



Finsbury Trading Limited t/a Super Savers Supermarket v Karisa (Appeal E232 of 2024) [2025] KEELRC 1099 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1099 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E232 OF 2024**

**M MBARÚ, J
APRIL 3, 2025**

BETWEEN

**FINSBURY TRADING LIMITED T/A SUPER SAVERS
SUPERMARKET APPELLANT**

AND

SAMUEL SAFARI KARISA RESPONDENT

(Being an appeal from the judgment of Hon. N. R. Akee delivered on 26 September 2024 in Mombasa CMELRC No. E199 of 2021)

JUDGMENT

1. The appeal arises from the judgment delivered in Mombasa CMELRC No. E199 of 2021. The appellant is seeking that the judgment be set aside and the claim dismissed with costs.
2. The appeal is that the trial court erred in finding that there was wrongful and unfair termination of employment despite the respondent admitting to having been suspended and involved in theft, an act of gross misconduct leading to termination of employment. The respondent, together with another employee, was summoned to a hearing on the issue of theft but failed to give satisfactory responses. The documentary evidence presented in court through the M-Pesa message of the respondent remitting Ksh. 84,000 was returned to the appellant as the cash amount wrongly received from a customer was not considered. The fact that the policy of the appellant prohibited employees from receiving cash payments from customers was not considered leading to errors in the judgment of the trial court.
3. The appeal is that the appellant paid the respondent his terminal dues of Ksh. 7,538 through a letter dated 3 November 2020. Employment commenced on 2 May 2019 but the court applied the year 2018 in error.
4. The appellant submitted that the respondent was not employed on 10 May 2018 but in May 2019 as evidenced by his letter applying for employment.



5. The respondent submitted that he was employed on 10 May 2018 as a loader earning Ksh. 15,609 per month. On 12 October 2020, he was summoned by the director, who accused him and Josiah Tediua Wafula of directing client orders to other people and stealing from the appellant. Under Section 10 of the *Employment Act*, the appellant did not produce any work records to challenge the claims made. The appellant did not discharge its burden of proof under Section 43 of the *Employment Act* that there was a valid reason leading to the termination of employment, as held in *Vincent Kebari v Stephen Kikera & Punit Vadgama t/a Gikera & Vadgama Advocates* [2020] eKLR. Before termination of employment, the respondent was not given a warning or a show cause notice, upon which he would make his response. His rights under Section 41 of the *Employment Act* were violated, and the awards of notice pay, leave pay, public holidays and compensation were justified. The appeal should be dismissed with costs.
6. The appellant contested these facts and submitted that it employed the respondent upon his application for employment on 2 May 2019. His employment was terminated in October 2020 for selling free promotion boxes and receiving money from customers instead of advising them to pay through the company's till number.
7. Under Section 45(2) of the *Employment Act*, the appellant had valid and genuine reasons to terminate the employment due to theft and after taking the respondent through the due process as held in *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR. The respondent admitted that on 12 October 2020, he was summoned to a hearing by the director and admitted to receiving money from a customer with a refund of Ksh.84,000 on 10 October 2020 to the appellant. Theft is an act of gross misconduct that justifies summary dismissal under Section 44 of the *Employment Act*, as held in *Francis Nyongesa Kweyu v Eldoret Water and Sanitation Company Limited* [2017] eKLR.
8. The awards by the trial court were not justified. The annual leave days earned were used from May 2019 as prorated and paid. The public holiday worked in 2018 was for a period outside employment and the appeal should be allowed and the judgment set aside.
9. The trial court delivered judgment and held that the appellant failed to follow the provisions of Section 45(2) of the *Employment Act*, leading to unfair and unlawful termination of employment. There were no reasons given and hence judgment was entered in favour of the claimant as stated on the face of the statement of claim.
10. The respondent admitted in his evidence in court that his letter of employment is dated 2 May 2019. He was employed as a loader and had a letter of appointment.
11. The respondent also admitted that his employment was terminated on 12 October 2020 for loss of money. The appellant filed an M-Pesa statement where the respondent made a refund of Ksh. 84,000.
12. Under Section 44 of the *Employment Act*, an employee who engages in theft and criminal acts is subject to summary dismissal. The employer is allowed to summon the employee on short notice and allow him to make representations. Where there is an admission of theft, the motions of Section 41(2) of the *Employment Act* are unnecessary. The admission of diverting customer payments and refund of Ksh. 84,000 was sufficient cause for summary dismissal as held in *Kennedy Shilabo Shibeka v Chairman, Board of Governors, Sigalagala Technical Training Institute* [2016] KEELRC 761 (KLR).
13. The appellant invited the respondent before the director to make his representations in the presence of another employee, and on the admissions, the sanction was justified. The claim that there was unfair termination of employment in the given circumstances does not apply.
14. Notice pay and compensation were reliefs not available in the given circumstances.



15. On the claims made, the respondent admitted in his evidence that he signed his annual leave form but was never allowed to proceed on leave. This evidence is not correct. Indeed, the respondent signed up for his leave days and was not allowed to proceed, but he did nothing about it. He cannot turn around upon cross-examination to assert that he did not proceed on annual leave.
16. The Memorandum of Claim does not provide particulars on the claim for work during public holidays, except for the evidence that he worked on 10 October 2020.
17. The respondent's submissions that he was employed in protective security and hence entitled to double payment where he worked during public holidays do not suffice, since he was employed under a written contract as a loader.
18. The protective security sector's Wage Orders are not applicable in this case.
19. Upon employment from May 2019, the claims for work during public holidays from May 2018 are unjustified. Cross-examination cannot cure such without pleading the days at work in the Memorandum of Claim. Parties are bound by their pleadings.
20. For work during public holidays from May 2019 to 12 October 2020, the following days accrue;
 - a. 1 January 2020;
 - b. Good Friday 2020;
 - c. Easter Monday 2020;
 - d. Labour Day 2020;
 - e. 1 June 2019;
 - f. 20 October 2019;
 - g. 12 December 2019;Total of 7 days.
21. On the general Wage Order, the respondent is entitled to Ksh. 7,284.20 for working during these public holidays.
22. Unremitted NSSF deductions are due to the statutory body rather than the employees. Where there is no remittance, the employee can only seek service pay.
23. The judgment of the trial court giving a general award as stated in the claim without an analysis of each claim is, therefore, irregular and is hereby reviewed. The only award that suffices is as set out above for public holidays.
24. For costs, the appeal is with merit, save that each party bears its costs.
25. Accordingly, judgment in Mombasa CMELRC No. E199 of 2021 is hereby set aside save for the award of Ksh. 7,284.20 for work during a public holiday. Each party bears its costs.

DELIVERED IN OPEN COURT AT MALINDI THIS 3 DAY OF APRIL 2025.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Davies Wekesa

