



Pandya t/a Ziwa Beach Resort aka Bamburi Beach Resort v Katana (Appeal E051 of 2023) [2024] KEELRC 1826 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1826 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E051 OF 2023**

**AK NZEI, J
JULY 11, 2024**

BETWEEN

**NITIN PANDYA T/A ZIWA BEACH RESORT AKA BAMBURI BEACH
RESORT APPELLANT**

AND

MWERO CHIRUNGA KATANA RESPONDENT

(Being an appeal from the judgment of the Magistrate Court – Hon. R.N. Akee dated 25th May 2023 in Mombasa CM – ELR Case No. 362 of 2020)

JUDGMENT

1. The Appellant herein was the Respondent (defendant) in Mombasa Chief Magistrate’s Court Employment Suit No. 362 of 2020 whereby it had been sued by the Respondent herein seeking the following reliefs:-
 - a. A declaration that termination of the Respondent’s employment was unfair and unlawful.
 - b. 12 months’ compensation for unfair termination of employmentkshs. 192,000
 - c. Severance pay (8,000x10 years).....kshs. 80,000
 - d. pay in lieu of noticeksh. 16,000
 - e. Maximum compensation for malicious prosecution.....kshs. 2,000,000
 - f. Salary arrears from September 2017 to 20th March 2020 (16,000x31 months).....kshs. 496,000
 - g. House allowance (kshs. 2,400x30 months).....kshs. 72,000



- h. Holiday allowance (13 holidays per year for 10 years) (kshs. 657.14x13 holidays x10 years)kshs. 85,428.20
 - i. A certificate of service.
 - j. Costs of the suit and interest.
 - k. Any other relief the Court deems fit to grant.
2. The Respondent had pleaded:-
- a. that he had been employed by the Respondent as a cook in September 2011, earning a monthly salary of kshs. 16,000, and worked until 15/9/2017 when the Respondent accused him of theft after an inferno outbreak that occurred on the said date.
 - b. that upon the Respondent's arrival at the scene of the fire incident, he instructed police officers from Bamburi police station to arrest the claimant on allegations of stealing by servant contrary to Section 281 of the penal code.
 - c. that the Respondent attended Court from September 2017 upto 20/5/2020 when he was acquitted for lack of evidence, and did not receive his salary from September 2017, which was a breach of his employment (contract) and his fundamental constitutional rights.
 - d. that the Respondent's termination was without adherence to due process set out in Sections 41,43 and 44 of the Employment Act, was without notice and reasons; and that the Respondent was not heard.
 - e. that termination of the Respondent's employment was abrupt, wrongful and unlawful, devoid of procedure and was not in accordance with justice and equity.
3. Documents filed alongside the memorandum of claim included the Respondent's written witness statement dated 12/8/2020 and an evenly dated list of documents listing some six documents. The listed documents included the Respondent's identity card, payslip for April 2016, NSSF statement, copy of a charge sheet, and a demand letter.
4. The Appellant filed Response to the memorandum of claim on 9/9/2020, denying the Respondent's claim. The Appellant further pleaded:-
- a. that on 15/9/2017, the Respondent removed, without permission, the employer's property namely a TV set, 13 canes of Tusker, a gas cylinder, one bed sheet and one mat, and purposely concealed them outside the employer's premises. That the items were discovered after a prolonged inquiry.
 - b. that the Appellant genuinely believed that the Respondent had an intent to permanently deprive the employer of its property.
 - c. that the Appellant reported the matter to Bamburi police station whereupon independent investigations were conducted and charges against the Respondent instituted vide Criminal case No. 1162 of 2017 (Republic -vs- Mwero Katana Chirunga).
 - d. that the Respondent was arrested on 15/9/2017 and never reported back to work after that date, and that this amounted to absenting himself from his work station without permission contrary to Section 44(1) (a) of the Employment Act 2007.



- e. that the Respondent avoided all forms of contact from the Respondent as from 18/9/2017, and only resurfaced through his lawyer on 23/7/2020.
5. Documents filed by the Appellant alongside its Response included witness statement of Nicodemus Master and a list of documents dated 25/6/2021, listing copies of the Respondent's payslips.
6. At the trial, the Respondent adopted his filed witness statement, which basically replicated his statement of claim, as his testimony. He also produced in evidence the document mentioned in paragraph 3 of this judgment. The Respondent further testified that it was the Appellant who instructed a police officer from Bamburi Police station to arrest him, and said that he did not want to see the Respondent again. That the Respondent was charged in Shanzu Law Courts and remanded for a month before he could raise the kshs. 25,000 bond, and that he was finally acquitted in 2020 for lack of evidence. That he was not given a termination letter, and that he did not go back to work as he had been told to stay away from the premises.
7. The Appellant called one witness, Nicodemus Kimeti Master (DW-1), a Manager at the Respondent's hotel. He adopted his filed witness statement as his testimony. He further testified that the Respondent was arrested upon interrogation by the police, and after the Respondent was found to have taken items belonging to the Appellant (a 6 kg gas cylinder, a 32 inch TV and beer) to a neighbouring property. That the Respondent never went back to work and attempts to reach him were futile. That the Respondent was not prevented from accessing his work place.
8. DW-1 further testified that the Respondent was engaged in attempts to salvage property from fire, and that the witness did not see the Respondent stealing, that the Respondent was not issued with a show cause letter, and that the Respondent did not receive his salary for September 2017.
9. The trial Court delivered its judgment on 25/5/2023, making a finding that the Respondent's termination was unlawful and unfair; and awarded him:-
 - a. 12 months' salary compensation for unfair termination.....kshs. 192,000
 - b. Severance pay.....kshs. 80,000
 - c. One month salary in lieu of notice.....kshs. 16,000
 - d. Compensation for malicious prosecution...kshs. 100,000
 - e. House allowance.....kshs. 72,000
 - f. Costs of the suit from the date of institution of the suit and interest from the date of judgment.
10. The trial Court also ordered that the Respondent be issued with a certificate of service.
11. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth grounds of appeal which I summarize as follows:-
 - a. that the learned trial magistrate erred in both fact and law in failing to interrogate material evidence and witness testimony (and to make a finding) on whether the Respondent was terminated or whether he simply deserted his duties; and in awarding him:-
 - i. 12 months' salary without cogent evidence that the Respondent's employment was actually terminated.



- ii. awarding severance pay of kshs. 80,000 based purely on speculation of termination of employment notwithstanding the fact that this award is only applicable to termination of employment on account of redundancy.
 - iii. awarding kshs. 72,000 for house allowance in total disregard of the Appellant's documents produced in evidence which demonstrated that the Respondent's salary was inclusive of house allowance.
 - b. that the learned trial magistrate erred in law and in fact in failing to appreciate the essential elements of the tort of malicious prosecution and specifically:-
 - i. failed to appreciate the fact that the office of the Director of Public Prosecution is the proper defendant in malicious prosecution claims and that the Appellant's role was only limited to lodging the complaint.
 - ii. failed to address the issue of malice, reasonableness of probable cause, which elements the Respondent was specifically required to prove, but did not labour to prove.
 - iii. failed to find that termination of criminal proceedings for lack of evidence is not proof of malice, and failing to appreciate that the Respondent did not place any material evidence on record showing that the criminal proceedings actually terminated in his favour.
 - c. failing to consider and to appreciate the nature of the Respondent's claim, the Appellant's pleadings, evidence on record, submissions, authorities and the interest of justice in the wide spectrum.
12. The Appellant sought the following reliefs on appeal:-
- a. that the appeal be allowed.
 - b. that the judgment dated 25/5/2023 be set aside and this Court do substitute the same with its own judgment.
 - c. costs of the appeal be granted to the Appellant against the Respondent.
13. This is a first appeal, and the evidence presented before the trial Court by both parties in prove of matters stated in their respective pleadings is before this Court for fresh evaluation and consideration. This Court, however, takes cognizance of the fact that it never saw or heard the witnesses first hand.
14. Having considered the pleadings filed in the trial Court and the evidence presented by the parties, issues that present for determination, in my view, are:-
- a. whether the Appellant terminated the Respondent's employment, and if so,
 - b. whether termination of the Respondent's employment was unfair.
 - c. whether reliefs sought by the Respondent in the trial Court were deserved.
15. On the first issue, the Respondent pleaded and testified that his employment was terminated by the Respondent on 14/9/2017. That on that date, the Respondent instructed a police officer from Bamburi police station to arrest the Respondent, and stated that he did not want to see the Respondent again. The Respondent further testified that he did not go back to work after being released on bond by the Court or after being acquitted in March 2020 for lack of evidence because he had been told by the Respondent to stay away. On his part, the Appellant testified that he did not terminate



the Respondent, and that it was expected that the Respondent would go back to work, that the Respondent absconded.

16. It is to be noted that the Appellant did not tell the trial Court what action he took against the Respondent upon him absconding duty, this despite the fact that absconding of duty by an employee is a gross misconduct under Section 44(4) (a) of the *Employment Act*. An employer cannot be allowed to just allege that an employee absconded duty. He or she must demonstrate what action, disciplinary or otherwise, he took after the employee absconded duty. It was stated as follows in the case of *Godfrey Anjere -vs- Unique Supplies Limited* [2015] eKLR:-

“In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.”

17. Still on the same issue, the Court stated as follows in *Stanley Omwoyo Onchwari -vs- Bom Nakuru YMCA Secondary School* [2015] eKLR (cited in *James Ashiemi Namayi -vs- Menengai Oil Refineries Ltd* [2016] eKLR:-

“The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues or family members) issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances.”

18. In the instant case, the Appellant did not demonstrate at the trial what action he took against the Respondent after he allegedly absconded duty; and neither did he rebut and/or controvert the Respondent’s evidence in Court that he had told him to stay away from his place of work, and that he (the Appellant) had also told the Respondent at the time of his arrest that he did not want to see him again. On a balance of probability, I find and hold that the Appellant terminated the Respondent’s employment, and uphold the trial Court’s finding in that regard.
19. On the second issue, the Appellant did not demonstrate that he had complied with the mandatory statutory procedure set out in Section 41 of the *Employment Act*, either after the Respondent was suspected of stealing or upon him absconding duty as alleged by the Appellant. The Appellant testified that he did not issue the Respondent with a show cause letter. Further, the Respondent was not shown to have been issued with a termination notice pursuant to Section 35(1) (c) of the *Employment Act*, or to have been paid in lieu thereof. Termination of the Respondent’s employment was devoid of procedural fairness.
20. On validity of the Appellant’s reasons for terminating the Respondent’s employment, evidence on record shows that the Respondent admitted to having taken properties (items) belonging to the Appellant to a neighbouring property after fire broke out in the Appellant’s premises, and failing to disclose that fact, only making a disclosure to the police upon interrogation. The Appellant was entitled to reasonably believe that the Respondent had either stolen the items in issue or had an intention of stealing the same. Such scenario pointed to gross misconduct on the part of the Respondent pursuant to Section 44 of the *Employment Act*. Termination of the Respondent’s employment was therefore substantively fair.



21. I find and hold that termination of the Respondent’s employment was procedurally unfair; and I so declare and uphold the trial Court’s finding in that regard. It was held as follows in the case of Walter Ogal Anuro -vs- Teachers Service Commission [2013] eKLR:-
- “...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
22. The Court of Appeal stated as follows in the case of Naima Khamis -vs- Oxford University Press [e.a] Limited, Civil Appeal No. 15 of 2014 [2017] eKLR:-
- “...We wish to take note of the provisions of Section 43(1) of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair.
- Also, Section 45(2)(c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair.
- A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord an employee an opportunity to be heard as by law required.”
23. On the third issue, and having made a finding that termination of the Respondent’s employment was substantively fair but procedurally unfair, I award the Respondent the equivalent of seven months’ salary as compensation for unfair termination of employment. That is kshs. 16,000x 7 = kshs. 112,000. The award of the equivalent of 12 months’ salary made by the trial Court is hereby set aside. I have taken into account the fact that the Respondent contributed to the reason for termination of his employment.
24. The award of kshs. 80,000 being severance pay is hereby set aside as termination of the Respondent’s employment was not on account of redundancy as envisaged in Section 40 of the Employment Act.
25. The award of kshs. 16,000 being payment in lieu of notice is upheld pursuant to Section 35(1)(c) of the Employment Act.
26. The award of kshs. 100,000 being compensation (damages) for malicious prosecution is hereby set aside. All that the Respondent presented in evidence regarding this particular claim is a copy of a charge sheet on Shanzu SPM’s Court Criminal Case No. 1162 of 2017, in which the Respondent is shown to have been charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The Appellant is named as the complainant in the said case. No proceedings, judgment and or ruling/orders of the said Criminal Court were exhibited before the trial Court, and the Respondent’s allegation that the prosecution in issue terminated in his favour was not proved. The allegation that the Respondent was acquitted for lack of evidence remains just that, an allegation. Further, the initiator and prosecutor in the aforesaid criminal case, that is the Director of Public Prosecutions, was not enjoined in the suit filed by the Respondent. Without this crucial enjoinder, a claim for damages arising from alleged malicious prosecution cannot stand.



27. The Appellant referred the Court to the persuasive case of *Lawrence Onyango Oduori -vs- Attorney General & Another* [2022] eKLR where the Court referred to Odunga’s Digest on Civil Case Law and Procedure (page 5276) and stated the essential ingredients of malicious prosecution as follows:-
- a. The proceedings must have been instituted by the defendant
 - b. The defendant must have acted without reasonable or probable cause.
 - c. The defendant must have acted maliciously.
 - d. The criminal proceedings must have been terminated in the plaintiff’s favour.
 - e. The plaintiff must satisfy all the above elements of malicious prosecution in order to succeed in obtaining an award of damages against the defendants....”
28. The award of kshs. 72,000 being house allowance is hereby set aside. Copies of the Respondent’s payslips exhibited by both the Appellant and the Respondent at the trial clearly show that the Respondent’s salary was inclusive of house allowance. The trial Court ought to have taken note of this glaring fact; and fell into error by not doing so.
29. The order for issuance of a certificate of service by the Appellant to the Respondent is hereby upheld pursuant to Section 51(1) of the *Employment Act*. The award of costs and interest in the primary suit is upheld.
30. The appeal herein partially succeeds. For avoidance of doubt, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the Respondent against the Appellant as follows:-
- a. Compensation for unfair termination of employmentkshs. 112,000
 - b. One month salary in lieu of notice.....kshs. 16,000
- Total kshs. 128,000
31. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
32. The appellant shall issue a certificate of service to the Respondent pursuant to Section 51(1) of the *Employment Act*.
33. Each party shall bear its own costs of the appeal.
34. The Respondent shall have costs of proceedings in the Court below, and interest on the awarded sum at Court rates, calculated from the date of the trial Court’s judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH July 2024

AGNES KITIKU NZEI

JUDGE

Order

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE



Appearance:

.....Appellant

.....Respondent

