 1999. In support of this position reliance was placed on an application for employment letter written by the Claimant on 6 May 1999 and letter of appointment indicating effective date of employment as 1 June 1999 (Respondent's Exh. 2).
- 41.Further the Respondent contended that prior to the Respondent coming into the scene (it did not exist in 1994), Florida Casinos were owned by a company called Equatorial Sun Ltd.
- 42.The Respondent's witness Mr. Obadiah Kariuki stated he was the Respondent's Group Human Resources Manager and testified that he had worked with Florida Casino from the year 1982!
- 43.There was no evidence on how the Respondent came to take over and operate the Florida casinos both in Nairobi and Mombasa. Was there a transfer of business? What of liabilities and assets and employees. As between the Claimant and the Respondent, the Respondent was in a peculiar position to lay out the facts before the Court. Mr. Kariuki was the Human Resources person even in 1999.
- 44.The Claimant's employment letter of April 1994 was on the letter head of Florida Casino. The

letter of appointment of 1999 was on the letter of Florida Casino Ltd. The leave application forms were on the letter head of Florida Casino and Night Club. The suspension letter was on the letter head of Florida Casino.

45. Considering the position of the Claimant, lay man and the position of the Respondent's witness, the Respondent should have clarified exactly the correct position. At what point did Equatorial Sun Ltd leave. At what point did Florida Casino Ltd come in. Similarly at what point did Flomiron Ltd come into the picture.
46. I am therefore satisfied that the Respondent should be legally liable for any relief/dues which the Court may grant the Claimant from 1994.

Whether the summary dismissal was justified

47. I now have to determine whether the facts presented before me justified the summary dismissal of the Claimant.
48. The contract of 1999 simply provided that employment can be terminated immediately for any of the following reasons, *drunkenness on duty, lateness or absence from duty without good reason, failure to obey reasonable order from Head of Department or Management and lastly neglect in performing any work which should have been performed or carelessly and improperly performing duties assigned.*
49. The summary dismissal letter gave the reason for the dismissal as using insulting language against a manager which amounts to gross misconduct as stipulated under section 17 (d) of the repealed Employment Act.
50. The dismissal of the Claimant was therefore founded on breach of a statutory clause.
51. The question of use of insulting language is one of fact. In testimony of both parties, I listened keenly but the Court was not given details of the Manager who was insulted or which insulting words were used.
52. The nearest suggestion that something happened is the statement written by the Claimant (Exh. 2). I cite it verbatim

DIRECT STATEMENT FROM SHADRACK KIOKO CONCERNING CASINO INCIDENT

at about 1.45 am I used wrong words to the Manager after I had stayed on the table for a longer time. There was some misunderstanding, and some blames, from both sides. Because of what happened on the table, and because of staying for that time I unconditionally used the words its as (though the manager was after me or not happy about me) and this is what the manager....about me; but for sure I didn't see it, and I can say it was my first bad word to come out of my mouth. It was a slip of the tongue. I am sorry to the manager for that mistake.

53. For what it is worth, this statement to my mind is an apology letter. An apology by itself is part of a disciplinary process. It appears the Respondent did not accept the apology. But the apology letter itself does not indicate what insulting words were used against which manager. It behoved the Respondent to justify its action. It did not provide sufficient material to enable me determine that its action to summarily dismiss the Claimant for using insulting language constituted justifiable or lawful grounds for the dismissal. The dismissal was not justified or lawful.

Whether the Claim is res judicata

54. In the Response, it was pleaded that the Claim herein was *res judicata* because there was another suit, Mombasa CMCC No. 1566 of 2008 between the same parties.
55. No reference was taken further of this plea though a copy of Summons to Enter Appearance and Complaint were annexed to the Memorandum of Response.
56. It was not suggested that the suit pending before the Magistrate's Court had been heard and determined on the merits and in any case, it is the Industrial Court which now has exclusive jurisdiction over employment and labour disputes. If the suit has not been determined the parties

know the legal options available them.

Appropriate relief

- 57.The Trade Disputes Act (repealed) provided for reinstatement and compensation of wages not exceeding twelve months wages where dismissal was found to be wrong. The Claimant decided not to pursue his claim under the mechanisms provided for under that Act and I cannot therefore make an award based on the provisions of the Act.
- 58.The terms of a Collective Bargaining Agreement are by law incorporated into individual contracts of employment. The Claimant and his legal advisers did not deem it useful or necessary to produce a copy of the relevant one in Court. I do not know what the Claimant would have been entitled to under the Collective Bargaining Agreement.
- 59.The letter of appointment issued to the Claimant did not provide for termination through notice. And where a contract does not provide for notice period there are numerous decisions from the Court of Appeal that the Court should consider what would constitute reasonable notice.
- 60.The Claimant served the Respondent for some 12 years without any warnings issued to him. He sought Kshs 56,598/- being three months salary in lieu of notice.
- 61.Considering the circumstances of this case, it is my considered view that a reasonable notice would be the equivalent of three months wages which I assess at Kshs 56,598/-
- 62.The Claimant had also sought general damages and loss of earnings and benefits. But no material was placed before me to warrant the grant of these prayers or indeed whether they are awardable for breach of employment contract.

Conclusion and Orders

- 63.In conclusion I do find and hold that the summary dismissal of the Claimant was not justified and unlawful and I award him the equivalent of three months wages which I assess in the sum of Kshs 56,598/- .
- 64.The parties failed to file submissions as agreed and therefore I make no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 27th day of September 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Shimaka instructed by Marende & Birir Advocates for Claimant

Mr. Jengo instructed by J.M Njengo & Co Advocates for Respondent