



**Diani Reef Beach Resort & Spa v Mutinda (Appeal E024 of 2023)
[2024] KEELRC 1951 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1951 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E024 OF 2023**

**M MBARŪ, J
JULY 4, 2024**

BETWEEN

DIANI REEF BEACH RESORT & SPA APPELLANT

AND

MUSAL MUTINDA RESPONDENT

*(Being an appeal from the judgment by Hon. J. B. Kalo delivered
on 16 February 2023 in Mombasa EMELCR No.45 of 2020)*

JUDGMENT

1. The appeal arises from the judgment delivered on 16 February 2023 in Mombasa CMELRC No.45 of 2020. The appellant being aggrieved is seeking the orders and judgment be set aside with costs.
2. The respondent was the claimant before the lower court and claimed that on 4 November 2003, he was employed by the appellant on several temporary contracts. He was confirmed as a housekeeping attendant on 1st January 2005 and then promoted to supervisor from 1st May 2006 and held the same position until 1st September 2017 earning Ksh.75, 000 per month. On 16 January 2020, the appellant issued him with notice of summary dismissal on the grounds that they had noted that on 1st January 2020, he had moved linen from the laundry irregularly without authorization. The appellant filed a criminal complaint at Diani Police. The respondent was arrested and then suspended on 11 January 2019.
3. Upon investigations of the matter, the police found no crime had been committed by the respondent. Within the summary dismissal letter, the appellant had claimed that he had failed to respond to the disciplinary process show cause or attend the hearing. This was alleged to be gross misconduct contrary to Section 44 of the *Employment Act*. Upon summary dismissal, the respondent was paid Ksh.468, 947.10 in terminal dues for;



4.
 - a. Salary up to 16 January 2020 Ksh.40,000;
 - b. 31 leave days Ksh.85,000;
 - c. 2 public holidays Ksh.5,000;
 - d. Pro-rata leave travelling allowance Ksh.7,062;
 - e. Gratuity for 11 years at 15 days salary ksh.525, 000.
5. Despite the payment of terminal dues, the respondent's case was that there was unfair termination of employment and false arrest following a complaint by the appellant which damaged his reputation. He was labelled as a thief. The summary dismissal was unjustified and hence claimed the following terminal dues;
 - a. Two months' notice pay Ksh.150,000;
 - b. 12 months compensation Ksh.900,000;
 - c. Service pay for 17 years Ksh.735,576;
 - d. Acting allowances from December 2014 to 2018 Ksh.45,000 for 51 months Ksh.2,295,000;
 - e. House allowance for 11 months Ksh.66,000;
 - f. Damages for defamation and false arrest; and
 - g. Costs.
6. In response, the appellant made mere denials concerning the claims made save that employment was terminated upon due process. Before the summary dismissal, he was taken through the disciplinary process and was paid terminal dues in full.
7. The trial court in judgment held that there was unfair termination of employment and awarded the claimant the following;
8.
 - a. 10 months' salary in compensation Ksh.700,000;
 - b. one-month notice pay Ksh.70,000;
 - c. service pay Ksh.735,576;
 - d. Costs and interests.
9. Aggrieved, the appellant filed this appeal on 13 grounds. The appellant challenged the findings by the trial court that the disciplinary process leading to termination of employment was not fair by failing to appreciate that the respondent declined to participate in any disciplinary process. The appellant court did not issue notice for a disciplinary hearing after the respondent waived his right to a hearing and hence the trial court failed to appreciate that it acted in good faith and terminated employment for a valid reason.
10. Other grounds for appeal are that the trial court failed to appreciate that the decision to terminate the employment of the respondent was within the management prerogative and the court should not interfere unless there was an illegality. Upon following the laid down procedures, the appellant was



justified in terminating employment. The award of 10 months in compensation failed to take into account the provisions of Section 49 of the *Employment Act*, 2007 (the Act) and was excessive.

11. The award of service pay did not take into account that the respondent fell within the provisions of Section 35(6) of the Act. The trial court applied selective evidence and occasioned a miscarriage of justice.
12. Both parties attended and agreed to address the appeal by way of written submissions.
Only the appellant filed written submissions.
13. The appellant submitted that the provisions of Section 45 of the Act require the court to address the question of whether there is an unfair termination of employment to consider the reasons and procedures gone into by the employer in reaching such a decision. In the case of *Kenya Union of Commercial, Food and Allied Workers Union v Vishnu Enterprises Cause No.2020 of 2016*, the court held that termination of employment is unlawful where the employer fails to prove the reasons leading to termination of employment.
14. In this case, the respondent declined to go through the disciplinary process. The trial court failed to take this into account and hence arrived at a wrong decision. In the case of *Godfrey Barasa Ochieng v Security Guards Services Limited* [2022] eKLR the court held that the court should scrutinize the procedures adopted by the employer in addressing the misconduct of the employee. Under Section 41 of the Act, when the respondent was invited for a disciplinary hearing he declined to attend. There was a valid reason leading to summary dismissal due to theft. There was a genuine and valid justification for termination of employment under Section 43 of the Act. The appellant called Jotham Mwangombe who gave detailed evidence on the circumstances leading to termination of employment but his evidence was not taken into account. The laundry supervisor, Johnson Nyamweya testified to stock taking and found discrepancies. The losses were reported to the police who conducted investigations and the respondent was arrested. The respondent neglected duty leading to loss of property and hence of gross misconduct liable to termination of employment and his terminal dues were paid in full including notice pay.
15. The appellant submitted that the award of notice pay, compensation and service pay should be set aside with costs.

Determination

16. This is a first appeal. The court is mandated to look at the entire record, re-assess and make its conclusions. However, take into account that the trial court had the opportunity to hear the witnesses.
17. On 16 January 2020, the appellant dismissed the respondent from his employment on the grounds of gross misconduct. The reasons were that he had irregularly been moving the food and beverage linen from the laundry to the discarded linen store. He did so without the movement form and he failed to follow procedure. He was issued with a notice to show cause to explain his conduct but he declined to respond. This amounted to gross misconduct.
18. Before the summary dismissal, the respondent was suspended to allow for investigations.
19. Through notice dated 8 January 2020, the respondent was invited to show cause and the allegations made against him were outlined. He had 48 hours to respond.
20. On 10 January 2020, the respondent replied to the notice to show cause that;

I Musa Mutinda, I can't seat for them hearing of show cause letter issues now.



Till then all investigations will be out and get results.

21. On the same day, 10 January 2020, the appellant responded to the respondent that he had refused to respond as required per company policy and a decision would be taken including summary dismissal.

Indeed, on 20 April 2022, the respondent testified in court that;

I was issued with a show cause letter dated 8/1/2020 and 10/1/2020. I did not respond to the letter. I gave my reasons for not responding to the show cause letter. The reason was the matter was under police investigation and I did not want to give self-incriminating information. I did not participate in the disciplinary proceedings for that reason. ..."

22. Before termination of employment, the law requires the employer to comply with the provisions of Sections 41 and 44 of the Act. Even in a case of alleged gross misconduct, the employer has the legal duty to ensure the employee is issued notice and allowed to attend and respond.
23. However, an employee who is invited to address a show cause notice on allegations of gross misconduct and fails to do so in essence frustrates the disciplinary process initiated by the employer. A show cause notice being for the stated purpose is meant to have the employee respond and upon the response, the employee can be found innocent and reinstated back to work or the motions of Section 41 of the Act addressed.
24. An employee who squanders the opportunity to address a show cause notice by taking the view that he can only respond once the criminal process is complete only acts to negate his employment. The employee, through his conduct, frustrates his employment. The employee, who is given a fair chance to give his side of the story, opts and takes the view that he will not do so until other secondary processes are complete and cannot blame the employer who proceeds to terminate his employment. In the case of *Daniel Otieno Okun v Kenyatta University* [2020] eKLR, the court held that;

An employee who squanders the chance given by the employer to attend a disciplinary hearing and defend himself pursuant to Section 41 of the Act cannot turn around and claim there was no due process. The employee should seize the opportunity given and attend and urge his case and demand to be either given better particulars or evidence. To keep off is conduct that is tantamount to an admission of guilt allowing the employer to terminate employment."

25. The employee should seize the moment and chance given by the employee to defend his employment. Upon suspension to allow for investigations, the next step that the respondent should have expected to be called to address was to respond to the notice to show cause. In *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust* [2017] eKLR the court held that where an employee squanders the opportunity granted for a fair hearing, the employer is justified to terminate employment for gross misconduct as envisaged under Section 44 of the *Employment Act*, 2007. The court held;

Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing."

26. The employer cannot be held at ransom by the employee who takes a view that he can only attend and respond to a notice to show cause under his terms and conditions. An employer has the right and prerogative to organize its business and is justified to call the employee to answer to alleged gross



misconduct. This position is aptly captured in the case of *Energy Regulatory Commission v John Sigura Otido* [2021] eKLR the court held that;

An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”

27. The findings by the trial court that the due process was not properly addressed were in error given the provisions of Section 41 of the Act. The refusal to attend disciplinary proceedings, whatever views the respondent had, he should have willingly obliged. The fear that he would incriminate himself is far-fetched. The threshold for disciplinary cases is proven within the provisions of Sections 43 and 45 of the Act whereas matters with the police require proof beyond reasonable doubt.
28. The respondent frustrated his employment and invited the notice of summary dismissal upon himself. The claim for notice pay and compensation is awarded in error.
28. On the award of service pay, the learned magistrate analyzed this claim with a finding that there was no evidence that Section 35(6) of the Act applied to the respondent to remove him from the benefits of Section 35(5) of the Act.
29. Service pay is due to an employee under the provisions of Section 35(5);
 - (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
30. However, these provisions must be read together with Section 35(6) of the Act for one to fully appreciate how the payment of service pay should accrue;
 - (6) This section shall not apply where an employee is a member of—
 - (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund.
31. Where an employee is registered with a pension scheme, has a CBA providing for payment of gratuity, has any other service pay scheme established by the employer, or is registered to NSSF, he is not entitled to service pay.
32. On 14 December 2004, the appellant issued the respondent with a letter of appointment spelling out his employment terms. Part of the terms and conditions included a house allowance, share of service charge, deductions and remittances to NSSF and NHIF, PAYE remittances and all legal requirements. These terms are carried forward in each contract and review the employment terms issued by the appellant.
33. The respondent was removed from the provision of service pay. He did not submit any CBA or other contract that allocated service pay as a separate benefit.

The award of service pay is not justified.



34. On costs, the appeal is with merit. The respondent acknowledged that he was paid his terminal dues immediately upon termination of employment. This placed the appellant in good standing in court under the provisions of Section 45(5) (a) to (c) of the Act. The court in assessing whether employment is fair or unfair is required to take the following into account;
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- (b) the conduct and capability of the employee up to the date of termination;
- (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
35. To this extent, the appellant took the respondent through the due process, his conduct was investigated and established that he was required to attend and show cause why a disciplinary hearing should not be conducted against him but he declined to attend or address. The appeal is found with merit and costs should be awarded.
36. Accordingly, the appeal is allowed. Judgment in Mombasa CMELRC No.45 of 2020 is hereby set aside in its entirety. Costs awarded to the appellant.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

