



**Kenya Union of Domestic Hotels, Educational Institutions, and Hospitals Workers (KUDHEIHA) v Kslh Mombasa Beach Hotel (Cause E036 of 2023) [2024] KEELRC 1560 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1560 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E036 OF 2023**

**M MBARŪ, J**

**JUNE 13, 2024**

**BETWEEN**

**KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS, AND HOSPITALS WORKERS (KUDHEIHA) ..... CLAIMANT**

**AND**

**KSLH MOMBASA BEACH HOTEL ..... RESPONDENT**

**JUDGMENT**

1. In the statement of claim dated 10<sup>th</sup> February 2023, the claimant filed the claim on behalf of Erick Kipngetich Chepkwony, the grievant and seeking a declaration that the respondent unfairly, wrongfully and maliciously terminated the services of the grievant and that the court awards damages as maximum compensation for unfair termination. The claimant is also seeking the following:
  - i. Payment of terminal dues of the grievant.
    - a. 4 months' salary instead of notice  $46,734 \times 4 = 186,939.00$
    - b. Service gratuity  $23,367 \times 16$  years worked = 373,872.00
    - c. Annual leave for 2021 = 43,734.00
    - d. Annual leave for 2022  $1557.8 \times 8$  days = 12,462.4
    - e. Leave travelling allowance = 5,600.00
    - f. Compensation for 60 pending off days not taken = 93,468.00
    - g. Compensation for shoes for 10 years. (2009, 2013-2021)  
 $700 \times 12$  months  $\times 10$  years = 84,000.00

Total exclusive of items iii, iv, v. = Ksh. 1,360,883.00

- ii. Award of damages for malicious persecution.
- iii. Costs of this suit be borne by the respondent.
2. The claim is that the grievant was employed by the respondent on casual terms on 1st August 2005 and was employed on a contract basis from 1<sup>st</sup> September 2010 until 12 May 2022 when he was unfairly summarily dismissed. His last wage was Ksh. 46,734.
3. The grievant testified that he was employed by the respondent in the maintenance department undertaking plumbing, electrical and cleaning duties as a general artisan. On 1 April 2022, he was called by his supervisor who indicated that the general manager wanted him in the office. He was issued with a letter of suspension for 14 days pending investigations and security investigations over the alleged possession of foot items belonging to the respondent.
4. On 16 April 2022, the grievant was issued with a notice to show cause and directed to respond by 19 April 2022. The allegations made were that he was involved in the theft of hotel items found inside a van belonging to a service provider.
5. On 27 April 2022 the grievant was invited to a disciplinary hearing and a verdict was issued on 12 May 2022 with summary dismissal for alleged theft. He lodged an appeal which was heard on 24 May 2022 but the respondent confirmed the summary dismissal. The grievant testified that the allegations made against him were not true and had the respondent conducted fair investigations, this would have been apparent.
6. Upon cross-examination, the grievant testified that he would work on electrical appliances including those in the kitchen. He was not required to remove anything from the kitchen. He was however required to feed fish in the pond and would carry leftovers from the kitchen including bread. He carried bread in a box and went to the pond to feed fish.
7. The grievant confirmed that upon his summary dismissal, the respondent paid him Ksh. 165,000 including his full wages for May 2022 at Ksh. 31,000 total being Ksh. 196,000
8. In response, the respondent admitted that the Grievant was employed as an Artisan from 1st November 2010 up to 12 May 2022 he was summarily dismissed due to theft of the respondent's property. His last wage was Kshs. 25,276 and a house allowance of 8,687.03 totaling Kshs. 33,963.03. As an artisan, the grievant's main duties included laying out, fitting and fabricating metal components to assemble machinery frames and welding. He failed to undertake his duties as required.
9. The response is that following an incident of theft that occurred on 31<sup>st</sup> March 2022, the CCVT captured the grievant carrying a box out of the kitchen. In a security report dated 5 April 2022 by Emmanuel Wambua, ISMAX Security, it captured the grievant at 1534 hours at the supplies gate and Wambua conducted a search and found items inside TOP IN TOWN laundry services van No. KDE 945V and inside was blue linen used to wrap towels and inside was a variety of foodstuffs including 9 packets of milk, 2 spaghetti and sugar tied in the bag. Upon enquiry, the van driver and his colleague stated that they had purchased these items from Naivas supermarket but could not produce a receipt. The items were carried in a bag belonging to the respondent.
10. An investigation was carried out and the report revealed that the grievant had left the kitchen on the material day carrying a carton and went to the direction where the laundry van was packed. He had the carton in his hands. For his conduct, the grievant violated the code of conduct where theft is defined as a matter of gross misconduct and liable for summary dismissal. He was suspended, issued with a notice

to show cause and called for a disciplinary hearing but failed to exonerate himself leading to summary dismissal. His appeal was found without merit and dismissed.

11. In evidence, the respondent called Eunice Nzilani the human resources manager who testified in support of the response. The grievant has since been paid his terminal dues in full.
12. On the claim for 4 months' notice pay, this was a case of summary dismissal and notice pay and compensation are not due. The grievant was registered with NSSF and no service pay is due. All leave days accrued and not taken were tabulated and paid in full and cheques totaling Ksh. 196,417 have been issued and cashed.

At the close of the hearing, both parties filed written submissions.

There are no written submissions by the claimant in the court file.

13. The respondent submitted that the termination of employment was procedurally and substantively fair and lawful. From the grievant's letter of summary dismissal dated 12th May 2022, the same was on account of attempted theft of impounded/confiscated hotel items on 31<sup>st</sup> March 2022. The particulars were enumerated in the notice to show cause and letter of summary dismissal. Before summary dismissal, the grievant was taken through a disciplinary process and opted not to call any witness.
14. In the case of Johnstone Langat *v Unilever Tea Kenya Limited (Cause E004 of 2021)* (2022) KEELRC 1238 (KLR) the Court cited the case of Anthony Mkala Chitavi v Malindi Water and Sewerage Co. Limited (2013) eKLR where it was held 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. That;

... 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 deciding to dismiss or give other sanction.

15. The respondent submitted that the reliefs sought are not due following the summary dismissal of the grievant. The grievant admitted during cross-examination having received a total of Kshs. 196,417 as terminal dues. In summary dismissal, notice pay and compensation are not available. On the claim for service gratuity, the grievant's employment contract does not provide for the same. Further, the grievant is not entitled to service pay by dint of the provisions of section 35 (6) of the *Employment Act, 2007* having been a member of NSSF. He had no accrued leave days pending leave allowance or pending off days.

### **Determination**

16. It is not in dispute that the grievant was an employee of the respondent. The question is whether he was unfairly terminated.
17. From the Respondent's list of documents, the grievant was engaged from 1<sup>st</sup> November 2010 to 30<sup>th</sup> January 2011, through a letter dated 3<sup>rd</sup> November 2010 earning a basic pay of Kshs. 8,638 and a house allowance of Kshs. 4,466. Both parties agree that the grievant was terminated on 12 May 2022. However, the employment contract for the period up to termination of employment is not provided.

18. In the job description dated 30 September 2011, the grievant's duties included welding components and assemblies, cutting work pieces, and installing, or repairing equipment.
19. The grievant testified that he had been allocated additional duties of feeding fish at the pond. After learning the kitchen, he would be given leftover bread in a box to feed the fish.
20. These duties are not outlined in his job description. The grievant admitted to leaving the kitchen with a box. Carrying bread to feed fish does not naturally mean such must be carried in a box. Reasonable allocation of duties of an artisan to feed fish at the pond is far removed from the grievant.
21. It so happened that around this time when he admitted to carrying a box from the kitchen, a service provider was found with food items stolen from the same kitchen. It cannot be a case of the grievant being at the right place at the wrong time. His carrying a box allegedly to feed fish which was not part of his outlined job description placed him at the wrong place at the wrong time. He became so closely connected to the stolen food items found in the laundry bag. He cannot extricate himself from the series of events leading to the food items found in Motor Vehicle No. KDE 945 V.
22. A notice to show cause was issued and the grievant was called to a disciplinary hearing.
23. In response to the notice to show cause, the grievant did not do justice to himself. Faced with serious allegations, his response was that;
 

... On that particular day I was assigned to check on cooking ... since it was noticed there was leakage. Again, it was routine that I take care of the fish at the ponds. I always collected leftover bread from the kitchen we took them to the ponds ...
24. The grievant failed to address himself to the issue at hand. His movements and the impounded goods were found in motor vehicle KDE 945 V the property of the respondent.
25. What came out clearly during the hearing was that the parties went for conciliation. The conciliator recommended that the employees should be reinstated or his terminal dues paid together with other employees involved in the matter as they were dismissed without a justifiable or lawful reason.
26. However, under Section 44(4) of the *Employment Act*, 2007 (the Act), an employer is allowed to dismiss an employee for gross misconduct as defined under the law or its policy as held in the case of *George Okello Munyolo v Unilever Kenya Limited* [2019] eKLR.
27. In this case, the Respondent had reasonable and sufficient grounds to suspect the grievant of having acted to the substantial detriment of the Respondent and its property and was justified in dismissing the Claimant under Section 44(4)(g) of the Act.
28. In the case of *Kamau v Kiambu Golf Club (Cause 2185 of 2017)* [2022] KEELRC 1689 (KLR) (25 May 2022) (Judgment) the court held that;
 

As courts have elaborated in innumerable decisions, for a summary dismissal or termination of employment to pass muster, it must not only be substantively justifiable but must in addition have been conducted by a fair procedure. In other words, it must pass the substantive justification and procedural fairness test. See *Naima Khamis v Oxford University Press TEA] Ltd* [2017] eKLR as well as *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
29. The court in the case of *Mutiso v South Eastern Kenya University (SEKU) (Cause E04 of 2021)* [2024] KEELRC 647 (KLR) (15 March 2024) (Judgment) held that;

... Summary dismissal was not unfair both in procedure and merits. The evidence was that the claimant was given a show cause letter, he replied, attended the disciplinary hearing, appealed the summary dismissal, and attended the appeal hearing but the summary dismissal was upheld. The respondent adopted a fair procedure as envisaged in section 41 of the *Employment Act* on notice and hearing of the employee. The respondent has also established that the reason was genuine and valid per section 43 of the Act as it existed and it was fair per section 45 of the Act relating to claimant's conduct, compatibility and respondent's operational requirements.

30. In this case, the termination of the employment of the grievant was therefore justified and he was taken through the due-process.
31. On the claims made, following summary dismissal notice pay and compensation are remedies removed from the grievant.
32. On the claim for service gratuity, the claimant did not file any collective agreement to assert the claim for gratuity pay. The grievant did not have this as a benefit under his contract. Being registered with NSSF, service pay is not due.
33. On the claim for annual leave for the year 2021, under Section 28 of the Act, this is due where there are no work records to confirm the employee has taken his annual leave. For leave due in the year 2021, the grievant is seeking payment of Ksh. 43,734 whereas, under his payment statement, he was earning a gross wage of Ksh. 37,328 of which the basic wage was Ksh. 25,276 which should be the basis for tabulating annual leave pay.
34. The last contract is not filed. The provisions of Section 28 of the Act apply to the extent that the grievant had 21 leave days. This amounts to Ksh. 25,276 for the year 2021.
35. For the year 2022, for the 8 days claimed at the rate of 25,276, the grievant is entitled to Ksh. 6,740. The total due in annual leave pay is Ksh. 32,017.
36. On the claim for leave travelling allowance, without a contract or agreement to confer the same, this claim is declined.
37. On costs, the claimant and respondents still engaged in industrial relations will each bear its costs.
38. Accordingly, the claims made are not justified save the grievant will be paid his annual leave unpaid at Ksh. 32,017. Each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JUNE 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....