



REPUBLIC OF KENYA



**Simba Corporation t/a Acacia Premier Hotel v Kirui (Appeal
E020 of 2023) [2024] KEELRC 413 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 413 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E020 OF 2023
CN BAARI, J
FEBRUARY 29, 2024**

BETWEEN

SIMBA CORPORATION T/A ACACIA PREMIER HOTEL APPELLANT

AND

HARUN KIMTAI KIRUI RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. S. N. TELEWA (SRM)
delivered on 7th October, 2022 in Kisumu CMEELRC NO. 163 OF 2021)*

JUDGMENT

1. This judgment relates to an appeal arising from a decision rendered on 7th October, 2022, where the Trial Court held that the Respondent herein had proved his case on a balance of probabilities, and proceeded to award him one month salary in lieu of notice, damages for wrongful termination, damages for loss of employment and costs of the suit.
2. The Appellant being dissatisfied with the decision of the Trial Court, lodged this appeal on 6th April, 2023.
3. The appeal is premised on the grounds THAT:
 - a. The Learned Magistrate erred in law and in fact in holding that the Appellant failed to prove that the money was not deposited in the Respondent's account, despite the glaring evidence presented by the Appellant that the Respondent had irregularly and fraudulently misappropriated the Appellant's revenue;
 - b. The Learned Magistrate erred in law and in fact in holding that the Appellant failed to establish what formed, and caused the basis for dismissal of the Respondent, despite the glaring evidence presented by the Respondent thereon;



- c. The Learned Magistrate erred in law and in fact in holding that the Chief Accountant and the members of the Security team carried out the investigations despite evidence presented by the Appellant to the contrary;
 - d. The Learned Magistrate erred in law and in fact in holding that the Chief Accountant and the members of the Security team sat on appeal despite evidence presented by the Appellant to the contrary;
 - e. The Learned Magistrate erred in law and in fact in holding that members of the disciplinary team were involved in the investigations despite evidence presented by the Appellant to the contrary;
 - f. The Learned Magistrate erred in law and in fact in holding that Sections 41, 43, 45 and 47 of the *Employment Act*, had not been complied with despite evidence presented by the Appellant to the contrary;
 - g. The Learned Magistrate erred in law and in fact in holding that due process was not properly followed despite evidence presented by the Appellant to the contrary;
 - h. The Learned Magistrate erred in law and in fact in holding that the composition of the disciplinary committee was not proper, and that the appeal was not properly conducted without any evidence leading to such conclusions;
 - i. The Learned Magistrate erred in law and in fact in holding that the disciplinary committee decided the appeal despite evidence to the contrary;
 - j. The Learned Magistrate erred in law and in fact in failing to hold that the Appellant had established that the Respondent had been fairly terminated to the required standard of law;
 - k. The Learned Magistrate erred in law and in fact in rendering judgment in favour of the Respondent, and awarding him both damages for wrongful dismissal and unfair termination and damages for loss of employment contrary to the provisions of the law;
 - l. The Learned Magistrate erred in law in awarding the Respondent damages for loss of employment despite not being engaged on a fixed term contract by the Appellant; and
 - m. The Learned Magistrate erred in law and in fact in finding that the Claimant is entitled to a one-month salary in lieu of notice.
4. The Appellant prays that the appeal be allowed, and the judgment and decree of the Learned Magistrate set aside, and the Respondent memorandum of claim dated 17th June, 2021, be dismissed with costs.
5. Parties canvassed the appeal by way of written submissions, and submissions were filed for both parties.

The Appellant's Submissions

- 6. It is the Appellant's submission that the Respondent had valid reasons to terminate the Respondent, having found him guilty of gross misconduct. It is the Appellant's further submission that investigations were carried out that found the Respondent culpable on the basis that while on duty, he served two guests and was paid for items through Mpesa and received Kshs.3,000 and Kshs.750 respectively, but he used the previous day's codes to settle the transactions and thereby pocketing the money paid in cash.



7. It is the Appellant's submission that what forms the basis for terminating an employee is based on the reasons that the employer genuinely believes to exist at the time of termination, and that the court must limit itself from overanalyzing the reason for termination as the level of proof is on a balance of probability, and not prove beyond reasonable doubt. It had reliance in Nairobi ELRC Cause No 1212 of 214, Lawrence Nyamichaba Ondari v National Hospital Insurance Fund [2018) eKLR to support this position.
8. It is the Appellant's submission that the Respondent engaged in a false representation of a fact with the intention to defraud the Appellant by intentionally using previous Mpesa transaction codes to clear bills that he had been paid in cash by the customers.
9. The Appellant submits that the Respondent admitted on cross-examination that he was aware that the repercussions of engaging in fraud is a dismissal. It submits that the Respondent having willfully engaged in fraud during the life of the employment; the Appellant had a reason and was justified to summarily dismiss him.
10. It is the Appellant's submission that the Respondent was issued with a show cause letter and that he failed to satisfactorily respond to the charges.
11. The Appellant further submits that the Respondent was invited to a disciplinary hearing on 22nd October, 2020, informed of the charges he was accused of and further informed of his right to have a fellow employee of his choice present during the disciplinary hearing.
12. It is the Appellant's further submission that the Respondent attended the hearing in the company of four (4) representatives, three (3) from the union and one fellow employee
13. The Appellant submits that in summarily dismissing the Respondent, it did so in total consonance with Section 41 of the *Employment Act*.
14. It is the Appellant's submission that the Respondent subsequently appealed against the dismissal and he was heard for a second time by a panel from Simba Hospitality, and his appeal was dismissed on the 23rd December, 2020.
15. It further submits that a perusal of the letter of summary dismissal dated 13th November, 2020, together with the Appeal outcome dated 23rd December, 2020, reveal that the documents are signed by Human Resource Officers from Acacia Hotel and Simba Hospitality respectively and which is a clear manifestation that the hearing and the appeal were head by a different set of people.
16. The Appellant avers that the Trial Court erred in finding that the Respondent was earning a monthly salary of Kshs. 28,100, when his contract of employment shows that he was earning a sum of Kshs. 16,116, and which sum he confirmed during cross-examination.
17. The Appellant submits that having been dismissed for gross misconduct under Section 44 of the *Employment Act*, the Respondent is not entitled to notice pay.
18. The Appellant submits that the Respondent was fairly terminated and is not deserving of the reliefs awarded, and urges this Court to set aside the awards. It submits further that the Trial Court failed to provide explanation why the 12 months' damages for loss of employment should issue. It placed reliance in the case of Anytime Limited v Fredrick Mutobera Omuraya [2022) eKLR to buttress this position.



19. It is the Appellant's final submission that the Respondent was not engaged in a fixed term contract, and as such, was not entitled to any loss of employment as he had no legitimate expectations to work for a fixed duration of time.

The Respondent's Submissions

20. The Respondent submits that he clearly demonstrated beyond any doubt that the Appellant's decision to dismiss him from employment was unlawful, unfair, illegal and irregular.
21. He submits further that he was a cashier and the codes for the bills were issued to him by the waiters who collected the bills from the customers, and it was not possible for him to tell what dates the codes supplied to him by the waiters related to, hence if anyone was to blame for the delay in submitting the codes, then it should be the waiters concerned.
22. The Respondent further submits that the Trial Court was right in finding that his role was limited to receiving bills from the waiters who picked them from customers.
23. The Respondent contends that the Chief Accountant's report that formed the basis for disciplinary action against him, was not availed in court, nor was the Accountant called to testify and corroborate the allegations by the Appellant. He submits that in the absence of the report by the accountant, all allegations leveled against him are nothing but hearsay.
24. It is the Respondent's submission that the employees of the Appellant who sat in the Disciplinary Committee, are the same one who investigated the manner contrary to the rules of natural justice and was thus not accorded a fair hearing.
25. It is his submission that the proceedings of the appeal committee were not produced in Court and is thus not clear how the decision was arrived at.
26. The Respondent finally submits that he has proved his case against the Appellant on a balance of probabilities as required by law, and therefore is entitled to the reliefs sought in the memorandum of claim and urges that the Court finds similarly, and dismiss the present appeal with costs.

Analysis and Determination

27. I have considered the Appellant's Record of Appeal and the submissions by both parties. The thirteen grounds of appeal coalesce into the following two grounds: -
- i. Whether the Trial Court erred in finding that the Respondent was unfairly terminated
 - ii. Whether the Trial Court erred in awarding the Respondent the reliefs sought.
28. The Court of Appeal in *Selle & Another vs Associated Motor Boat Co Ltd* (1968) EA 123 set out the guiding principle in dealing with a first appeal in the following words: -

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."



29. By the foregone decision, it is clear that my role as a first Appellate Court is to re-evaluate, re-assess and re-analyse the evidence on record and determine whether the conclusions reached by the Learned Trial Court are to stand or not.
30. The Trial Court found the termination of the Respondent unfair on the basis that firstly, the Appellant failed to establish the basis for the dismissal, the Appellant was in breach of the rules of natural justice in the manner in which it handled the Respondent's dismissal, the proceedings of the administrative appeal were not produced in evidence before Court, and that in whole, the Appellant did not adhere to the provisions of Sections 41, 43, 45 and 47 of the *Employment Act*.
31. The Appellant on its part contend that it terminated the Respondent fairly having found him guilty of gross misconduct. It is its further contention that what forms the basis for termination are reasons that the employer genuinely believes to exist at the time of termination, and that the Court must limit itself from overanalyzing the reason for termination as the level of proof is on a balance of probability, and not prove beyond reasonable doubt.
32. A fair termination/dismissal, means that an employer complied with the strict requirements of Sections 41, 43, 45 and 47(5) of the *Employment Act*, in respect of procedure and the validity and fairness of reasons for termination.
33. The Respondent was issued a show cause letter dated 26th October, 2020. Minutes of the Disciplinary Committee produced before Court, indicate that the disciplinary hearing took place on 22nd October, 2020. Section 41 of the *Employment Act* provides as follows on procedural fairness:
- 41(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.”
34. Although the Respondent was issued a show cause letter and invited to appear before a Disciplinary Committee to answer to the charges levelled against him, the minutes of the hearing go to confirm that he was heard before he was notified of the charges against him, contrary to the express provision of Section 41 of the *Employment Act*. This rendered the process unlawful and the outcome unfair.
35. In *Loice Otieno v. Kenya Commercial Bank Limited Cause No. 1050 of 2011*, the Court held that it is a mandatory requirement to comply with the principles of natural justice in summary dismissal from employment.
36. I thus uphold the Trial court's finding that the Respondent's dismissal was procedurally flawed.
37. On whether the Appellant had valid reasons to dismiss the Respondent, Section 45 of the *Employment Act*, requires that an employer proves that the reasons for termination are valid and fair. Further, Section 43(2) specifically states that 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.
38. The Appellant argued that it dismissed the Respondent for willfully using mpesa payment codes to account for/close bills that were paid through cash, and proceeded to keep the money received from the Respondent's customers. This it argued further, was a genuine reason to terminate the Respondent.



39. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the Court stated thus on validity of reasons for termination: -

“It is now clear that the burden placed on an employer by Section 43 of the *Employment Act*, is to establish a valid reason that would cause a reasonable employer to terminate employment.”

40. The Court of Appeal affirmed this position in *Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR by citing with approval the following excerpt from the Halsbury’s Laws of England, 4th Edition, Vol.16(1B) para 642:-

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable response to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.

In assessing an employer’s action therefore, the Court is not expected to supplant its own decision with that of the employer. In other words, the Court does not ask what it would have done in the circumstances of the particular case; all the Court asks is whether overall, the employer acted responsibly and reasonably and if the answer to this question is in the affirmative, the Court should not interfere with the employer’s decision”.

41. The minutes of the disciplinary hearing, carry excerpts of the discussions where the Respondent admitted having closed bills based solely on Mpesa codes given to him by guests without ascertaining whether the payments had been made. He further admitted receiving cash for clients’ down payments and failing to make reservations for customers who ended up making double payments.
42. The Court of Appeal in Civil Appeal No 66A of 2017, *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR held as follows on the standard of prove: -

“The trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services.”

43. In my view, the Respondent admitted the reasons for his dismissal at the hearing going by the minutes produced before court.
44. The acts and omissions of the Respondent no doubt caused the Appellant losses which leads me to the conclusion that the reasons for the Respondent’s dismissal fell within the band of reasonable responses which would cause a reasonable employer to dismiss an employee.



45. I thus find and hold that the Appellant had valid, fair and justified reasons to dismiss the Respondent.
46. On the second ground, which is whether the Trial Court erred in awarding the Respondent the reliefs sought, I will proceed to analyze each prayer/claim and make a determination.

One Month Salary in Lieu of Notice

47. No evidence was led to show that the Respondent was issued termination notice, or that he was paid in lieu of the notice. Further, although the Trial Court awarded the Respondent Kshs. 28,100/- on account of notice, the employment contract produced in evidence does not support the award for reason that the Respondent's gross monthly salary was Kshs. 16,116/-
48. I thus uphold the award in the sum of Kshs. 16,116.

Damages for wrongful dismissal

49. The Respondent was awarded 12 months salary for wrongful dismissal. A finding of an unfair termination/wrongful dismissal, without doubt entitles an employee to compensation in accordance with Sections 49 and 50 of the [Employment Act](#).
50. The Trial Court however, did not give reasons for the maximum award. In *Moi Teaching and Referral Hospital v James Kipkonga Kendagor* [2019] eKLR, the Court of Appeal held that a judge who awards the statutory maximum of 12 months' salary without justification has exceeded his powers.
51. Further, in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the Court pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the Trial Judge must justify or explain why a claimant is entitled to the maximum award.
52. This court has found that the Appellant had valid reasons to dismiss the Respondent, and that the finding of a wrongful dismissal is only for procedural flaws. For this reason, I find that the Respondent contributed to his dismissal and has therefore not proved a case for maximum compensation.
53. I thus set aside the award of 12 months' salary and substitute therewith four (4) months salary for wrongful dismissal.

Damages for loss of employment

54. Damages for loss of employment is not a remedy known to Section 49 of the [Employment Act](#). To award this claim therefore, is tantamount to unjustly enriching the Respondent, having already made an award of damages for wrongful dismissal.
55. The claim is devoid of merit, and the award by the Trial Court in this respect is set aside in its entirety.

Underpayment

56. The Trial Court dismissed the prayer for underpayment on the basis that the Respondent ought to have claimed it before he was dismissed.
57. In my view, the claim was valid, and all the Respondent needed to do is show that he was paid a rate lower than he was entitled to under the minimum wage order of the respective year(s), and the specific period of underpayment.
58. The Respondent statement of claim only indicates the amount he seeks on account of underpayment, but does not state the period the underpayment accrued. The issue of under payment did not also arise in his examination in chief.



59. The claim is thus not proven and it fails.
60. In conclusion, I make the following orders: -
- i. The award of one-month salary in lieu of notice is upheld at Kshs. 16,116/-
 - ii. The award of 12 months' salary is set aside and substituted with 4 months salary for wrongful dismissal at Kshs. 64,464/-
 - iii. The award of damages for loss of employment is set aside in its entirety.
 - iv. The claim for underpayment is declined.
 - v. The Appellant shall bear half the costs of the suit before the Lower Court.
 - vi. Parties shall bear their own costs of the appeal.
61. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF FEBRUARY, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Nyamwaro present for the Appellant

N/A for the Respondent

Erwin Ongor - Court Assistant

