



**New Buxton Inn Limited v Stephen (Appeal E009 of 2021)
[2024] KEELRC 2308 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2308 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E009 OF 2021
AK NZEI, J
SEPTEMBER 26, 2024**

BETWEEN

THE NEW BUXTON INN LIMITED APPLICANT

AND

OKELLO OJIAMBO STEPHEN RESPONDENT

*(Being an Appeal from the judgment of Hon. G. Kiage in
CMELRC Bo. 296 of 2018 delivered on 18th February 2021)*

JUDGMENT

1. The Appellant was the Respondent in Mombasa Chief Magistrate’s Court Employment Case No. 296 of 2018, whereby it had been sued by the Respondent herein vide a memorandum of claim dated 7/9/2018 and filed in the said Court on 2/10/2018. The Respondent had pleaded that he had been employed by the Appellant on 10/9/2008 to render hotel and catering services at a salary of kshs. 10,447, but was not given a formal employment contract. That the Respondent worked until 26/4/2018 when the Appellant falsely accused the Respondent of having overcharged a customer by kshs. 100 with an intention of defrauding the customer; while in reality the customer had been served meals and his bill prepared by another employee with the claimant only issuing an ETR receipt based on the bill prepared by the said other employee of the Appellant.
2. The Respondent had further pleaded in the primary suit:-
 - a. that the respondent was suspended by the Appellant’s director for 2 weeks and that when he reported back upon the lapse of the two weeks, the director told him that he was still consulting his conscience on whether to reinstate the Respondent, that the Appellant never reinstated the Respondent, that the Appellant’s actions amounted to unfair constructive dismissal.



- b. that upon the unfair termination, the Respondent was not paid his full terminal dues, which included salary in lieu of notice, salary for the month of April 2018, service pay, compensation for unfair termination of employment and unpaid NHIF and NSSF.
 - c. that the Respondent worked for the Appellant for ten years from 2008, but was not given a formal contract, and that this was an unfair labour practice.
 - d. that the Appellant's reason for terminating the Respondent's employment was unreasonable and was not satisfactory as the Respondent did not prepare the customer's bill that was in issue, and only issued an ETR receipt believing the already prepared bill to have been properly computed.
3. The Respondent sought the following reliefs in the trial Court:-
 - a. Salary in lieu of notice.....kshs. 10,447
 - b. Salary for the month of May.....kshs. 10,447
 - c. Service pay 15/30 days x10,447x9 years.....kshs. 47,011
 - d. 12 months' compensation for unfair termination of employmentkshs. 125,724.
 - e. Unpaid NSSF from 2008-2013 (400x12x5)kshs. 24,000
 - f. Unpaid NHIF from 2008-2013(600x12x5).....kshs. 36,000
 - g. Costs of the suit and interest.
 - h. Any other relief that the Court may consider just.
 4. Documents filed alongside the Respondent's memorandum of claim included the Respondent's written witness statement and a list of documents dated 7/9/2018, listing 3 documents. The listed documents were a letter dated 25/5/2018, a Certificate of Medical Examination and an NSSF statement dated/issued on 9/7/2018.
 5. The Appellant filed Response to the Respondent's claim and denied having employed the Respondent as pleaded by him; and pleaded that the respondent was suspended on 11/5/2018 for gross misconduct to give room for investigations.
 6. The Appellant further pleaded that the Respondent issued an ETR receipt knowing that it was overcharged as the Captain's Order used to generate the ETR was less by kshs. 100; and did so with intention of defrauding the customer. That subsequent investigations revealed that the incident was not the first one of its kind.
 7. It was the Appellant's further pleading that the Respondent failed to pick his phone (calls) to attend a meeting (sic) after investigations were completed. The Appellant denied having terminated the Respondents' employment; and stated that the Respondent misconducted himself at the Appellant's work place, and was a bad influence to the rest of the Appellant's workers.
 8. Documents filed alongside the Appellant's said Response included a written witness statement of Michael Okatch Omondi, the Appellant's director, and a list of documents dated 12/11/2018, listing 6 documents. The listed documents were copies of a Captains' Order dated 26/4/018 for kshs. 1,090 in respect of food and kshs 760 for drinks, ETR receipt for kshs. 1,570 dated 26/4/2018, a letter dated



11/5/2018 addressed to the Respondent, an investigation report dated 4/6/2018, the Respondent's NSSF statement and a petty cash voucher dated 11/5/2018.

9. At the trial, the Respondent, being the claimant, adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 4 of this judgment. The Respondent further testified that he was terminated on 26/4/2018 after being blamed over some kshs. 100 alleged to have been stolen from a customer by a waiter. He denied involvement in any investigations into the issue. The Respondent further testified that he was earning kshs. 14,447 per month at the time of his termination.
10. The Appellant called one witness, Michael Okatch Omondi (DW-1), who adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 8 of this judgment. Cross-examined, DW-1 testified that on questioning the Respondent on why the RTR receipt issued was at variance with the Captain's Order, the Respondent said that it was a mistake. That the Respondent was put on suspension and when investigations were completed, the Appellant tried to contact him to no avail. That the Appellant did not terminate the Respondent's employment. That the Respondent admitted having charged a patron.
11. The trial Court delivered its judgment on 18/2/2021 and rendered itself as follows:-

“.....the upshot of the foregoing is that the respondent has failed to discharge the burden and to demonstrate that the claimant's termination from employment was both substantively and procedurally fair. In the end, I find that the claimant was unfairly and uprocedurally terminated from employment by the Respondent.”
12. The trial Court proceeded to make the following awards in favour of the Respondent herein:-
 - a. One month salary in lieu of notice.....kshs. 10,447
 - b. Service pay.....kshs. 31,341.
 - c. Compensation for unfair termination of employment (kshs. 10,447x6)kshs. 62,682.
 - d. Costs of the suit and interest.
13. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth the seven grounds of appeal, challenging the trial Court's finding of unfair termination and making an award on that basis.
14. The Appellant seeks to have the appeal allowed and the trial Court's judgment set aside and substituted with an order dismissing the Respondent's suit with costs.
15. This is a first appeal. As stated in *Selle & Another -vs- Associated Motor Boat Co. Ltd & Another* [1968] Ea 123 And In *Peters -vs- Sunday Post Ltd* [1958] Ea 424, And Restated In *Mursal -vs- Manesa* [2022] eKLR:-

“A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”



16. Having considered the pleadings filed in the trial Court and evidence adduced thereon, issues that present for determination, in my view, are as follows:-
- a. whether the Appellant terminated the Respondent's employment, and if so, whether the termination was unfair.
 - b. whether the Respondent is entitled to the awards made in his favour by the trial Court.
17. On the first issue, the Appellant produced in evidence its letter to the Respondent dated 11/5/2018, which is shown to have been served on the Respondent, and which the Respondent did not deny having received. Indeed, the Respondent pleaded to having been suspended by the Appellant vide the said letter which stated in part:-
- “...these issue shows (sic) negligence at the work place hence spoiling the reputation of new Buxton Inn Ltd, hence Stephen Ojiambo have been suspended from the company until further notice.”
18. The Appellant (DW-1) testified that upon completing its investigations regarding the Respondent, it tried to contact the Respondent to no avail. On his part, the Respondent pleaded that he was never called back to work and that this amounted to constructive dismissal. Parties are always bound by their pleadings.
19. The incident that is alleged to have triggered the Respondent's suspension is said to have occurred on 26/4/2018, and the Respondent is shown to have been sent on suspension vide a letter dated 11/5/2018. The Appellant produced in evidence a petty cash voucher indicating that the Respondent's salary for April 2018 was also paid on the said date (11/5/2018). The primary suit is shown to have been filed in the trial Court on 2/10/2018. This was over four months from the date of the suspension letter. More often than not, the length of time that an employee's suspension from duty should take is provided for in an employer's disciplinary policy, where such policy exists, suspension from duty itself being a disciplinary measure/action. The Appellant was not shown to have had a disciplinary policy in place.
20. Ordinarily, a suspension period should only last as long as is necessary to complete investigations or to address the issues at hand. If the allegations against the employee are found to be unfounded, the employee should be reinstated without unreasonable delay. If the allegations are found to be founded, the employee should be subjected to appropriate disciplinary proceedings without unnecessary delay, if the employer decides to discipline the employee. Delay by an employer in acting either way, in my view, amounts to constructive dismissal as pleaded by the Appellant.
21. The Court of appeal stated as follows in the case of Coca-cola Eas & Central Africa Limited -vs- Maria Kagai Ligaga [2015] eKLR:
- “Constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct. The employer's behavior in either case must be shown to be heinous, so intolerable, made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows



that the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination."

22. In the instant case, the respondent did not take any initiative to terminate his employment with the Appellant, either on account of the lengthy suspension or on account of any other valid reason. The Appellant is not shown to have terminated the Respondent's employment, either. In my view, the primary suit was filed pre-maturely. I find and hold that the Appellant did not terminate the Respondent's employment, constructively or otherwise.
23. Having made the foregoing finding, the second issue collapses, and cannot be considered.
24. Finally, and having considered written submissions filed on behalf of both parties herein, I find merit in the Appellant's appeal, and the same is hereby allowed. The trial Court's judgment delivered on 18/2/2021 is hereby set aside, and is hereby substituted with an order dismissing the Respondent's suit in the trial Court, being Mombasa Chief Magistrate's Court ELR Cause No. 296 of 2018.
25. Each party will bear its own costs of the appeal and of proceedings in the trial Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH SEPTEMBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

.....Appellant

.....Respondent

