



Simba Corporation t/a Acacia Premier Hotel v Omondi (Appeal E007 of 2023) [2024] KEELRC 485 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 485 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E007 OF 2023
CN BAARI, J
MARCH 6, 2024**

**BETWEEN
SIMBA CORPORATION T/A ACACIA PREMIER HOTEL APPELLANT
AND
IGNATIUS OMONDI RESPONDENT**

(Being an appeal from the Ruling and Order of Hon. S. N. Telewa (SRM) delivered on 6th January, 2023 in Kisumu CMELRC No. E167 of 2021)

JUDGMENT

1. This judgment relates to an appeal arising from a decision rendered on 6th January, 2023, where the Trial Court held that the Respondent 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 13th February, 2023.
3. The appeal is premised on the following grounds:
 - a. That the Learned Magistrate erred in law and in fact in holding that the appeal was not properly conducted without any evidence leading to such conclusions.
 - b. That the Learned Magistrate erred in law and in fact in holding that there was need to issue the Respondent with a notice despite being summarily dismissed.
 - c. That the Learned Magistrate erred in law and in fact in holding that the Appellant had to produce proceedings and minutes for the Appeal hearing.



- d. 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.
 - e. 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.
 - f. That 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.
 - g. 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.
 - h. That 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 Applicant.
 - i. 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. 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.
7. It is the Appellant's further submission that investigations were carried out that found the Respondent culpable on the basis that he was found to have raised cheque No. 6240 amounting to Kshs 2,960 for two whole tilapias, but the bill was subsequently voided with remarks that the customer had changed his mind and the fish returned to the fridge.
8. Additionally, the Appellant avers that the Respondent stated that the customer had changed his order from fish to two kienyeji chicken, while on further scrutiny, it is evident that the order was not placed by the Respondent, in direct contravention of the company's F&B standard operating procedures.
9. The Appellant further submits that on 20th October 2020, it received a complaint from one of its guests that the Respondent had charged breakfast at Kshs. 1600, yet the customer had booked an all-inclusive bed and breakfast room.
10. It is the Appellant's submission that 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. 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.
11. It is the Appellant further submission that the Respondent was guilty of the two incidents of misconducts consequently unjustly enriching himself which amounts to a genuine reason for his summary dismissal.



12. 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.
13. 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.

PARA 14.

It is the Appellant's submission that the Respondent was issued with two show cause letters dated 13th October, 2020, and 20th October, 2020, and that he failed to satisfactorily respond to the charges.

15. 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.
16. 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
17. The Appellant submits that in summarily dismissing the Respondent, it did so in total consonance with Section 41 of the *Employment Act*.
18. 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.
19. 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.
20. 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. 24,000/-, and which sum he confirmed during cross-examination.
21. 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.
22. It is the Appellant's submission that courts are called upon to considerer the 13 grounds set out under Section 49 of the Act, to justify their award of damages. It placed reliance in the Court of Appeal decision in *Ol Pejeta Ranching Limited v David Wanjau Muhoro Civil Appeal No. 42 of 20 15*, for the holding that:

“Remedies for unfair termination are provided for in section 49 of the Act. They include, payment equivalent to a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raff of considerations such as the conduct of the employee, which to any extent caused or contributed to the termination.”



23. The Appellant urges this Court to find that the termination of the Respondent was as a result of his fraudulent dealings in stealing from the Appellant and its customers, and set aside the 6 months' salary compensation for unfair termination.
24. 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.
25. 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

26. 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.
27. 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.
28. 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.
29. 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.
30. It is the Respondent's submission that the employees of the Appellant who sat in the disciplinary committee are the same ones who investigated the manner contrary to the rules of natural justice and was thus not accorded a fair hearing.
31. 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.
32. The Respondent finally submits that he has proved his case against the Appellant on a balance of probability 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

33. 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.



34. The Court of Appeal in *Selle & Another v 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...”
35. 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.
36. 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*.
37. 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.
38. 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.
39. The Respondent was issued a show cause letters dated 13th October, 2020, and 20th October, 2020. The Respondent was then invited for a disciplinary hearing vide a letter dated 21st October, 2020, and the 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.”
40. The events described in paragraph 46 above, in my view, meet the minimum standards set under Section 41 of the *Employment Act*. Although it is evident that the times lines allowed to the Respondent to respond to the second show cause letter seem short, the Respondent nonetheless, was able to respond to the letter, and did not raise issue with the timeline. The Court notes that the Respondent told the committee after the hearing, that he felt that he was fairly heard.
41. 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 justices in summary dismissal from employment.
42. In the premise, I find that the Respondent’s dismissal met the procedural fairness test.



43. 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.

44. The Appellant argued that it dismissed the Respondent for charging a customer for a bill he already settled, and failure to post a customer's order in the system. This it argued, was a genuine reason to terminate the Respondent.

45. 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.”

46. 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”.

46. The minutes of the disciplinary hearing, carry excerpts of the discussions where the Respondent told the committee that he could not remember whether he posted the bills in issue in the Appellant's system, and further took fault for the mistake. He further admitted refunding an amount of Kshs. 1600 received from a customer, whom he had charged, while the customer had already settled the same bill.

47. 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."

48. In my view, the Respondent admitted the reasons for his dismissal at the hearing going by the minutes produced before Court.
49. The acts 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.
50. I thus find and hold that the Appellant had valid, fair and justified reasons to dismiss the Respondent.
51. 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
52. 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. 24,000/-
53. Although the Appellant's position is that the Respondent was not entitled to notice for reason of summary dismissal, the misconduct committed by the Respondent, does not fall within those categorized under Section 44(4) of the *Employment Act*, as to warrant summary dismissal, but instead, a termination of employment.
54. I thus uphold the award in the sum of Kshs. 24,000/-.

Damages for wrongful dismissal

55. The Respondent was awarded 12 months salary for wrongful dismissal. The finding of this Court is that the Respondent was terminated fairly, and does not deserve an award of compensation.
56. The award of 12 months' salary by the Trial Court is set aside in its entirety.

Damages for loss of employment

57. Damages for loss of employment is not a remedy known to Section 49 of the *Employment Act*. To allow this award, is tantamount to unjustly enriching the Respondent.
58. The award/claim is devoid of merit and is set aside in entirety.

Underpayment

59. The Trial Court dismissed the prayer for underpayment on the basis that the Respondent ought to have claimed it before he was dismissed.
60. 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.
61. 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 and neither was the finding of the Trial Court in this regard challenged.



62. The claim is thus not proven, and it fails.
63. In conclusion, I make the following orders: -
- i. The award of one month salary in lieu of notice is upheld at Kshs. 24,000/-
 - 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.
 - 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.
64. 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

