



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Obutoto v Pizza Bistro Limited (Employment and Labour Relations Appeal E050 of 2022) [2025] KEELRC 316 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 316 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E050 OF 2022
MA ONYANGO, J
FEBRUARY 7, 2025**

BETWEEN

IBRAHIM OKOKO OBUTOTO APPELLANT

AND

PIZZA BISTRO LIMITED RESPONDENT

(Being an appeal from the Judgment and decree arising from Chief Magistrate's Court at Eldoret in CMELRC No. 24 of 201 Cause No. 13 of 2019 delivered by the Honourable D. Mikoyan CM on 26th October, 2022)

JUDGMENT

1. The Appellant herein was the Claimant in the trial court in which he had sued the Respondent vide a Statement of Claim dated 4th February 2019 seeking compensation for alleged unfair and unlawful termination of his employment.
2. In his Statement of Claim, the Appellant averred that he was employed by the Respondent in 2012 as a head chef earning a salary of Kshs. 21,000 per month and that he served the Respondent with dedication and commitment until the 22nd of January 2018 when the Respondent summarily dismissed him from employment. That the Respondent failed to pay him his terminal dues.
3. The Appellant particularized the terminal dues he was entitled to as follows:
 - i. Unpaid house allowance for the year (2012)Kshs. 42,000
 - ii. Unpaid house allowance for the year (2013-2017)Kshs 252,000
 - iii. Unpaid house allowance for the year (2018)Kshs 4,200
 - iv. Annual leave Dues for the year 2012 to 2018...Kshs 151,200



- v. Service benefits.....Kshs 75,600
- vi. One-month salary in lieu of notice.....Kshs 25,200
- vii. 12 months compensation for unfair termination....Kshs 302,400
- viii. NSSF remittance for 72 months worked.....Kshs 28,800
- ix. NHIF remittance for the 72 months worked.....Kshs 18,520
- x. Loss of future earnings for 17 years.....Kshs 5,140,800

4. The Appellant therefore sought the following reliefs:

- a. A declaration that the summary dismissal of Claimant from his permanent employment, by the Respondent was malicious, unlawful, unfair, unprocedural and a fundamentally violated the Rights of the Claimant.
- b. A declaration that the Claimant was entitled to House Allowance.
- c. A declaration that the Claimant is entitled to one-month salary in lieu of annual leave.
- d. A declaration that the Claimant is entitled to National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF), for the period worked.
- e. A declaration that the Claimant is entitled to his dues, compensation, damages, and benefits as a result of wrongful dismissal from the employment as calculated herein.
- f. A maximum compensation of 12 months as per Section 49 (c) of the *Employment Act* and Section 12 of the *Employment and Labour Relations Court Act*
- g. Compensation and /or damages for working for 7days a week and during public holidays.
- h. Damages and terminal dues as per the calculations at paragraph 4 in this judgment
- i. Loss of Earning of salary for a period of 17 years that the claimant would have worked until the statutory retirement age of 60 years.
- j. A Certificate of Service as per section 51 of the *Employment Act*;
- k. Costs of this suit from the date of filing until its full determination.
- l. The claim is allowed in entirety.
- m. Any other and/ or further relief as the court deems fit and just to grant.

5. The Respondent filed a Memorandum of Defence dated 13th March 2019 in which it denied the averments made in the claim.

6. In its defence, the Respondent averred that it acted in accordance with due process as it not only asked the Claimant to show cause in writing as to why disciplinary action should not be taken against him for gross misconduct but also provided the Claimant with the reason for terminating his employment contract and offered him an opportunity to be heard.

7. In response to the allegation by the Claimant that the Respondent was not remitting contributions to NSSF and NHIF on behalf of the Claimant as required by law, the Respondent maintained that it remitted the same to the relevant statutory bodies.



8. With regard to the prayer for house allowance, the Respondent contended that the Claimant was paid house allowance together with his salary for the entire period he worked for the Respondent.
9. It was the Respondent's contention that the termination of the Claimant's employment was by summary dismissal. That he was summoned by the Respondent and the reasons for his dismissal were explained to him.
10. The Respondent particularized the Claimant's misconduct to be:
 - a. Refusal to take instructions from the Manager and Director;
 - b. Fighting and threatening his colleagues with a kitchen knife
 - c. Creating disturbances at the workplace due to fights with colleagues.
11. At the hearing the Claimant testified on his own behalf as CW1 while the Respondent called Yusuf Chandbhai, its Director, who testified as RW1.
12. After hearing the parties, the trial court delivered its judgment on 26th October 2022, dismissing the claim. The trial court found that due process was followed by the Respondent in dismissing the Claimant from employment and that the reasons given for his dismissal were valid.
13. The Appellant being dissatisfied with the trial court's judgment instituted the instant appeal vide the Memorandum of Appeal dated 24th November, 2022 on the following grounds of appeal:
 - i. The learned Magistrate erred in law and fact and rendered a decision that dismissed the Plaintiff's/Appellant's suit and consequently awarded the Respondent costs.
 - ii. The learned Magistrate erred in law and fact and failed to appreciate the proper effect and purport of the suit and arrived at a decision which is not supported by the Law.
 - iii. The learned Magistrate erred in law and fact and dismissed the Plaintiff's suit with costs and failed to appreciate and consider the evidence on record.
 - iv. The learned Magistrate erred in law and fact by failing to act judiciously and hence failing to properly analyze evidence on record and consequently misapprehended evidence on record and as such reaching a decision that is not founded in law.
 - v. The learned Magistrate erred in law and fact by misapprehending the evidence on record and applying the wrong principles of law and rendered a decision that is incompetent and not supported by evidence and law.
 - vi. The learned Magistrate erred in law and fact by misapplying the provisions of sections 43 and 45 of the Employment Act and rendered a decision that is incompetent and not supported by evidence and law.
 - vii. The learned Magistrate erred in law and fact by failing to appreciate the fact that the Plaintiff/Appellant was summarily dismissed from employment without any justifiable cause and reason and hence he was entitled to be compensated by the Respondent in accordance with the tenets and principles of Employment Law.
 - viii. The learned Magistrate erred in law and fact in dismissing the Plaintiff's/Appellant's suit in total disregard of the provisions of the Constitution, the Statutory Law, the Employment Law, the Case Law and the submissions tendered therein.



14. The Appellant thus prayed for the Appeal be allowed and the Judgment delivered on 26th October 2022 be set aside in its entirety.
15. When the Appeal herein came up for directions on the 12th October 2023, the court directed that the Appeal be disposed of by way of written submissions. The Appellant's submissions are dated 18th December 2023 and were filed on the even date. I have perused the record and did not find the submissions for the Respondent.

Appellant's Submissions

16. In his submissions, the Appellant condensed grounds 1, 2, 3, 4, 5 and 7 to one issue and submitted that the learned trial magistrate failed to act judiciously, failed to properly analyze evidence on record, misapprehended evidence on record and as such reached a decision that is incompetent and not supported by evidence and law.
17. The Appellant submitted that in his Statement of Claim, witness statement and oral evidence, he stated and testified that he was summarily and unfairly dismissed by the Respondent as the due process of the law was not followed.
18. He submitted that the termination letter insinuates that the Appellant was summarily dismissed for gross misconduct and yet there was no evidence to prove that he was found guilty of the misconduct he was alleged to have been involved in. It is the Appellant's submission that he was accused of threatening colleagues with kitchen knife, a serious offence by dint of the provisions of *Criminal Procedure Code*. He averred that the Respondent ought to have reported to the police and issued with OB number but no such report or OB number was produced in court to corroborate the allegations. Further, the Appellant submitted that much as RWI testified that he threatened his colleagues with a knife, none of the alleged colleagues was called to testify that indeed he actually threatened anyone.
19. The Appellant submitted that there was no fair reason to dismiss him summarily from employment and contended that the trial magistrate misapprehended evidence on record and applied wrong principles of law in dismissing his claim.
20. With regard to the second issue for determination in Ground 6 of the Memorandum of Appeal, it was submitted that the learned Magistrate erred in law and fact by misapplying the provisions of section 43 of the *Employment Act* and rendered a decision that is incompetent and not supported by evidence and law. It was submitted for the Appellant that the learned trial magistrate failed to appreciate the fact that as much as the Respondent may have given reasons for summarily dismissal vide the impugned termination letter dated 12th January 2018, the Respondent did not follow the due process as outlined the case of *Galgalo Jarso Jillo v Agricultural Finance [2021]eKLR*.
21. Consequently, the Appellant urged the court to set aside the judgment of the trial court and allow the instant appeal in its entirety with costs.

Analysis and Determination

22. Having considered the record of appeal and submissions on record, the issues for determination from grounds in the Memorandum of Appeal can be crystallized into the following three issues for determination by this court:
 - a. Whether the Learned Magistrate erred in failing to hold that the summary dismissal of the Appellant was without a valid reason



- b. Whether the Learned Magistrate erred in failing to hold that the summary dismissal of the Appellant procedurally unfair
- c. Whether the Appellant is entitled to the prayers sought in the Statement of Claim

Whether the summary dismissal of the Appellant was without valid reason

23. The law relating to fair termination is contained in Sections 41, 43 and 45(2) of the *Employment Act*. It is trite law that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but also ensure compliance with fair procedure.

24. Section 43 of *Employment Act* 2007 provides inter alia:

43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the 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.

25. The burden of proof in cases of termination of employment is provided for in section 47(5) as follows:

47

- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

26. The employee is required to prove that an unfair termination occurred while the employer is required to justify the grounds for termination.

27. From the record, the Appellant was issued with a show cause letter dated 12th January 2018 which is reproduced hereunder:

TO: Mr. Ibrahim Hamisi Okoko-ID No. 13576876

12.01.2018

From: The Director

Subject: Show Cause Letter

After repeated counselling and warning to you both verbal and written it is clear that your conduct and working relationship with other staff is wanting and falls below the company's working required standards as per the company's rules and regulations. The latest being your refusal to take orders from your superiors (manager and director) after threatening your colleagues with a kitchen knife. This amounts to gross misconduct. You are hereby advice to write a show cause letter why disciplinary action should not be taken on you.

The Director

Signed

Yusuf Chandbhai



28. Further, the record shows that on the same date, the Appellant was issued with a letter of termination of his employment which reads as follows:

From: The Director

12th January 2018

Dear Mr. Ibrahim Hamisi Okoko.-

Subject: Termination of Employment.

We regret to inform you that your employment is being terminated effective 12th Jan, 2018. This decision was reached after the completion of a full internal disciplinary process. The conclusion from this process were as follows; you were found culpable and or guilty of having been involved in gross misconduct and further threatening your colleagues with a kitchen knife. This is against the company's rules and regulations.

Upon termination, all benefits associated with this position will cease to be valid. You are requested to return all company properties in your possession to the manager in-charge.

Please note that you are bound by our confidentiality policy. Any information that was received during the course of your work, regarding our customers, company, partners etc. must not be disclosed to any party. Such information must also be deleted from all your personal devices.

You are entitled to your salary up and until the date of this letter. This decision is non-reversible. You are advised to refer to our Rules and Regulation-code of Conduct that you undertook with us. This office remains at your disposal for up to two working days after your last day of employment. We wish you all the best in your future endeavors.

Yours sincerely,

Yusuf Chandbhai,

Signed

Director

29. From the above show cause letter and the termination letter, it is clear that the Appellant was summarily dismissed for the reason that he threatened his colleagues with a kitchen knife.

30. The evidence on record is that after the Appellant threatened his colleague with a kitchen knife, he was issued with a show cause letter which he refused to sign or acknowledge and left the employment premises. He was then issued with a letter of termination on the same day.

31. The foregoing is confirmed by the Appellant in his testimony when he stated:

“Then a new employee from Nairobi branch who was the supervisor who alleged that I held a knife against him. I was stopped from working without reason or notice. I later went to collect dues but they failed hence present case....”

32. Under cross examination the Claimant stated:

“I didn't fight the supervisor but had a commotion. I was cutting items. I didn't fight Asha Kairu. I never caused a commotion. I was head chef until the new supervisor came. I had done menu for all the years of service but supervisor came with other things.

I was called by Yusuf Director but I was far out I had not been paid.”



33. Respondent’s witness, RW1, in his testimony at the trial court in examination in chief stated as follows;
- “The Claimant became violent and cruel to colleagues and customers. I issued him with a show cause letter and counselled him. He came back to work after the show cause but when he armed himself with a knife against the manager, we terminated his service and pay his last salary.”
34. Under cross examination RW1 stated:
- “... The Claimant refused to sign show cause letter dated 12/1/2018. Termination letter issued... it was the manager who wrote it for my signature... The Claimant just left work. Termination letter then issued. I have no evidence that I called him together with staff when he deserted.”
35. The evidence shows that the Appellant threatened his supervisor with a knife probably because, as he stated “I had done menu for all the years of service but supervisor came with other things.” He was unhappy with the manager for taking over this role.
36. The evidence points to the fact that after the Appellant was issued with the show cause letter which he refused to sign, he went away. He was then called and refused to go back following which a letter of termination was issued. This is confirmed by the evidence of RW1 and by the Appellant who stated that he was called by Yusuf but he was far away.
37. From the foregoing, there is evidence that the Appellant had a commotion with his colleague. He was then issued with a show cause letter but walked away without signing for it. He was called and refused to go back. The Respondent then issued the letter of termination. All this happened on the same date.
38. It is therefore evident that there was valid reason for termination of the Appellant but the procedure followed was not as provided in section 41 of the Act.
39. Section 45(4) provides that-
- (4) A termination of employment shall be unfair for the purposes of this Part where—
- (a) the termination is for one of the reasons specified in section 46; or
- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- (b) the conduct and capability of the employee up to the date of termination;
- (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;



- (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- (e) the existence of any previous warning letters issued to the employee.

40. In this case it is my finding that the Respondent rushed with the issuance of the letter of termination. RW1 stated that the Appellant had been a good employee. No mention was made of any previous disciplinary incidents. The Appellant obviously felt aggrieved because a new manager had been brought to take over some of his roles. This should have been handled in a manner that created harmony, not friction as it obviously did.
41. I find that the circumstances under which the termination occurred, the Respondent did not act in accordance with justice and equity. For these reasons I find that the termination was unfair.

Whether the Appellant is entitled to the prayers sought in the Statement of Claim

42. In his Memorandum of Claim, the Appellant sought several declarations in view of alleged unfair and unlawful dismissal of his employment as well as terminal benefits as enumerated in paragraph 4 of this judgment. The reliefs will be addressed in separate heads as hereunder:

- i. A declaration that the summary dismissal of Claimant from his permanent employment, by the Respondent was malicious, unlawful, unfair, unprocedural and a fundamentally violated the Rights of the Claimant.

Having found that the summary dismissal of the Appellant was unprocedural, I declare it as so. I however find no evidence of malice or violation of fundamental rights of the Appellant.

- ii. One-month salary in lieu of notice

Having found that the termination of the Appellant's employment was unfair, he is entitled to pay in lieu of notice which I award him. From the Appellant's last salary voucher, he was paid a basic salary of Kshs 21,000. I award the Appellant Kshs 21,000 as pay in lieu of notice.

- iii. House allowance

The Appellant prayed for unpaid house allowance from the year 2012 to 2018. In its Memorandum of Defence, the Respondent averred that the Appellant was paid an all-inclusive salary which included a house allowance. The Appellant was entitled to housing allowance pursuant to section 31(2) of the *Employment Act* based on a minimum of 15% of the basic salary. Under the Regulation of Wages (General) (Amendment) Order, 2017, the Appellant was entitled to a monthly salary of Kshs 12,396.35 exclusive of a house allowance. It is therefore the finding of this court that the Appellant was paid an all-inclusive salary including house allowance. The Claim for house allowance is declined.

- iv. Annual leave Dues for the year 2012 to 2018

RW1 in his testimony averred that leave allowance was part of the Appellant's salary. There is no proof that the Appellant was paid in lieu of leave. Leave cannot be part of salary as an employee is by law entitled to proceed on leave unless the same is paid for in lieu.

The Appellant is entitled to pay in lieu of annual leave for the years worked being 6 years. At 21 days per year the Appellant is entitled to $(21 \times 6) = 126$ days. This works out to Kshs. 101,770 which I award him.

- v. Service benefits



Under Section 35(6) of the *Employment Act*, an employee who is a member of NSSF is not entitled to service pay. From the NSSF statement at page 85 of the Record of Appeal, it is clear that the Appellant was a member of NSSF and is therefore not entitled to service pay.

vi. 12 months' compensation for unfair termination

The Appellant had served the Respondent for over six years as at the time he was summarily dismissed from employment. Taking into account the length of service, the circumstances around the termination of the Appellant's employment and all other relevant factors under section 49(4) of the Act, it is my view that an award of 5 months' salary is reasonable compensation. In making this award I have taken into account the factors set out in section 49(4) of the *Employment Act*. The Appellant is awarded Kshs. 105,000 under this head.

vii. NSSF and NHIF remittance for 72 months worked

From the NHIF and NSSF statements attached to the Respondent's bundle of documents, it is clear that the said deductions were remitted. These claims are declined. In addition, this court in the case of *Wanjiku v Vanela House of Coffees (Cause 454(N) of 2009) [2018] KEELRC 663 (KLR) (9 November 2018)*, observed as follows in respect of a claim where an employee was seeking to be paid of NSSF and NHIF dues:

“ Even if no remittances had been made by the respondent, the claimant would still not be entitled to a refund of the same as both NSSF and NHIF have statutory and administrative structures to collect the same from defaulting employers, backed up by powers to prosecute and charge penalties for late payment.”

viii. Loss of future earnings for 17 years

Section 49 of the *Employment Act* caps compensation for unfair dismissal at a maximum of 12 months. The Act does not make provision for payment for loss of future earnings. Further, the Appellant did not deny that he was employed by Moto Moto Bakers from 1st March, 2018 at a higher salary than what he was earning while in the employment of the Respondent. he thus did not suffer loss of future earnings.

This prayer is declined.

43. In conclusion, the appeal succeeds and the Judgment of the Trial Court is set aside in its entirety, and substituted with the following orders:

- i. A declaration that the Appellant was unfairly terminated.
- ii. An award of pay in lieu of notice..... Kshs 21,000
- iii. Leave dues..... Kshs. 101,770
- iv. 5 months' salary as compensation for the unfair termination Kshs 105,000/=

44. The Respondent shall bear the costs of the suit both at the lower court and for this appeal.

45. It is so ordered.

DATED, DELIVERED AND SIGNED AT ELDORET' THIS 7TH DAY OF FEBRUARY, 2025.

M. ONYANGO

JUDGE

