



Kenya Hotels and Allied Workers Union v Panari Hotel (Employment and Labour Relations Cause 880 of 2019) [2024] KEELRC 2009 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2009 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 880 OF 2019**

AN MWAURE, J

JULY 24, 2024

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION CLAIMANT

AND

PANARI HOTEL RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 23rd December 2019.

Claimant's Case

2. The Claimant avers that it is a duly registered trade union under section 19 of the *Labour Relations Act*, 2007 mandated to represent employees in the hospitality sector, whereas, the Respondent is duly registered company whose core business involves food, beverage and accommodation.
3. The Claimant avers that the grievants are former employees of the Respondent who were unfairly terminated as follows: Peter Mutinda on 31/07/2018; Vincent Nyangau Manoti on 27/08/2018; and Job Keitany Kandie on 27/08/2018.
4. The Claimant avers that Peter Mutinda was unfairly terminated on grounds that he was engaged in loose talk with a guest, Anne Adams against an unknown guest. Vincent Manoti and Job Kandie were terminated for allegedly being suspected for the loss of guest money.
5. The Claimant avers that the grievants were employed by the Respondent as follows: -
 - a. Peter Mutinda employed on 01/06/2006 as head porter, later promoted to switch board supervisor in November 2011 earning a basic salary of Kshs 31,211 and house allowance 8,894;



- b. Vincent Manoti employed on 01/10/2011 as a room steward earning a basic salary of Kshs 14,938 and house allowance 8,503; and
 - c. Job Kandie employed on 01/04/2009 as a room steward earning a basic salary of Kshs 14,938 and house allowance 8,503.
6. The Claimant avers that the grievants had a clean record with the Respondent prior to their termination and they together with other employees exercised their constitutional freedom to affiliate to the Claimant union.
 7. The Claimant avers that the grievants were deducted agency fee by the Respondent in favour of the Collective Bargaining Agreement (CBA) entered by the parties.
 8. The Claimant avers that prior to the termination, Vincent Manoti and Job Kandie were arraigned at the police station and no charges preferred against them leading to their release.
 9. It is the Claimant's case that prior to the termination, the grievants were suspended; ordered to show cause; and subjected to a hearing. However, no evidence was adduced against them regarding the allegations by the Respondent.
 10. The Claimant avers that two of the grievants, Vincent Manoti and Job Kandie appealed against the termination which the Respondent did not respond to.
 11. The Claimant avers that the grievants reported their case to the union on 27/08/2018 and 09/09/2018 and it promptly reported the matter to the Ministry of Labour & Social Protection for conciliation.
 12. The Claimant avers that after deliberations by the appointed conciliators, the Respondent's decision was faulted. However, the Respondent has declined to implement the conciliator's findings and recommendations prompting it to file this claim.

Respondent's Case

13. The Respondent avers that Peter Mutinda's employment was terminated on 31/07/2018 upon complaint of Dr. Beatrice Muganda who stated that Peter had disparaged her character to a fellow guest, Ann Adams by stating she was a drunkard who drunk a lot in the evening with other delegates. Dr. Muganda's was apprehensive that if such false allegations reached her office, she would be deemed as wasting donor resources and termination of her employment.
14. The Respondent avers that Peter Mutinda was issued a show cause notice (NTSC) on 20/07/2018 hence given an opportunity to defend himself. Mr. Mutinda responded on 27/07/2018 and thereafter invited to a disciplinary hearing on 30/07/2018.
15. The Respondent avers that the disciplinary committee concluded that Mr. Mutinda was guilty of the charges levelled against him and pursuant to this finding, his employment was terminated on 31/07/2018.
16. Being dissatisfied, Mr. Mutinda escalated the matter to his trade union by registering the complaint which was made with the Ministry of Labour & Social Protection and a conciliator was appointed.
17. In respect to Vincent Manoti, the Respondent avers that he was suspended from employment after a guest who stayed in room 907 complained that his money was stolen and he had access to the visitor's room on the particular date. Pursuant to the complaint, the grievant was directed to write a statement concerning the complaint.



18. The Respondent avers that Mr. Manoti was suspended from employment vide a letter 13/08/2018 to allow for further investigations. He was issued a NTSC dated 16/08/2018 which he responded in written statement on 20/08/2018 where he admitted that he went to room 907 at around 1800 hrs.
19. The Respondent avers that Mr. Manoti was invited for a disciplinary hearing vide a letter dated 20/08/2018 which was held on 23/08/2018. Upon conclusion of the disciplinary hearing, the grievant was summarily dismissed from employment on 23/08/2018 but paid all payments due to him.
20. The Respondent avers that the grievant being dissatisfied with the decision exercised his right of appeal vide a letter dated 30/08/2018. He attended the appeal hearing on 26/09/2018 at the General Manager's office which was unsuccessful and his dismissal upheld.
21. Being dissatisfied with the decision of his appeal, the grievant through the trade union registered a complaint with the Ministry of Labour & Social Protection and a conciliator appointed.
22. The Respondent avers that the grievant, Job Kandie faced similar charges as Vincent Manoti together they were the room stewards the day money was stolen from a visitor's luggage in room 907.
23. The Respondent avers that the grievant responded on 09/08/082018 regarding the loss of money and he was suspended from employment on 13/08/2018 to facilitate further investigations.
24. It is the Respondent's case that the grievant was issued a NTSC dated 16/08/2018 which he responded vide a written statement dated 20/08/2018. He was subsequently invited for a disciplinary hearing on the same day, which was held on 23/08/2018.
25. The disciplinary committee recommended his summary dismissal and issued a summary dismissal letter dated 27/08/2018 and paid all payments similar to termination of employment.
26. The Respondent avers that the grievant appealed the decision vide a letter dated 30/08/2018, however, the appeal was unsuccessful and the grievance was escalated to the trade union who lodged the complaint with the Ministry of Labour and Social Protection who appointed a conciliator.
27. It is the Respondent's case that it followed due procedure and gave the grievants opportunities to be heard hence cannot be accused of unfair termination.

Evidence in Court

28. The Claimant first witness, Peter Mutinda Mutune (CW1) adopted his witness statement and list of documents dated 23/12/2019 as his evidence in chief and exhibits.
29. During cross-examination, CW1 testified that he only seeks 12 months compensation for unlawful dismissal as all his dues were paid by the Respondent.
30. CW1 testified that he received a NTSC, however, he did not appear before a disciplinary hearing as it never took place. He was invited for the hearing, he went to the hotel but did not attend.
31. CW1 testified that he did not appeal the decision as his termination was all planned by the committee.
32. CW1 testified that he responded to the NTSC but he did not indicate what evidence was not given to him.
33. CW1 testified during re-examination that he responded to the NTSC on 24/07/2018 and received the invitation to the disciplinary hearing. Vide an email dated 28/07/2018, he asked for evidence to enable him defend himself but the email was not responded to.



34. CW1 testified that he did not attend the disciplinary hearing as he was not given proof of his disciplinary case.
35. The Claimant's 2nd witness, Job Keitany Kandie (CW2) avers that he was a casual labourer and adopted his witness statement and list of documents dated 23/12/2019 as his evidence in chief and exhibits.
36. CW2 testified that he was issued a NTSC and he attended the disciplinary hearing. He was shown some footage during the hearing but was not supplied with either the police or supervisor report.
37. CW2 testified that the Respondent was paid 27 days service pay, his salary and pending leave days, but was not paid gratuity for 9 years up to date.
38. CW2 testified that he attended the disciplinary hearing and was not treated fairly by the disciplinary committee and he appealed.

Respondent's Case

39. The Respondent's witness, Catherine Mwikali (RW1), avers that she is the Respondent's HR Manager since July 2022 after this case was filed. She was briefed on the case and availed the documents.
40. RW1 adopted her witness statement dated 30/10/2023 as her evidence in chief and relied on the Claimant's exhibits.
41. During cross examination, RW1 testified that Mr Mutinda was provided reasons of his dismissal in his letter of termination.
42. RW1 testified that the complaint against Mr Mutinda by Beatrice Muganda was made directly to the management orally, however, the reasons for the disciplinary hearing were given to him in writing.
43. RW1 testified that the complaint was not part of the NTSC and there is no case against the hotel or Mr. Mutinda for his loose talk.
44. RW1 testified that Ephantus Mutiso was not present when the complaint was made. Mr. Mutinda was said to have talked loosely in the company of Mutiso.
45. RW1 testified that the Respondent conducted internal investigation but this was not produced in court.
46. RW1 testified that Mr Mutinda never had a conversation with Beatrice according to her information. There was a disciplinary hearing on 30/07/2018.
47. RW1 testified that Mr Mutinda was not supplied with documents requested as they could not trace the same. He was issued with warning letters but they were not produced in court.
48. RW1 testified that the matter was referred to the conciliator and responded to but the Respondent never adopted the report.
49. RW1 testified that Job Keitany was terminated on 27/08/2018 as a guest in one of the hotel rooms reported he had lost money; they were room stewards.
50. RW1 testified that the NTSC, invitation to the disciplinary hearing and summary dismissal letter did not indicate the money lost or produce the guest's written report.
51. RW1 testified that Kandie was reported to the police but she does not know the outcome of the matter. No charge was raised with the police and the name of the complainant can be availed but his name is not in court.



52. RW1 testified that she is not aware if the complainant filed a statement with the police. There were other complaints against Job but have not been produced in court.
53. RW1 testified that the CCTV footage was availed to Job and at the disciplinary hearing but was not produced in court.
54. RW1 testified that the matter was referred to a conciliator through the union and the Respondent responded but it was not satisfied with the recommendation.
55. RW1 testified that valuables were stored in the safe and there was no complaint the safe was broken into.
56. RW1 testified that a cheque was prepared for Job but he did not collect it.

Claimant's Submissions

57. The Claimant reiterated the averments in its Memorandum of Claim and the testimonies of the grievants in court during hearing in its submissions.
58. It is the Claimant's submission that Peter Mutinda was never given an opportunity to be heard, as no disciplinary hearing was ever conducted by the Respondent, which position was affirmed to by RW1. The Claimant relied on the provisions of Sections 41, 43 and 45 of the [Employment Act](#).
59. The Claimant submitted that this court should find that the termination of Peter Mutinda and Job Keitany Kandi was unfair and contrary to [the Constitution](#) of Kenya, the [Employment Act](#) and the rules of natural justice and allows the prayers sought. It relied on the Supreme Court case of Petition 37 of 2018 Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR and Court of Appeal case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR.

Analysis and Determination

60. Having considered the pleadings, affidavits, evidence in court and submissions, the issues for determination are:
 - a. Whether the termination of the grievants' employment was unfair.
 - b. Whether the grievants are entitled to compensation for unfair termination.

Whether the termination of the grievants' employment was unfairly terminated

61. It is trite law that for termination of an employment to be deemed fair and lawful the employer must prove that the same was substantively justified and procedurally fair.
62. Substantive justification is aptly provided for under Section 43, 45, 47 and 44 of the [Employment Act](#) as follows: -

Section 43 of the Act states: -

- “(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.”

63. Whereas Section 45(2) of the Act reads: -

“ 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
- (c) that the employment was terminated in accordance with fair procedure.”

64. Section 44 (4) (e) and (g) reads: -

“ Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”

65. Lastly, section 47(5) reads: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

66. It was the Respondent’s case that Peter Mutinda’s employment was terminated on grounds that one of the Respondent’s guest, Dr. Beatrice Muganda, orally complained to the management he had disparaged her character to a fellow guest, Ann Adams by stating she was a drunkard who drunk a lot in the evening with other delegates.

67. However, during RW1 testimony, the complaint was not included in the NTSC and there is no case against the hotel or Mr. Mutinda for his loose talk.

68. Therefore, it is evident that the Respondent did not have any valid reason to dismiss the grievant’s employment as there was no causal link between the grievant and the alleged complaint.



69. In respect to the dismissal of Job Keitany's employment, it was the Respondent's case that he was involved in the alleged theft on one of its guests residing in room 907. However, in RW1 testimony, the Respondent neither had conclusive evidence of the money lost nor the guest's written report.
70. Therefore, the Respondent lacked valid reasons to dismiss his employment as the allegations were not substantiated.
71. In respect to procedural fairness, Section 41 of the [Employment Act](#) provides: -
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
72. Persuaded by numerous authorities on unlawful termination as per employment laws it is mandatory for an employer to pass both substantive justification test meaning he has a valid reason to terminate an employee and procedural fairness test. One such an authority is Kenfreight E.A Limited vs Benson K. Nguti (2016) eKLR where the Court of Appeal held:
- “Apart from issuing a proper notice according to the contract (or payment in lieu of notice) as provided an employer is duty bound to explain to the employee in the presence of another employee or a union official in a language the employee understands the reason or reasons for which the employer is considering termination of the contracts. In addition the employee is entitled to be heard and his representation if any considered by an employer before the decision to terminate his contract of service is taken.”
73. The court finds the respondents did not prove valid reason in this case to terminate the grievants and neither did they follow the mandatory procedure well set out in sections 41 of the [Employment Act](#). In conclusion grievants Peter Mutinda and Job Keitany Kandie were unlawfully and unprocedurally terminated from their employment and judgment is entered in their favour.
74. The Court however did not find the evidence of Vincent Nyangau Manoti and is not clear if he abandoned his suit. He did not testify in court and did not produce his witness statement or even file his submissions. The Court has no more to say about Vincent Nyangau Manoti.
75. Mr Peter Mutinda admitted he was paid his dues and so did Job Keitany. Each are awarded general damages for unlawful termination at an equivalent of 10 months' salary each as well as costs.
- a. Mr Peter Mutinda kshs 401,050/-
- b. Job Keitany Kshs 234,410/-
76. They are also entitled to accruing interest at court rates from date of judgment till full payment. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

