Swahili Beach Resort Limited v Lempairas (Appeal E081 of 2022)
[2024] KEELRC 13216 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13216 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E081 OF 2022

AK NZEI, J

NOVEMBER 22, 2024

BETWEEN

SWAHILI BEACH RESORT LIMITED ..... APPELLANT

AND

STEPHEN MITISO LEMPAIRAS ..... RESPONDENT

JUDGMENT

1. The Appellant herein was the Respondent (defendant) in Kwale Chief Magistrate's Court Employment Case No. E017 of 2021 whereby it had been sued by the Respondent herein. The Respondent had sought the following reliefs:-

    a. One month salary in lieu of notice ..... Kshs.42,500/=.

    b. Unpaid leave days (21 x 1,417 x 10 years) ..... Kshs.297,570/=.

    c. Unpaid holidays worked (5 x 1,417 x 10 years) ..... Kshs.70,850/=.

    d. Compensation for unlawful termination (42,500 x 12) ..... Kshs.510,000/=.

    e. Unpaid overtime (121.30 x 1 hour x 15 days x 120 months) ..... Kshs.218,340/=.

    f. Unpaid NHIF (1,000 X 120 months) ..... Kshs.120,000/=.

    g. Service pay (42,500 x 12) ..... Kshs.212,500/=.

    h. Costs of the suit and interest.

2. The Respondent had pleaded that he had been employed by the Appellant as a Beach Manager on 17th July, 2009, and that he was earning a basic salary of Kshs.42,500/=as at the time of his dismissal on 1st January, 2019.

3. It was the Respondent's pleading:-

a. that on 1st January, 2019, he (the Respondent) reported on duty at 6.30 a.m and that at around 9.00 a.m, the Respondent's director (one Kelly) and the Human Resource Manager (one Ituku) summoned the Respondent to the office and instructed him to leave the Respondent's premises as his services were no longer required.

b. that the Respondent had not been issued with any notice.

c. that the Respondent had not been allowed to take leave during the entire period of employment; and that he had worked for extra hours without pay.

d. that for the 10 years that the Respondent had worked, the Appellant did not remit his NHIF and NSSF contributions.

e. that the Appellant had terminated the Respondent's employment without following the laid down procedure in that the Respondent had not been given notice, was not given a hearing, was not paid his terminal dues and his employment was terminated without any valid reason.

4. Documents filed alongside the Respondent's Memorandum of Claim dated 1st July, 2021 and filed in Court on 2nd July, 2021 included the Respondent's affidavit in verification of the claim, the Respondent's written witness statement dated 1st July, 2021 and a list of documents listing 20 documents. The listed documents included copies of the Respondent's Identity Card, a commendation letter dated 18th February, 2013, a congratulatory letter dated 6th November, 2013, an employment letter dated 20th November, 2013, a congratulatory letter dated 10th December, 2013, a congratulatory letter dated 1st February, 2014, a certificate of outstanding performance dated 27th February, 2014, a letter of commendation dated 26th March, 2014, a letter of commendation dated 11th February, 2015, letter of promotion dated 14th August, 2015, letter of salary increase dated 4th September, 2015, certificate of employee of the month for the month of November 2015, pool attendant award dated 20th February, 2016, certificate of employee of the month of January 2017, letter of promotion dated 1st February, 2017, recommendation letter dated 4th April, 2017, letter of promotion dated 1st July, 2017 and a demand letter, among other documents.

5. The Appellant entered appearance and subsequently filed response to the Respondent's claim, denying the same. The Appellant further pleaded:-

a. that the Respondent had been employed as a Security Guard on 31st May, 2012, was promoted to a Security Supervisor on 1st October, 2016, and was then promoted to a Beach Manager on 1st July, 2017.

b. that the Respondent had been terminated for gross misconduct; in particular reporting to work while intoxicated and/or being drunk and disorderly, which is a ground for summary dismissal.

c. that the Appellant followed due process in terminating the Respondent's employment.

d. that the Respondent took leave during his employment, and had no pending leave days at the time of termination.

e. that the Respondent's claim was time-barred pursuant to Section 90 of the *Employment Act*.

6. Documents filed alongside the Appellant response to the Respondent's claim included a written witness statement of one Godfrey Mukolwe dated 20th January, 2022 and a bundle of documents, which included the Respondent's temporary contract of employment as a Security Guard dated 31st May, 2012, a contract of employment dated 20th November, 2013, a letter dated 14th August,

2015 (promoting the Respondent to the position of Beach Operation Supervisor), Staff Rules and Regulations, a letter dated 1st July, 2017 promoting the Respondent to the position of Beach Manager, a summary dismissal letter dated 2nd January, 2019 and a bundle of leave application forms, among other documents.

7. At the trial, the Respondent, being the Claimant in the primary suit, adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph *4* of this Judgment. He denied having received any termination letter(s) (dated 25th September, 2018 and 2nd January, 2019 respectively), and denied having been drunk as stated by the Appellant. The Respondent further testified that he took annual leave in 2018 and 2019, but denied having taken leave during the other years of employment.

8. It was the Respondent's further evidence (under cross-examination) that he worked for 12 hours from Monday to Monday; even on public holidays. That he was paid his salary on being terminated, less Kshs.11,000/= for a phone which he used to have. That he used to be given certificates of recognition and accolades.

9. Re-examined, the Respondent testified that he was on leave during the month of December 2018, and was called to come back on 1st January, 2019.

10. The Respondent called one witness, Geofrey Aggrey Mukolwe (RW-1), who adopted his filed witness statement and produced the documents referred to in paragraph *6* of this Judgment. Cross-examined, RW-1 testified that the Respondent was a good employee, and that he was terminated for gross misconduct. That the Respondent was given several verbal warnings but was not issued with a show cause letter. That the Respondent was issued with a termination letter but did not sign it. That he (RW-1) had nothing to show that the Respondent was drunk and hence his termination. That the Respondent had taken leave in 2017/2018, and had no pending leave days at the end of 2018; and had no pending public holidays. That the Respondent was earning a salary of Kshs.45,000/= or thereabouts, and was dismissed in January 2019.

11. The trial Court delivered its Judgment on 11th October, 2022, making a finding that the Respondent had been unfairly and unprocedurally dismissed. The Respondent was awarded:-

    a. Compensation for unfair termination of employment (Kshs.42,500/= x 5) ..... Kshs.212,500/=.

    b. Overtime allowance ..... Kshs.218,340/=.

    c. One month pay in lieu of notice ..... Kshs.42,500/=.

    d. One public holiday ..... Kshs.1,417/=.

    e. Costs of the suit.

    f. Interest to accrue at Court rates.

12. Aggrieved by the trial Court's said Judgment, the Appellant preferred the present appeal and set forth 6 grounds of appeal, which I summarise as follows:-

    a. The learned trial Magistrate erred in law and in fact in awarding the Respondent Kshs.474,757/= on account of unfair termination when no evidence of unfair termination was adduced and the award went against the weight of evidence.

b. The learned trial Magistrate erred in fact by ignoring the Appellant's evidence that the Respondent had executed a Discharge Voucher absolving the Appellant of any claims by the Respondent, and thereby arriving at a wrong decision.

c. That the learned trial Magistrate erred in law and in fact; and misdirected herself in failing to acknowledge that the Discharge Voucher had not been nullified or set aside, and constituted a valid contract.

d. That the trial Magistrate erred in both law and fact by disregarding the evidence on record and following the Respondent's termination, he was paid all his terminal dues.

e. The trial Court treated the Appellant's submissions lightly and disregarded its evidence.

13. The Appellant sought the following reliefs on appeal:-

a. That the appeal be allowed.

b. That the decision of the Subordinate Court and/or the Judgment and Orders issued on 11th October, 2022 be set aside, and the Court herein be pleased to reassess the general damages payable to the Respondent.

14. This is a first appeal, and the evidence adduced in the trial Court is before this Court for fresh evaluation. This Court, however, takes cognisance of the fact that it did not see or hear the witnesses first hand. Having considered the pleadings filed in the trial Court and the evidence adduced thereon, issues that fall for determination, in my view, are as follows:-

a. Whether termination of the Respondent's employment by the Appellant was unfair.

b. Whether the reliefs granted by the trial Court were deserved by the Respondent.

15. I will handle the grounds of appeal together. On the first issue, for any termination of employment to pass the fairness test, there must be both substantive and procedural fairness in effecting the termination.

16. It was stated as follows in the case of Walter Ogal Anuro – vs – Teachers Service Commission [2013] eKLR:-

> "... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

17. In the present case, it was a common ground that the Respondent was employed by the Appellant. It was also a common ground that the Respondent's employment was terminated by the Appellant. The Respondent pleaded and testified that his employment was abruptly terminated verbally by the Appellant on 1st January, 2019, without notice and without any valid reason. On the other hand, the Appellant pleaded that the Respondent was terminated on account of gross misconduct, that is, reporting to work while intoxicated and being drunk and disorderly. At the trial, the Appellant produced in evidence a summary dismissal letter dated 2nd January, 2019, which was not shown to have been served on the Respondent, and which the Respondent denied having received. Further, the Appellant (RW-1) testified that the Appellant had nothing to show that the Respondent had been drunk as alleged by the Appellant (and denied by the Respondent).

18. In my view, where intoxication of an employee during working hours is alleged by an employer and the employee denies the allegation, it becomes a case of the employer's word against the employee's word. To avoid this kind of a scenario; employers are obligated, in my view, to obtain a scientific proof of an employee's intoxication, if the intoxication occurs during working hours. This may call for involvement of the relevant experts.

19. Section 44(4)(b) of the *Employment Act* lists intoxication during working hours as a gross misconduct on account of which an employee can be summarily dismissed. Involvement of the relevant experts (like medical experts) to establish an employee's intoxication is the only way in which injustice to an employee alleged to have been intoxicated can be avoided. Sections 43(1) and 45(2)(a) & (b) of the *Employment Act* obligate an employer to establish the existence of a fair and valid reason for terminating an employee's employment. The Appellant did not demonstrate the existence of a valid reason for terminating the Respondent's employment.

20. Section 41 of the *Employment Act* sets out a mandatory procedure that must be adhered to by an employer intending to terminate an employee's employment on account of misconduct, poor performance or physical incapacity. The Section states as follows:-

    1. 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.

    2. Notwithstanding any other provisions 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."

21. The Appellant in the present case did not demonstrate, or even allege, adherence to the foregoing mandatory procedure, yet gross misconduct on the part of the Respondent was alleged.

22. The Court of Appeal stated as follows in the case of Kenfreight (E.A) Limited – vs – Benson K. Nguti [2016] eKLR:-

> ". . . It is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that the reason related to the employee's conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure . . ."

23. I come to the unavoidable conclusion that termination of the Respondent's employment was procedurally and substantively unfair, and I uphold the trial Court's findings in that regard.

24. On the second issue, and having made a finding that termination of the Respondent's employment was unfair, I uphold the award of Kshs.212,500/=, being the equivalent of five months' salary as compensation for unfair termination of employment, made to the Respondent by the trial court. I have taken into account the number of years the Respondent had worked for the Appellant and the manner in which his employment was terminated. Indeed, I would have awarded the Respondent more had he filed a cross-appeal against the award made to him in the foregoing regard.

25. The award of Kshs.218,340/= being overtime allowance was not proved, and is hereby set aside. Claims of overtime payment are in the nature of special damages, and must always be specifically pleaded and strictly proved, on a balance of probability. The Respondent in the present case did not even attempt to do that.

26. The award of Kshs.42,500/= being one month salary in lieu of notice is upheld pursuant to Section 35(1)(c) of the *Employment Act*.

27. The award of Kshs.1,417/= being one public holiday pay was not proved, and is hereby set aside.

28. In sum, and having considered the written submissions filed, the appeal herein partly succeeds to the extend set out in this Judgment. For avoidance of doubt, Judgment is hereby entered for the Respondent against the Appellant as follows:-

    a. Compensation for unfair termination of employment ..... Kshs.212,500/=.

    b. One month salary in lieu of notice ..... Kshs.42,500/=.

    Total = Kshs.255,000/=.

29. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.

30. The Respondent is awarded interest on the awarded sum, to be calculated at Court rates from the date of the trial Court's Judgment.

31. Each party will bear its own costs of the appeal, but the Respondent is awarded costs of the suit in the Court below.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 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.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent