



**Odero v Real People Kenya Limited (Appeal E134 of 2023)
[2024] KEELRC 1476 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1476 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E134 OF 2023
M MBARŪ, J
MARCH 14, 2024**

BETWEEN

MILLICENT ACHIENG ODERO APPELLANT

AND

REAL PEOPLE KENYA LIMITED RESPONDENT

*(Being appeal from the judgment of Hon. G. Sogomo delivered
on 17 November 2023 in Mombasa MCELRC No. E362 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 17 November 2023 in Mombasa MCELRC No. E362 of 2022. The appellant filed the claim on the grounds that on 18 January 2018, she was employed by the respondent as a customer service officer. She worked until 27 April 2022 when her employment was terminated. She was earning a consolidated annual salary of Kshs. 420,000 per month.
2. The claim was that during employment, the appellant developed stiff person syndrome, a disorder that affected her mobility. The respondent’s treatment of the appellant changed upon this diagnosis and became discriminative contrary to Article 27 of [the Constitution](#) and Sections 5 and 47 of the [Employment Act](#), 2007 (the Act). These changes are that the respondent attempted to transfer her from Mombasa to Nairobi through a letter dated 8 November 2021 without providing the support structure to enable her to carry out her duties in her new condition. Deducting her salary without just cause as seen in the pay slip for September 2021 to frustrate her to leave employment. Failing to comply with Section 15 of the [Persons with Disabilities Act](#) by failing to put in place special facilities to accommodate the appellant and to provide flexible working hours. Failing to provide easy-to-access toilet/washroom amenities to the appellant who is unable to walk without support. Requiring the appellant to continue working in the same conditions as the rest of the employees despite the disability. Deducting the salary for days the appellant reported to be unwell and was undergoing treatment and had asked for leave.

3. The appellant also claimed that on 27 April 2022, her employment was terminated. She had received an email dated 21st April 2022 with an alleged petty cash deficit at – the Mombasa branch. The email was from Violet Akoth who asked the appellant to explain the deficit. The appellant sent a response and indicated that the missing funds were held by her superior, the branch manager Amos Mactolo and she had made several follow-ups. If there was any loss of funds, the appellant was not in charge as she had been admitted to a hospital in Nairobi, and the branch manager was left in charge. The matter was reported to the internal quality analyst section to assist in following up with the branch manager on the missing funds.
4. On 25 April 2022, the respondent issued the appellant with a show cause notice alleging misappropriation of funds and that she should respond. The appellant gave a detailed explanation that the branch manager was holding the questioned funds. On 26 April 2022, the appellant was issued with a hearing notice for 4 pm over alleged misappropriation of funds. At the disciplinary hearing, the appellant asked the branch manager to be present to confirm her testimony but this was rejected. Instead, through notice dated 27 April 2022 her employment was terminated because she had failed to disclose that she had not received the funds intended for petty cash.
5. On 18 May 2022, the appellant lodged her appeal against termination of her employment and on 23 May 2022 the appeal was dismissed.
6. The appellant claimed that termination of employment was unlawful and unfair and claimed the following dues;
 - a) 12 months' compensation Kshs. 420,000;
 - b) Notice pay Kshs. 35,000;
 - c) Exemplary damages for discrimination on account of disability Kshs. 2,000,000;
 - d) Costs of the suit.
7. In response, the respondent admitted employing the appellant and was aware of her medical conditions which were not connected in any way with termination of employment. The respondent reasonably accommodated the appellant and tried to make the work environment friendly. The respondent relocated its Mombasa branch offices to the ground floor of the new offices to avoid the appellant using staircases. The respondent sought to transfer the appellant to Nairobi to be closest to her doctor at Coptic Hospital as well as to ease her responsibilities. The intended transfer was intended to have the appellant reassigned to the call center where there would be minimal movement. She contested the transfer although the employment contract allowed for a transfer.
8. It was the respondent's case that they facilitated the appellant to have treatment by negotiating unique medical cover which was different from other members of staff and allowed her to recuperate while on sick leave beyond the statutory required period with full pay.
9. Employment was validly terminated after subjecting the appellant to due process and a disciplinary hearing. She conceded to the deficit on the petty cash account after being prompted by an officer of the respondent through an email dated 21 April 2022. The appellant accepted that she became aware of the deficit in petty cash at the end of September 2021 and that she reported the same to the finance department on 19 April 2022, 7 months later. The cash counts for March 2022 forwarded to the finance department were fictitious. This conduct necessitated disciplinary action to which the appellant was issued with a show cause notice and disciplinary hearing notice as she was in breach of the Code of Conduct and the law read together with clauses 7(e), (f), and (g) of the Grievance Procedure

- and Disciplinary Code on making false statements and declarations, misrepresentation and fraudulent non-disclosure of relevant information.
10. Upon termination of employment, the respondent paid the appellant Kshs. 51,667 being salary for April 2022 less statutory deductions plus leave days earned from Kshs. 11,666.57. In the notice dated 27 April 2022, the appellant was directed to clear for payment of her dues but failed to oblige and the claims made should be dismissed.
 11. The learned magistrate heard the parties and in judgment dismissed the claim with costs.
 12. Aggrieved, the appellant filed this appeal on the grounds that;
 - a) The learned magistrate erred in fact and law in finding that the appellant's termination was lawful when it was not.
 - b) The learned magistrate erred in fact and law in upholding the termination of the appellant while finding her blameless for the misappropriation complained of.
 - c) The learned magistrate erred in law and in disregarding evidence confirming the appellant was not provided with adequate opportunity to prepare for the hearing and her chosen witness was not allowed at the hearing.
 - d) The learned magistrate erred in law and in failing to consider testimony that the appeal panel was constituted similarly to the disciplinary panel.
 - e) The learned magistrate erred in fact and law in disregarding the respondent's internal grievance procedure, providing a first warning in such cases.
 13. The appellant is seeking that the judgment of the trial court be set aside and substituted with an award allowing the claims made with costs.

Both parties attended and agreed to file written submissions.
 14. The appellant submitted that there was no substantive reason leading to termination of employment. She was the whistle-blower concerning the shortfall of petty cash as confirmed by Zachary Gachuru for the respondent that the appellant never handled petty cash. This was sent to the branch manager Mark Tolo. At the time, the appellant was admitted to the hospital. On 19 April 2022, the appellant reported the deficit to the finance department and the respondent sent its officer from Nairobi to investigate the missing petty cash.
 15. The appellant submitted that she discovered the cash deficit at the end of September 2021. She asked the manager who said he would give the missing funds. This was the immediate supervisor as branch manager but failed to pay back. The appellant reported the matter to Violet Okoth, the internal auditor. The blame on the appellant was not justified.
 16. The appellant submitted that she was denied procedural fairness when the respondent failed to apply its own rules to the procedure in addressing her case. The manual allowed for a written warning, a final warning, and then dismissal in such a case. She was instead treated differently. The show cause notice issued on 25 April 2022 gave the appellant little time to prepare her responses. The disciplinary hearing followed soon thereafter which denied the appellant sufficient time to prepare for the hearing on 26 April 2022. Eventually at the hearing she requested to have the branch manager called as her witness but the disciplinary committee refused.
 17. Section 41(1) of the *Employment Act*, 2007 (the Act) provides for due process before termination of employment but in the appellant's case, the respondent failed to comply as held in Janet Nyandiko

v Kenya Commercial Bank Limited [2017] eKLR and National Bank of Kenya v Samuel Nguru Mutonya Civil Appeal No.118 of 2017. The employee must be allowed to call evidence in response and the procedures adopted by the employer must be by the law.

18. The appeal allowed was not procedural as the same persons who formed the disciplinary committee were the same at appeal. This was contrary to Clause 5.1 of the Grievance Procedures which required a different team to sit on appeal. This resulted in both unfair and unprocedural termination of employment and the appeal should be allowed.
19. The respondent submitted that the appellant's case was dismissed by the lower court for good cause and the appeal is without merit. During the hearing, she admitted that she knowingly relayed to the finance department fictitious cash counts. She did not verify the cash counts for the month before sharing them with the finance department contrary to the finance policy.
20. There was no discrimination as alleged and the appellant confirmed that she was the beneficiary of the medical cover insurance that was provided to the respondent. She was taken through the due process and attended a disciplinary hearing and the termination of employment was justified.
21. The respondent submitted that under Section 43 of the Act, the employer is allowed to terminate employment where there are valid reasons. Section 41(2) allows for summary dismissal where the employee is of gross misconduct. In the notice to show cause, the appellant was informed that on 25 September 2021, she received 10,000 from the Mombasa branch manager, one Amos MacTolo being part of the petty cash that had been remitted to him. The appellant failed to report this fact to the respondent's officers. The appellant had aided the misappropriation of funds by submitting falsified reports for the branch in a bid to conceal that the funds initially disbursed were not surrendered in full as required. She failed to explain her conduct leading to termination of employment. The report to the internal auditor was much later in April 2022, 7 months later.
22. In the case of Peter Kamau Mwaura & another v National Bank of Kenya, the court held that Section 45(1) and (2) of the Act termination of employment must adhere to the fairness test by the employer establishing evidence that there was a valid reason leading to termination of employment.
23. The respondent has filed minutes of the disciplinary hearing held on 26 April 2022 where the appellant was found culpable and employment terminated on 27 April 2022. The appellant failed to report for over 7 months the petty cash that was handed to her by MacTolo and that this did not tally with the cash count. This issue only came up after the internal auditor asked. The appellant was found to have shared fictitious and false reports with the finance department from September 2021 to April 2022. This led to justified termination of employment.
24. The appellant was taken through the due process, a show cause notice was issued and the appellant was able to respond and attend disciplinary hearing. She cannot turn around and be found to state that the time allocated was too short as held in Gideon Karani Njine v Rift Valley Railways [2019] eKLR. The respondent had a duty to fast-track the disciplinary hearing due to the delicate nature of the charges against the appellant which related to aiding misappropriation of petty cash funds and misrepresentation and non-disclosure of material information. Summary action was necessary under the law.
25. The respondent submitted that the alleged discrimination against the appellant did not occur. Termination of employment was for stated reasons. Upon the appellant getting unwell, the respondent facilitated treatment and went out to secure the work environment to accommodate her. The effort to transfer the appellant from Mombasa to Nairobi was in the same vein as she was attending hospital at Coptic Hospital in Nairobi but she declined the transfer even though her contract provided she

could work anywhere. The medical cover was enhanced to accommodate the appellant and paid for by the respondent. There existed no reasons to justify a claim that there was discrimination against the appellant.

26. The respondent submitted that the trial court had no jurisdiction to hear and address a claim of discrimination alleged by the appellant. Under Article 23(2) of *the Constitution*, only a superior court should hear and determine such a claim. Under Section 8(2) of the Magistrates Court Act, the lower court had no jurisdiction to address rights under Article 25(a) and (b) of *the Constitution*.
27. The appellant was paid all her terminal dues and evidence was submitted in this regard. The appeal is without merit and should be dismissed with costs.

Determination

28. As the first appellate court, I am duty-bound to re-evaluate and reconsider the evidence adduced before the trial court to draw my independent conclusions remembering that, unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See *Selle v Associated Motor Boat Company Ltd (1968) EA*.
29. From the appeal, the issues for determination can be summarised as follows;
Whether there was unlawful and unfair termination of employment;
Whether the appellant was taken through the due process;
Whether the appeal should be allowed; and
Who should pay the costs?
30. The appeal is on 5 main grounds. The appellant did not challenge the findings with regard to the issue of discrimination alleged in the lower court and the findings by the learned magistrate that the court had no jurisdiction to hear constitutional violations save for claims under Article 25(a) and (b) of *the Constitution* read together with Section 8(2) and (3) of the Magistrates Court Act. That the discrimination claim is protected under Article 27 of *the Constitution* and hence the lower court had no jurisdiction.
31. The appellant's claim before the lower court was anchored about her rights in employment. As a person with a disability, the respondent acted contrary to her interests and hence there was discrimination against her. Indeed, under Article 165 of *the Constitution* read together with Articles 23, 25, and 41, only superior courts have been given jurisdiction to interpret *the Constitution* on the violation, the threat to violate, or breach of constitutional rights under the Bill of Rights and particularly the right not to be discriminated against by fair labour practices. Essentially, a claimant ought to discern the claim, even though the monetary value allowed for the lower court exists, ultimately, the remedies sought are important to consider when selecting which form to lodge a claim. See *Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 4 others [2020] eKLR*.
32. In employment claims, disability discrimination practices are outlawed under Section 5 of the *Employment Act, 2007* (the Act) read together with Article 27 of *the Constitution*. It is also unlawful to terminate employment on medical grounds. However, in a claim that there is discrimination against an employee due to disability as the appellant had alleged, proof of disability under the *Persons with Disabilities Act* is imperative. Illness and disability can only be differentiated upon certification and registration as a person with a disability. The motions of such matter are addressed under the Persons with Disabilities which the appellant failed to address in the entirety of the claim before the lower court.

33. In the case of *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (22 October 2021) (Judgment), the Supreme Court analyzed the issue of discrimination against any employee which is prohibited by article 27 of *the Constitution* as well as section 5 and 46 of the Act. No person should directly or indirectly discriminate against another person on account of health status or disability. One is not the other. While one may have a health condition, that is not necessarily a disability.
34. The findings by the learned magistrate in this regard cannot be faulted.
35. On whether there was unlawful or unfair termination of employment, termination of employment is unlawful where the employer fails to take the employee through the due process of the law particularly the provisions of Sections 35, 41, and 44 of the Act. Termination of employment is wrongful, where the employer fails to abide by the employment contract terms and conditions or any workplace policy that regulates employer and employee relations on the shop floor.
36. The appellant was summarily dismissed by the respondent on account of gross misconduct through misappropriation of funds. The grounds were that you aided the Branch Manager in the misappropriation of Kshs. 35,866 by failing to disclose that you were not in receipt of the funds intended for petty cash for six months and further prepared and signed off the cash count sheet knowing that the funds were not available, and the cash count was a misrepresentation of the situation at hand.
The appellant was hence summarily dismissed.
37. Under Section 44(4) of the Act read together with Section 41(2), the employer is allowed to summarily dismiss the employee for gross misconduct.
38. The motions of dealing with gross misconduct are to allow the employer shorter timelines to address such matters under Section 44(1) of the Act;
 - (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
39. Notice must be issued to the employee however short in time to allow attendance and hearing. The motion of Section 41(2) then come into play that;
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
40. The key elements of this section have been defined by the Court of Appeal in the case of *Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017)* [2022] KECA 540 (KLR) (13 May 2022) (Judgment) to include the following matters that;

... four elements must thus be satisfied for the summary dismissal procedure to be said to be fair, being: -

 - a) An explanation of the grounds of termination in a language understood by the employee;
 - b) The reason for which the employer is considering termination;

- c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
- d) Hearing and considering any representation made by the employee and the representative chosen by the employee.

41. In the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR the court gave emphasis to these provisions that;

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, in writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before deciding to dismiss or give other sanction.

42. In this case, the appellant was issued with a show cause notice on 25 April 2022 and she was able to respond immediately as directed. A hearing notice was issued on 26 April 2022 where she attended and was accorded a hearing. Save, the appellant asked to have the branch manager, Mombasa attend the hearing as this was the person closely related to the allegations made against her, that she aided and facilitated the misappropriation of funds.

43. Was the failure to call MacTolo fatal to the findings of gross misconduct?

44. On 25 April 2022, the appellant while responding to the show cause notice stated as follows;

... I kept sending him constant reminders verbally and on stick notes and he told me that whoever asked me of the shortage I should say that he (Amos) had the money. ...

I have all the formal communication on email to Amos Mactolo although he was replying by word of mouth, emails sent to QA, and the hard questions he asked. ...

2. I was under duress to make those sheets if we had money from my manager every month and he would say I will sign. ...

45. The appellant faced a serious charge on her part. That of aiding the branch manager in misappropriation of petty cash and further, failing to disclose these facts for six months and further, preparing and signing off the cash count sheet knowing that the funds were not available, and the cash count was a misrepresentation of the situation at hand. These were personal and individual matters to deal with. The presence of the branch manager would not have aided the appellant in any regard.

46. The notice to attend the disciplinary hearing advised the appellant that she had the right to be represented at the hearing and the right to call any witness. These aspects were not addressed.

47. These are matters well addressed by the learned magistrate and sound findings. This court cannot fault the trial court.

- 48. On the remedies sought, the finding that summary dismissal was justified, notice pay, and compensation are reliefs removed from the appellant. Indeed, upon summary dismissal, the provisions of Section 18(4) and (5) of the Act apply. But, the appellant failed to particularise her claims in this regard. The fact of terminal dues being paid and acknowledged is not contested.
- 49. On the question of costs, the appeal is without merit and the appellant was paid terminal dues immediately after employment ceased. That places the respondent in good standing in terms of Section 45(5) of the Act. The appellant ought to meet 50% of the respondent's costs.
- 50. Accordingly, the appeal herein is found without merit and is hereby dismissed. The appellant is to meet 50% costs due to the respondent for this appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 14 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and