Alomba v Green Park Golf & Country Complex t/a the Great Rift Valley Lodge & Golf Resort (Civil Appeal 46 of 2019) [2025] KECA 378 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 378 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 46 OF 2019

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 28, 2025

BETWEEN

NOAH AKARU ALOMBA ..... APPELLANT

AND

GREEN PARK GOLF & COUNTRY COMPLEX T/A THE GREAT RIFT VALLEY LODGE & GOLF RESORT ..... RESPONDENT

(An Appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (M. Mbaru J.) dated 25th April 2019 in ELRC Cause No.3 of 2017)

JUDGMENT

1. The appellant was employed by the respondent as an electrician in the respondent's maintenance department from 5th August 2011 to 6th December 2014 when he was summarily dismissed for absconding from duty. The respondent's case was that the appellant was granted permission to be absent from duty from 28th November 2011 to 1st December 2014 to enable him to attend the burial of a colleague's father. However, neither did he resume duty on 1st December 2014 nor did he communicate with his employer to explain his inability to report to work. Instead, he reported back to work on 5th December 2014 and he was summarily dismissed for absenting himself from duty.

2. Aggrieved by the summary dismissal, the appellant appealed to the respondent on 7th December 2014, but he never received any feedback. Consequently, vide memorandum of claim dated 9th January 2017 filed at the Employment and Labour Relations Court, (the ELRC), he sued the respondent seeking the following orders:

    a. two months' notice pay-- Kshs.52,2720.00;

    (b). 45 months leave --Kshs. ,685.00.00;

    (c) pro-rated leave travelling allowance-- Kshs.1,958.00;

(d) service charge for December, 2014 --Kshs.8,000.00;

(e) underpayment for 2012-- Kshs.184,080.00;

(f) overtime 882 hours-- Kshs. 221,646.60;

(g) compensation -- Kshs.276,660.00; and

(h) costs.

3. The respondent opposed the claim vide reply dated 14th February 2017 in which it asserted that it lawfully terminated the appellant's services and that the alleged un paid leave and the leave travelling allowances were duly paid. It maintained that service charge for December 2014 was not due because the claimant did not work. It also disputed the claims in respect of the alleged underpayment and overtime.

4. In the impugned judgment dated 25th April 2019, Mbaru, J. dismissed the appellant's claim for unlawful termination and held that the appellant was only entitled to the admitted claims, namely: Kshs.7,685.00 in respect of leave days, Kshs.1,692.00 for travelling allowance, underpayment of Kshs.4,800.00, and, ordered that the appellant was be re-issued with a Certificate of Service in accordance with Section 51 of the *Employment Act*, 2007 (the Act).

5. Aggrieved by the said verdict, the appellant is now before this Court seeking to reverse the said decision. In his memorandum of appeal dated 1st July 2019, the appellant cites the following grounds: that this court vacates the finding by the ELRC that his summary dismissal was lawful and justified; that this Court sets aside the finding that he deserved no notice pay and compensation; that this Court considers his claim for overtime; or in the alternative this Court orders the ELRC to review its finding on the said claim.

6. The grounds in support of the appeal are that:

(a) the learned judge erred in law by declaring that the summary dismissal was procedurally fair;

(b) the learned judge erred in law by declaring that the appellant was not entitled to pay in lieu of notice;

(c) the learned judge erred in law by declaring that the appellant's overtime claim was compensated without due regard to his employment record; and,

(d) the learned judge erred in law by declaring that the appellant was not entitled to compensation for unfair dismissal.

7. During the hearing of this appeal on 4th February 2025, the appellant appeared in person while Mr. Njuguna appeared for the respondent. The appellant's written submissions are dated 16th December 2024 while the respondent's written submissions and its list of authorities are both dated 22nd January 2025.

8. In support of the appeal, the appellant maintained that his summary dismissal was unfair, unjust and unlawful for want of due process. He contended that the reported back to work on 5th December 2014 and he was summoned by the respondent on 6th December 2014 and he was issued with a letter communicating his summary dismissal without being accorded any opportunity to be heard and defend himself in the presence of another employee of his choice as required under Section 41 of the Act. He faulted the learned judge for failing to find that his termination was procedurally unfair. To support his argument, he cited the Supreme Court decision in Simon Gitau Gichuru vs. Package

Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) that termination of employment must be done in accordance with the provisions Section 41(1) of the Act and the need to accord an employee a hearing and an opportunity to reply to the allegations against him so as to avoid the harsh sanction of a summary dismissal.

9. He submitted that the court has the discretion to grant any or all the remedies allowed by the law and urged this Court to invoke Section 49(1) (c) of the Act and award him pay in lieu of notice which was clearly provided in his employment contract, the collective bargaining agreement and Section 36 of the Act. To support this argument, he cited Kenfreight (EA) Limited vs. Nguti (Petition 37 of 2018) [2019] KESC 79 (KLR) (23 July 2019) (Judgment) where the Supreme Court stated that the appropriate remedy for an employee who has been unlawfully terminated is provided under Section 49 of the Act, and that payment of an award under Section 49(1)(a) of the Act is different from an award under Section 49 (1)(b) and (c). Further, Section 49 allows an award to include any or all of the listed remedies provided that a court in making the award, exercises its discretion judiciously and is guided by Section 49 (4) (m).

10. The appellant also submitted that the trial judge erred by refusing his claim for overtime, yet the respondent did not disapprove it by evidence as required by Section 74 of the Act. He added that Section 49(4) of the Act mandates the courts to consider the rights of an employee to press for other claims owed to him or her by an employer. He contended that the respondent being the custodian of the employment records by dint of Section 74 (1)(e) & f) read together with sub Section 7(4) of the Act did not rebut his claim for overtime which had accrued. In conclusion, the appellant maintained that the trial court's decision not to allow his claims unfairly offended his constitutional rights including deprivation of his earned property and fair labour practice, and a breach of articles 40 and 41(1) of *the Constitution*.

11. In opposing the appeal, the respondent maintained that it is not in dispute that the appellant was absent from work without lawful excuse from 1st to 5th December 2014 and that the appellant in his defence only produced a prescription note dated 4th December 2014 which did not meet the requirement of Section 30 (1) of the Act. Further, the court found that he had no sick off days, and that he failed to account for his absence on 1st to 4th December 2014. Also, the trial court noted that the respondent had an inhouse clinic and no explanation was offered by the appellant why he skipped the respondent's clinic in Naivasha to seek treatment in Kayole Nairobi.

12. The respondent also submitted that Mr. Mukudi who was allegedly notified of the appellant's absence denied such notification, therefore, the respondent's failure to reasonably notify the employer about his absence is a valid ground for dismissal as was held by the ELRC in the case of Fred Mudembei Shilagava vs. Emco Billets and Steel Limited [2015] eKLR.

13. The respondent submitted that the appellant was afforded a reasonable opportunity to defend himself because he was notified of the charges and afforded an opportunity to respond before the decision to dismiss him was made as evidenced in the appellant's witness statement. It was the respondent's position that the appellant was allowed to work from 2pm to 6pm while the respondent spent the morning trying to establish the appellant's absence from work. It maintained that the disciplinary hearing does not necessarily need to take the rigours of court proceedings which require an indelible proof and strict formal process. To buttress this submission, the respondent cited the case of George Musamali vs. G4S Security Service Kenya Ltd [2016] eKLR where this Court held that internal disciplinary proceedings are not similar to court proceedings or criminal trial where witnesses have to be called and establish prove beyond reasonable doubt.

14. Regarding the claim for notice pay, the respondent maintained that since the summary dismissal was justified and fair, there was no legal basis for the award of notice pay and compensation for unlawful termination which is discretionary. The respondent relied on the case of Kenya Revenue Authority & 2 others vs. Darasa Investment Limited [2018] eKLR in support of the reasoning that there is no reason to interfere with the trial court's discretion since the appellant has failed to prove that the learned judge misdirected herself or took into consideration matters which ought not to have been considered or failed to take into account any particular relevant factors; and or was otherwise plainly wrong.

15. This being a first appeal, this Court has a duty to re-evaluate, re-assess and re- analyse the evidence on record and determine whether the conclusions reached by the trial Judge should hold bearing in mind that we did not see or hear the witnesses. Secondly, we should appreciate that our responsibility is to rule on the evidence on record and not to introduce extraneous matters not presented by the parties in their evidence during the trial. (See Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212).

16. We note that during hearing the appellant confirmed that he had been paid by the respondent all the admitted sums as per the judgment of the ELRC. However, the appellant maintained that he was still claiming an unpaid sum of Kshs.184,000 in respect of house allowance. We have scrutinized, compared and contrasted the appellant's oral submissions and his the memorandum of appeal dated 1st July 2019. We note that the issue of the alleged unpaid house allowance was not raised in the appellant's memorandum of appeal. As as a result, we are precluded from entertaining the said issue. Therefore, what remains for determination in this appeal is a singular issue, which is whether the appellant was lawfully terminated.

17. It is not in dispute that the appellant was summarily dismissed. However, his contestation is that he was not accorded due process, therefore, the dismissal was unfair and unlawful. This issue entails a close examination of Section 44 of the Act. For starters, Section 44 (1) of the Act stipulates that summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. Under Section 44 (3) of the Act, subject to the provisions of the Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

18. Central to the issue at hand is Section 44 (4) (a) to (g) of the Act which lists various acts that may amount to gross misconduct to justify summary dismissal. However, a reading of the said provision shows that the list provided therein is not exhaustive. The Section 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—
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> a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work; (Emphasis added).

19. The appellant's grievance is that he was not accorded an opportunity to be heard since he reported to work on 5th December 2014 and was summoned by the respondent on 6th December 2014 when he was issued with a letter of summary dismissal without being accorded any opportunity to be heard and defend himself in the presence of another employee of his choice as required under Section 41 of

the Act. In determining the said issue whether the appellant's termination was fair, the learned judge stated:

> " ...work absence for no good cause is a justified ground for summary dismissal. The claimant was invited to show cause before summary dismissal. The claimant was accorded due process as required under Section 44 read together with Section 41(2) of the *Employment Act*, 2007. The summary dismissal is lawful and justified."

20. To determine the question whether the appellant's dismissal was procedurally unfair, we need to establish whether the respondent discharged the burden of proof placed upon it by Section 45(2) of the Act and whether the appellant discharged the burden of proof placed upon him by Section 47(5) of the Act. When an employee claims their dismissal was unfair, the onus falls on the employer to prove that the termination was both procedurally and substantively fair, meaning they must demonstrate they followed a fair process in dismissing the employee and that the reason for dismissal was justified; the employee only needs to establish the fact of dismissal to initiate the process of proving unfairness. This Court in Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR had the following to say on the burden of proof:-

> "There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the 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. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under Section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble: "..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.."
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> Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.
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> 14. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:
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> > 5. 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 of the termination of employment or wrongful dismissal shall rest on the employer.
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> So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under Section 43 1. 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."

21. The sort title to Section 41 of the Act reads: "notification and hearing before termination on grounds of misconduct." The said Section provides as follows:

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(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.

22. Beyond proving the existence of reasons to justify termination of employment, an employer is required to prove that the said reasons were fair, valid and related to the employee's conduct. There is no dispute that the appellant absented himself from work without permission. Under Section 44 (1) (a), absenteeism from work without leave or permission is a lawful ground for summary dismissal. This being the law, we find nothing to suggest that the reason for the termination was illegal. The question now narrows to whether the termination was procedurally unfair. A dismissal is procedurally unfair if it is not carried out in accordance with a fair procedure.

23. Section 41 of the Act provides the minimum standards of a fair procedure that an employer ought to comply with. Four elements are required under the said Section:

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee. In determining this issue, the learned judge stated:

> " The claimant was invited to show cause before summary dismissal. The claimant was accorded due process are (sic) required under Section 44 read together with Section 41 (2) of the *Employment Act*, 2007. The summary dismissal is lawful and justified."

24. There is no dispute that the appellant was granted permission to be away from duty from 28th November 2011 to 1st December 2014. However, he reported back to work on 5th December 2014. He 6th December 2014, he was issued with letter of summary dismissal also dated 6th December 2014. The said letter communicated the reasons for the termination and the dues payable to the appellant. The appellant promptly responded to the said letter on 7th December 2014 and asked for the decision to be reversed and threatened to seek advice from the union representative. At the heart of fair procedure is the need to prevent arbitrariness in the outcome of a decision. The question now narrows to whether the decision to summarily dismiss the appellant was arbitrary.

25. As we search for the answer to the above question, we note that in response to the accusation that he absented himself from duty without permission, the appellant submitted a letter dated 4th December 2014 from East Care Medical Centre, a medical facility at Kayole stating that he was attended at the said facility on 1st December 2014 complaining of several ailments listed therein. The appellant did not explain why he procured and submitted the said document in support of his reasons for his absenteeism if he was not afforded a hearing nor is he denying that he submitted the said letter to support his defence that he had a valid reason to absent himself from work. This being the position, it cannot be argued that the appellant was not afforded a hearing or that he did not know the reasons for his termination. Procedural fairness is contextual in nature. The circumstances of this case suggest that he was accorded an opportunity to submit his defence, which he

    did, but, the respondent was not persuaded by his explanation. The test to be applied involves the legal fiction of the reasonable man – someone endowed with ordinary intelligence, knowledge and common sense. It is important, nevertheless, to remember that the notion of the reasonable man cannot vary according to the individual idiosyncrasies. Whether the treatment note from East Care Medical Centre proved that the appellant was indisposed, and therefore had a valid reason to absent himself from work, we refuse to substitute the reasoning by the learned judge with our own.

26. In conclusion, we find no reason to fault the learned judge for finding that the summary dismissal was in accordance with the law. In the circumstances, we find that this appeal is devoid of merit and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.