Elsa's Kopje Limited v Mwendwa (Civil Appeal 624 of 2019)
[2025] KECA 725 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 725 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 624 OF 2019

W KARANJA, SG KAIRU & WK KORIR, JJA

MAY 2, 2025

BETWEEN

ELSA'S KOPJE LIMITED ..... APPELLANT

AND

TITUS WAMBUA MWENDWA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (H. Wasilwa, J.) dated 15th October 2019 in ELRC Cause No. 942 of 2015)

JUDGMENT

1. This appeal arises from the judgment of the Employment and Labour Relations Court (ELRC) (H. Wasilwa, J.) delivered on 15th October 2019. The ELRC found that the appellant was not justified in dismissing the respondent from employment and awarded him one month's salary in lieu of notice and compensation equivalent to 12 months' salary.

2. The respondent, Titus Wambua Mwendwa (Mwendwa), was an employee of the appellant, Elsa's Kopje Limited (Elsa's), until 21st April 2015, when he was summarily dismissed from employment. Mwendwa was employed as a room steward at Elsa's hotel/camp situated within Meru National Park, Meru County. The circumstances leading to Mwendwa's dismissal from employment are as follows.

3. Between 29th October 2014 and 1st November 2014 Elsa's hotel guests visiting the country from overseas were booked into, and stayed in Room Number 5 at the hotel. During the duration of their stay, Mwendwa was assigned as the steward in charge of that room. At the end of their stay, and on check out, the guests reported that they had lost USD 700. According to Mwendwa, and this was disputed by Elsa's, the guests reported and complained to the management of the hotel that Mwendwa had stolen that money. Following that complaint, Mwendwa claims that he was summoned to the Manager's office where he was accused of tampering with the safe in the room and stealing from the guests. Again, this claim was disputed by Elsa's.

4. Later, it turned out that no money had in fact been lost. In an email titled "Good news" sent to the hotel on 9th November 2014, the guests reported:

> " ...we are happy to tell you we found the dollars, they were at the wallet we thought (sic). We are so sorry for the inconvenience."

5. Mwendwa was not content to let the matter rest at that. He instructed his advocates to seek redress against the hotel guests for defamation. In a letter dated 9th December 2014 addressed to the said hotel guests, Mwendwa's advocates demanded admission of liability for defamation, whereupon the quantum of damages payable would be gone into.

   Mwendwa's pain is manifest from the contents of that letter which read in part:

> ...at the time of checking out of your room, and without any justification whatsoever, you alledged that the safe assigned to your room had been tampered with and you had, as a result, lost Usd 700. You approached the management of the hotel and complained that our client has stolen that money. At no time did you ask our client to explain the circumstances of the alleged loss of your money. You went directly to our client's bosses in order to cause our client the greatest possible injury. You made this complaint knowing very well that it was false and without basis. It was a malicious allegation intended to malign our client in his reputation and to cause him grief. You achieved this unlawful end.
>
> Titus was summoned to the manager's office where he was accused with tampering with the safe and stealing from customers. He felt disparaged and embarrassed. He is a man who has worked hard to build a reputation of honesty and reliability. He was pricked in his heart as word went round that he had stolen money from hotel customers. His attempts to explain himself were not received well, as the complaint had come from very valued and premium clients, who in the estimation of everyone, could not lie. Those who received information about your allegations looked at our client as a person who was dangerous and untrustworthy. They also viewed him as a seasoned swindler, who had the know-how to breach the security of a safe."

6. On the face of it, that demand letter and a subsequent reminder dated 16th March 2015, were copied to Elsa's which took a rather dim view of Mwendwa's threat of litigation againts its guests. By a letter dated 18th March 2015, Elsa's suspended Mwendwa from duties and summoned him to attend a disciplinary meeting on 23rd March 2015 where "the issue to be discussed is the threat of litigation for money... against a client of Elsa's...". The minutes of that meeting as well as a second meeting held on 16th April 2015 are part of the record.

7. What followed was Elsa's letter dated 21st April 2015 summarily dismissing Mwendwa from employment. The relevant part of that letter stated:

> " Dear Titus
>
> Re: Summary Dismissal
>
> This is to refer to the incident that occurred in November 2014, where our guests reported in the normal way that money was missing from their possession. Neither the guests nor the management connected your name to the incident, nor were you treated as a suspect in the matter. Around December the Manager advised you that the guests have in fact, to their chagrin, found their money in their hotel room in Nairobi.

> IMMEDIATELY after, you proceeded to instruct two different firms of lawyers to write to the guests to demand an apology and offer restitution for purported defamation. This action has caused untold damage to the reputation of the camp and put the employment of 50 staff at risk. The management is convinced that your continued employment is inimical to the camp and the wellbeing of other staff. The management has no option but to dismiss you from its employment summarily.
>
> You are accordingly so dismissed from the date of this letter."

8. Aggrieved, Mwendwa lodged his claim before the ELRC that culminated in judgment in his favour as we have already stated. In his Memorandum of Claim, Mwendwa complained that his dismissal from employment was procedurally and substantively wrongful. Elsa's, on its part in its response pleaded that it was justified in dismissing Mwendwa for gross misconduct as he "began communicating" with its clients "on matters not raised with [it] in total breach of his contract of employment." The parties elected not to adduce oral evidence and relied entirely on the documents filed before the court.

9. The ELRC found that based on the evidence, Mwendwa was indeed taken through a disciplinary process and was given a fair hearing before termination. The Judge however found that based on Section 43 of the *Employment Act*, Elsa's failed to prove the reasons for termination and that "demanding an apology from a guest who [Mwendwa] perceived had referred to him as a thief cannot be of such magnitude as to warrant summary dismissal."

10. Elsa's has challenged that judgment on eight grounds of appeal which coalasce into two questions, namely, whether the summary dismissal was substantively justified, and whether the Judge erred in granting Mwendwa the remedies that she did. We heard counsel on the appeal on 16th December 2024.

11. Learned counsel for Elsa's Mr. Ombati appearing with Mr. Seraji submitted that contrary to the finding by the ELRC, the reason for terminating Mwendwa's employment was valid and justified based on the express and implied terms of his employment, Elsa's internal regulations, industry practice and employment laws. It was urged on the strength of the decision of the Court in Geoffrey Gikonyo Mathu vs. Intex Construction Company Limited [2017] eKLR that the grounds set out in Section 44(4) of the *Employment Act* are not exhaustive as an employer is at liberty to make further regulations expanding the grounds that may constitute gross misconduct.

12. It was urged that Elsa's conduct in dismissing Mwendwa from employment in the circumstances indicated was a reasonable response within the hospitality industry and was justified. According to counsel, Elsa's demonstrated during the trial that there were reasonable and sufficient grounds to dismiss Mwendwa from employment. In adjudicating on the reasonableness of an employer's conduct, it was submitted, the court should not substitute its own views for those of the employer and decide whether it would have dismissed the employee on those facts but must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss the employee on those facts. In that regard, the decision in Kenya Revenue Authority vs. Reuwel Waithaka Gitahi & 2 Others [2019] eKLR was cited. It was submitted that the Judge erred in substituting the court's 'own reasonable grounds' with those of the employer.

13. Counsel urged that based on the misdirection by the Judge, this Court is entitled to interfere with the judgment and the award which are based on a misapprehension of the facts and the law.

14. It was submitted that Section 44(1) of the *Employment Act* does envisage summary dismissal; that an employer may dismiss an employee without notice whose conduct is found to constitute a fundamental breach of the terms of employment. That to the extent that the termination of employment in this case was lawful, no compensation is payable, and none should have been awarded. That in any event, the

award of one month's salary and the award of maximum compensation was erroneous and should be reviewed based on Section 49 of the *Employment Act*. The case of Kiambaa Dairy Farmers Co-operative Society Limited vs. Rhoda Njeri & 3 Others [2018] eKLR was cited.

15. Opposing the appeal, learned counsel Mr. Kalii holding brief for Mr. E.K. Mutua, SC for Mwendwa submitted that contrary to Elsa's contention, the learned Judge did not state or hold that Section 44(4) of the *Employment Act* is exhaustive of the grounds upon which an employer may dismiss an employee. If anything, the conclusion by the Judge demonstrates that Section 44(4) of the *Employment Act* is not exhaustive. The case of Geoffrey Gikonyo Mathu vs. Intex Construction Company Limited (above) was cited for the argument that Section 44(4) does allow an employer to make regulations expanding the grounds that may constitute gross misconduct but in this case no evidence was adduced to show that it had made such regulations expanding the scope.

16. It was submitted that in demanding an apology on account of what he reasonably believed to be defamatory statements, Mwendwa was exercising his civil right and to deny him such right would be unlawful.

17. As regards the remedies awarded, counsel for Mwendwa submitted that Elsa's did not tender any evidence to show that it had paid Mwendwa any monies on account of his terminal dues. That on the strength of the Supreme Court decision in Kenfreight (E. A.) Limited vs. Benson K. Nguti [2019] eKLR Section 49 of the *Employment Act* 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) of the Act.

18. Counsel concluded by urging the Court to dismiss the appeal.

19. We have considered the appeal and the submissions in keeping with the mandate of the Court under Rule 31(1) of the Court of Appeal Rules. As already stated, the parties did not testify before the ELRC and relied entirely on the pleadings, witness statements, documents and submissions placed before the Court. In that context, we begin with the issue whether the summary dismissal was substantively justified.

20. Section 44 of the *Employment Act* (the Act) provides for summary dismissal. Section 44(3) of the Act provides that, 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. Under Section 44(4) of the Act, some of the matters that "may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause" are set out with the rider that "the enumeration of such matters or the decision of an employer to dismiss an employee summarily" 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." Arguments were canvassed before us on whether the categories or list of gross misconduct enumerated under Section 44(4) of the Act is exhaustive. The decision of this Court in Geoffrey

Gikonyo Mathu vs. Intex Construction Company Limited [2017] eKLR provides an answer in the negative that:

> "This list is not exhaustive as Section 44(4) of the *Employment Act* allows an employer to further make regulations expanding the grounds that may constitute gross misconduct."

21. Under Section 43 of the Act, in a 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 of the Act. Section 45(2) then provides that 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."

22. In this case, in a bid to demonstrate that Elsa's discharged its burden Under Section 43 of the Act to prove the reason for the termination, counsel submitted that it was established that the reason for terminating Mwendwa's employment was valid and justified based on the express and implied terms of his employment, Elsa's internal regulations, industry practice. Indeed, as already noted, in its memorandum of response to the claim, Elsa's pleaded that Mwendwa was dismissed for gross misconduct for communicating with its clients "on matters not raised with [it] in total breach of his contract of employment." However, no evidence whatsoever was presented before the trial court by Elsa's to support this claim. The contract of employment between Elsa's and Mwendwa was not produced. Nor were the "internal regulations" regulations alluded to produced and neither was any evidence of "industry practice" industry practice presented to the trial court. No doubt, Mwendwa considered, whether rightly or wrongly, that he had been defamed by the guests. No evidence was presented to show that in order for him to pursue his legal rights he required to either consult or get the concurrence of the employer before doing so. It may have been courteous for him to inform his employer that he was considering doing so, but no evidence whatsoever was presented to demonstrate that there was either a contractual or implied obligation to do so. We accordingly uphold the conclusion by the learned Judge that Elsa's failed to discharge its burden to prove that it had valid reason to terminate Mwendwa's employment.

23. The next issue is whether whether the Judge erred in granting Mwendwa the remedies that she did. The total award made by the Judge in favour of Mwendwa translates to Kshs. 256,730 comprised of one months' salary in lieu of notice and the equivalent of twelve months salary. The trial court was required, under Section 49(4) of the Act, to consider the several factors enumerated thereunder. In Kenfreight (EA) Limited vs. Nguti (Petition 37 of 2018) [2019] KESC 79 (KLR) the Supreme Court of Kenya held that Section 49 of the *Employment Act* provides for remedies for unfair termination of an employment contract; that when giving an award, the court has discretion to determine what was fair under the circumstances; and that the court's discretion has to be based on the set parameters including the limiting of the award to a maximum of the equivalent of 12 months' salary. See also CMC Aviation Limited vs. Mohammed Noor [2015] KECA 775 (KLR). In the present case, the learned Judge did not at all give reasons in the judgment or the justification for awarding the maximum compensation. That in our view was an omission. Nonetheless, considering the circumstances in which the termination took place, we do not think that the award is manifestly excessive so as to warrant interference with it.

24. In the end, the appeal fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY, 2025.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR