



**Githina v Placid View Properties Ltd t/a Ole Sereni Hotel (Appeal
9 of 2020) [2024] KEELRC 1450 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1450 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 9 OF 2020
MA ONYANGO, J
JUNE 6, 2024**

BETWEEN

JULIUS KARANJA GITHINA APPELLANT

AND

PLACID VIEW PROPERTIES LTD T/A OLE SERENI HOTEL RESPONDENT

*(Being an appeal from the judgment of Hon. Orege K. I (SRM)
in CMELRC No. 222 of 2018 delivered on 10th January 2020)*

JUDGMENT

1. The Appellant herein sued the Respondent at the lower court vide a Memorandum of Claim dated 18th September 2018 seeking compensation for wrongful and unfair dismissal from employment.
2. In response, the Respondent filed a Memorandum of Response on 21st November 2018 denying the averments in the claim. According to the Respondent, the dismissal of the Claimant was fair, procedural and within the law as his willful neglect of his duties at work under the employment contract amounted to gross misconduct.
3. Upon hearing the parties the trial court found that the Respondent had sufficient reason to summarily dismiss the Appellant.
4. The Appellant (Claimant in the trial court) was aggrieved by the said judgment and lodged the instant appeal vide his Memorandum of Appeal dated 10th February 2020 on the grounds that:
 - i. The Honourable Magistrate erred in fact and misdirected himself when he made a finding that the Appellant had a specific work station; had failed to be at the said work station; and had failed to give an explanation at the work station.



- ii. The Honourable Magistrate erred in law and in fact when he failed to find that there was no substantive justification for the termination of the Appellant.
 - iii. The Honourable Magistrate erred in law and in fact when he failed to find that there was no procedural fairness adopted when effecting the Appellant's termination.
 - iv. The Honourable Magistrate erred when on one hand he found that some terminal dues had not been paid while on the other hand, he failed to ascertain them in terms of figures
 - v. The Honorable Magistrate erred in law in failing to properly consider the Appellant's evidential material and submissions.
 - vi. The learned magistrate erred in dismissing the Appellant's Claim.
5. Consequently, the Appellant seeks for orders that:
- a. This appeal be allowed;
 - b. The decision of the magistrate court delivered on 10th January 2020 be set aside and this court makes appropriate assessment of terminal dues payable and an order for issuance of the Certificate of Service.
 - c. The costs of this Appeal be awarded to the Appellant
 - d. Such further Orders may be made as this Honourable Court may deem fit to grant.
6. The appeal was disposed of by way of written submissions. Both parties filed their submissions. The Appellant's submissions are dated 25th July 2022 while the Respondent's submissions are dated 6th December 2022.

The Appellant's Submissions

7. Counsel for the Appellant, in his submissions framed the issues for determination to be:
- i. Whether there was procedural fairness adopted when effecting the Appellant's termination;
 - ii. Whether there was substantive justification for terminating the Appellant;
 - iii. Whether the Appeal should be allowed.
8. On the first issue, it was submitted that the subject termination was not procedural as the procedure adopted was unfair. According to the Appellant, after he handed up the call from the Front Office Manager, a show cause letter was typed by the Human Resource officer within 30 minutes and a decision made to suspend him pending a disciplinary hearing the following day being less than 24 hours.
9. It is submitted that the Appellant complained about the composition of the disciplinary committee but the trial court never bothered to interrogate the same in its judgment. The Appellant states that the disciplinary panel was made up of the Human Resource Manager, Jackson Ngige the Front Office Manager and Paul Ayoma a gym manager whose area of operation was different from the Appellant's line of work.
10. On the second issue whether there was substantive justification for terminating the Appellant's employment, it is submitted that the Appellant being the Head of Concierge, was in charge of other concierges and the alleged accusations that the Appellant abandoned his duties of guarding the main



entrance is misconceived as there was a doorman and outsourced security guards whose duties were to man the entrance and screen guests.

11. According to the Appellant, from the nature of his job he did not have one station and could help a guest from any point at the hotel including rooms, lobby, kitchen, restaurant and parking.
12. It is therefore the Appellant's submission that the first ground is clear that the trial magistrate was wrong in holding that the Appellant had a fixed work station and failed to be at the work station and gave no explanation for it.
13. On the last issue whether there was procedural fairness adopted when effecting the termination of the Appellant's employment, the Appellant submits that the procedure adopted was inherently flawed.
14. In the end, the court was urged to award compensation with interest from the date of termination till payment in full.

The Respondent's Submissions

15. On its part, the Respondent identified the issues for determination to be:
 - i. Whether there was a valid reason to warrant summary dismissal of the Appellant;
 - ii. Whether the Appellant's dismissal was fair, lawful and due procedure was followed;
 - iii. Whether the Appeal should be allowed.
16. On whether the Respondent had a valid reason to dismiss the Appellant, it is submitted that the Appellant's employment was terminated on grounds of misconduct and particularly that the Appellant had abandoned his duties of manning the main entrance into the Hotel and opted to sit at the travel desk. It is the Respondent's further submission that when the Appellant was contacted by his senior, the Front Office Manager, he picked up the phone and hung up. According to the Respondent, the Appellant's conduct of abandoning his work station during working hours posed a high security risk that was likely to lead to loss of the guests' luggage, an act which amounts to gross misconduct and calls for summary dismissal. In support of this position, the cases of *Violet Kadala Shitsukane vs Kenya Post Savings Bank* (2020) eKLR and *Galgalo Jarso Jillo vs Agricultural Finance Corporation* (2022) eKLR were cited.
17. On the second issue, the Respondent submitted that the Appellant's dismissal was fair and lawful. It is submitted that the procedure followed was both substantively and procedurally fair. According to the Respondent, the Appellant was issued with a Notice to Show Cause dated 7th December 2017 which notice laid down the complaint regarding the Appellant's behavior towards his seniors and further acts of willfully neglecting to perform his duties. It is submitted that the Appellant responded to the show cause letter and was thereafter invited to a disciplinary hearing vide a letter dated 7th December 2017. It is the Respondent's submission that the notice stipulated the date, time, the venue where the disciplinary hearing was to be held and the Appellant was requested to come with a representative of his choice. It is submitted that the disciplinary hearing took place and that it was properly constituted with the Front Office Manager, the Human Resource Officer and the Gym Instructor who was a neutral party. The Respondent submits that the Appellant was given an opportunity to call an employee of his choice but chose not to. In support of the position that the Appellant was taken through due process as required by law, the case of *Anthony Mkals Chitavi vs Malindi Water & Sewerage Company Limited* (2013) eKLR was cited.



18. The Respondent submitted that it employed the requisite internal labour dispute resolution mechanisms in adherence with the provisions of the Employment Act concerning summary dismissal for purposes of providing the Appellant with a fair hearing.
19. Lastly, on whether the appeal should be allowed, it is contended that the Appellant has failed to demonstrate that the termination of his employment was unfair or that his dismissal was wrongful and as such, he has failed to satisfy the burden of proof as is required by law.
20. Consequently, the court was urged to dismiss the Appeal in totality with costs.

Analysis and Determination

21. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
22. Vide his Memorandum of Claim dated 18th September 2018, the Appellant stated that he was employed by the Respondent on 31st March 2014 as a Head Concierge earning a gross salary of Kshs. 56,825.80. He averred that it was an express term of the employment contract that the employment relationship was terminable only by two months' notice or payment of 2 months' salary in lieu; that the relationship was terminable summarily if the conditions laid out under section 44(4) of the Employment Act were existing and also, upon giving a notice to the Claimant under section 41 of the Employment Act.
23. It is the Claimant's case that he performed his duties diligently during the term of employment until around 13th December 2017 when he was summarily dismissed in breach of the express and implied terms of the contract; that the Respondent unlawfully terminated his services without justifiable cause; that the Respondent failed to accord the Claimant a fair hearing prior to the termination as required by the labour laws and the principles of natural justice, and lastly, that the Respondent failed to pay him his terminal dues even after informing him that he would be paid.
24. The Appellant therefore prayed for the following remedies:
 - i. An order for payment of the Claimant dues and damages totaling to Kshs 812,110.60
 - ii. An order for account and payment of service charge, leave and leave travel allowance
 - iii. Interest on (a) and (b) from 13th December 2017
 - iv. An order for the Respondent to issue the Claimant with Certificate of service in accordance with section 51 of the Employment Act.
 - v. An order for the Respondent to pay costs of this suit plus interests thereon
 - vi. Any other relief this Honourable court deems fit to grant.
25. As mentioned earlier in this judgement, the Respondent in its Memorandum of Response denied the averments made by the Appellant in his claim and maintained that the Appellant was dismissed for justifiable cause.

The Evidence Adduced

26. At trial the Appellant testified as CW1 and adopted his witness statement as part of his evidence in chief. He stated that on the material day that the Respondent alleges that he neglected his duties, he was at work patrolling around the building as he did not have a designated station. He averred that



there was no guest that was not assisted and denied admitting at the disciplinary hearing that he had deserted his duty station.

27. On cross examination, CW1 told the trial court his duties were to assist guests. He explained that he was at the travel desk on the material day, moving around the hotel when he was called by the supervisor who abused him before hanging up. He stated that he was later asked to go to the Human Resource office where he was asked to show cause, which he responded to. He stated that he was invited to a disciplinary hearing the following day which hearing was thereafter rescheduled to 13th December 2017. The Claimant testified that he was not comfortable with the composition of the disciplinary hearing committee and that he did not attend the meeting with a neutral person.
28. On re-examination, the Appellant maintained that he made a complaint to the Human Resource officer regarding the composition of the disciplinary committee but his complaint was ignored.
29. The Respondent called Paul Kibiru, its Human Resource Manager who testified as RW1. RW1 adopted his witness statement as his evidence in chief. He reiterated that the Claimant was given a fair hearing and found guilty.
30. On being cross-examination, RW1 stated that the Front Office Manager left employment because of intoxication. He did not have the minutes of the disciplinary committee proceedings. RW1 further stated that the Claimant was not at the desk and that there was no guest.
31. With that evidence, the Respondent close its case and the court directed parties to file written submissions. Judgment was thereafter delivered on 10th January 2020 which judgment is now the subject of this appeal.

Determination

32. Upon analyzing the Record of Appeal and the submissions of the parties in this Appeal, I find that the main issue that falls for my determination is whether the findings and the award of the trial court are in conformity with the pleadings and evidence adduced before it the court and the law.
33. I will address the grounds of appeal in the order in which they have been set out in the Memorandum of Appeal.
34. In ground 1 of Appeal the Appellant has faulted the trial court for making a finding that the Appellant had a specific work station; had failed to be at the said work station; and had failed to give an explanation for his absence at the work station.
35. From the Appellant's employment contract dated 2nd June 2015, the Appellant was employed as a Head Concierge. I have perused the said Employment contract and I have noted that it does not specify the duties that the Appellant was required to perform.
36. According to dictionaries and other online job descriptions, a concierge is a hotel employee who assists guests by booking tours, making theatre and restaurant reservations including Greeting guests/ customers, managing guest/customer complaints, taking messages, managing mail, luggage and deliveries, performing basic administrative, secretarial and reception duties, running errands to assist guests, arranging transportation and excursions upon visitor request and generally ensuring that guests are happy. A concierge is therefore a specialized customer service representative. A head of concierge is thus responsible to ensure that the needs of guests in hotels, resorts and other accommodation facilities are served by coordinating other personnel in a hotel in providing information and special services to enhance guests' visits.



37. In this case, the Respondent in its submissions explained that once a Head of Concierge welcomes the guests, he is required to allocate the duty of carrying their luggage to the porters on duty. The Respondent submitted that the Appellant abandoned his duties of manning the main entrance into the Hotel and opted to sit at the travel desk. On his part, the Appellant in his witness statement dated 18th September 2018 explained that on 7th December 2017, while conducting his duties as a Head Concierge, noticed that the travel desk was unmanned and went to assist a guest. He further stated that he received a call from the Front Office Manager who instead on inquiring why the Appellant was not at the door, insulted him before hanging up. According to the Appellant, there was no guest at the entrance at that time and the security guards were there.
38. From the above, it is evident that the Appellant was at work doing what he was employed to do at the time he is alleged to have absconded duty. Absconding duty occurs when an employee does not report to work without authorization. The Appellant was at work and therefore did not abscond duty. Furthermore, there is no evidence that there was any lapse in the performance of the Appellant's duties or loss of a guest's luggage. This ground of appeal therefore succeeds.
39. The 2nd ground of appeal is whether there was substantive justification for the termination of the Appellant's employment. From the Respondent's submissions, the Appellant was dismissed from employment on grounds of absconding his duties. The burden of proof in employment claims as stipulated in Section 43 of the Employment Act is on the employer to prove the reason for the termination as valid in any legal proceedings.
40. In this case there is no doubt that the Appellant was in the course of his work when he was accused of leaving his work station to attend to a guest in the travel desk. There were no specific duties assigned to the Appellant for him to be faulted for performing another duty not stipulated in his contract of employment. It is therefore my finding that the trial court misdirected itself on the law and facts by holding that there was a valid reason for terminating the employment of the Appellant
41. On the third ground on whether there was procedural fairness in the termination of the Appellant's employment, the Appellant has submitted that the process adopted by the Respondent was inherently flawed as the Appellant was required to show cause by 3pm the same day and was asked to attend a disciplinary hearing the following day in less than 24 hours. The Appellant has submitted that although the hearing was rescheduled, it did not take away the unusual speed with which the issue was handled. The Appellant also faulted the composition of the disciplinary hearing committee and also stated that he was not given an opportunity to attend the hearing with a representative of his choice. On its part, the Respondent has maintained that there was procedural fairness in the termination of the Appellant from employment. According to the Respondent, the Appellant was informed of the allegations levelled against him and he was given an opportunity to show cause and to be heard.
42. Section 41 of the Employment Act provides as follows:-
- “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.”
43. Although it is not in contest that the Appellant was taken through some form of disciplinary hearing, no evidence was adduced by the Respondent to disapprove the Appellant's assertion that the disciplinary hearing committee was not properly constituted and that he chose on his own volition not



to attend the hearing with a representative. In the absence of minutes of the said disciplinary hearing, it is my view that the Respondent failed the test of procedural fairness.

44. On the ground whether the trial court erred in finding that some of terminal dues had not been paid but failed to ascertain them, I have noted that neither of the parties submitted on this ground. It is however not in doubt that the Appellant was not paid his dues. The Respondent has submitted that the Appellant has not been paid his dues to date as he is yet to undertake a clearance process with it. According to the Respondent, the court cannot ascertain the outstanding leave days the Appellant had accumulated which can only be ascertained by the Respondent upon clearance.
45. From a perusal of the Appellant's Memorandum of Claim, the Appellant prayed for two months' salary in lieu of notice the sum of Kshs. 113,651. he further prayed for salary for 13 days worked in December, 2017 and compensation.
46. The Respondent admitted that the Appellant has not been paid his terminal dues. The Appellant's letter of appointment provided for notice of two months or pay in lieu thereof. Having found the termination was unfair, the Appellant is entitled to pay in lieu of notice. He is also entitled to compensation. Having found the termination was for reasons that were totally unfounded, and taking into consideration all the circumstances of the case including the length of service of the Appellant it is my view that compensation equivalent to 10 months' salary is reasonable. I accordingly award him the same.
47. The Appellant is entitled to certificate of service which the Respondent is directed to issue to him within 30 days.
48. In the end, the Appeal herein succeeds and I make the following orders:
 - a. The decision of the trial court dismissing the Appellants claim is hereby set aside and in place thereof issue an order allowing the Claim with costs.
 - b. Judgment is entered in favour of the Appellant against the Respondent as follows:
 - i. Pay in lieu of notice Kshs. 113,651.60
 - ii. Salary for 13 days worked in December, 2017 Kshs. 16,549.00
 - iii. Compensation (10 months' salary) Kshs. 568,250.00
 - iv. Respondent to issue certificate of service to Appellant
 - v. The Respondent shall pay the Appellants' costs for the appeal and in the lower court
 - vi. Interest shall accrue on items (i) and (ii) from date of filing suit and on all other items from date of judgment.
49. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 6TH DAY OF JUNE, 2024.

MAUREEN ONYANGO

JUDGE

