



REPUBLIC OF KENYA



**KENYA LAW**  
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**Resort v Tsui (Appeal E067 of 2024)  
[2024] KEELRC 13420 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13420 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E067 OF 2024  
M MBARÚ, J  
DECEMBER 16, 2024**

**BETWEEN**

**MAASAI BEACH RESORT ..... APPELLANT**

**AND**

**AMANI KARISA TSUI ..... RESPONDENT**

*(Being appeal from the judgment of Hon. G Sogomo delivered on  
2 February 2024 in Mombasa CMELRC Cause E045 of 2023)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 2 February 2024 in Mombasa CMELRC E045 of 2023.
2. The background of this appeal involves a claim filed by the respondent in the trial court. He stated that the appellant employed him as a night guard on November 14, 2019, with a monthly salary of Ksh. 20,000. On September 26, 2022, he was suspended due to allegations regarding a missing metal rod at the premises. Subsequently, on October 11, 2022, he was summarily dismissed without a hearing or payment of his terminal dues. He later discovered that the appellant had already hired someone to replace him. He is claiming the following terminal dues:
  - a. Notice pay ksh.20,000;
  - b. Unpaid house allowances at 15% for 34 months Ksh.102,000;
  - c. Unpaid leave for 2 years Ksh.32,307.66;
  - d. Unpaid prorated leave for 10 months Ksh.13,461.52;
  - e. Public holidays of 2 years Ksh.15,384.60;



- f. 12 months compensation Ksh.240,000;
  - g. Certificate of service;
  - h. Costs of the suit.
3. The appellant filed a response and a counterclaim. There was no unfair termination of employment as alleged and nobody was hired to take over the respondent's duties. The respondent was subject to ongoing investigations of the theft which was reported at Bamburi Police station. There was no termination of employment but a suspension pending investigations of the theft. He went into hiding upon suspension and at the time of filing suit, the matter was still with the police pending investigations. The respondent committed gross misconduct of theft which occurred while he was on duty and his claim is without merit and should be dismissed.
4. In the counterclaim, the appellant's case was that prior to his suspension from duty, the respondent was employed as a security guard and was required to be diligent. Due to gross misconduct, he was liable for the damage and loss incurred plus interest due to the theft of various items including metal rods. The appellant sought a declaration that the respondent be held liable to compensate for the loss and damage following theft together with costs.
5. The trial court heard the parties and delivered judgment on 2 February 2024 and held that the appellant failed to issue the respondent with notice terminating employment or to subject him to a disciplinary process leading to unfair termination of employment. The learned magistrate made the following awards;
- a. Notice pay ksh.20,000;
  - b. Unpaid leave Ksh.102,000;
  - c. Unpaid prorated leave Ksh.13,461,31;
  - d. Compensation at 3 months Ksh.60,000;
  - e. Certificate of service;
  - f. Costs and interest.
6. Aggrieved, the appellant's appeal is on the following grounds;
1. That the learned judge [magistrate] erred in law and fact in drawing wrong inferences and making the wrong conclusions in the context of the pleadings, evidence and submissions made.
  2. The learned magistrate erred in fact and law in wrongfully applying and interpreting the principles applicable in determining a suit on a basis of fair hearing as per natural justice.
  3. The learned magistrate erred in law and fact by entertaining extraneous considerations in arriving at his verdict.
  4. The learned magistrate erred in law and fact in failing to find that it was crucial for the respondent to testify in court.
  5. The learned magistrate erred in law and fact in failing to appreciate the respondent's written submissions which were duly filed as per the given timelines.
  6. The learned magistrate erred in law and fact in disregarding the respondent's written submissions.



7. Both parties agreed to address the appeal by way of written submissions.
8. The appellant submitted that the respondent failed to discharge his burden of proof under Section 47(5) of the *Employment Act*. There were justified grounds under Section 44(4) (g) of the *Employment Act* to dismiss the respondent for gross misconduct upon committing theft and the matter was reported to the police. The appellant complied with Section 44(3) of the *Employment Act* where the respondent breached his contractual duty to work diligently. In the case of *William Kiaritha Gacheru v East African Packaging Industries Ltd* [2016] eKLR the court held that dismissal from employment must be for a valid reason. In this case, the appellant had a valid reason leading to termination of employment due to theft. In the case of *Peter Munywoki Nzivo v Nguru Construction & Mining Company Limited* [2022] eKLR, the court held that the allegation raised against the claimant was serious and enough and constituted grounds for summary dismissal.
9. The appellant accorded the respondent a chance to prove his innocence by availing himself at the police station to assist with investigations regarding theft. He decided to hide. In the case of *Jacob Juma Makokha v Radar Security (K) Limited* [2018] eKLR the court held that where the employer suspects the employee of stealing, there is a right to summary dismissal under Section 44(4) of the *Employment Act*.
10. In this case, the respondent was suspended pending investigations to pave the way for criminal investigations but he failed to present himself to the police. The appellant is not liable to the remedies under Section 49 of the *Employment Act* due to the conduct of the respondent and the appeal should be allowed.
11. The respondent submitted that the appellant did not back up its case with any documentary evidence as required under Section 10(7) of the *Employment Act*. The terms of the employment contract were not proved.
12. The appeal is fatally defective and filed contrary to Section 79G of the *Civil Procedure Act*. The judgment was delivered on 2 February 2024 and the appellant filed an application seeking a stay of execution. There was no appeal filed in time following the judgment by the trial court. The appeal is filed without the decree as required under Order 42 Rule 13(4) of the Civil Procedure Rules. In the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR the court held that without the Record of Appeal, the court cannot determine the appeal before it. The failure to attach a decree renders the appeal fatal as held in *Chege v Suleiman* [1988] eKLR.
13. The respondent submitted that the appellant did not demonstrate that they accorded the respondent a fair hearing under Section 41 of the *Employment Act*. Upon suspension, he was not called for a hearing, which led to unfair termination of employment contrary to Sections 43 and 45 of the *Employment Act*. The remedies sought were justified, and the judgment by the trial court should be confirmed, and the appeal should be dismissed with costs.

#### Determination

14. This is a first appeal. This Court is not necessarily bound to accept the trial court's findings of fact. The duty is to review, reconsider the evidence, evaluate it and draw its conclusions. However, it should recognize that it has neither seen nor heard the witnesses and should make due allowances in this respect, as held in the case of *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123.



1. The appellant has admitted that the respondent was suspended from duty on 26 September 2022 following the theft of various items, including a metal rod, while he was on duty. The matter is pending investigations by the police, who could not trace the respondent.
15. On his part, the respondent had his case that he reported back to work on 11 October 2022 but was directed to go back home, and he found another person had taken up his position.
16. Where theft occurs while an employee is on duty, this amounts to negligence of duty contrary to Section 44(4) (g) of the *Employment Act*. The employer is allowed to terminate employment through summary dismissal. However, the employee must be accorded the protection of section 41(2) of the Act. The notice must be issued, and the employee must be allowed to attend and make his representations as held in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
17. In this case, upon the respondent being suspended on 26 September 2022, there is no evidence that he was summoned back and issued a notice to show cause why his employment should be terminated by summary dismissal or summoned to attend a disciplinary hearing at the shop floor. Whereas the appellant was justified to report the criminal conduct to the police, the internal mechanisms for any alleged gross misconduct are regulated under Section 41 of the *Employment Act* as held in the case of *Kanjau v Kenya Power and Lighting Co Ltd* [2023] KEELRC 2297 (KLR) and the case of *Freddy Kipkorir Lang'at v Co-operative University of Kenya* [2021] KEELRC 101 (KLR) .
18. Whatever the misconduct or gross misconduct, the due process required the appellant to adhere to the law.
19. For the termination of employment to pass the fairness test, it must be shown that there was substantive justification for the termination and procedural fairness. Section 43 of the *Employment Act* which provides 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 the explanation.
  - (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.
20. Where the police summoned the respondent or could not trace him for the employment misconduct and reasons leading to his suspension, the appellant should have completed the process by summoning him for a disciplinary hearing on the shop floor. The principles governing criminal proceedings are different from those regulating workplace misconduct. Leaving the respondent at large and waiting for the police to complete investigations led to a legal lapse on the part of the appellant. The appellant did not address the motions of Section 41 of the *Employment Act*. There was an unfair termination of employment.
21. Where the appellant could not trace the respondent to conduct the disciplinary hearing, notice terminating his employment should have been issued with a copy to the Labour Office as required under Section 18(5) of the *Employment Act*. That would have formed a reasonable basis and protection for the appellant.



22. The findings by the learned magistrate cannot be faulted. The procedures taken were discussed at length, and the notice pay and compensation were justified.
23. On the other remedies sought, the respondent claimed a house allowance for the 34 months worked, 15% of the wage paid. The respondent was paid a Ksh wage: 20, 000 per month. A night guard working in Mombasa in September 2022 was entitled to a salary of Ksh.16, 959 per month. Where a house allowance was to apply at 15%, this would amount to Ksh.2, 543.85 gross wage ksh.19, 502.85
24. The Ksh.20 000 wage paid is above the minimum wage. To claim a house allowance beyond what was paid is unjust enrichment.
25. On the claim for prorated leave days, under Section 28(4) of the *Employment Act*, the employee can only accumulate annual leave days for up to 18 months. Unless there is evidence that the employer has allowed the employee to carry forward such yearly leave, the cut-off point is 18 months, which amounts to 33 days. There is no record that the appellant allowed the respondent to carry forward his leave days or take any leave days.
26. The annual leave due is based on the basic wage due of Ksh. 16,959 for 33 days; the total owing is Ksh.18 654.90 for untaken leave days.
27. On the claim for work during public holidays, the respondent particularized the days worked during such special days. The appellant did not counter these details with a work record that the respondent was not at work or was compensated for working during public holidays.
28. The respondent applied a conservative tabulation for working during public holidays at Ksh.15, 348.60, which is justified in this case.
29. Compensation is awarded at 3 months for the lapse in the appellant's failure to adhere to the mandatory provisions of Section 41 of the *Employment Act*. The award is well-reasoned and cannot be faulted.
30. On the counterclaim, the appellant's case was that they suffered loss and damage following theft while the respondent was on duty. There are no particulars of the loss or damage. There is no evidence of the items lost or their value.
31. As outlined above, the report to the police is not similar to internal disciplinary measures where the respondent should have been summoned and allowed to make his representations in the presence of another employee of his choice. Where he failed to attend as directed by the appellant, recourse was to issue notice terminating employment with a copy to the Labour office.
32. The court finds no merit in the counterclaim.
33. The costs will apply as awarded by the trial court.
34. Accordingly, the judgment of the trial court in Mombasa CMELRC E045 of 2023 is confirmed in the following terms;
  1. Compensation Ksh.60,000;
  2. Notice pay Ksh.20,000;
  3. Leave pay Ksh.18,654.90;
  4. Public holidays ksh.15,348.60;
  5. certificate of Service;



6. Costs as awarded by the trial court for the trial court proceedings. For the appeal, each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF DECEMBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

