

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E 269 OF 2024

PRIDE INN HOTEL INVESTMENTSAPPELLANT

VERSUS

NICKSON KARISA MANGWENJERESPONDENT

*(Being an appeal from the judgment of Hon. D.M. NDUNGI (PM) delivered on
20th November 2024 in Mombasa CMEELRC 178 of 2020)*

JUDGMENT

Background

1. Through the Memorandum of Claim dated 24th November 2020, the Respondent sued the Appellant in the above-mentioned suit, seeking against them: -
 - a) A declaration that termination of his employment was unfair and unlawful.

b) That the Appellant be ordered to pay the Respondent KShs. 683,041.08.

c) Costs of the claim plus interest thereon at Court rates.

d) Certificate of Service to be issued to him.

e) Any other relief the court deems fit to grant.

2. The monetary remedies sought were tabulated as follows;

a) 12 months compensation for unfair and unlawful termination -Kshs.415,764.00

b) Notice pay in lieu -Kshs. 34,647.00

c) Service pay (Kshs.17,323.50 x6 years)-
Kshs.103,941.00

d) Public Holidays Allowance (13 holidays per year)

-(Kshs.1,649.86 per day x13x6years)

Kshs.128,689.08-20

Total: Kshs. 683,041.08

3. The Appellant opposed the Respondent's claim through a Response to the Memorandum of Claim dated 15th January, 2021. The Appellant admitted that at all material times, the Respondent was its employee. However, it denied his cause of action and entitlement to the reliefs he had sought.

Respondent's case in the lower court

4. It was the Respondent's case that he was employed by the Appellant as a Senior Chef from 2015 until 26 September 2020, when he was summarily dismissed on allegations of gross misconduct arising from an incident involving a client's order. He stated that he simply prepared a meal for a regular client and instructed a colleague to serve it.
5. Although the cost of the meal was eventually deducted from his salary, he was still dismissed. He argues that this action by the Appellant amounted to double punishment. He asserted that he could not refuse the client's request, as doing so would have amounted to neglect of duty.
6. He contended that his summary dismissal was both procedurally and substantively unfair, as he was subjected to

a disciplinary hearing without sufficient notice or time to prepare, was not given a fair hearing, and was condemned unheard in breach of sections 41, 43, and 45 of the Employment Act, 2007.

7. He also claims that he was not given an opportunity to appeal, that the allegations against him were unfounded and unclear.
8. He asserted that he diligently performed his duties throughout his employment and that the Appellant's actions were unlawful, unjust, and in breach of labour laws, including the failure to pay his terminal dues despite attempts at out-of-court resolution.

Appellant's case in the lower court.

9. The Appellant's witness, Nicholas Ochieng, is the Human Resource Manager and stated that the Respondent was employed as a Senior Chef from 2015 until 26th September 2020. On 20th September 2020, he received information from the General Manager that the Respondent had

committed gross misconduct by breaching the hotel's Standard Operating Procedures.

10. He states that he promptly issued the Respondent with a notice to show cause and invited him to a disciplinary hearing, providing him with sufficient time to prepare and the opportunity to be accompanied by a witness of his choice. He further states that the disciplinary hearing took place on 23rd September 2020, during which the Respondent admitted to breaching the procedures, pleaded for leniency, but failed to justify his conduct.

11. The witness stated that after the hearing, the Appellant decided to dismiss the Respondent promptly, and that this decision was communicated in writing, including information on the right of appeal. He asserts that the Respondent later liaised with the Appellant and received all his entitlements, and that no further payments are due to him.

Judgment of the lower court

12. The trial court found that although the Appellant had a valid reason to discipline the Respondent for serving food without

a Kitchen Order Ticket (KOT), the Appellant failed to comply with the mandatory procedural requirements under section 41 of the Employment Act.

13. Consequently, the court found that the termination was procedurally unfair and therefore unlawful, despite the existence of a substantive reason. The court awarded the Respondent compensation of eight months' salary, one month's salary in lieu of notice, and public holiday dues. The court also ordered the Appellant to issue a certificate of service and to cover the costs of the case.

The appeal

14. The appellant being aggrieved the Judgment, appeals against on the grounds;

- 1) THAT the learned magistrate erred in law and fact in holding that the respondent's summary dismissal was unlawful against the weight of the evidence adduced.
- 2) THAT the learned magistrate erred in law and fact by erroneously awarding public holiday allowances

yet the respondent did not adduce any evidence to prove the claim.

3) THAT the appellant shall upon receipt of typed proceedings file a supplementary memorandum of appeal to include other grounds and reasons that may become apparent therein.

Appellant's submissions

15. The Appellant argues that the trial court erred both in law and in fact by determining that the Respondent's summary dismissal was unlawful and in granting public holiday allowances. It is contended that the Respondent was lawfully dismissed for violating the Appellant's Standard Operating Procedures by serving food without generating a Kitchen Order Ticket (KOT), and that a valid disciplinary process was carried out before the termination.

16. Appellant further submits that the trial Magistrate failed to consider important evidence that the Respondent had

previously engaged in similar misconduct and had been pardoned.

17. It is also argued that he was issued with a show cause letter dated 21st September 2020 and participated in discussions, responding to the allegations before the disciplinary hearing. Furthermore, it is submitted that the Respondent admitted the misconduct, pleaded for leniency both in writing and during the disciplinary proceedings, and was informed of his right to appeal. The dictates of procedural fairness as contemplated under Section 41 of the Employment Act were therefore adhered to.
18. Reliance is placed on **Dyer and Blair Investment Bank Limited v John Kungu Kiarie & CFC another [2017] eKLR, Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212, Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] KECA 300 (KLR), Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR, and Otieno v Penda Health Limited (Cause E424 of 2024) [2024] KEELRC 1468 (KLR)** to support the position that the Respondent was given a fair

hearing and that the dismissal was both substantively and procedurally fair.

19. With reference to the award of public holiday allowances, the Appellant asserts that the trial court improperly shifted the burden of proof onto their position. It is argued that the Respondent did not establish that he worked on public holidays without remuneration, and that it was incumbent upon them to substantiate their assertions.
20. In conclusion, the Appellant contends that the trial court's findings regarding unfair dismissal and the awards granted were erroneous, and requests that the judgment be entirely overturned and the Respondent's claim be dismissed.

Respondent's submissions

21. The Respondent opposes the appeal and supports the judgment of the trial court, arguing that the Appellant failed to comply with the law when terminating his employment.
22. He claims that he was not served with a show cause letter prior to the disciplinary hearing, was not issued with a notice to attend the hearing, and was only verbally summoned

without being given sufficient time to prepare his defence or call a witness. This, he asserts, rendered the process unfair and unlawful.

23. It is further submitted that the show cause letter was issued after the disciplinary hearing had already taken place, a testament to procedural unfairness.

24. He further contends that he was not paid terminal dues, including notice pay, leave, public holiday allowance, and service pay, and that the Appellant failed to produce any records showing that these payments were made.

25. The Respondent relies on sections 41, 43, and 45 of the Employment Act to argue that the Appellant failed to follow due process and failed to establish valid reasons for termination.

26. In support, reliance is placed on **Matsesho v Newton (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) (29 July 2022) (Judgment)**, **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR**, **Naqvi Syed Qmar v Paramount Bank Limited & another [2015] eKLR**, **Ronald Ongori Gwako v Styroplast Limited [2022]**

eKLR, Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR, Kenfreight EA Ltd v Benson K. Nguti CA No. 31 of 2015, Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR, and CMC Aviation Limited (No. 1) [1978] KLR.

27. He accordingly urges the Court to uphold the trial court's judgment, dismiss the appeal, and award costs.

Analysis and determination

28. As this is a first appeal, the Court must reassess the evidence on record and reach its own independent conclusion, bearing in mind that it did not see or hear the witnesses.

29. I have carefully considered the record, the grounds of appeal and the submissions of Counsel for the parties, and hold that the instant appeal turns on two issues: Was the Respondent unfairly dismissed? Was the Respondent entitled to the reliefs granted?

30. It is worth noting that, in the architecture of the Employment Act, summary dismissal of an employee is only fair if the

process leading to the decision to summarily dismiss conformed to the dictates of procedural fairness and the decision itself was anchored in valid and fair reasons related to the employee's conduct, capacity or compatibility, or the employer's operational requirements.

31. In **Pius Isindu Machafu vs Lavington Security Guards (Cause 1050 of 2012) [2014] KEIC 121 (KLR):-**

“13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligation on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of employment contract and unfair termination involving breach of statutory law. The employer must prove reasons for termination/dismissal [section 43]; prove the reasons are valid and fair [section 45]; prove that the grounds are justified [section 47[5]; amongst other provisions.....”

32. I have carefully considered the trial Magistrate's judgment. Undoubtedly, he held that the summary dismissal was unfair

on the ground that it was effected without adherence to the dictates of procedural fairness. Apparently, the trial Court was persuaded by the Appellant's position that the summary dismissal was for a valid reason and, as such, was substantively fair.

33. The trial Court's decision on the substantive justification of the summary dismissal was not impugned by an appeal or cross-appeal. As such, this Court will have no business dealing with the issue in this appeal, though it is noted that both Counsel for the parties have extensively submitted on the same.

34. Section 41 of the Employment Act sets out a mandatory procedure that an employer must follow when contemplating the termination of an employee's employment or a summary dismissal. The procedure comprises three ingredients, all of which must be present in the process leading to the decision to terminate or summarily dismiss. Otherwise, by operation of the law under section 45 of the Employment Act, the termination or summary dismissal shall be deemed unfair.

35. The employer must inform the affected employee of their intention to take disciplinary action against them and the reason for that intention, and permit them an adequate opportunity to prepare to defend themselves against the accusations levelled against them, while in the company of a colleague of their choice or a trade union representative [if the employee is a member of a trade union]. The employer must then consider the representations made by the employee and the person accompanying them [where relevant] before taking a final decision on the matter.

36. In **Nyamwaro v County Government of Nyamira (Appeal E041 of 2023) [2024] KEELRC 1535 (KLR)**, the Court held that even in cases of summary dismissal, an employee is entitled to a hearing in accordance with section 41 of the Employment Act.

“It is now settled that even in cases of summary dismissal, the employee is entitled to a hearing in accordance with Section 41 of the Employment Act, 2007 and Section 4 of the Fair Administrative Actions Act.”

37. Ordinarily, the notification component of the procedure is satisfied by an employer providing a notice to show cause, an invitation to a disciplinary hearing, or any other correspondence notifying the employee of the accusations against him, the place, date and time of the disciplinary hearing, how the hearing shall take place, and the right to accompaniment. In their nature, such correspondence must precede the hearing.
38. As the learned trial Magistrate accurately observed, the show cause letter in this matter was issued on 24th September, 2020, while the disciplinary hearing was allegedly conducted on 23rd September, 2020. Consequently, it cannot be asserted that the Appellant duly informed the Respondent of its intent and the reasons thereof prior to the purported disciplinary hearing, thereby affording him the opportunity to prepare and present a defence. It is therefore apparent that the procedural requirements concerning notification and the hearing process as stipulated under Section 41 of the Employment Act were not satisfied.

39. Sight has not been lost of the fact that the Respondent denied having been invited to a disciplinary hearing. Indeed, the 2nd Appellant's witness admitted in cross-examination that they had nothing to show that he had been invited to a disciplinary hearing. Time and again, this Court has held that not every meeting should be labelled a "disciplinary hearing meeting". For a meeting to be considered a disciplinary hearing, it must be shown that it was intended to be one.
40. By reason of the foregoing, I have no basis to fault the trial court's holding that the summary dismissal against the Respondent was procedurally unfair.
41. Regarding the second issue, the Appellant contests the granting of compensation for the public holidays worked. The Respondent asserted entitlement to the compensation on the grounds that he worked on public holidays and was not duly compensated. The Appellant's witness acknowledged that the Respondent worked on public holidays because the hotel remained operational; however, she stated that employees received additional rest days as compensation. Nevertheless, she also conceded that she lacked evidence to

demonstrate that the Respondent was indeed compensated with such additional days.

42. This Court is aware that a claim for compensation for public holidays worked but not compensated for does not automatically succeed merely because the employee asserts that he so worked, and that the employer, as the holder of employment records, should prove otherwise. He must put forward a prima facie case that he so worked and was not duly compensated. It is not difficult to hold that, in the matter before the lower court, the Respondent did discharge this duty.

43. The Respondent's claim for compensation was not merely a claim thrown into court. He pleaded, in detail and with a discernible formula, how the amounts he sought were arrived at. The Appellant's own witness admitted that the Respondent worked during the public holidays, but raised a defence that he was compensated with extra days. At this point, the burden shifted to the Appellant to prove the fact of compensation in the manner alleged. In my view, the Appellant failed to prove the same.

44. In the upshot, I conclude that the learned trial Magistrate did not err in finding that the summary dismissal of the Respondent was unfair and in awarding compensation for public holidays worked but not paid for. Consequently, I find the appeal to be without merit. It is hereby dismissed with costs.

Read Signed and Delivered this 30th Day of April 2026.

OCHARO KEBIRA

JUDGE