



REPUBLIC OF KENYA



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**Del Monte Kenya Limited v Kiptoo (Employment and Labour Relations Appeal
E007 of 2024) [2025] KEELRC 45 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 45 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2024
ON MAKAU, J
JANUARY 23, 2025**

BETWEEN

DEL MONTE KENYA LIMITED APPELLANT

AND

BEN KIMAIYO KIPTOO RESPONDENT

*(Being an appeal from the Judgment of the Honourable Mr.V.Asiyo (PM) delivered
on 28th March, 2024 in Thika Chief Magistrates Court MLELRC Cause NO.
E023 of 2021) (Before Hon. Justice Onesmus N Makau on 23rd January, 2025)*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 5th April 2024, the appellant seeks the following orders: -
 - a. That this appeal be allowed.
 - b. That the Judgment of the Lower Court be set aside and the Respondent's suit against the Appellant be dismissed with costs to the Appellant.
 - c. Costs of the Appeal.
2. The appeal stands on the following grounds: -
 - a. That the learned trial Magistrate erred in law and in fact in holding and finding that the Respondent proved his case against the Appellant to the required standards.
 - b. That the learned trial Magistrate erred in law and in fact in shifting the onus of proof to the Appellant whereas it was upon the Respondent to prove his case against the appellant.



- c. That the learned trial Magistrate erred in law and in fact in declaring that the Respondent's termination was unlawful and unfair against the weight of the evidence to the contrary.
- d. That the learned trial Magistrate erred in law and in fact in awarding the Claimant/Respondent unpaid leave for the entire period worked of 15 years when there was no evidence to support that conclusion.
- e. That the learned trial Magistrate erred in law and in fact in failing to consider that Kshs.68,450 salary was gross and the same was subject to statutory deductions and therefore the award of Kshs.410,700.00 for unlawful/unfair termination and the award of Kshs.68,450 for one month's salary in lieu of notice were subject to statutory deductions.
- f. That the learned trial Magistrate erred in law in holding that the respondent is entitled to compensation for unlawful termination and other terminal dues to wit; leave days for the 15 years worked, one month's pay in lieu of notice, 6 months' salary for unfair and unlawful termination.
- g. That the learned trial Magistrate erred and misdirected himself in law and in fact when he failed to consider the Appellant's case and its submissions on both points of law and facts in his judgment without proper reasons to do so.
- h. That the learned trial Magistrate erred in law and in fact in awarding interest from the date of filing in an unliquidated claim thereby arriving at an unjust conclusion.
- i. That the learned trial Magistrate erred in law and in fact in coming to the conclusion that he did contrary to the evidence on record and or without any evidence in support thereof.
- j. That the learned trial Magistrate erred in law and in fact by arriving at the conclusion he did while relying on extraneous materials and or facts which did not form part of the proceedings.

Before the trial court

- 3. The respondent sued the appellant for unlawful and unfair termination of his employment. The respondent had worked for the appellant as a Security Supervisor from 1st July 2005 to 5th February 2021 when he was dismissed from service for gross misconduct, namely, theft of the employer's pineapples. His gross salary then was Kshs.68, 450 per month.
- 4. In the suit he alleged that the dismissal was not justified by a valid reason and it was not done in accordance with a fair procedure. Consequently, he prayed for compensatory damages plus accrued benefits under his contract of employment, costs and interests.
- 5. The appellant filed a Statement of Response on 4th November 2021 admitting that it employed the respondent but denied that his salary was Kshs.68,450. It further admitted that it dismissed the respondent from service but denied that the same was unfair and unlawful.
- 6. On the contrary, it averred that the respondent was apprehended by the company Security Officers at Field 14 while in possession of unauthorised pineapples and upon being given a chance to defend himself in writing and in a disciplinary hearing he was unable to exonerate himself from the offence of being found with pineapples in the company motor vehicle KCV 048K at Field 14, which amounted to the offence of stealing. Consequently, the appellant averred that the respondent was not entitled to the reliefs sought save for the dues set out in the dismissal letter, which had already been paid to him.
- 7. During the hearing, the respondent testified as CW1 and called Felix Omondi as CW2, while the appellant called its Security Foreman Mr.Simon Wachira Mwangi as RW1. The respondent's case, in



- brief, was that on 19th January 2021, he was on his security duties aboard motor vehicle KCV 048K driven by CW2 when they were informed by a passer-by that there were pineapples left behind by thieves. They then rushed to the place and boarded the pineapples to the company vehicle they were using and started searching for more in order to take them to the harvesting point.
8. Before long RW1 and a group of guards stopped them and accused them of stealing the pineapples. RW1 then drove the vehicle to the HR office and they were suspended from duty even without being given a chance to explain themselves. Thereafter they were dismissed from service without a fair hearing since the purported disciplinary hearing was hurriedly conducted. They also averred that the reason for the dismissal was not valid because recovery of pineapples from thieves was part of their duties and the respondent had indeed earned a promotion for doing the same duty.
 9. RW1 confirmed that he caught the respondent and CW2 with pineapples in the company car they were using. He contended that they were supposed to inform the control tower about recovered pineapples, then collect the same and record an incident report, but they never did that. He denied that there was any grudge between him and the respondent.
 10. After the hearing, both sides filed written submissions and the trial court (Hon.Asiyo PM) rendered the impugned judgment on 23rd March 2024 in the following terms: -
 - a. “That the termination of the claimant’s contract of service is declared unfair and unlawful.
 - b. That the claimant is awarded a sum of Kshs.410,700 as compensation for unlawful/unfair termination.
 - c. That claimant is awarded Kshs.68,450 in lieu of notice.
 - d. That the claimant is awarded a sum of Kshs.718,724.9 being payment of unpaid leave for the 15 years.
 - e. That I award interest on the above orders (b), (c) and (d) from the date of filing of this cause till payment in full.
 - f. That the respondent to pay the costs of the cause.”

Submissions in the appeal

11. It was submitted for the appellant that for a claim of unfair termination to succeed, the claimant must establish that the reason for termination was not valid and fair, and that the fair procedure was not followed.
12. With respect to the reason for the termination, it was submitted that the respondent was caught stealing pineapples from the employer’s field contrary to section 44(4)(g) of the *Employment Act*. It was submitted that under the said section, it was entitled to dismiss the respondent if it had reasonable and sufficient grounds to suspect that the respondent had committed a criminal offence against it which in this case was stealing the pineapples.
13. It was further submitted that the investigations report provided reasonable and sufficient grounds to believe that the respondent committed the crime of stealing. The report contained photos from the scene, tracking report and interview statements recorded by the three suspects and seven witnesses including James Idd Kahacia who was manning the Watch tower.
14. Mr.Kahacia saw the guard by the name Robert Kibet Biwott picking pineapples which were then loaded onto the vehicle driven by CW2. He then contacted another guard about the incidence and



- who in turn informed RW1. A team of guards were mobilized around RW1 and they apprehended the respondent and his driver.
15. It was further submitted that there was no evidence of any thieves in the area as there were no foot prints or motor cycle tyre marks at the scene. Further that the respondents did not report the incidence of theft to his senior. Finally, the guard at the watch tower did not see anyone else picking pineapples except the guard manning Field 2, Mr.Biwott.
 16. As regards the procedure followed, it was submitted the offences was investigated and thereafter the respondent was served with show cause letter. Subsequently, he was accorded a hearing under section 41 (2) of the Employment Act and a decision communicated vide the dismissal letter dated 5th February 2021. It was submitted that the respondent was accompanied by Mr.Lawrence Kirera during the disciplinary hearing.
 17. Finally, it was submitted that the respondent was not entitled to the reliefs granted by the trial court since the dismissal was justified and fair. As regards the award of leave for whole period of service, it was submitted that the respondent did not discharge the onus of proof and therefore the award of Kshs.718,724.90 was not merited. In conclusion, the court was urged that, in case it finds the procedure of termination was flawed, the summary dismissal should be reduced to a normal termination and the parties to bear own costs since the respondent contributed the termination by his own conduct. The award of interest was also faulted since the claims before the trial court were unliquidated.
 18. On the other hand, it was submitted for the respondent that RW1 confirmed in evidence that the respondent was supposed to collect the material pineapples and record an incident report. He further confirmed that they arrested the respondent while collecting the pineapples and before waiting to see if he would record the incident report.
 19. It was further submitted that, it was part of the respondent's duty to recover pineapples and referred to a letter of commendation given to him for the same work before. It was also submitted that RW1 confirmed that the pineapples were loaded onto a company vehicle and it was within the company premises. Further, RW1 admitted that the respondent was a good employee who had no previous record of theft. Finally, it was submitted that the vehicle in issue had a car tracker which could have indicated if the pineapples were stolen.
 20. As regards the procedure followed, it was submitted that the respondent was not accorded a fair opportunity to defend himself. It was submitted that, the right to fair hearing included the employees right to have sufficient time to prepare his response. Reliance was placed on Rebecca Ann Maina & other v Jomo Kenyatta University of Agriculture (2014) eKLR and Julius Macharia Mwangi v Matanga Investments Limited (2019) eKLR where the court upheld the right of an employee to have sufficient time to prepare his defence.
 21. As regards the award of damages by the trial court, it was submitted that the respondent was entitled to the same after the court made a finding that the dismissal was unlawful and unfair. It was submitted that, considering the respondent's long service of fifteen years, an award of 12 months' gross salary was merited as compensation for unfair termination plus one-month salary in lieu of notice.
 22. It was further submitted that the award of leave for the 15 years served was merited because the appellant acknowledged in its pleading and evidence that the respondent was never given leave or compensated in cash. Reliance was placed on Mbogo & another v Shah (1968) E.A P 15 where the court held that an appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court misdirected itself in some matter, or that it was clearly wrong in the exercise of judicial discretion as a result of which it arrived at an erroneous decision.



23. In conclusion, it was submitted that the appellant has not tendered any acceptable reason to warrant the orders sought in the appeal. Consequently, the court was urged to dismiss the appeal with costs.

Mandate of this court

24. The mandate of a first appellate court is to re-evaluate the evidence on record and make its own conclusion. The court should also not interfere with the finding of fact and the exercise of judicial discretion of the trial court unless it is not supported by evidence and the law or where there is a misdirection in some matter or misapprehension of evidence or the law which has resulted into an error in the decision. see *Kenya Ports Authority v Kunston (Kenya) Limited* (2009) EA 212, *Butt v Khan* (1978) eKLR and *Mbogo & another v Shah* (1968) EA 15.

Issues for determination

25. Having received guidance from the foregoing binding authorities, I have perused the record of appeal and the submissions made for and against the appeal. The following issues fall for determination: -
- a. Whether the dismissal of the respondent was unlawful and unfair.
 - b. Whether the reliefs granted to the respondent by the trial court should stand.

Unlawful and unfair dismissal

26. Section 45 (1) & (2) of the *Employment Act* provides that: -

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason-
 - i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

27. The above provision emanates from Article 4 of the ILO Convention 158 on Termination of Employment which states that: -

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”

28. In this case, the reason cited for the dismissal from service was gross misconduct in the form of stealing of the employer’s pineapple from its field by the respondent. The respondent denied the offence and maintained that the pineapples were recoveries left behind by thieves and he intended to surrender them to the employer’s harvest section.



29. However, the employer contended that the respondent was caught with CW2 while stealing the pineapples using company motor vehicle KCV 048K. The report was made by a guard called James Idd Kahacia who was manning a Watch Tower when he saw another guard Mr. Biwott picking pineapples which were loaded onto the said vehicle by the respondent and CW2.
30. Investigations were done at the scene and no foot prints or motor cycle tyre prints were seen to support the allegation of presence of thieves at the scene. During the disciplinary hearing several witnesses including the eye witnesses testified. The respondent and CW2 admitted that they were caught at the scene with the pineapples. Upon evaluation of the said evidence, the employer genuinely believed that the respondent was stealing the pineapples and dismissed him under section 44 (4) (g) of the *Employment Act*. The said provision entitles an employer to a summarily dismissal if: -
- “(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”
31. Section 43(2) of the *Employment Act* states that: -
- “The reasons for termination of a contract are those 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.”
32. Having considered the evidence before the court, I am satisfied that the employer had sufficient grounds for suspecting that the respondent and his colleagues were stealing the pineapples. First is the evidence of an eye witness Idd Kahacia who saw Mr. Biwott picking the pineapples. Second was the failure by the respondent to report the alleged theft with the RW1, Senior officer or the control room.
33. As per the provision of section 43(2) and 44(4)(g) of the *Employment Act*, the employer is not required to prove that indeed the employee stole but rather demonstrate reasonable evidence or sufficient grounds of suspecting that the employee committed the offence.
34. The circumstances of this case were sufficient to arouse a suspicion that the respondent was stealing the pineapples from the employer. Hence the employer was justified to terminate the employment as the respondent had become a thief of the property he was employed to protect. That was a fundamental breach of the contract of employment which went to the root of a relationship whose glue was trust.
35. I gather support from *Galgalo Jarso Jillo v Agricultural Finance Corporation (2021) eKLR* where Manani J held as follows concerning termination under section 44(4)(g) of the *Employment Act*: -
- “...it does not require the employer to have watertight evidence of the alleged criminal transgression for the ground to arise. All that is required is for the employer to have justifiable and compelling grounds to suspect that the affected employee has engaged in acts that are criminal in nature and which affects the property of the employer.”

Procedure followed

36. Section 41 of the *Employment Act* provides as follows: -
- “(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.”

37. In the instant case, the respondent was caught red handed and he was interrogated by his supervisor. Thereafter he was suspended and given show cause letter to defend himself in writing. Subsequently, he was accorded a disciplinary hearing on 3rd February 2021 and the decision was communicated by the dismissal letter dated 5th February 2021.
38. However, the respondent contended that he was not accorded a fair hearing before the dismissal and faulted the employer for giving him short notice and concluding the hearing in a hurried manner. The appellants admitted that it gave the respondent a notice of 24 hours.
39. In the case of *Rebeca Ann Maina & 2 others V Jomo Kenyatta University of Agriculture & Technology (2014) eKLR*, Ndolo J held that:
- “I agree with counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to the allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence.”
40. I agree with the above decision and hold that the respondent was not accorded sufficient time to prepare his defence. A notice of 24 hours when the employee was on suspension was not sufficient and it denied him a fair hearing. The right to fair hearing includes the right to sufficient notice to prepare and mount defence.
41. Such defence also include having another employee to accompany him to the hearing and also to call witnesses. The failure to afford the respondent fair hearing rendered the termination unfair within the meaning of section 45 of the *Employment Act*, 2007.

Reliefs

42. In view of the foregoing conclusion, the respondent was entitled to compensation for unfair termination and salary in lieu of notice pursuant to section 49 and 50 of the *Employment Act*. The trial court awarded him six months’ salary in compensation plus one-month salary in lieu of notice. No justification was given for the award of six months compensation.
43. Section 49(4) of the *Employment Act* provides for several factors to be considered when deciding what remedy to give under subsection (1)(c) of the *Employment Act* which provides for an award of up to 12 months gross salary. Consequently, the discretionary award must be interfered with.
44. In this case, the respondent worked for 15 years but he contributed to the termination through misconduct. Having considered the above factors, an award of 4 months gross salary will be reasonable remedy for the unfairness caused through the hurried hearing.
45. The award of salary in lieu of notice will not be interfered with because it was justified. The respondent pleaded a gross salary of Kshs.68,450 and produced a bundle of pay slips. The appellants did not



produce any pay slips to rebut the alleged salary. Consequently, I am satisfied that the trial court relied on the available evidence when it applied the said gross salary in assessing compensatory damages.

46. As regards the claim for leave, the respondent pleaded that he was not given leave or paid in lieu for the period he served. He repeated the said averment in his written statement which he adopted as his evidence. The appellant never rebutted the evidence and it never challenged it during cross examination. Consequently, I find that the respondent was entitled to the award of leave and as such the trial court was right in granting the same.
47. However, the court erred by using the gross salary to assess the compensation as opposed to the basic pay of Kshs.52,500. Consequently, the sum due for leave is $Kshs.52,500 \times 21/30 \times 15 = Kshs.551,250.00$

Conclusion

48. In view of the findings above, I allow the appeal to the extent highlighted and grant the following orders: -
- a. The respondent is awarded 4 months gross salary as compensation for the unfair termination being Kshs.273,800.
 - b. The respondent is awarded Kshs.551,250 as leave for 15 years.
 - c. The rest of the awards granted by the trial court remains unchanged.
 - d. Each party shall bear own costs of the appeal because the appeal did not fully succeed.
 - e. The award to the respondent is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF JANUARY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

