



REPUBLIC OF KENYA



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**Ochieng v Instarect Limited (Civil Appeal 459 of 2018)
[2022] KECA 973 (KLR) (26 August 2022) (Judgment)**

Neutral citation: [2022] KECA 973 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 459 OF 2018
DK MUSINGA, MA WARSAME & MSA MAKHANDIA, JJA
AUGUST 26, 2022**

BETWEEN

PETER APOLLO OCHIENG APPELLANT

AND

INSTARECT LIMITED RESPONDENT

(An appeal against the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Mbaru, J.) delivered on 29th June 2017 in E.L.R.C Cause No. 1554 of 2012.)

JUDGMENT

1. This judgment is in respect of the judgment of Mbaru, J. in Employment and Labour Relations Court (ELRC), Cause No. 1554 of 2012 that was instituted by the appellant against the respondent claiming damages for unlawful and wrongful dismissal from employment.
2. The background to the impugned judgment is that vide a letter dated 14th January 2011, the appellant was employed by the respondent as a Sales and Marketing Manager. His services were however summarily terminated vide a letter dated 17th January 2012. The appellant was dissatisfied with the said termination and challenged it before the ELRC. In his statement of claim before the ELRC, the appellant averred that the reasons for the summary dismissal were vague, evasive and false and contrary to the provisions of the *Employment Act*, 2007. He averred that he was dismissed because of pursuing an explanation for non-payment of bonuses to his sales team and for discriminatory payments of such bonuses during the term of his employment contract as well as for his agitation for better working conditions for his sales team.
3. The appellant claimed:
 - a. One-months' notice pay- Kshs.60,130
 - b. Commission- Kshs.26,946



- c. Annual leave for one year-Kshs.60,130
 - d. Service pay-Kshs.30,065
 - e. Damages for wrongful dismissal
 - f. Certificate of service
 - g. Costs of the suit.
4. In its defence, the respondent stated, inter alia, that according to the terms of his employment contract, the appellant was not to engage in any other employment or work without the respondent's written approval; he was not to accept any remuneration, gifts or other benefits from other persons with whom the respondent had business relations, but the appellant violated some of the terms of his engagement.
 5. The respondent further stated that on 13th January 2012, one of its clients wrote an email complaining about the competence of work done by the appellant, and that the appellant had been making demands for direct payment from the client instead of the client making payment at the respondent's office. The respondent investigated the complaint and established that the appellant had been requesting various clients to deposit money directly to a M-Pesa number that did not belong to it. That forced the respondent to immediately terminate the appellant's contract of employment vide the letter of 17th January 2012. The respondent clearly stated the reasons of the summary dismissal of the appellant's employment and denied the allegations of having engaged in any discriminatory practices as alleged by the appellant.
 6. Further, the respondent stated that upon receipt of the dismissal letter which required the appellant to surrender all the tools of trade that were in his possession, the appellant failed to return some keys and unlawfully withheld a measuring wheel until April 2012, thereby causing the respondent loss of Kshs.884,736.00 in replacing the same, which the respondent sought by way of a counterclaim as special damages as follows: -
 - a. 1 viro lock- Kshs. 3, 600
 - b. 2 viro padlocks - Kshs. 7, 200
 - c. 3 viro padlocks Kshs. 3, 000
 - d. Loss associated with measuring wheel Kshs.870, 936Total: Kshs.884,736
 7. During the hearing, the appellant testified that he was frustrated by the respondent in various ways with a view to forcing him to resign but he resisted. The respondent had alleged that he was moonlighting but there was no evidence to that effect. He asserted that he was dismissed for questioning about the extension of his probation, pursuing payment of commission and payment of bonus.
 8. The appellant denied that he had solicited for payment of any money through M-pesa for services rendered to the respondent's clients.
 9. The appellant admitted that he did not return some keys and a measuring wheel until about 3 months after his dismissal. He however stated that there were several other measuring wheels that could be used by the respondent and therefore denied the alleged loss as a result of his delay in returning the same. He further complained that he was not given a hearing before his dismissal.



10. The respondent called two (2) witnesses. The first one was Lornah Mathenge, its Administrator, who was in charge of personnel. She testified in line with the respondent's averments in its defence. She stated that although the appellant was on probation for three months, the period was extended because the respondent was not satisfied with the appellant's conduct and he had been given two warning letters. Subsequently, he was confirmed into his position and given a salary increment. She refuted the appellant's allegations of discrimination in the payment of bonus.
11. The witness further testified that the appellant was involved in moonlighting, contrary to his terms of employment. She cited several instances where a number of the respondent's clients indicated that they had made direct payments for services rendered by the appellant on behalf of the respondent through an Mpesa number 0711928133 which was the appellant's private cellphone number. Regarding the keys that the appellant did not return after his dismissal, the witness testified that the respondent had to buy new padlocks and duplicate others. She further testified that the appellant did not return a measuring wheel until sometime in April 2012 and as a result the respondent suffered considerable loss over the time that the measuring wheel remained with the appellant.
12. Regarding the manner in which the dismissal was effected, the respondent's witness testified that the appellant was given an opportunity to respond to the allegations that had been raised against him but did not proffer any explanation. The appellant was again required to attend a disciplinary hearing accompanied by another employee, but he did not honour the invitation, instead he left employment, thus causing the respondent to issue the dismissal letter.
13. Gordon Peter Hays, the respondent's Managing Director, also testified. He told the trial court that all the bonuses due to the appellant were paid to him. The witness denied that he ever instructed the personnel officer to ask the appellant to resign.
14. The trial court held, inter alia, that the appellant admitted that on 17th January 2012, he was summoned by Ms. Mathenge, the Administrator to the Boardroom for a meeting where he was confronted with various allegations. There was however no other employee who accompanied the appellant to that meeting. The trial court further established that the respondent had received various clients' complaints against the respondent and through emails that were addressed to him, there was evidence that he was sourcing for private work and payments to himself. The trial court held that an employee who uses the employer's time for his own business violates the provisions of section 44 (4) of the [Employment Act](#).
15. Regarding the remedies that had been sought by the appellant, the trial court held that there was procedural unfairness in the dismissal of the claimant because the meeting of 17th January 2012 "should have conformed to the due process" as provided for under section 41 of the [Employment Act](#) which requires that a claimant be accompanied by another employee in such a meeting. The court awarded one month's salary (Kshs.60,130.00) for unfair dismissal. The court also awarded one month's salary in lieu of notice and Kshs.60,130.00 for leave pay.
16. On the respondent's counterclaim, the trial court established that the appellant conceded that he continued to hold onto the respondent's keys and measuring wheel after his dismissal from employment, and that by so doing the respondent incurred losses. The court went on to allow the counterclaim as prayed by the respondent. The appellant was condemned to pay the costs of the suit.
17. In conclusion, the court held that since the dues owed to the appellant were lower than what was owing to the respondent on account of its counterclaim and costs, the respondent would be paid by the appellant what was due as per the judgment, less the amount found due and payable by the appellant.



18. Being aggrieved by that decision, the appellant preferred this appeal. The memorandum of appeal raises five grounds that may be summarized as follows: that the learned judge erred in law in: allowing the respondent's counterclaim in the absence of evidence to support it; failing to find that the prayers in the counterclaim were in the nature of special damages and ought to have been specifically proved; awarding only one month's salary as compensation for unfair dismissal; and in ordering the appellant to pay costs of the suit to the respondent.
19. The appellant urged this Court to allow the appeal with costs; set aside the trial court's judgment and substitute therefor an order varying the quantum of damages payable to him for unfair dismissal from one month's salary to twelve months' salary and award him costs of the appeal as well as costs of the suit in the ELRC.
20. The respondent filed a cross-appeal, faulting the learned judge for finding that the appellant's dismissal lacked in fair procedure and was thus unlawful. The court was urged to find that the appellant's dismissal was fair and lawful.
21. The appeal was canvassed by way of written submissions with brief oral highlights by counsel. Mr. John Wananda appeared for the appellant while Mr. Ben Simiyu represented the respondent.
22. We need not rehash the submissions, but we shall allude to parts of the same in determining the salient issues that arose in this appeal.
23. The first issue for our determination is whether the trial court erred in awarding the claim for special damages. The respondent had stated that a total sum of Kshs.13,800.00 was spent in replacing five Viro padlocks and one Viro lock after the appellant failed to return some keys following his dismissal. The respondent also claimed a sum of Kshs.870,936.00 as loss of income that it suffered as a result of the appellant's delay in returning a measuring wheel for a period of nearly three months. These, in our view, are claims that needed to be strictly proved.
24. The amounts claimed on account of the replacement of padlocks are special damages, and as held in *Hahn v Sing* [1985] eKLR "special damages must not only be pleaded but must also be strictly proved." The respondent produced three receipts for the sums of Kshs.7200, Kshs.3000 and Kshs.3600, totaling to Kshs.13,800.00. That was sufficient proof of the claim for replacement of the padlocks. However, the amount of Kshs.870,936.00 that was sought on account of loss associated with the measuring wheel was not sufficiently proved. The respondent's witness, Lornah Mathenge, told the trial court that it was the speculative income that the respondent expected to have earned if it had made use of the measuring wheel over the period that the appellant remained with it. She said that the amount was based on customers' enquiries.
25. The respondent in his submissions stated as follows:

"The total number of enquiries relating to the fencing from 17th January 2012 to April 2012 when the appellant returned the keys was Kshs.13,373,559.85 and those relating to walling were Kshs.11,522,570.00 and so the average sales per person over that period should have been Kshs.870,936.00. This amount is what translated to the total loss incurred by the respondent through the appellant's actions and the unavailability of the measuring wheel when it was required for work."
26. The maker of that computation was not disclosed to the court and neither was he called as a witness. The computation was simply based on enquiries made by various people, but no evidence of those enquiries and the computation of the quotations given were tendered. The computation was said to have been based on the respondent's average monthly sales and profits, but no evidence was adduced



in proof of the sales records and profits. The amount claimed was arrived at on the theory that 70% of all inquiries made turn into actual sales, yet no evidence was adduced in proof of that theory or assumption. We therefore find and hold that the loss of Kshs.870,936.00 was wrongly awarded to the respondent as it was not proved. It matters not that the appellant did not adduce evidence to discount the respondent's counterclaim in respect of that sum. The burden of proof lay on the respondent but was not discharged.

27. As regards the claim for Kshs.13,800.00, we find that there was sufficient evidence that the respondent had to spend that sum in replacing several padlocks as a result of the appellant's wrongful act of failing to return store keys that had been given to him. This was the only amount that ought to have been awarded to the respondent on account of its counterclaim. We therefore partially allow grounds 1 and 2 of the appeal.
28. We now turn to grounds 3 and 4 that relate to the dismissal of the appellant. The appellant urged the court to affirm the learned judge's finding that his dismissal was unprocedural and thus amounted to unlawful dismissal. He faulted the learned judge for awarding him one month's salary in compensation for unlawful dismissal. He submitted that the learned judge did not offer any explanation for limiting the award to only one month. Citing this Court's decision in *CMC Aviation Limited v Mohammed Noor* [2015] eKLR, the appellant submitted that the learned judge should have stated the reason for exercising his discretion in the manner she did. He urged us to enhance the compensation to 12 months' salary.
29. On the other hand, the respondent in his cross-appeal urged us to find that the appellant was lawfully dismissed and set aside the learned judge's finding to the contrary as well as the award of one month's salary in compensation for unlawful dismissal.
30. The respondent's Administrator told the trial court that appellant was given an opportunity to respond to the complains that had been levelled against him, but he failed to give any explanation. She added that he was also required to attend a disciplinary hearing accompanied by another employee, but the appellant declined to do so. The appellant disputed that. The appellant said that on 17th January 2012 he was summoned by the Administrator to her office alone and he was confronted with various allegations which he denied. A few hours later he was summarily dismissed.
31. The learned judge held that even in a serious case of an employee who grossly misconducts self at a workplace, under section 41(2) of the *Employment Act*, before such an employee is summarily dismissed the employer should hear and consider any representations the employee may make, and the employee should be accompanied by at least one person. The trial court found that the meeting of 17th January 2012 was between the appellant and the respondent's Administrator only.
32. We have carefully perused the record of appeal and there is no evidence that the appellant was ever informed of his statutory right to be accompanied by an employee of his choice to the meeting that he had with the respondent's Administrator. We therefore agree with the appellant that the learned judge was right in finding that there was procedural unfairness. This finding disposes of the respondent's cross-appeal.
33. We now turn to consider whether the learned judge erred in awarding the appellant only one month's salary as compensation for unfair dismissal. We agree with the appellant that the learned judge did not state what she took into consideration in arriving at that compensation. The appellant urged us to enhance the compensation to 12 month's salary.
34. It is trite law that in order to justify reversing a trial court's decision on quantum, this Court must be satisfied that that the judge acted upon wrong principles of law, or that the amount awarded was



extremely high or inordinately low as to amount to an erroneous estimate of the damage the claimant was entitled to. See *Butt v Khan* [1981] KLR 349.

35. The factors that guide a trial court in giving an appropriate remedy in a claim of unfair termination and wrongful dismissal are set out under section 49(4) of the *Employment Act*. In our view, some of the relevant considerations were the conduct of the appellant and the extent to which the appellant may have contributed to the dismissal. There is evidence that the appellant had previously been given two warnings. There were also serious allegations that had been made against the employee regarding moonlighting. The appellant had worked for just about a year and after his dismissal he caused the respondent unnecessary loss and inconvenience for deliberately failing to hand over store keys and a measuring wheel. We therefore think that the one month's salary that he was awarded for unfair dismissal as well as one month's salary in lieu of notice was sufficient. We shall therefore not enhance the compensation awarded by the trial judge.
36. The last ground of appeal challenges the order on costs that the appellant was condemned to bear. Having set aside a substantial part of the respondent's counterclaim, we think the order as to the costs of the suit before the trial court should be varied. Considering the outcome of the appeal and the cross-appeal, we order that each party do bear its own costs before this Court and the trial court.
37. In conclusion, the sum of Kshs.13,800.00 that was proved on the respondent's counterclaim shall be subtracted from the sum of Kshs.180,390.00 that was awarded to the appellant. The net sum shall accrue interest at court rates from the date of the trial court's judgment.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

