



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1197 OF 2011

JOB LUBANGA ASIEMA.....CLAIMANT

VS

THE KIVI MILIMANI HOTEL.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim against the Respondent which was brought by way of a Memorandum of Claim dated 14th July 2011 is for unfair and unlawful termination of employment. The Respondent filed a Statement of Response on 4th August 2011 and the matter was heard on 31st May and 5th July 2013 with Mr. Rabala appearing for the Claimant and Mr. Osiemo appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called its Personnel Manager, Jane Achieng Mayi. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent on 1st September 2009 initially as a Porter at a monthly salary of Kshs. 12,222. The Claimant testified that he was later promoted to the position of Receptionist although he did not have a letter to confirm this. The Claimant's employment was subject to a probation period of 3 months which was extended for a further 3 months.
3. On 27th January 2011, the Claimant was on duty at the Reception. At 2.00 pm, some VIP guests checked into the Hotel and at around 4.00 pm, the guests called the Reception from their room reporting that some of their personal belongings had been stolen. The Claimant reported the incident to the Manager on duty and at around 7.30 pm, the Claimant and 5 of his colleagues were arrested and booked at Kilimani Police Station. The Claimant was suspended on the same day and on 11th April 2011, his employment was terminated. Enclosed in the letter of termination was a cheque for Kshs. 73,768.50 in favour of the Claimant.
4. It was the Claimant's case that his employment was terminated without notice and without lawful cause and that he was not given an opportunity to defend himself. He claimed the following:
 - a. Outstanding leave days and leave allowance accruing up to 11th April 2011;
 - b. Salary for the remainder of his employment period ;
 - c. Allowances and benefits taking into account promotions and salary increments for the remainder of his employment period;
 - d. General damages for wrongful and unlawful termination of employment;
 - e. Severance pay;

- f. Costs and interest.

The Respondent's Case

5. In its Statement of Response, the Respondent admitted having employed the Claimant as a Porter but denied that the Claimant was a dedicated employee pointing out that his probation had in fact been extended to allow him time to improve on his performance. The Respondent denied that the Claimant was arrested at its behest adding that the Claimant had not been absolved from wrongdoing. It was the Respondent's case that the Claimant's dismissal was lawful and that he was paid all his dues. Jane Achieng Mayi, the Respondent's Personnel Manager told the Court that the Claimant's employment was terminated because of lack of trust.

Findings and Determination

6. The main issue for determination in this case is whether the termination of the Claimant's employment was fair and lawful. In determining the lawfulness and fairness of a termination of employment, the Court is called upon to inquire into the reason(s) for the termination as well as the procedure adopted in effecting the termination.
7. Section 43 of the Employment Act, 2007 provides that:
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***
8. Section 45 (2) of the Act goes on to provide that:
- (2) A termination of employment by an employer is unfair if the employer fails to prove:-***
- (a) that the reason for the termination is valid;***
- (b) that the reason for the termination is a fair reason-***
- (i) related to the employees conduct, capacity or compatibility; or***
- (ii) based on the operational requirements of the employer and***
- that***
- (c) That the employment was terminated in accordance with fair***
- procedure.***
9. It was the Respondent's case that the Claimant's employment was terminated because of his involvement in theft at the Hotel. Jane Achieng Mayi testified that the Respondent terminated the Claimant's employment because there was lack of trust. From the evidence on record, it would appear that the Respondent suspected that the Claimant alongside other employees were involved in the theft. The Claimant's suspension letter provided *inter alia*:

“due to a police case under investigation and you are one of the suspects in the case of a guests’

room robbery on the 27th January, you will be suspended from duties for 14 days.” (sic)

10. According to this letter, the Claimant's suspension was to run until the outcome of the police investigations. It would appear that the investigations took long prompting the Respondent to write to the Officer Commanding Station (OCS), Kilimani Police Station asking for a conclusive report in order to allow determination of the fate of the staff under suspension. On 3rd March 2011, the OCS, Kilimani wrote to the Respondent stating that the evidence adduced thus far could not link either of the suspects to the crime since they had been randomly picked for interrogation.

11. There is no evidence of any further progress on the police case. It

seems to me therefore that the Respondent terminated the Claimant's employment on the basis of suspicion. The question then is whether this suspicion was a valid reason for termination of employment within the meaning of Section 45(2) of the Employment Act, 2007.

12. In the case of *David O. Owino Vs Kenya Institute of Special*

Education [2013] eKLR this Court held that:

“Acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”

13. The effect of this is that the Respondent could legitimately have instituted its own internal disciplinary proceedings against the Claimant in spite of the status or outcome of the investigations by the Police. For some reason however, the Respondent appears to have abdicated this responsibility to the Police. The letter of termination dated 11th April 2011 did not give any reason for the termination.

14. Further, the recommendation letter issued to the Claimant on 10th May 2011 made no suggestion that the Claimant had any disciplinary or performance issues. In fact this letter stated expressly that the Claimant was hardworking, honest and responsible. There was no mention of any wrongdoing on the part of the Claimant. It is my conclusion therefore that the Respondent failed to demonstrate any valid reason for termination of the Claimant's employment.

15. The next question is whether the Respondent followed due process in effecting the termination of the Claimant's employment. The Claimant was suspended on 27th January 2011 pending investigation and on 11th April 2011, he was terminated. An employee on suspension has a legitimate expectation that they will be given an opportunity to rebut the findings of any investigation before any further action is taken against them. Moreover, Section 41 of the Employment Act, 2007 sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity. There is no evidence that the Claimant was ever afforded any opportunity to defend himself as required under Section 41 of the Act and I therefore find that the termination of his employment was unfair for want of due process. Overall, I find that the termination failed both the substantive justification and procedural fairness test.

16. In its written submissions, the Respondent advanced the argument that the Claimant was on probation and that consequently, the reliefs sought were not available to him. From the record, the Claimant's probation was extended for 3 months effective 10th June 2009. The extended probation

would have ended in September 2009 and since the Claimant's appointment letter dated 1st September 2009 referred to confirmation of appointment, the logical conclusion is that the Claimant was in fact confirmed in September 2009. The argument that he was on probation therefore falls.

17. The Respondent further submitted that since the Claimant acknowledged receipt of the letter of termination which contained a discharge clause, he could not bring any action against the Respondent on account of his employment. This Court has had occasion to pronounce itself on the effect of forms of discharge executed by employees in the case of ***Simon Muguku Gichigi Vs Taifa SACCO Limited [2012]eKLR*** as follows:

“An employer cannot...circumvent their obligation to an employee by producing a form of discharge executed by the employee. If the law is not followed, no form of discharge can cure the irregularity.”

18. In the instant case, the termination had many irregularities which cannot be cured by the Claimant's statement that he had no further claims to make against the Respondent. That settles the issue of liability and the Claimant's right to bring this claim.

19. I will now address myself to the specific reliefs sought. The Claimant asked the Court to grant him salary as well as allowances and benefits taking into account promotions and salary increments for the remainder of his employment period. To grant this prayer would amount to an order for specific performance which is a prayer to be granted in very exceptional circumstances which have not been established in this case. This prayer is therefore declined. I however award the Claimant the equivalent of eight (8) months salary in compensation for unfair termination.

20. The claim for severance pay which is applicable in cases of redundancy does not apply in this case and is dismissed. The Respondent produced leave records showing that the Claimant took 26 days' leave in 2010. Additionally, the tabulation of the Claimant's final dues included pay in lieu of 26 accumulated leave days as at the date of termination. The claim for leave therefore fails and is dismissed.

21. Ultimately I award the Claimant the sum of Kshs. 131,104 being the equivalent of eight (8) months' pay. In calculating this award, I have adopted the figure of Kshs. 16,388 being half of the figure of Kshs. 32,775.40 reflected as 2 months' pay in the Respondent's tabulation of the Claimant's final dues dated 11th April 2011.

I award the costs of this case to the Claimant.

Orders accordingly

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF NOVEMBER 201

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JUDGE

In the Presence

.....Claimant

.....Respondent