



**Carslake Nominees Ltd t/a Diani Sea Resort & another v Chesebe (Appeal E058 of 2022) [2024] KEELRC 2523 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2523 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E058 OF 2022  
AK NZEI, J  
OCTOBER 18, 2024**

**BETWEEN**  
**CARSLAKE NOMINEES LTD T/A DIANI SEA RESORT ..... 1<sup>ST</sup> APPLICANT**  
**DIANI PROPERTIES LTD T/A DIANI SEA LODGE ..... 2<sup>ND</sup> APPLICANT**  
**AND**  
**LUKE SIKEET CHESEBE ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. D.O Mbeja in Mombasa Chief Magistrate's Court ELRC E201 of 2020)*

**JUDGMENT**

1. The Appellants herein were the Respondents (Defendants) in Mombasa Chief Magistrate's Court Employment Case No. E201 of 2020 whereby they had been sued by the Respondent in the appeal herein seeking the following reliefs:-
  - a. Four (4) months' pay in lieu of notice.....Kshs.219,200/=.
  - b. Two (2) years' salary for unfair termination (54,775x12x2) .....Kshs.1,314,600/=.
  - c. Four (4) years unpaid leave allowance (54,775x4).....Kshs.219,100/=.
  - d. Compensation for four years unpaid leave travelling allowance (5,400x4) .....Kshs.21,600/=.
  - e. Salary for 38 accumulated resting/holidays (54,775/26x38 days) .....Kshs.80,055/=.
  - f. Underpayment of basic salary and house allowance (1<sup>st</sup> January 2020 to 28<sup>th</sup> March 2020 as per CBA) .....19,836/=.



- g. Under payment of basic salary and house allowance (1<sup>st</sup> January 2019 to 31<sup>st</sup> December 2019) .....Kshs.45,528/=.
  - h. Uniform allowance .....Kshs.37,800/=.
  - i. Acting Allowance .....Kshs.2,101,208/=.
  - j. Compensation for terminal gratuity .....Kshs.644,840/=.
  - k. General damages for defamation.
  - l. A declaration that the Respondent's summary dismissal was unfair.
  - m. Certificate of Service.
  - n. Costs of the Suit and interest.
2. The Respondent had pleaded that he was, at all times material to the suit, an employee of the Respondents, having been initially employed by the 1<sup>st</sup> Respondent on 28<sup>th</sup> September 1991 before being transferred to the 2<sup>nd</sup> Respondent; and before being promoted to the position of Head Storekeeper in charge of Central Maintenance Store for both the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents. That the claimant held the said position until 28<sup>th</sup> March 2020 when he was summary dismissed from employment.
3. It was the Respondent's pleading:-
- a. That as the Head Storekeeper, he was earning a gross monthly salary of Kshs.39,448/=, plus monthly service charge which fluctuated depending on business. That during the months of January, February and March 2020, his gross salary was Kshs.53,205/=, Kshs.54,775/= and Kshs.44,069/=; Kshs.54,775/= being the highest salary that he earned. The Respondent further pleaded:-
    - a. That on 21<sup>st</sup> March 2020, the Claimant received a letter from the 1<sup>st</sup> Respondent alluding to fraudulent activities relating to maintenance purchases, and that there were mysterious losses and vandalism of various items in the maintenance department.
    - b. That the Respondent was sent on suspension to pave way for investigations, and was asked to show cause why disciplinary proceedings could not be taken out against him.
    - c. That on 27<sup>th</sup> March 2020; the Respondent presented himself for disciplinary proceedings that were taken for purposes of defeating the *Employment Act* and the CBA, as the Claimant was not given an opportunity to be heard/to respond to the allegations.
    - d. That the Claimant's employment was summarily terminated on 28<sup>th</sup> March 2020. That the summary dismissal was wrongful and unfair.
    - e. That the Respondent appealed against the Respondents' decision, but the appeal was not heard on merit. That the Respondent was informed that the 1<sup>st</sup> Respondent had closed business due to Covid-19.
    - f. That the Respondent had worked with the Respondent for 28 years and 5 months and was not paid his terminal dues, which left the Respondent traumatized and his family exposed to hardship due to unfair loss of income.



4. Documents filed alongside the Respondent's Memorandum of Claim included the Respondent's Written Witness Statement dated 9<sup>th</sup> October 2020 and an evenly dated list documents, listing 12 documents. The listed documents included letters of appointment dated 28<sup>th</sup> September 1991, 12<sup>th</sup> November 1991 and 17<sup>th</sup> December 1993 respectively, promotion letters dated 14<sup>th</sup> January 1997 and 2<sup>nd</sup> September 2002 respectively, suspension letter dated 21<sup>st</sup> March 2020, Respondent's letter dated 25<sup>th</sup> March 2020, summary dismissal letter dated 28<sup>th</sup> March 2020, appeal letter dated 3<sup>rd</sup> April 2020, Appellant's letter dated 7<sup>th</sup> April 2020, payslips for January, February and March 2020, a copy of Collective Bargaining Agreement. Employment Manual and the Appellant's memo dated 3<sup>rd</sup> August 2020.
5. The Respondent filed a further Witness Statement dated 12<sup>th</sup> November 2021 and an evenly dated further list of documents, listing what he referred to as relevant pages of the agreement with KUDHEIHA.
6. The Appellants entered appearance on 17<sup>th</sup> November 2020 and filed a joint Response to the Respondents Statement of Claim. The Appellants:-
  - a. Admitted having employed the Respondent as pleaded by him; and stated that the Respondent was initially employed on contract as a watchman on 28<sup>th</sup> September 1991 and was confirmed to permanent employment on 17<sup>th</sup> February 1993; and was subsequently promoted to the position of Head Storekeeper in charge of Central Maintenance store for both the first and 2<sup>nd</sup> Respondent.
  - b. Admitted the Respondent's pleadings on his monthly earnings as pleaded in Paragraph 7 of the Statement of Claim.
  - c. Admitted the Respondent's pleadings as set out in Paragraph 8 of the Statement of Claim. The Respondents further admitted the contents of Paragraph 9 of the Statement of Claim, and the fact that the Respondents' employment was terminated on 28<sup>th</sup> March 2020.
  - d. The Respondents denied that termination of the Claimant's employment was unfair.
  - e. Admitted that the Respondent was not paid his terminal dues for reasons set out in the termination letter.
  - f. Denied having portrayed the Respondent as a thief, a fraudster or an unreliable person.
7. Documents filed alongside the Appellant's Statement of Response included a Witness Statement of Angela Mwendarani dated 30<sup>th</sup> July 2021 and an evenly dated list of documents, listing six (6) documents. The listed documents were copies of a signed letter dated 7<sup>th</sup> August 2015, a warning letter dated 31<sup>st</sup> December 2019, a suspension letter dated 21<sup>st</sup> March 2020, a dismissal letter dated 28<sup>th</sup> March 2020, minutes of a disciplinary hearing held on 27<sup>th</sup> March 2020 at Diani Sea Lodge and a report on items bought without approval for the months of July and November 2019.
8. At the trial, the Respondent, being the Claimant in the Primary Suit, adopted his filed Witness Statements (dated 12<sup>th</sup> November 2020 and 9<sup>th</sup> October 2020) as his testimony. He also produced in evidence the documents referred to in paragraphs 4 and 5 of this Judgment. Cross-examined, the Respondent testified that he had received a warning letter which expired. That he received a suspension letter and attended a disciplinary hearing. That he appealed but there was no hearing.



9. The Appellants called one witness, Angela Mwendarani, the Appellants' Human Resource Officer (RW1), who adopted her filed Witness Statement and produced in evidence the documents referred to in paragraph 7 of this Judgment.

Cross-examined, RW-1 testified that the suspension letter dated 21<sup>st</sup> March 2020 did not have particulars, and did not indicate the items lost. That at the disciplinary hearing, only some documents were sampled, that investigations were still ongoing and the Appellant's decided to terminate the Respondent's employment; and that the matter was referred to the police for further action.

10. RW-1 further testified that under Clause 10 of the CBA, an employee was supposed to be suspended, that the Respondent was terminated. That there were no documents to show that the Respondent went on leave; that his leave days were computed for four years, and that an employee was entitled to be compensated for working during holiday. That the Respondent was among those given uniform, that the Respondent had the right of appeal.
11. I have seen the Respondent's suspension letter dated 21<sup>st</sup> March 2020, and the same reads in part:-

“Re: suspension letter and invitation for a disciplinary meeting

The organisation is currently conducting a review on various areas of operations which so far has revealed a number of fraudulent activities related to maintenance purchases.

Through an ongoing review of purchasing documents, we have found out gross irregularities in purchasing, inventory/stock which are intentional and deliberate. Further we also found out mysterious losses and vandalism of various items in maintenance department.

As the Head Storekeeper, your duty is to order and maintain inventory as per the applicable procedures. The allegations are related to fraudulent activities in purchasing, flouting purchasing procedures, loss of items, among others. This has led to substantial losses to the organization and from the review conducted, you are implicated.

We therefore, have no option than to send you on suspension to pave way for further investigations. This is effective from Saturday 21<sup>st</sup> March 2020. You are also required to show cause why disciplinary action should not be taken against you in regard to the above highlighted allegations. This is in accordance with Employment Law and the Company Policies. Your written explanation should reach the Human Resource Manager on or by Thursday 26<sup>th</sup> March 2020 at 11.00 am.

Kindly note you shall be expected to report back on Friday 27<sup>th</sup> March 2020 at 3.00 pm for disciplinary hearing in presence of the Works Committee. The venue shall be Diani Sea Lodge T. V. room.

In those days, you will not have access to the hotel premises or handle any transaction or operations on behalf of Diani Sea Lodge. After the hearing, you shall be informed of the committee's decision in writing . . .”

12. I have noted that the foregoing suspension letter:-
- a. Did not contain particulars of the alleged losses, fraudulent activities, vandalism, illegal purchases and flouted procedures.



- b. Did not notify or inform the Respondent of his right to be accompanied to the disciplinary hearing by either a fellow employee or a shop floor union official pursuant to the mandatory provisions of Section 41(1) of the *Employment Act*, 2007.
  - c. Was purported to combine a suspension letter, a show cause letter and an invitation to attend a disciplinary hearing.
13. I have also taken note of the fact that the Respondent was required to attend a disciplinary hearing on 27<sup>th</sup> March, 2020, and had only six (6) days to respond to the Appellants' allegations against him and to prepare for the disciplinary hearing. I have also noted that the said suspension letter/show cause letter/invitation to attend disciplinary hearing did not forward to the Respondent the documents/copies of the documents which the Appellants alleged in the letter to have reviewed, and to have formed the basis of the allegations levelled against the Respondent.
14. I have severally stated in previous decisions that a show cause letter and an invitation to attend a disciplinary hearing are quite different, and serve different purposes. A show cause letter in employment and labour matters takes the places of what, in other regimes of the law, is referred to as a charge sheet. A show cause letter contains the allegations made by an employer against an employee. It ought to contain particulars of such allegations to enable the employee to respond to the same. Making of general allegations without stating any specifics denies an employee the right and opportunity to understand the charges levelled against him and to specifically respond to them. It renders the disciplinary process unfair, in my view.
15. An employee on whom a show cause letter has been served must always be given adequate time to respond to the allegations raised therein. In my view, an invitation to attend a disciplinary hearing ought to be given separately, and an employee ought to be given adequate time to prepare for the hearing and to get a witness to accompany him to the hearing as contemplated in Section 41(1) of the *Employment Act*, 2007.
16. The trial court delivered its Judgement on 31<sup>st</sup> August, 2022 and, having considered provisions of the *Employment Act*, made a finding that the Appellants had not established wrong doing (fault) on the part of the Respondent. The Court further found that termination of the Respondent's employment was unfair, and awarded him a total of Kshs.1,034,339/=; made up of one month salary in lieu of notice, 12 months' salary being compensation for unfair termination, uniform allowance, 4 years' unpaid leave allowance, underpayment of basic salary and house allowance. The Respondent was also awarded costs of the suit and interest from the date of filing suit.
17. Aggrieved by the said Judgement, the Appellants preferred the present appeal and set for the 7 grounds of appeal, which I summarise as follows:-
  - a. The learned Magistrate erred in law and in fact in failing to consider the evidence adduced by the Appellant's pointing to the facts:-
    - i. that the Respondent was given a notice to show cause.
    - ii. was accorded a fair hearing and that he understood the proceedings.
  - b. The learned Magistrate erred in law and in fact by failing:-
    - i. to consider the Appellant's evidence pointing to the fact that the Respondent had representatives of the union present during the disciplinary hearing.



- ii. failing to consider the evidence adduced and in finding that the Respondent's termination was unlawful and unfair.
  - c. The learned Magistrate erred in both law and fact in awarding the Respondent compensation of one year salary, costs and interest from the date of filing suit; yet the Respondent prayed for costs from the date of Judgement.
18. The Respondent filed a cross appeal dated 23<sup>rd</sup> September, 2022.
19. Having considered the pleadings filed in the trial court and evidence adduced thereon, issues that fall for determination, in my view, are as follows:-
  - a. Whether termination of the Respondent's employment was unfair.
  - b. Whether reliefs granted by the trial court were deserved by the Respondent.
  - c. Whether the Respondent's cross appeal is merited.
20. Before delving into the issues herein above isolated, it is worthy noting that this is a first appeal, and that the evidence presented before the trial court is before this court for fresh evaluation. The duty of as first appellate court is well settled, and was set out in the cases of *Selle & Another – vs – Associated Motor Boat Company Limited & Another* (1968) E.A 123 and in *Peters – vs – Sunday Post Ltd* (1958) E.A page 424, among many other decided cases. I will handle the grounds of appeal together.
21. On the first issue, and as already stated in this Judgment, the Appellants did not set out any specific charges against the Respondent to which he could specifically respond, and no wrong doing and/or specific wrong doing was demonstrated on the part of the Respondent. Indeed, I have noted from the minutes of the disciplinary hearing held on 27<sup>th</sup> March, 2020 that the issues raised by the Appellants at the hearing were significantly different from the general allegations stated in the suspension/show cause/invitation letter dated 21<sup>st</sup> March, 2020. I find and hold that termination of the Respondent's employment was substantively unfair.
22. I also find and hold that termination of the Respondent's employment was procedurally unfair as the Respondent was not informed of his right to be accompanied to the disciplinary hearing either by a fellow employee or a union official; who ought to have been given an opportunity to be heard alongside the Respondent pursuant to Section 41(1) of the *Employment Act*.
23. In all the circumstances of the case, the Appellants did not act in accordance with justice and equity, and the termination was procedurally and substantively unfair pursuant to Sections 41(1), 43(1) and 45(2)(a) and (4)(b) of the *Employment Act*. I uphold the trial court's finding that termination of the Respondent's employment was unfair.
24. The Court of Appeal stated as follows in the case of *Naima Khamis – vs – Oxford University Press (E.A) Limited* (2017) eKLR:-

“ . . . We wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45(2)(c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair.

A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where



the employer fails to follow the laid down procedure as per contract or fails to accord an employee an opportunity to be heard as by law required.”

25. Having made a finding that termination of the Respondent’s employment, was unfair, and taking into account the number of years that the Respondent had worked for the Appellants and the manner in which his employment was terminated, I award the Respondent the equivalent of seven months’ salary as compensation for unfair termination of employment. The Respondent had pleaded that his gross monthly salary (inclusive of house allowance) was Kshs.39,448/=, plus service charge which fluctuated depending on the business. Parties are always bound by their pleadings. The equivalent of seven months’ salary is  $Kshs.39,448 \times 7 = Kshs.276,136/=$ , which I award to the Respondent. The award of twelve months salary made by the trial court is hereby set aside.
26. The award of one month salary in lieu of notice is upheld, and the Respondent is awarded Kshs.39,448/= being payment in lieu of notice.
27. The award (of Kshs.37,800/=) being uniform allowance was not proved, and is set aside.
28. The award of four (4) years unpaid leave is upheld as it was admitted by the Appellants (RW-1) in evidence. The calculation of the same, however, ought to have been based on the Respondent’s pleaded gross salary and the minimum number of leave days for the said completed years of service which, by dint of Section 28(1) of the Employment Act, is 21 days. I therefore award the Claimant Kshs.110,454.4 for unpaid leave days. The award of Kshs.219,100/= (as pleaded) is hereby set aside.
29. The award based on alleged underpayment of basic salary and house allowance was not proved, and is hereby set aside.
30. The award of interest from the date of filing suit is hereby set aside as the same was not based on justifiable reasons. Further, the Respondent had prayed, in his pleadings, for an award of interest from the date of Judgement. Again, parties are bound by their pleadings.
31. On the third issue, the reliefs sought in the Respondent’s cross appeal filed on 23<sup>rd</sup> September, 2022, being 3 months’ salary in lieu of notice, salary for 38 accumulated resting/holidays, terminal gratuity for 28 years of service and compensation for acting allowance were not proved, and are declined. Service gratuity was not part of the reliefs sought by the Respondent in the trial court, while no evidence was led in proof of the other reliefs. The cross appeal fails, and is dismissed with no order as to costs.
32. In sum, and having considered written submissions filed on behalf of parties herein, Judgment is hereby entered for the Respondent against the Appellants jointly and severally as follows:-
  - a. Compensation for unfair termination of employment ..... Kshs.276,136/=.
  - b. One month’s salary in lieu of notice ..... Kshs.39,448/=.
  - c. Unpaid leave days.....Kshs.110,454.4.Total Kshs.426,038.4.
33. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
34. The Respondent is awarded interest on the awarded sum from the date of the trial court’s Judgment.
35. Each party shall bear its own costs of the appeal, but the Respondent is awarded costs of proceedings in the trial court.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER 2024**



**AGNES KITIKU NZEI**

**JUDGE**

Order

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

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant

.....Respondent

