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Case Action:	Judgment
Judge:	Onesmus Ndambuthi Makau
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Advocates:	-
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**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 278 OF 2014**

**FAITH MUHACHE KINGI .....CLAIMANT**

**VERSUS**

**SAROL HOLDINGS LIMITED .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for ksh. 507,500 being employment dues plus compensation for unfair termination of the claimant's employment by the respondent on 22/3/2014. The basis of the suit is that the reason for termination was not valid and the procedure followed to terminate the contract was not fair.

2. The respondent has denied liability and averred that the dismissal of the claimant was justified because she was guilty of gross misconduct including theft and fraud which led to a loss of ksh.50000.

3. The suit was heard on 25/9/2014 when the claimant testified as CW1 and the defence called Hassan Olad and Ibrahim Abdi Ali as RW1 and RW2 respectively. In addition, the counsel for the two parties agreed to the admission of the written statement of Mr. Andrew Musyoka Mutangili and Rod Charters dated 10/7/2014 and 14/7/2014 respectively admitted as part of the defence evidence.

**CLAIMANT'S CASE**

4. CW1 was employed by the respondent as an Administrator from 20/6/2013 vide written contract dated the same day. Her salary was ksh.35000 per month. CW1 worked continuously until 24/3/2014 when she received a letter dated 22/3/2014 terminating her services. The reason for the termination according to CW1 was that she received payment of ksh. 50000 from client and stole it. She was also accused of dishonestly taking money meant for supply of water that was never delivered. The termination letter denied her terminal dues accusing her of being untrustworthy.

5. CW1 denied the alleged theft of ksh.50000 received from a client. She also maintained that she paid for the water supplied and attached all the receipts to the vouchers and kept them in the respondent's office. She worked for a total of 9 months. She denied that her contract was not for a fixed term. CW1 explained that her problems with the respondent started in January 2014 when RW1 became her new supervisor and recommended that CW1's salary be reduced and CW1 to protest. RW2 then started to give conflicting instructions to the ones CW1 gave to other workers. On 24/3/2014 CW1 was served with a termination letter. That came a few days after resuming duty from one week off. CW1 denied ever being given any notice for a hearing before the termination. The letter was therefore a

shocker to CW1 because it described her as a thief. She sought audience with RW1 but he evaded her forcing her to serve a demand letter on 21/5/2014. The respondent replied through her lawyers offering to pay salary for March 2014, one month salary in lieu of notice plus leave for 2 weeks less ksh.50000 allegedly stolen by CW1. She contended that if truly there was evidence that she stole any money from the respondent, she would have been reported to the police and charged. She prayed for salary in lieu of notice, salary for March 2014, leave earned plus 12 months salary for unfair termination.

6. On cross examination by the defence counsel, CW1 explained that she was serving 3 sister companies including the respondent as per the contract dated 20/6/2013. She further explained she holds a Bachelors of Arts Degree in sociology but no training in accounts. She admitted that her job title was Accounting and Administration with duties including salary payment and HR management. She was assisted by RW2 while RW1 was the overall boss assisted by other directors. She denied pocketing ksh.50000 from clients. She further denied that there times when clients stayed in the hotel and failed to pay. She maintained that she offered to pay the ksh.36000 bill left by a client just to have the matter settled and have her dues paid. She however denied liability for the said bill of Kh.36000 left by the client. CW1 admitted receipt of the respondents email dated 12/12/2013 which complained about CW1's poor performance.

7. CW1 maintained that her contract was for an indefinite term but terminable by notice. She further maintained that if for any wrong doing she was to be dismissed, she was entitled to a hearing before the dismissal. She explained that she was never given such hearing. CW1 admitted that a client called Garney Abdulkadir ran away from the hotel one day before his scheduled checkout date and left an unpaid bill of ksh.36000. CW1 denied liability for the said date contending that she had no control over the client. CW1 further contended that RW1 told her to go home for one week from 13/3/2014 saying that Garney was a suspected terrorist and as such she should stay away because she had telephone conversation with him (Garney). According to her RW1 told her that the one week was an off. According to CW1, Mr. Garney was a frequent guest of the respondent hotel. CW1 resumed work on 20/3/2014 and worked upto 24/3/2014 when she was given the termination letter. She admitted that on 13/3/2014, RW1 asked her to explain the unpaid bill by Mr. Garney. There was no complaint about her performance on that day and the meeting was not about her termination. She denied the alleged theft and the responsibility for the disappearance of Mr. Garney. According to CW1, RW1 gave her to the one week off for her security because according to RW1, Garney was a terror suspect.

## DEFENCE CASE

8. RW1 is one of the directors of the Respondent. When he took over the management of the hotel from Mr. Rod Charters, RW1 found CW1 working at the respondent's Paradise Apartments. According to RW1, CW1 was the manager, Administrator and the accounting officer of the premises. On 8/3/2014, RW1 was informed by RW2, via phone call, that a client called Garney had left the hotel before paying his bill of ksh.50000. On the same day RW1 met with RW2, CW1 and Omar Salat and asked CW1 why she released the client before payment of bills. RW1 explained that CW1 admitted the mistake and offered to pay the outstanding bill. On 9/3/2014 RW1 gave CW1 one week off to pave way to investigations. After the one week off the respondent terminated CW1's services for gross misconduct which had caused a loss of ksh.15 million to the respondent. RW1 further explained that CW1 went to collect her salary on 29/3/2014 but he told her to wait for the Directors decision. He produced a copy of invoice dated 3/3/2013 for ksh.27000 which Garney left unpaid. RW1 maintained that he did not wish to continue employing CW1 after losing trust in her.

9. On cross examination by the claimant's counsel, RW1 confirmed that he come to paradise Apartments in January 2014. He explained that he lost trust in the CW1 because she was allowing customers to use the apartments without paying. He however admitted that he had only one case of that nature and no other against CW1. He maintained that the respondent lost ksh.15 million but he did not produce any proof. He admitted also that he was not accusing CW1 of the said loss. He admitted that he was not present when the guest left without paying their bills. RW1 admitted further that he terminated CW1 fur suspecting her for the lost money. RW1 admitted that he had no proof of the lost money. RW1 further admitted that although he cited the reason for the dismissal in the letter, he never gave CW1 a hearing prior to the dismissal because he did not know that requirement. He also never paid her any dues. He maintained that RW2 reported the theft issue to the police. RW1 contended that Mr. Garney was a terror suspect and as such he did not blame CW1 for not pursuing him for the outstanding bill. He admitted that CW1 was not present when the terror suspect left the hotel without paying his bill.

10. RW2 is the current manager of the Paradise Apartments since 22/1/2014. He contended that CW1 was the Administrator and his junior. On 6/3/2014 RW2 received a call from Andrew Musyoka, a security guard at 1.00 am informing him that a guest had left at midnight without payment with orders from CW1. On the same morning, Rw2 followed up the report and confirmed that the guest left an outstanding bill of ksh.47000. When RW2 asked CW1 about the matter, she told him that the money was to be paid by Mpesa. He suspected that CW1 was paid the money by Mpesa after the guards detained the guests for 40 minutes before CW1 authorized them to release the guests.

11. RW2 reported the matter to Rw1 and the two met in the same morning with Mr. Salat Omar. On 25/3/2014 RW2 reported the matter to the police but later RW1 told him to stop the police case.

12. On cross examination by the claimant's counsel RW1 confirmed that he was absent when the guests left the hotel. He also explained that the guests left their luggage in the hotel saying that they were going to Malindi and come back. He admitted that he had an invoice of Ksh.27000 only which was not paid by Garney. He denied attending the meeting between CW1, RW1 and Omar saying that he was told to stay away. He maintained that he reported the fraud involving the loss of Ksh.47000 to the police as the manager but RW1 stopped him from pursuing the case with the police. He maintained that CW1 is the one who authorized for the release of the guest but RW1 did not have any prove that CW1 actually made the alleged phone call directing for the release of the guests. RW2 did not also have any proof that CW1 received any money from the clients in issue.

13. By his written statement dated 14/7/2014 rod charters confirmed that CW1 worked for the respondent form 20/6/2013 to 22/3/2014. He further confirmed that RW2 was assisting CW1 in the operations. Mr. rod blamed CW1 for failing to perform her duties as a required and failing to account for money she collected. He explained that CW1 was dismissed for theft of ksh.50000 after being given a chance to defend herself.

14. Andrew Musyoka Muntangili also filed a statement dated 10/7/2014. He was the security guard at the respondents hotel. On 6/3/2014 2 guests of similar origin came in using a Tuk tuk at midnight and shortly thereafter tried to leave the hotel using the same Tuk tuk and without any luggage. Andrew reported to CW1 about the matter through phone and CW1 called the guests and discussed about payment with the guest who promised to pay by Mpesa. After one hour, CW1 called Andrew telling him to release the guests. The guests left and never returned to the hotel. Andrew then reported the issue to RW2.

15. After the close of the hearing both parties filed written submission of which the court has carefully

considered in this judgment.

## ANALYSIS AND DETERMINATION

16. There is no dispute that CW1 was employed by the respondent from 26/6/2013 to 24/3/2014 when she was dismissed for gross misconduct involving fraud and theft of the respondent's money. There is also no dispute that CW1 was never accorded any hearing before the dismissal and she was also not paid her dues on separation. The issues for determination are whether the termination of CW1's employment by RW1 was unfair and whether the reliefs sought ought to issue.

### Unfair termination

17. RW1 admitted on cross-examination that he never accorded CW1 any hearing on the misconduct she was accused of in the letter of termination. That was a material breach of Section 41 and 45 of the employment Act. Section 45 of the Act provides that, termination of employment is unfair unless the employer proves that he followed a fair procedure before terminating the contract. On the other hand Section 41 of the Act provides in mandatory terms that before an employer dismisses an employee for misconduct under Section 44 of the Act, he shall first accord the employee an oral hearing in the presence of another employee of the accused employees choice and in a language he understands. Consequently, the termination was rendered unfair by the said affront to Section 41 and 45 *supra*.

18. In addition the court is of the view that the termination was substantially unfair because no valid and fair reason was proved by the employer to justify the dismissal. All the defence witnesses did not have any evidence to prove that CW1 received ksh.50000 from Mr. Garney and stole it. In any case the witnesses contradicted on the actual bill that Mr. Garney left outstanding. Only ksh.27000 was contained in an invoice produced by RW1 whose author is unknown. There is further no evidence to prove that CW1 authorized Andrew to release Mr. Garney on the night of 6/3/2014 after receiving payments by Mpesa . It is also admitted by the defence witnesses that CW1 was not present when the guests left without payment. In this courts observation, the defence was not specific whether CW1 allowed guests to leave without pay or that she was paid by Mpesa and failed to account for the money. The burden of proving the reasons for the termination is upon the employer under Section 43 and 45 of the employment Act. Consequently, the court finds and holds that the termination of the claimant's employment on 22/3/2014 was unfair within the meaning of Section 45 of the Employment Act.

### Reliefs

19. Under Section 49 of the said Act, an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. She is therefore awarded ksh.35000 being one month salary in lieu of notice. She is also awarded ksh.28000 being salary for the 24 days worked in March 2014 plus Ksh.17500 in respect of leave days outstanding on pro-rata basis. CW1 will also get ksh. 315000 being gross salary for 9 months as compensation for unfair

termination. In awarding the last item the court has considered the fact that the termination was unfair both substantially and procedurally. The court also considered that only 9 months have lapsed after dismissal and as such the maximum compensation of 12 months should not reasonably issue.

## DISPOSITION

20. For the aforesaid findings and reasons, judgment is entered for the claimant in the sum of ksh.395,500 plus costs and interest.

Orders accordingly.

**Dated, signed and delivered this 19<sup>th</sup> December 2014.**

**O. N. Makau**

**Judge**



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