



REPUBLIC OF KENYA



**Eskodoye v Carslake Nominees Limited t/a Diani Sea Resort (Appeal E072 of 2023) [2025] KEELRC 337 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 337 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E072 OF 2023  
AK NZEI, J  
FEBRUARY 7, 2025**

**BETWEEN**

**LAVINAH INDOSHI ESKODOYE ..... APPELLANT**

**AND**

**CARSLAKE NOMINEES LIMITED T/A DIANI SEA RESORT .... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Mr. D. W. Mburu in Mombasa Chief Magistrate's Court, ELRC No. E066 of 2020)*

**JUDGMENT**

1. The Appellant was the Claimant in Mombasa Chief Magistrate's Court Employment Case No. E066 of 2020 whereby she had sued the Respondent herein seeking the following reliefs:-
  - a. Six months' salary as compensation for unfair termination (Kshs.39,899 x 6) ..... Kshs.239,394/=.
  - b. Two months' salary in lieu of notice .... Kshs.79,798/=.
  - c. Salary underpayment for 3 months (21/1/2019 to 20/4/2019) ..... Kshs.21,108/=.
  - d. Salary underpayment (from 21/4/2019 to 31/12/2019) .. Kshs.43,360/=.
  - e. Salary underpayment (1<sup>st</sup> to 31<sup>st</sup> January, 2020) ... Kshs.6,600/=.
  - f. Payment for 7 pending leave days .... Kshs.8,574/=.
  - g. A declaration that termination (of the Appellant's employment) was unfair and illegal.
  - h. General damages for defamation.
  - i. General damages for hardship caused.



- j. Costs of the suit and interest.
2. The Appellant had pleaded:-
- a. that she had been employed by the Respondent as a Stores Clerk on contract terms from 21<sup>st</sup> January, 2019 to 20<sup>th</sup> April, 2019; then renewed on 21<sup>st</sup> April, 2019 to 31<sup>st</sup> July, 2019; then on 1<sup>st</sup> August, 2019 to 31<sup>st</sup> January, 2020; and that thereafter, the contract of service continued indefinitely.
  - b. that on 8<sup>th</sup> February, 2020, the Appellant's services were summarily and unfairly terminated.
  - c. that at the time of her summary dismissal, the Appellant was earning a gross salary of Kshs.39,899/=; up from her initial salary of Kshs.30,147/= and Kshs.27,406/= respectively.
  - d. that on 29<sup>th</sup> January, 2020, the Appellant received a letter sending her on suspension to pave way for investigations for alleged fraudulent activities and gross irregularities.
  - e. that on 6<sup>th</sup> February, 2020, the Appellant presented herself for a disciplinary hearing and explained that the issues raised happened before her contractual employment with the Respondent.
  - f. that without considering the Appellant's response to the allegations, the Respondent issued the Appellant with a letter on 8<sup>th</sup> February, 2020, summarily dismissing her from employment. That termination of the Appellant's employment was unfair as it was without notice or payment in lieu thereof; and terminal dues were not paid to the Appellant.
  - g. that by a Memo dated 3<sup>rd</sup> August, 2020 and titled "investigation of fraudulent activities in the Hotel", the Respondent published a false and defamatory statement against the Appellant who had been an employee in the purchasing department stating:-

"Operational areas in the hotel are greatly affected with many staff being directly implicated in the scam, both management junior staff. These include Kitchen, Staff Canteen Bar, Stores, Maintenance and Purchasing. They collaborated with Security and Accounting including Cashiers."
  - h. that by summarily dismissing the Appellant and publishing the foregoing statement to all staff, the Respondent portrayed the Appellant as a thief, an unreliable person, a fraudster and the person behind the losses [incurred] by the hotel, hence damaging her reputation.
  - i. that the Appellant had diligently served the Respondent from January 2019 to 8<sup>th</sup> February, 2020 when she was summarily dismissed; with no allegations of fraudulent activities against her.
  - j. that the Respondent had no valid reasons for terminating the Appellant's employment.
3. Documents filed alongside the Appellant's statement of claim included her written witness statement dated 9<sup>th</sup> October, 2020 and an evenly dated list of documents, listing ten documents. The listed documents included letters of contract dated 21<sup>st</sup> January, 2019, 21<sup>st</sup> April, 2019 and 1<sup>st</sup> August, 2019; leave application/authorization forms, payslips, a CBA for the year 2019/2020, a suspension letter dated 29<sup>th</sup> January, 2020, a summary dismissal letter dated 8<sup>th</sup> February, 2020, the Respondent's Memo dated 3<sup>rd</sup> August, 2020 and a copy of the Appellant's National Identity Card.



4. On 25<sup>th</sup> October, 2021, the Appellant filed an amended statement of claim, which did not change the averments made in the initial statement of claim, save for the total sum claimed, which the Appellant changed from Kshs.159,440/= to Kshs.398,834/=.
5. On 24<sup>th</sup> November, 2021, the Appellant filed a further list of documents and listed “relevant pages” of an agreement between Kenya Association of Hotel Keepers & Caterers and KUDHEIHA.
6. The Respondent entered appearance on 18<sup>th</sup> November, 2020 and filed Response to the Appellant’s claim, admitting having employed the Appellant as a Stores Clerk on contract terms from 21<sup>st</sup> January, 2019 to 20<sup>th</sup> January, 2019, which was renewed on 21<sup>st</sup> April, 2019 to 31<sup>st</sup> July, 2019, and from 1<sup>st</sup> August, 2019 to 31<sup>st</sup> January, 2020; and denied having employed her indefinitely thereafter.
7. The Respondent however admitted that the Appellant remained in its employment until 8<sup>th</sup> February, 2020 when she was summarily terminated, but denied that the termination was unfair. The Respondent further admitted that the Appellant was earning a gross salary of Kshs.39,899/= at the time of termination, and denied having underpaid the Appellant.
8. The Respondent further pleaded:-
  - a. that the Appellant was suspended on 29<sup>th</sup> January, 2020 and that she presented herself for a disciplinary hearing on 6<sup>th</sup> February, 2020 and gave an explanation as pleaded by her.
  - b. that the Appellant’s employment was not unfairly terminated.
  - c. that the Respondent denied the Appellant’s claim.
9. The Respondent filed a written witness statement of Angela Mwenderani dated 17<sup>th</sup> August, 2022 and a list of documents dated 16<sup>th</sup> August, 2022, listing 3 documents. The listed documents included the Appellant’s job description, response to show cause letter dated 4<sup>th</sup> February, 2020 (responding to a show cause letter dated 29<sup>th</sup> January, 2020), and minutes of a disciplinary hearing held on 6<sup>th</sup> February, 2020.
10. At the trial, the Appellant, being the Claimant in the primary suit, adopted her filed witness statement as her testimony and produced in evidence the documents referred to in paragraph 3 of this Judgment. She further testified that her employment had been unfairly terminated as she had not committed the alleged acts, which had been raised at the disciplinary hearing, as the show cause letter did not set out any details. That she was informed of the allegations at the meeting/hearing.
11. The Appellant further testified that she had been underpaid as she had been paid a salary that was below the salary recommended in the CBA; and that she had 7 pending leave days.
12. Cross-examined, the Appellant testified that the suspension letter indicated that theft had occurred, and that the same was being investigated.
13. The Respondent called one witness, Angela Mwenderani (RW-1), who told the trial court that she was the Respondent’s Human Resource Manager. She adopted her filed witness statement as her testimony, and produced in evidence the Respondent’s documents referred to in paragraph 9 of this Judgment. She further testified that the Appellant had been employed as a Stores Clerk, earning a basic salary of Kshs.24,225/= and a house allowance of Kshs.9,225/=.
14. RW-1 testified under cross-examination that whereas the show cause letter talked of inventory records not being updated, the disciplinary committee found that the Appellant had been involved in theft, and dismissed her for theft. That theft had not been captured in the show cause letter, which talked of



financial loss. That the Appellant did not have access to any of the documents before the disciplinary hearing. That the Respondent had not filed any audit report to prove the [alleged] losses. For record purposes, it is worthy noting that the Respondent (RW-1) did not dispute the fact that the Appellant was its employee for an indefinite time at the time of her termination.

15. The trial court delivered its Judgment on 29<sup>th</sup> June, 2023 and made a finding that the Appellant's summary dismissal was lawful, and on that basis proceeded to disallow the Appellant's claims for compensation for unlawful dismissal and payment in lieu of notice. The claim based on alleged underpayment was also disallowed by the trial court for lack of proof. The claim for damages for defamation was also declined, and in declining it, the trial court stated as follows:-

“ 21. ... The Court wishes to highlight that the main elements in a defamation claim include the identification of the person being defamed, and the statement must be published to attract a negative impact on the Claimant. Based on the wording in the internal memo dated 3<sup>rd</sup> August, 2020, nothing directly links the statement to the Claimant, nor is the document accessible publically, as it is reserved for employees working for the respondents. The claim for defamation damages is therefore unfounded.”

16. The trial court allowed the claim for seven (7) untaken leave days and awarded the Appellant Kshs.8,574/=. The rest of the claims were rejected and dismissed, and each party was ordered to bear its own costs.

17. Aggrieved by the said Judgment, the Appellant preferred the appeal herein and set forth the following three grounds of appeal, which I will handle together:-

- a. The trial court erred on the veracity of the contents of the dismissal letter dated 8<sup>th</sup> February, 2020 and thereby misdirected himself in law and reached a wrong decision.
- b. The Honourable trial Magistrate misdirected himself on the law and applied it wrongly on the facts, thus leading to a wrong decision.
- c. The Honourable Magistrate erred in law by placing the burden of proof on the Claimant whereas the same statutorily lies on the employer, [and] thus reached a wrong decision.

18. This is a first appeal. The duty of a first appellate court has long been settled, and has been restated in numerous decided cases. One of such cases is the case of Easy Coach Bus Services & Another – vs – Henry Charles Tsuma & Another (suing as the Administrators and Personal Representatives of Josephine Wayenga Tsuma) [2019] eKLR; where the Court stated as follows:-

“ 7. Firstly, as first appellate court, this court has a duty to examine matters of both law and fact and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis, bearing in mind that the appellate court did not have an opportunity to hear the witnesses first hand and to test the veracity of their evidence and demeanor . . .”

19. It is for the foregoing reason that I have, in this Judgment, preceded to summarise both the pleadings filed and the evidence presented thereon before the trial court; and which I have considered. In my view, issues that fall for determination herein are as follows:-

- a. Whether termination of the Appellant's employment by the Respondent was unfair.
- b. Whether the reliefs sought by the Appellant in the trial court were deserved.



20. On the first issue, for fairness to be attained in termination of an employee's employment, there must be both procedural and substantive fairness. The Court stated as follows in the case of *Walter Ogal Anuro – vs – Teachers Service Commission* [2013] eKLR:-

“ . . . For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

21. In the present case, the Respondent issued the Appellant with “a suspension letter and invitation for a disciplinary hearing” dated 29<sup>th</sup> January, 2020, which stated as follows, in part:-

“As a qualified Store Clerk, you have a duty to ensure that all inventory records are well updated. The physical stock should always match the stores records. Instead, you intentionally failed to do so as seen in various documents. Your failure has led to substantial financial losses to the organization . . .

We therefore have no option than to send you on suspension to pave way for further investigations. This is effective from Wednesday 29<sup>th</sup> January, 2020.

You are also required to show cause why disciplinary action should not be taken against you in regard to the above highlighted allegations. This is in accordance with the employment laws and the company policies. Your written explanation should reach the H.R. Manager on or by Tuesday 4<sup>th</sup> February, 2020 at 10 a.m.

Kindly note you shall be expected to report back on date Thursday 6<sup>th</sup> February, 2020 for a disciplinary hearing in the presence of the works committee. The venue shall be Diani Sea Resort Conference room . . .”

22. It is clear from the foregoing that the Respondent's said letter to the Appellant served as a suspension letter, a show cause letter (catalogue of accusations against an employee/charge sheet) and an invitation for a disciplinary hearing. The accusations that were to inform the subject and/or the agenda of the disciplinary hearing were those stated in the said letter, that is “intentional/deliberate failure by the Appellant to ensure that store inventory records were updated.”

23. The Appellant is shown to have responded to the accusation vide a letter dated 4<sup>th</sup> February, 2020 and to have stated:-

“ . . . My duty is to ensure that all inventory records are updated. Updating the bin cards also depends on the timely posting of invoices in the G.I.N. If it is delayed, it paralyzes all the operations in the stores, especially the paper work.

I did not intentionally or deliberately fail to update bin cards. Sometimes invoices are not updated in the G.I.N.”

24. The Appellant having denied the charge levelled against her, it behoved the Respondent to demonstrate the validity of the Charge/Respondent's allegations against the Appellant.

25. From the minutes of the disciplinary hearing held on 6<sup>th</sup> February, 2020, the Appellant is shown to have denied the allegations made against her, and to have reiterated what she had stated in response to the show cause letter/suspension letter/invitation for a disciplinary hearing dated 29<sup>th</sup> January, 2020. The Respondent is not shown to have addressed the issue of “delayed posting of invoices in the G.I.N



that the Appellant had repeatedly stated paralysed operations in the store. The trial court is not shown to have been addressed on the issue of whose responsibility it was to do the posting of invoices to the G.I.N. I have perused the Appellant's job description document which was produced in evidence by the Respondent, and the said posting of invoices to the G.I. N is not shown to have been one of the Appellant's duties. Further, the alleged unupdated store inventory records and documents that were to inform the updating were not produced in evidence by the Respondent. The charge against the Appellant was not proved, on a balance of probability.

26. The Claimant's summary dismissal letter states, in part:-

“ After serious considerations of the deliberations during the hearing related to the allegations against you, the management did not find your explanation satisfactory.

We hereby inform you that the matter has been reported to the police for further action.

We, therefore, under the circumstances have no option than to summarily dismiss your employment with us as in accordance to (sic) the Employment Act, Section 44(4)(c) and (g) . . .”

27. Under Section 44(4)(c) and (g) of the Employment Act, an employee may be summarily dismissed for wilfully neglecting to perform any work which it is his duty to perform or carelessly performing the same; or commits or is reasonably suspected to have committed a criminal offence against or to the detriment of his employer or his employer's property. In the present case, the Appellant was not shown to have either wilfully neglected her work or to have carelessly performed the same, or to have committed a criminal offence to the detriment of the Respondent or its property. Indeed, no loss or damage was shown to have been caused by the Appellant's actions or inaction. The outcome of the alleged reference of the matter to the police by the Respondent was not disclosed to the trial court.

28. I find and hold that termination of the Appellant's employment was substantively unfair.

29. On procedural fairness, the notice to show cause dated 29<sup>th</sup> January, 2020, which also served as a suspension letter and an invitation for a disciplinary hearing, did not explain to the Appellant of her right to be accompanied to the disciplinary hearing by either a fellow employee or a union official. This contravened the mandatory provisions of Section 41 of the Employment Act on procedural fairness in terminating an employee's employment. Termination of the Appellant's employment was thus substantively and procedurally unfair. I so declare. The trial court's finding that termination of the Appellant's employment was lawful and fair is hereby set aside.

30. On the second issue, and having made a finding that termination of the Appellant's employment was unfair, I award the Appellant the equivalent of three (3) months' salary as compensation for unfair termination of employment. From the Appellant's payslip exhibited at the trial, the Appellant is shown to have been earning a gross salary of Kshs.39,899/= per month at the time of termination. The equivalent of three (3) months' salary is therefore  $Kshs.39,899 \times 3 = Kshs.119,697/=$ , which I award to the Appellant. I have taken into account the fact that the Appellant was on her first month of employment after the lapse of her last fixed term contract on 31<sup>st</sup> January, 2020.

31. The claim for salary in lieu of termination notice is allowed, and the Appellant is awarded Kshs.39,899/= being one month salary pursuant to Section 35(1)(c) of the Employment Act. The trial court's order dismissing the claim is hereby set aside.

32. The claims for salary underpayment and general damages for defamation and hardship caused were not proved, and are declined; and the trial court's order dismissing the same is upheld.



33. The claim for Kshs.8,574/=, being payment for untaken leave days, and which the trial court allowed, is hereby upheld.
34. In sum, and having considered the submissions filed herein, Judgment is hereby entered for the Appellant against the Respondent as follows:-
- a. Compensation for unfair termination of employment ..... Kshs.119,697/=.
  - b. Payment in lieu of notice ..... Kshs.39,899/=.
  - c. Unpaid leave days ..... Kshs.8,574/=.
- Total Kshs.168,170/=
35. The awarded sum shall be subject to statutory deductions that were applicable at the time of termination of the Appellant's employment, pursuant to Section 49(2) of the *Employment Act*.
36. The Appellant is awarded interest on the awarded sum, and the same shall be calculated at court rates from the date of the trial court's Judgment.
37. The Appellant is awarded costs of both the appeal and of proceedings in the court below. Costs of the appeal shall be taxed on the lower scale.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025**

**AGNES KITIKU NZEI**

**JUDGE**

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Miss Saisi for the Appellant

Mr. Osodo for the Respondent

