



**Bacchus Grocers Limited v Karisa (Appeal E112 of 2024)
[2025] KEELRC 178 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 178 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E112 OF 2024
M MBARÚ, J
JANUARY 30, 2025**

BETWEEN

BACCHUS GROCERS LIMITED APPELLANT

AND

RAMA NGUMBAO KARISA RESPONDENT

*(Being appeal from the judgment of Hon. Noelyne Reuben
delivered on 6 May 2024 in Mombasa CMELRC E109 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 6 May 2024 in Mombasa CMELRC E109 of 2022. The appellant is seeking that the judgment be set aside and the claims by the respondent be dismissed with costs.
2. The appellant filed four (4) grounds of appeal;
 1. The trial court erred in law and fact in finding and holding that it was an undisputed fact that the claimant was unfairly terminated.
 2. The trial court erred in law and fact in failing to find that the respondent heard the claimant's defense before deciding to terminate him.
 3. The court erred in law and fact in failing to find that the respondent had a valid reason to consider terminating the claimant.
 4. The trial court erred in law and fact in finding that the respondent failed to discharge its burden of proof pursuant to Section 45(2) of the *Employment Act* while terminating the claimant.
3. The background to the appeal is a claim filed by the respondent before the trial court. He claimed that the appellant employed him as a cashier in August 2015 at a wage of Ksh.20, 000 per month. He



worked until 5 February 2022, when his employment was terminated over alleged theft without notice or being allowed a hearing. He claimed the following dues;

- a. Unpaid salary for January 2022 Ksh.30,627.45;
 - b. Notice pay ksh.30,627.45;
 - c. 12 months compensation Ksh.367,529;
 - d. Underpayments;
2022 for 1 month Ksh.10, 627.45;
2021 for 12 months Ksh.127, 529.45;
2020 for 12 months Ksh.127, 529.45;
2019 for 12 months ksh.127, 529.45;
 - e. Work during public holidays;
2019 for 12 days;
2020 for 13 days;
2021 for 12 days;
2022 for 1 day
Total 38 days Ksh.112, 062;
 - f. Overtime of 4 hours each day ksh.993,420;
 - g. Costs of the suit.
4. In response, the appellant's case was that the respondent was a line attendant per his letter dated 30 March 2020. There were justified grounds for summary dismissal as the respondent committed gross misconduct by stealing Ksh.27, 500 and there was due process in addressing his case. He was served with a notice to show cause, to which he responded and was invited to attend a disciplinary hearing.
 5. The appellant also argued that the respondent's contract was to lapse on 29 March 2021 and had only one month left. He was under an agreement dated 30 March 2020, and the claims for underpayment are not justified.
 6. In the judgment, the learned magistrate held that the respondent admitted to taking money from the appellant, which was the cause of termination of employment. However, the trial court proceeded to make the following awards;
Notice pay ksh.20, 000;
4 months compensation Ksh.80, 000;
Unpaid salary for January 2022: Ksh.20, 000;
Public holidays worked Ksh.112, 062;
Costs of the suit.
 7. Parties attended and agreed to address the appeal by way of written submissions.
 8. Only the respondent complied and filed written submissions on 6 January 2025.



9. The respondent submitted that the Record of Appeal dated 24 July 2024 contains an index without all the trial court records. Under Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2024 a memorandum of appeal should be accompanied by a record comprising proceedings and decree which are missing in this case. In the case of *Hakika Transport Services Limited v Idle Civil Appeal E003 of 2022*, the court held that an appeal is fatal if a primary record such as proceedings and a copy of the decree is missing. In this case, the appellant has not explained how he failed to file these records.
10. The respondent submitted that the court cannot decide when a primary record such as the proceedings and the decree upon which the appeal is premised is missing.
11. There were justified reasons leading to termination of employment under Section 45(2) of the *Employment Act*. The appellant was taken through due process and given reasons why his employment was terminated. He failed to show good cause why his conduct was justified. In the case of *Duncan Mbarire v Nairobi Aviation College Limited [2016] eKLR* the court held that it does not matter what offence the employee is accused of. If the employee is not heard, the termination of employment is unfair. In this case, the appellant was given a hearing and issued with a letter dated 5 February 2022 giving him written reasons. In the case of *Standard Group Limited v Jenny Luesby [2018] eKLR* and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* the court held that where the employee is given a hearing, there is compliance with the mandatory provisions of the law.
12. The appeal is without merit and should be dismissed. The failure to attach key and primary documents renders the appeal fatal.

Determination

13. As this is a first appeal, the court can make a fresh and exhaustive examination, re-evaluation, and re-analysis of the entire record to draw inferences and make an independent conclusion. However, differences must be given to the findings by the trial court since it had the opportunity to hear the witnesses given evidence.
14. Through notice dated 5 February 2022, the appellant terminated the respondent's employment on the grounds of having admitted to giving out company money without the knowledge and consent of the management. He was issued with a notice to show cause dated 19 January 2022. The matter had been reported to Makupa Police Station, and there was a disciplinary hearing leading to termination of employment.
15. In his statement in support of the claim, the respondent averred as follows;

Around January 2021, a colleague named Onesmus John Mutua came to me for assistance when he needed money. I did not have any, so he advised me to take it from the company and that he would refund me after getting his salary advance.

Around 16 January 2022, the managing director found out that a sum of 27,500 was missing. She took me to Makupa police station, where the case was registered, and we were given an OB No. 24/16/1/22. I admitted liability and was given two hours to pay up the money, which I did. ...
16. An employee who admits to theft commits gross misconduct contrary to the provisions of Section 44(4) (g) of the *Employment Act*. On his admission, the employer is allowed to sanction him accordingly. In this case, the appellant gave the respondent a notice to show cause and invited him to a disciplinary hearing.



17. The learned magistrate noted that the respondent had admitted to having taken some money from the appellant's property. However, the trial court held that the respondent was terminated from employment without a hearing.
18. A disciplinary hearing was unnecessary because of his admission of liability and his offer to refund the money taken without the employer's consent and approval. Indeed, the respondent returned the money.
19. Where the employer finds a justified, valid, and good cause to terminate employment due to theft of its property, upon admission by the employee, the sanction of summary dismissal is lawful.

The award of notice pay and compensation was in error.

20. In employment and labour relations, each claim should be addressed on the merits the reasons leading to termination of employment notwithstanding. Even where there is a lawful cause leading to termination of employment, where terminal dues are claimed, such should be assessed on the merits.
21. Section 18 (4) of the *Employment Act* requires that;
 - (4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
22. The claims for unpaid salary for January 2022 are based on the employment termination on 5 February 2022. The respondent is entitled to his wages for work done.
23. The respondent was on a contract as a cashier dated 30 March 2020. There is no evidence that he was paid his wage for January 2022, which is due at Ksh.30, 627.45.
24. On the underpayment claim, the respondent was under a contract dated 1 February 2019 and the last contract dated 30 March 2020. Each had terms and conditions of employment. Each contract was distinct and separate from the other as allowed under Section 10(3) of the *Employment Act*.
25. The claim filed on 21 March 2022 covered both contracts back to 2019.
26. Under the last contract, the wage due is Ksh.20 000 per month. Under the Wage Orders applicable from 1 May 2018 to April 2022, the cashier position had a minimum salary of Ksh.30, 627.45 as claimed by the respondent. This is the rate applicable in assessing the claims.
27. The trial court should have assessed the underpayments based on the position held and the wage due under the Wage Orders. Whatever reasons resulted in termination of employment for work done, the minimum wage applied under Section 18(5) (b) of the *Employment Act*.
28. The respondent made modest claims in underpayments;
 - 2022 for 1 month Ksh.10, 627.45;
 - 2021 for 12 months Ksh.127, 529.45;
 - 2020 for 12 months Ksh.127, 529.45;
 - 2019 for 12 months ksh.127, 529.45;These are due as claimed.
29. Work during public holidays should be compensated. The public holidays are gazette by the Minister and published; hence, they are special days. Where the employee remains at work, if not given another day off in compensation, these should be monetized.



30. The respondent outlined all the public holidays she spent at work. The appellant did not address how these days were compensated. The claim for Ksh.112, 062 is justified.
31. The evidence on the overtime claim is that the respondent remained at work for 4 extra hours each day. The start and end times are not stated. The general claim cannot suffice.
32. On the whole, the appeal is partially successful. The judgment in Mombasa CMELRC E109 of 2022 is hereby reviewed in the following terms;
 - a. Employment terminated fairly and lawfully;
 - b. Underpayments Ksh.393,215.65;
 - c. Public holidays Ksh.112,062;
 - d. The dues (b) and (c) shall be subject to tax deductions;
 - e. Each party is to bear its costs for the lower court and in this appeal.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.

M. MBARŪ

JUDGE

