



**Mbevi v Crystal Bay Resort (Cause E009 of 2022)
[2024] KEELRC 2320 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2320 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE E009 OF 2022
M MBARŪ, J
SEPTEMBER 26, 2024**

BETWEEN

VINCENT MICAH MBEVI CLAIMANT

AND

CRYSTAL BAY RESORT RESPONDENT

JUDGMENT

1. The respondent employed the claimant on 15 November 2009 as a chief accountant earning Ksh.25, 500 and a house allowance of Ksh.4, 500 per month. He rose through the ranks to the position of financial controller at a salary of Ksh.165, 662 per month.
2. The claim is that from January 2018 to November 2020 the claimant was not paid his salary. That for 18 days worked in July 2021, he was not paid his salary.
3. The claim is also that for 5 years, the claimant was not allowed to take his annual leave on the basis that there was a shortage of staff. For one year and 2 months, he worked during public holidays without compensation. He worked 3 hours of overtime every day for 11 years without compensation. He was not paid his terminal dues as outlined in the Collective Bargaining Agreement (CBA).
4. The claim is that there was an unfair termination of employment on 18 January 2021 without due process or payment of terminal dues.

The claimant is seeking the following dues;

- a. Holiday pay for 5 years Ksh.700,920;
- b. Overtime pay for 11 years and 3 months Ksh.9,676,891;
- c. Annual leave for 5 years ksh.828,310;
- d. Withheld salaries Ksh.5,798,270;



- e. 3 months' Notice pay Ksh.496,986;
 - f. Gratuity for 11 years Ksh.1,099,103.65;
 - g. 12 months compensation Ksh.1,987,944;
 - h. Certificate of service;
 - i. Costs of the suit.
5. The claimant testified that upon employment by the respondent, he worked diligently and was promoted to the position of financial controller earning a salary of Ksh. 165,662 per month. He was issued a contract dated 15 November 2009 Seasonal Appointment Letter from 16 November 2009 to 30 August [year no legible].
 6. In a contract dated 3 March 2010, the claimant was issued with a letter of permanent employment as a chief accountant/financial controller. The allocated salary was Ksh.95, 289 for the position of chief accountant and Ksh.70, 373 for the additional role of financial controller. The consolidated salary was Ksh.165, 662.
 7. The claimant testified that his employment was terminated by the respondent's director who accused him of discrepancies in the bank account. That he withdrew funds from the account without his knowledge yet he had no access to the account. The director and his son were the only persons allowed to make withdrawals. The respondent has not filed any bank statements to demonstrate how the claimant accessed the account and withdrew funds.
 8. The claimant testified that the director had asked him not to give his son any money. He could only draw cheques to be cashed by the director or the son. In this instance, he was accused of withdrawing money and the police called to arrest him pending police investigations into the matter, the respondent terminated his employment by summary dismissal without due process. He has a pending criminal case No.E761 of 2021 Malindi Chief Magistrates Court. The respondent alleged that he altered cheques to withdraw money which was not true. He would prepare bills and payroll for approval by the director who was the signatory. For any bank withdrawals, the bank would call the director to approve. For the 12 years of service, the claimant had no work record and the particulars of the alleged cheques or payment withdrawals were not given to allow him to prepare a response. The police were called on him and they escorted him out of the premises.
 9. The claimant reported the matter to his trade union which made the demand for payment of terminal dues without success. The notice of summary dismissal was issued in February 2021 through email. There was no hearing or reason given. At the time the claimant was earning a gross salary of Ksh. 70,000 and not Ksh.170, 000 and the reduction of salary was not justified. The seasonal contract from 15 November 2009 to 30 April 2010 had 8 months which he was paid Ksh.30, 000 only and the balance is due.
 10. Under the CBA, notice before termination of employment was agreed at 3 months.
 11. From the year 2018, the respondent reduced his salary because he was too expensive to pay. The due salary had been reinstated a month before the summary dismissal.
 12. Upon cross-examination, the claimant admitted that he worked for 3 years without his full salary. He only earned an allowance of Ksh.45, 000 or different amounts but in December 2020 his full salary was reinstated. He has a relationship with Flamingo Bar where he is currently working. Part of the cheques



he prepared while working for the respondent were to Flamingo Bar. The township of this entity is not before the court.

13. In response, the respondent admitted that the claimant was initially employed under a seasonal contract from 15 November 2009 at a gross wage of Ksh.30, 000 per month. He was later retained with no contract at a wage of ksh.70, 000 per month.
14. In the year 2021, the respondent discovered that the claimant was involved in fraudulent activities by altering cheques and stealing for some time to a loss of more than Ksh.35, 109,405.
15. On 22 February 2021, the claimant was summarily dismissed pending investigations from the police due to the act of fraud. Before the dismissal, the respondent conducted investigations and noted the claimant had been stealing from the company. The claimant fled from the scene when called upon to explain his conduct. The respondent invited the Director of Public Prosecutions (DPP) to address the criminal elements of the matter. He was charged in court with a criminal offence of altering cheques contrary to Section 356(a) of the *Penal Code* and stealing contrary to Section 282 of the *Penal Code*. Malindi Criminal case No.E754 of 2021 is still pending with the claimant being the accused person. The orders sought should not be issued pending the determination of his criminal liability and this claim should be dismissed with costs.
16. In evidence, the respondent called Ahmed Bwana Fae the chief accountant who testified that his role was to prepare the payroll. The claimant was in charge of suppliers. In the year 2021, the respondent discovered that the claimant was involved in fraudulent activities and the police were called to conduct investigations. The DPP confirmed that there were forged cheques and the claimant was charged in an ongoing criminal case.
17. As a result of the criminal case, the claimant was issued with a notice of summary dismissal. All pending salary arrears were paid in full. The respondent was not aware that the claimant was unionized and this only arose when the suit was filed.
18. The respondent also called Gentrise Chitechi the human resources manager who testified that he was employed in the year 2013 while the claimant was employed in the year 2009. The claimant was on a seasonal contract first which ran its term and lapsed. He was issued with a permanent contract.
19. Chitechi testified that he was not involved in the summary dismissal of the claimant. This was between him and the director. As the human resources manager he was aware of what was going on and the circumstances leading to summary dismissal. There was no formal communication or notice with accusations that the claimant was required to address before the summary dismissal. There was a pending criminal case in court. For the internal investigations, no record has been filed in court.

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

20. The pleadings, evidence and written submissions are analyzed and the issues which emerge for determination are;
 1. Whether there was unfair termination of employment;
 2. Whether the remedies sought should be issued;
 3. Who should pay the costs.



21. Through notice dated 22 February 2021, the respondent terminated the claimant's employment through summary dismissal. The reasons for summary dismissal were that he had been stealing from the respondent by forging cheques by adding figures after the director had signed the cheques;

... for instance, after presenting a cheque of Ksh.20,400 for signing you would then add the number "2" before "20,400" so that the final amount is Ksh.220,400 which you then present to the bank. ...
22. The respondent noted that the matter and the conduct of the claimant were reported to the police who analyzed statements from KCB bank and observed discrepancies in the amounts withdrawn and the payments to which the withdrawals were made.
23. Under the provisions of Section 44(4) of the *Employment Act*, the employer is allowed to terminate employment through summary dismissal but the employer is required to secure the employee under the provisions of Section 41(2) of the *Employment Act*:
 - (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.
24. The employee must be issued with notice to allow him to attend and make his representations in the presence of another employee of choice. In the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* Cause No.64 of 2012 and the case of *Kwale Water and Sewerage Co. v Said Dingo Nyondo* Civil Appeal E025 of 2021 the courts have held that even in a case of gross misconduct, the provisions of Section 41 of the *Employment Act* are mandatory. The employee must be taken through the due process and allowed a hearing.
25. Where the respondent was aware of criminal investigations relating to alleged criminal conduct, such did not stop the respondent from conducting internal investigations and disciplinary hearings. However short the notice requiring the claimant to attend and address, an internal disciplinary hearing was required under the provisions of Sections 41 and 44 of the *Employment Act*. Where the respondent was unable to conduct a disciplinary hearing due to the conduct of the claimant, such matter should have been demonstrated in court.
26. The witnesses called by the respondent largely agreed that they were not involved in his disciplinary case, it remained a matter between the director and the claimant. Even the human resources manager who was well aware of what was going on was not involved in any disciplinary proceedings.
27. In the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* [2015] eKLR the court held that the employer must demonstrate the reasons leading to the summary dismissal upon taking the employee through the due process. This position is reiterated in the case of *Kenya Revenue Authority v Renwel Waitbaka Gitabi & 2 others* [2019] eKLR that even where the employer genuinely believes that there exist justified reasons to warrant termination of employment, the due process under Section 41 of the *Employment Act* is mandatory.
28. In this case, the respondent was aware that the claimant had been arrested and charged in Malindi Criminal Case No.E754 of 2021 but instead of inviting him to show cause why his employment should not be terminated, a notice of summary dismissal was issued. The response that the claimant left the scene when he learnt that the police had come to conduct investigations and never resumed work is



not as stated in the notice dated 22 February 2021. The issue is that he had been charged in court for stealing and forgery.

29. As outlined above, the witnesses called by the respondent did not present a case that there were any efforts to invite the claimant to a disciplinary hearing.

30. This resulted in unfair termination of employment contrary to the provisions of Sections 41, 43 and 45 of the *Employment Act*.

The claimant is seeking 3 months' notice pay based on the CBA.

31. The respondent as the employer is the lawful custodian of work records in terms of Sections 10 and 74 of the *Employment Act*.

32. Under the records filed with the response to the claim is a payment statement for December 2020. The gross salary is noted as Ksh.81, 580.

33. In paragraph (10) of the Amended Response, there is an admission that the last gross salary was ksh.165, 662 per month.

34. The claimant filed his seasonal contract dated 15 November 2009 and the gross wage paid was ksh.30, 000. He filed the Permanent Employment Letter dated 3 May 2010 for the position of Chief Accountant and the salary payable is Ksh.95, 289 with the additional duties of a financial controller at a salary of Ksh.70, 373 total salary of ksh.165, 622.

35. The claimant filed his payment statement for December 2020 and this too indicates the total salary payable was Ksh.162, 622 per month.

There is no CBA filed.

36. The payment statement filed by both parties has no noted union dues or remittances to a trade union.

37. Under the Contract and provisions of Section 35 of the *Employment Act*, notice pay is due in one month all at Ksh.165, 622.

38. For the unfair termination of employment, as outlined above, there was no due process. The respondent made no effort to call the claimant to account through the internal procedures. They wholly relied on investigations by the police which run a different course outside employment relations.

39. The claimant admitted that he was involved in the running of Flamingo Bar. This matter was not gone into by the respondent. The court is not closed to this evidence and the fact that the claimant readily admitted to the same. These put into account as required under Section 45(5) of the *Employment Act*, the court finds an award of 3 months gross salary as appropriate compensation all at Ksh.496, 866.

40. On the claim for overtime for 11 years, the claimant's case is that he worked 3 hours overtime for the entire duration of his employment. Under clause (13) of the employment contract, hours of work were agreed at 48 hours each week. The evidence that the claimant would report to work with 3 hours overtime every day for a total of 11 years is grossly exaggerated. The time tabulation for 11 years is erroneous since there are two distinct contracts. One is under seasonal employment and the other commencing on 3 May 2010 which are regulated differently.

The need to work overtime is not with the approval of the employer.

41. On the claim for leave pay for 5 years from January 2016 to January 2021, under the provisions of Section 28(4) of the *Employment Act*, the claimant was only allowed to accumulate his annual leave for



18 months. To accrue leave days beyond such period, he must submit his applications to take annual leave but with the approval of the employer, get a carry forward. Without any approval to accumulate leave days, the legal minimum is 33 days only.

42. On the salary of ksh.165, 622 the 33 leave days amount to ksh.182, 184.20 in leave pay.
43. On the claim for withheld salaries from January 2018 to November 2020, initially, the claimant's evidence was that he was paid Ksh.35, 000 from January to December 2019 and Ksh.43, 200 from January to November 2020.
44. The claimant amended his claim and claimed the total salary due at ksh.165, 622 for the period of January 2018 to November 2020.
45. In his evidence in court, the claimant testified that during this period, he would earn allowances but his salary was not paid in full.
46. His pleadings and evidence are at variance concerning unpaid wages. More disparities are in the written submissions where the claimant submitted that between January 2018 to November 2020, he was being paid allowances of various amounts ranging from 5,000 to Ksh.50, 000. He was also provided with food.
47. The respondent did not make matters easier. No payment records were filed. The witnesses called and in particular the accountant had no records on the payroll despite stating that all employees were paid their salaries in full.

Work records would have easily addressed such matters.

48. On the evidence and submissions by the claimant, I take it he was paid an allowance of Ksh.50, 000 from January 2018 to November 2020. From the due salary of Ksh.165, 622 there is an unpaid salary of Ksh. 115, 662 and for 35 months a total of Ksh.4, 048,170 is due.
49. On the claim for holiday pay, the days sought to be paid for are not particularized. Each public holiday is published by the Minister. These are not general days.
50. On the claim for gratuity pay, this is not a legal requirement under Section 35(5) of the *Employment Act* as submitted by the claimant. It has to be a term of contract or under the CBA which is not addressed as a benefit.
51. A certificate of service should be issued under the provisions of Section 51 of the *Employment Act* at the end of employment. Whatever reasons are given and leading to termination of employment, a Certificate of Service is not a letter of recommendation. It should be issued with notice terminating employment.
52. On costs, on the findings that there was unfair termination of employment without due process, the claimant is entitled to his costs.
53. Before conclusion, the respondent made a case that there are ongoing criminal proceedings against the claimant in Malindi Criminal case No.E754 of 2021 and that he is charged for having stolen various amounts by altering cheques to defraud the respondent of various sums of money. This is a matter ongoing and without indication that the claimant is guilty. Such matter should be concluded and upon the judgment, the respondent has the benefit of legal representation. This will suffice.
54. Accordingly, judgment is hereby issued for the claimant against the respondent in the following terms;
 - a. A declaration that employment was terminated unfairly;



- b. Compensation Ksh. 496,866.
- c. Notice pay Ksh.165,662;
- d. Leave pay Ksh. 182,184.20;
- e. Unpaid salaries 4,048,170;
- f. Certificate of Service;
- g. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

