



**Simba Corporation t/a Acacia Premier Hotel v Oguta (Appeal
E008 of 2023) [2024] KEELRC 477 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 477 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E008 OF 2023
CN BAARI, J
MARCH 6, 2024**

**BETWEEN
SIMBA CORPORATION T/A ACACIA PREMIER HOTEL APPELLANT
AND
WILLIAM OGUTA RESPONDENT**

*(Being an appeal from the Judgment of Hon S.N Telewa (SRM) Kisumu
delivered on 6th January 2023 in Kisumu CMELRC NO. 166 OF 2021))*

JUDGMENT

1. William Oguta (the Respondent) sued Simba Corporation trading as Acacia Premier Hotel (the Appellant) before the Chief Magistrates Court at Kisumu alleging unfair termination of service.
2. In a judgment delivered on 6th January 2023, the Trial Court found the Respondent's termination unfair and awarded him the equivalent of 6 months' salary as compensation, 12 months' salary as damages for loss of employment and 1 month salary in lieu of notice.
3. The Appellant being aggrieved with the decision of the Trial Court, lodged this Appeal on 13th February, 2023, premised on the following grounds:
 - i. That the Learned Magistrate erred in law and in fact in holding that the appeal arising from the disciplinary hearing was not properly conducted without any evidence leading to such conclusions.
 - ii. That the Learned Magistrate erred in law and in fact in holding that the Appellant's employees could not sit and hear the Respondents Appeal.
 - iii. THAT 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.



- iv. THAT the Learned Magistrate erred in law and in fact in holding that there was need to issue the Respondent with a notice or payment in lieu of notice despite being summarily dismissed.
 - v. THAT the Learned Magistrate erred in law and in fact in holding that Sections 41, 43, 45 and 47 of the Employment Act and Labour Relations Act had not been complied with despite evidence presented by the Appellant to the contrary.
 - vi. THAT the Learned Magistrate erred in law and in fact in failing to hold that the Appellant had established that the Respondent had been unfairly terminated to the required standard of law.
 - vii. THAT 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.
 - viii. THAT the Learned Magistrate erred in law in awarding the Respondent damages for loss of employment despite not being engaged in a fixed term contract by the Appellant.
 - ix. THAT 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. It is the Appellant's prayer that the appeal herein be allowed and the judgment of Hon. Telewa, and its consequential orders be set aside and the memorandum of claim by the Respondent be dismissed with costs.
 5. Pursuant to the directions of the Court of 4th of October, 2023, both parties filed written submissions.

The Appellant's Submissions

6. It is the Appellant's submission that it 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 he wrote a statement with the Appellant's investigation team, where he stated that he was on duty from 22nd to 24th September, 2020, and further confirmed that the allegations levelled against him were true.
7. The Appellant submits that during the hearing before the Trial Court, it testified that it carried out investigations which found the Respondent culpable to the charges for reason that while on duty, he served two guests and was paid for items worth Kshs 2,200 and Kshs. 2,050 respectively, but used the previous day's codes to settle the transactions and thereby pocketing the money paid in cash.
8. It is the Appellant's submission that what forms the basis for terminating an employee are the reasons that the employer genuinely believe 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.
9. 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.
10. 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.



11. 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.
12. 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.
13. 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.
14. The Appellant submits that in summarily dismissing the Respondent, it did so in total consonance with Section 41 of the *Employment Act*.
15. 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 23rd December, 2020.
16. It further submits that a perusal of the letter of summary dismissal dated 13th November, 2020, together with the Notice of 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.
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 nine 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. 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 herein unfair on the basis that firstly, the Appellant failed to establish the basis for the 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 terminating an employee are 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.
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 15th October, 2020. He subsequently was issued an invitation letter dated 19th October, 2020, to appear before the disciplinary committee for hearing of



his case on the 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. The record shows that the Respondent was issued a show cause letter, spelling out the charges levelled against him, and to which he responded to. It is also not disputed that an invitation to appear before the disciplinary committee was sent to him, and which informed him of his right to be represented by a union representative. Again, it is confirmed that the Respondent was represented.
35. In the case of Philip Kimosop v Kingdom Bank Limited (2022) eKLR, the Court opined that the Respondent’s action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing constituted fair procedure.
36. Further in Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR, the Court observed as follows on procedure:

“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, 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 making the decision to dismiss or give other sanction.”

37. In light of the foregoing, I find and hold that the Respondent was accorded fair process in accordance with Section 41 of the [Employment Act](#), 2007.
38. 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.
39. 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.
40. 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 Appellant’s customers. This it argued further, was a genuine reason to terminate the Respondent.



41. 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.”

42. 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”.

43. The security report produced in evidence indicates that the Respondent admitted the allegations levelled against him. Further, minutes of the disciplinary hearing, carry excerpts of the discussions where the Respondent admitted to the charges and further sought to be forgiven.
44. The Court of Appeal in Civil Appeal No 66A of 2017, *Kenya Revenue Authority v Reuwel Waitthaka 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.”

45. In my view, the Respondent admitted the charges levelled against him at the hearing going by the minutes produced before Court.
46. The acts and omissions of the Respondent no doubt caused the Appellant losses which lead 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.



47. I thus find and hold that the Appellant had valid, fair and justified reasons to dismiss the Respondent.
48. On 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

49. No evidence was led to show that the Respondent was issued notice prior to dismissal, or that he was paid in lieu of the notice.
50. The award on this account is upheld.

Damages for wrongful dismissal

51. The Respondent was awarded 12 months salary for wrongful dismissal.
52. This Court has found the Respondent's dismissal both procedurally and substantively fair. The award is therefore not tenable.
53. The award is set aside.

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. In any event the dismissal herein, has been found to be lawful.
55. The award/claim is devoid of merit and is for dismissal.

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 proved 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. 21,700/-
 - ii. The award of 12 months' salary is set aside in its entirety.
 - iii. The award of damages for loss of employment is set aside in its entirety.
 - iv. The claim for underpayment is declined.
 - v. Parties shall bear their own costs of both the appeal and the suit before the lower court.
61. Judgment accordingly.



SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF MARCH, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Nyamwaro present for the Appellant

Mr. Anyumba present for the Respondent

Erwin Ongor - Court Assistant

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