Vipingo Beach Limited v Makokha (Appeal E019 of 2024)
[2025] KEELRC 395 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 395 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

APPEAL E019 OF 2024

M MBARŨ, J

FEBRUARY 13, 2025

BETWEEN

VIPINGO BEACH LIMITED ..... APPELLANT

AND

SHABAN NAMAKWA MAKOKHA ..... RESPONDENT

(Being an appeal from the judgment of Hon. S. D. Sitati delivered on 22 July 2024 in Kilifi CMELRC No.E017 of 2023)

JUDGMENT

1. This appeal arises from the judgment delivered on 22 July 2024 in Kilifi CMELRC No.E017 of 2023. The appellant seeks that the judgment be set aside and substituted with an order dismissing the suit with costs.

2. The background of the appeal is a claim filed by the respondent on the basis that the appellant employed him on 1 October 2019 as a security officer within the Vipingo area. He was provided with an annual contract at the start of his employment. At the end of the contract, he was not given another contract. On 18 October 2022, the respondent reported to work, was notified of summary dismissal, and was informed that his terminal dues would be paid in October 2022. He claimed that he worked four hours overtime and during public holidays without compensation, and his employment was terminated unfairly, contrary to section 41 of the *Employment Act*. He was not paid his terminal dues and claimed the following;

    a. Notice pay Ksh.38,500;

    b. Overtime Ksh.1,454,571.04;

    c. Public holidays Ksh.132,127.53;

7.

d. Compensation and Ksh.463,000;

e. Certificate of service;

f. Costs of the suit.

3. In reply, the appellant's case was that the termination of employment was fair and lawful, and all terminal dues were settled as per the *Employment Act*. The respondent was employed as a security supervisor from 1 October 2019. His employment was terminated through summary dismissal on the grounds of gross misconduct upon admission to committing theft against the appellant company. The respondent was in the head office security department and carried out supervisor functions only during working hours of 8 hours within 6 days each week. Being a supervisor, he was not required to work during public holidays. Following his summary dismissal, notice pay and compensation are not due.

4. The learned magistrate heard the parties and held that termination of employment was not justified and awarded the respondent the following;

a. 12 months compensation Ksh.360,000;

b. Notice pay Ksh.30,000;

c. Overtime Ksh.654,400;

d. Certificate of service;

e. Costs of the suit.

17. Aggrieved, the appellant filed the appeal because the trial court's findings were not justified and failed to take into account the submissions and evidence by the appellant. The respondent's confession on 4 October 2022 was not considered. The trial court failed to consider that the work of a security manager involved him working with the police. Hence, he could not have been intimidated to confess as he did so voluntarily. The appellant asked the respondent to investigate the issue of stolen water pipes, but he opted to report the incident to the police since he was involved. The appellant had a right to report criminal acts to the police for investigations.

18. Other grounds of appeal are that the appellant had a genuine reason to suspect the respondent had committed theft of water pipes after being negligent while investigating as the security manager. The trial court erred in ignoring the disciplinary minutes dated 12 October 2022, in which the respondent confessed to being involved in theft, and hence, the award of 12 months was in error and excessive. Notice pay, overtime, and alleged work during public holidays were not justified.

19. On the appeal, the appellant submitted that they employed the respondent as head of security in a contract dated 30 September 2019. His employment was terminated through summary dismissal for admission of theft contrary to section 44 of the *Employment Act*. In the case of Diamond Industries Limited v Mwale Appeal E028 of 2022, the court held that theft is a criminal act. When it happens on the shop floor, an employer can summarily dismiss the employee for gross misconduct. The protection for the employee is under Section 41(2) of the *Employment Act*, where he must be issued a notice to attend a disciplinary hearing.

20. In Patrick O Oluoch v Ereto Bookshop Limited [2019] eKLR, the court held that an employee's admission of theft of the employer's property is sufficient cause for summary dismissal. The standard of proof is on a balance of probability, not beyond a reasonable doubt, as held in Kenya Revenue Authority v Reuwel Waithaka Gitahi & others [2019] eKLR.

21. In this case, the respondent, having admitted to theft, was invited to defend himself without giving a satisfactory response. This justified summary is dismissal. The awards by the trial court were not justified. The respondent testified in court and admitted that he took the water pipes because he thought they were discarded. Based on his confession, evidence, and the law, the case should have been dismissed with costs.

22. On the award of overtime, the respondent, as head of security, was a supervisor working 8 hours a day for 6 days each week. He was not required to work on public holidays, so the awards were not justified.

23. The respondent submitted that the appellant has not adhered to the Employment and Labour Relations Court (Procedure) Rules, 2024, in filing the appeal. Rule 15(1) requires an appellant to file certified copies of unresolved pleadings. The Record of Appeal does not contain certified copies of the pleadings, so the appeal is incompetent.

24. The respondent submitted that the procedure for terminating his employment was not lawful. The appellant's witness testified that the hearing notice was verbal, and no notice to show cause was issued. The respondent's right to call another employee of his choice was not secured, and there was no record of the meeting being held, leading to unlawful summary dismissal. This was contrary to Section 41 of the *Employment Act*. In the Standard Group Limited v Jenny Luesby [2018] eKLR case, the court held that before summary dismissal, the employee must be allowed to defend himself. In Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR, the court held that the due processes under Section 41 of the *Employment Act* are mandatory. The employee must be allowed to attend the disciplinary hearing with another employee of his choice.

25. The respondent submitted that he is entitled to the awards by the trial court with costs.

Determination

26. A first appellant court must subject the evidence to a fresh and exhaustive examination and conclusion. However, the court must remember that it did not have the opportunity to see and hear the witnesses first-hand.

27. Through notice dated 18 October 2022, the appellant terminated the respondent's employment through summary dismissal. The reasons were that in a meeting held on 12 October 2022, where he was present, the issue of theft of water pipes that had disappeared from the estate on 24 September 2022 was discussed, and his signed statement was taken into account. The notice acknowledged that the respondent had admitted that, together with other persons, he had stolen and sold the pipes. He admitted to receiving Ksh.3, 000 from the proceeds of the sale of the stolen pipes.

28. In his evidence before the trial court on 22 January 2024, he testified that ... I admitted that I stole pipes, but that is not what I did. 10 of my previous statements had been shredded by my employer. I made the admission under police pressure. I did not steal. I did not report to the police that I had been coerced to record the statement.

29. A statement dated 4 October 2022 was filed in court. The respondent outlined what happened to the water pipes, how they were sold, and how the proceeds were shared with third parties.

30. Under section 44(4) of the *Employment Act*, an employer can terminate employment through summary dismissal where the employee breaches a fundamental employment contract provision, particularly where the employee commits criminal acts. Upon commission of gross misconduct, called to account, the employee who voluntarily admits to such conduct is sanctioned. The recourse to section 41(2) of the *Employment Act* on the face of admission is unnecessary.

31. In the case of Nairobi City Water and Sewerage Company Limited v Irungu [2024] KECA 677 (KLR), the court held that;

> Determining an appropriate sanction regarding summary dismissal is mainly at the employer's discretion. However, this discretion must be exercised reasonably. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction levied by the employer but whether, in the circumstances of the case, the sanction was reasonable. Under the *Employment Act* and the appellant's Code of Conduct, gross misconduct is grounds for summary dismissal.

32. In Nairobi Bottlers Limited v Imbuga [2024] KECA 434 (KLR) and the case of Wetangula v Co-operative Bank of Kenya Limited [2025] KECA 111 (KLR), the court held that summary dismissal is allowed where the employee performs his duties negligently. The court should not substitute its views with those of an employer when the employee is called to account and admits to his gross misconduct. The sanction issued by the employer's policy should apply unless it is shown to be contrary to justice.

33. In this case, the appellant went overboard despite having the statement dated 4 October 2022. This must have been done to abide by the due process and ensure justice for the employees.

34. The respondent was invited to a meeting to make his representations. In the meeting held on 12 October 2022, though unnecessary, the respondent reiterated his acts of gross misconduct.

35. The trial court found that the proceedings of the meeting held on 12 October 2022, on the face of the statement by the respondent on 4 October 2022, were in error. The motions of a disciplinary hearing/ meeting at the shop floor are not similar to a criminal trial as held in Kenya Revenue Authority v Reuwel Waithaka Gitahi & others, cited above. All the employer is called to do is allow the employee to respond.

    In this case, the hearing/meeting was not necessary.

36. Where the respondent felt his statement had been secured through coercion, he did nothing to secure his rights upon writing his statement on 4 October 2022 and attending the meeting on 12 October 2022. He did not revoke his statement as recorded. He let it be.

37. Several months after filing his claim on 3 May 2023, he still held on to his statement dated 4 October 2022.

38. The letter and statement dated 4 October 2022 are valid and cannot be applied to justify a claim for unlawful and unfair termination of employment.

39. The award of compensation and notice pay were in error. This is not due when summary dismissal is valid and justified.

40. On the awards for overtime, the respondent claims that he worked from 6 a.m. to 6 p.m. for 6 days each week with overtime of 4 hours. His evidence in court was that, as the supervisor, he headed a team of 13 in 2 shifts. He was at work to reinforce. I also had the office telephone, and the manager needed me. I was on the ground.

41. A supervisor is an administrative position, unlike the security guard's role. Because of his role, the claimant was earning a wage higher than that of a security guard. His was not a basic wage. It was a management wage over and above the minimum due.

42. The contract of service allocated working hours in the following terms;

> ... Security Section of the company operates on 12 hours shift for 5 days a week with two days off on any day of the week as will be determined by management. A management team member will be expected, within reasonable limits, to respond to emergency situations outside regular working hours.

43. Indeed, the respondent testified that he had a telephone allocated for easy communication. As the supervisor, a claim for overtime based on his allocated wage, which is 6 a.m. to 6 p.m., is not justified.

    The overtime award by the trial court was in error.

44. The respondent claimed work during 37 public holidays. These are special days gazetted by the Minister. They are not general days, and a claimant must particularize such days for the employer's assessment in the reply. The court must also analyse such public holidays via the Minister's publications. A general claim as herein made by the respondent cannot suffice.

    The award of public holidays without particulars was in error.

45. In terms of Section 51 of the *Employment Act*, a Certificate of Service is due at the end of employment. On 20 October 2022, the appellant issued the respondent his Certificate of Service, which was filed together with the response.

46. On costs, the claims by the respondent addressed above were not justified. Costs awarded were not based on any special circumstances and, hence, contrary to Section 12(4) of the *Employment and Labour Relations Court Act*. The discretion to award costs in employment matters must be applied judicially and in deserving cases.

47. In this regard, the appeal is with merit. The judgment in Kilifi CMELRC No. E017 of 2023 is hereby set aside in its entirety. Costs of the appeal awarded to the appellant.

    Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF FEBRUARY 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet