



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 974 OF 2016**

**TIMOTHY STEPHEN MBOGHO.....CLAIMANT**

**VERSUS**

**KENYA SAFARI LODGES AND HOTELS LIMITED....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by Timothy Stephen Mbogho against his former employer, Kenya Safari Lodge and Hotels Limited. The claim is documented by a Statement of Claim dated 9<sup>th</sup> December 2016 and filed in court on even date. The Respondent filed a Reply on 14<sup>th</sup> March 2017 to which the Claimant responded on 6<sup>th</sup> April 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Eunice Nzilani.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 11<sup>th</sup> November 2013, in the position of Food and Beverage Manager, at Mombasa Beach Hotel. The Claimant held this position until 12<sup>th</sup> October 2015, when he was appointed as Acting General Manager.

4. On 17<sup>th</sup> December 2015, the Claimant was appointed to the substantive position of General Manager on a three year contract which was to end on 16<sup>th</sup> December 2018. The contract of employment was renewable subject to satisfactory performance.

5. The Claimant earned a monthly salary of Kshs. 328,514 made up as follows:

- a) Basic salary.....Kshs. 217,800
- b) House allowance.....65,714
- c) Other remuneration allowances.....45,000

6. On 5<sup>th</sup> April 2016, the Claimant was sent on compulsory leave for a period of 30 days. The leave was extended on numerous occasions until the Claimant was finally terminated on 12<sup>th</sup> August 2016.

7. The Claimant pleads that he was subjected to unfair administrative action by the Respondent's Board of Directors that culminated in unfair and unlawful dismissal as follows:

- a) He was sent on compulsory leave for a period exceeding 30 days which was later extended indefinitely, in violation of the Terms and Conditions of Service of the Respondent, the provisions of the Constitution of Kenya and the Employment Act, 2007;
- b) He was subjected to intimidation and threats by members of the Board of Directors of the Respondent, which prejudiced him greatly;
- c) The Board of Directors thereafter, vide letter dated 16<sup>th</sup> June 2016 sent show cause letter to the Claimant giving him only 2 days to respond;
- d) The Respondent thereafter, vide letter dated 6<sup>th</sup> August 2016, informed the Claimant of a formal hearing to be held at the Mombasa Beach Hotel on 11<sup>th</sup> August 2016 at 9.00 am;
- e) In clear violation of the provisions of Section 41 of the Employment Act, the Claimant was not accorded the right to have another employee representative present during the explanation;
- f) Vide letter dated 12<sup>th</sup> August 2016, the Claimant was dismissed from employment.

8. The Claimant avers that he was denied a fair, just and due process. He adds that the issues raised by the Respondent in the show cause letter were brought to the attention of the Board of Directors through the KSLH Business Plan requesting for additional financial injection by the shareholders.

9. The Claimant seeks the following remedies:

- a) Monthly salary for the remaining period of the contract  
from the date of termination to completion date.....Kshs. 6,534,000
- b) 3 months' salary in lieu of notice.....653,400
- c) Unpaid leave pay.....123,420
- d) Gratuity at the rate of 31% payable  
on the contract period (3 years).....2,430,648
- e) Allowances for remainder of the contract:
  - (i) House allowance.....1,971,420
  - (ii) Other remuneration allowance.....1,350,000
- f) General damages for lost income and livelihood, unfair and unlawful termination
- g) Certificate of service
- h) Costs plus interest

**The Respondent's Case**

10. In its Reply dated 14<sup>th</sup> March 2017 and filed in court on even date, the Respondent admits that the Claimant was appointed as General Manager by letter dated 17<sup>th</sup> December 2015 having previously worked as Food and Beverage Manager and Acting General Manager. The Claimant's contract as General Manager was for a period of 3 years running from 17<sup>th</sup> December 2015 to 16<sup>th</sup> December 2018.

11. The Respondent further admits that by letter dated 5<sup>th</sup> April 2016, the Claimant was sent on compulsory leave for a period of 30 days. The Respondent however denies that the compulsory leave was extended and states that the Claimant was merely requested to remain away from work pending the Board's resolution.

12. The Respondent denies that the Claimant was in any way subjected to unfair administrative action by the Board of Directors. The Claimant was therefore not unfairly or unlawfully terminated.

13. The Respondent states that the Claimant was issued with a show cause letter dated 16<sup>th</sup> June 2016 to which he was required to respond within 2 working days. The Respondent maintains that the Claimant had adequate time to respond.

14. The Respondent further states that the Claimant was invited to a hearing by letter dated 6<sup>th</sup> August 2016. The Respondent adds that after according the Claimant a fair hearing and completion of investigations, the Claimant's employment was terminated by letter dated 11<sup>th</sup> August 2016.

15. The Respondent states that during his tenure as General Manager the Claimant:

- a) Flouted the provisions of the PPDA 2005/PPAD 2015;
- b) Authorised cash purchases beyond the set limit, thus exposing the Respondent to high cost of goods;
- c) Issued cheques to suppliers and creditors without sufficient funds in respective accounts thereby occasioning the Respondent to incur penalties for unpaid cheques;
- d) Operated the Respondent's account overdrafts beyond the approved limits without approval from the Board;
- e) Misused the discretionary entertainment account; and
- f) Failed to remit staff statutory and payroll deductions between October 2015 and February 2016.

16. The Respondent maintains that it was necessary to send the Claimant on compulsory leave to allow ample investigations. Upon finalization of investigations, the Claimant was informed of the allegations raised against him and was asked to show cause why disciplinary action should not be taken against him.

17. The Respondent avers that proper legal procedure as laid down in the Employment Act, 2007 was followed in terminating the Claimant's employment. Moreover, the Claimant was paid all his terminal dues.

### **Findings and Determination**

18. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case for unlawful and unfair termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

19. The Claimant's employment was terminated by letter dated 11<sup>th</sup> August 2016 stating as follows:

*“Dear Mr. Mbogho,*

**RE: TERMINATION OF EMPLOYMENT**

*Reference is made to your contract of employment as the General Manager KSLH dated 17<sup>th</sup> December 2015 and our letter dated 5<sup>th</sup> May 2016 (KSLH/HRD/CLTM/0416).*

*On 16<sup>th</sup> June 2016 (KSLH/HRD/CLTM/0616) you were issued with a show cause letter on procurement, financial and human resource irregularities and your response received on 20<sup>th</sup> June 2016.*

*The Board having reviewed your written and verbal response in its meeting of 11<sup>th</sup> August 2016 at the KSLH offices in Mombasa noted that, as the General Manager KSLH, you never took any action against procurement, financial and other irregularities in the organization. In view of the above, the board has found you culpable of poor performance.*

*Consequently, this letter serves to convey the decision of the Board, that effective 12<sup>th</sup> August 2016 your contract of employment with Kenya Safari Lodges and Hotels Ltd has been terminated in accordance with Clause 13 of your contract letter.*

*Please note that your termination has been carried out under the following terms:-*

***1. Notice***

*You will be paid 3 months’ pay in lieu of notice in according (sic) with Contract Letter Clause 13(b) and KSLH Terms and Condition Clause 8.1*

***2. Annual Leave***

*A computation of your pending Annual leave days will be done and communicated to you.*

***3. Terminal Benefits***

*i. Your final dues will be processed and paid subject to submission of a*

*fully signed staff clearance form.*

*ii. You will be expected to pay the company any liabilities such as advances, imprests, IOUs and balance in debtors accounts there be any confirmed (sic) by the Finance Manager.*

***Gratuity***

*4. You will not be eligible to payment of gratuity of 31% of your basic salary for the contract period. As per Clause 10 of your contract letter and Clause 7.9 of KSLH Terms and Conditions of service.*

***Company Property and Staff Clearance***

*5. You will be expected to present a fully signed clearance form to the office of the Ag. General Manager. You may contact the undersigned if you need any clarification on the foregoing. Your certificate of Employment will be issued within 2 weeks following submission of your clearance form.*

*Yours sincerely,*

*Kenya Safari Lodges and Hotel Ltd*

(Signed)

Said M. Ali

**Chairman of the Board of KSLH**

20. In its pleadings filed in Court the Respondent accuses the Claimant of several acts of misconduct and poor performance. In her testimony, the Respondent's Human Resource Manager, Eunice Nzilani gave a detailed account of the disciplinary process availed to the Claimant prior to the termination.

21. Nzilani however also states that at the time his employment was terminated, the Claimant was still on probation. This is an important detail which caught the attention of the Court. The letter appointing the Claimant to the position of General Manager is dated 17<sup>th</sup> December 2015. Clause 5 thereof states as follows:

*“Probation: During the first 6 months of this appointment, you will be on probation during which period either party may terminate this employment by giving one (1) month notice or one month pay instead. The Board reserves the right to constantly review and evaluate your performance during this period. Confirmation to this position will be subject to your performance. Since the same period will serve as induction and Orientation period”*

22. The Claimant's termination took effect on 12<sup>th</sup> August 2016. A quick tabulation reveals that by this time, the Claimant had served close to eight (8) months as General Manager. This was evidently beyond the probation period stated in his letter of appointment and it cannot therefore be said that at the time of termination he was still on probation.

23. That settled, I will now proceed to examine the disciplinary process prior to termination. On 5<sup>th</sup> April 2016, the Claimant was sent on compulsory leave for a period of 30 days. The compulsory leave was to end on 4<sup>th</sup> May 2016 but on 20<sup>th</sup> May 2016, the Respondent wrote to the Claimant asking him to remain away from his work station until 31<sup>st</sup> May 2016. On 30<sup>th</sup> May 2016, the Respondent wrote to the Claimant once again asking him to stay away until 30<sup>th</sup> June 2016.

24. On 16<sup>th</sup> June 2016, the Claimant was issued with a show cause letter and was required to respond within two days. The letter further also notified the Claimant that he had been suspended pending disciplinary hearing. The Claimant responded to the show cause letter on 20<sup>th</sup> June 2016 and on 6<sup>th</sup> August 2016 he was invited to a disciplinary hearing scheduled for 11<sup>th</sup> August 2016.

25. Section 43 of the Employment Act, 2007 provides as follows:

***43.(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.***

26. It is now firmly settled that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment. In ***Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR***, the Court of Appeal affirmed this position by citing with approval the following excerpt from the ***Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 16(1B) para 642***:

***“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”***

27. From the evidence on record, it would appear that there were genuine concerns regarding the general performance of the Respondent's business during the tenure of the Claimant as General Manager. Applying the range of reasonable responses test, it seems to me that these concerns constituted a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act.

28. It is also on record that the Claimant was taken through a disciplinary process. The Claimant contends that he was not given adequate time to prepare his defence and that he was not accompanied at the disciplinary hearing. There was however no evidence that he asked for more time to either prepare his defence or to find someone to accompany him at the hearing. The Claimant held a very senior position and the Court was unconvinced that he would be intimidated to the level where he would be unable to ask for a fair hearing.

29. The Court however took issue with the prolonged period of compulsory leave visited on the Claimant. One of the procedural fairness requirements under Section 41 of the Employment Act is that the employer complies with its own internal disciplinary rules. Clause 5.2 (a) of the Respondent's Terms and Conditions of Service expressly provides that compulsory leave shall not exceed thirty (30) days.

30. No good reason was advanced as to why the Respondent violated its own internal rules. For this reason alone the Court finds and holds that in handling the Claimant's case, the Respondent failed to comply with the procedural fairness requirements set out under Section 41 of the Employment Act.

### **Remedies**

31. In light of the above finding, I award the Claimant three (3) months' salary in compensation. In making this award, I have considered the Claimant's length of service and the finding that the Respondent had a valid reason for the termination.

32. From the evidence on record, the Claimant was paid notice and leave pay. These claims are therefore spent. The Court found no basis for the claims for salary and allowances for the remainder of the contract and gratuity which are anticipatory in nature. There was also no basis for the claim for general damages.

33. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 985,542 being 3 months' salary in compensation for unfair termination of employment.

34. This amount will attract interest at court rates from the date of judgment until payment in full.

35. The Claimant is also entitled to a certificate of service plus costs of the case

36. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 1<sup>ST</sup> DAY OF NOVEMBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Muganda h/b Mr. Marete for the Claimant

Mr. Mugambi for the Respondent



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