



**Leopard Beach and Spa v Imbochi (Appeal 21 of 2020)
[2023] KEELRC 1256 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1256 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 21 OF 2020
M MBARÚ, J
APRIL 20, 2023**

BETWEEN

LEOPARD BEACH AND SPA APPELLANT

AND

ZACHARIA IMBOCHI RESPONDENT

*(being an appeal from the judgment of Hon. G. Kiage (SPM) delivered
on 5th March, 2020 in Mombasa CMCC ELRC Case No.419 of 2018)*

JUDGMENT

1. This appeal challenges the judgment in Mombasa CMELRC No.419 of 2018 delivered on March 5, 2020 by which the Learned Magistrate held that the respondent was unfairly dismissed from his employment by the appellant and that no witness had attended the disciplinary hearing to corroborate the allegations of the accountant which was a contradiction. Aggrieved, the appellant filed the instant appeal on 9 grounds and on the basis that the trial magistrate findings that the respondent's witness No.2 did not attend the initial disciplinary hearing whereas there was no such admission was in error and his summary dismissal was without notice. Had such factors been put into consideration, the award made for the respondent should not have issued.
2. The background to the appeal is that on April 16, 2018 the appellant suspended the respondent from duty following gross misconduct and for insulting and threatening a co-worker. The respondent reported the matter to his trade union. There was a disciplinary meeting held on May 4, 2018 where the respondent was accompanied by one Elijah Michira and present was Kioko Musyoki and Abraham Lankeu and the matter was discussed and following which through letter dated May 9, 2018 he was dismissed from employment for gross misconduct. The respondent was allowed an appeal.
3. In judgment, the trial court made a finding that the respondent as the employee was given a hearing and found to have grossly misconducted himself by abusing and threatening a fellow worker but when



he was allowed to appeal, it was before the same people who had heard his initial case and hence was not impartial, the investigations report was not issued. The show cause notice which had been issued to the employee also served as the letter of suspension leading to unfairness and the respondent was awarded compensation at 12 months and costs of the suit.

4. In this regard, the appellant submitted in support of the appeal that the respondent attended the disciplinary hearing and was heard on the merits and the findings that he was not allowed to cross-examine the witnesses is just but an afterthought. The suspension was to allow the respondent as the employee to show cause why disciplinary action should not be taken against him for gross misconduct and upon which there was a disciplinary hearing in the presence of other employees. In the case of *Thumuda H Mwaruwa v Kenya Ports Authority* [2017] eKLR, the court held that an employee who is invited to attend disciplinary hearing cannot turn around and state he was denied a fair hearing. In the case of *Rashid Ali Rashid v Mombasa Sports Club* [2017] eKLR the court held that fair procedure is where an employee is invited to a disciplinary hearing and allowed to make representations and in this case, the appellant allowed the respondent such an opportunity and the judgment of the trial court that there was unfair termination of employment should be set aside with costs.
5. In reply, the respondent acting in person filed list of cases and relied on *Muthaiga Country Club v KUDHEIHA Workers* [2017] eKLR; *Kenya Revenue Authority v Reuwel Waitbaka Gitabi & others* [2019] eKLR; and *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR.
6. Upon consideration of the Record of Appeal and the grounds thereto and the written submissions on record and the authorities relied upon by the respondent, this being a first appeal, the court is required to reappraise and re-evaluate the evidence before the trial court and arrive at own findings taking into account the trial court had the chance to hear the witnesses.
7. Before the trial court, the respondent as the claimant, his case was that he was aggrieved by the appellant on the issue of service charge. The service charge for employees was reduced by the appellant and which led to him being agitated and upon which he was victimised and his employment terminated. The respondent testified that;

... the service charge for the employees was reduced which is that led to the agitation and ultimately to my termination.

I was victimised unlawfully and terminated contrary to the law. I was acting on behalf of my fellow employees as a union representative. ... there was an ongoing negotiation for a CBA and I was to participate on behalf of my fellow members and to represent their interests. ...
8. The respondent admitted that he was issued with a show cause notice following his conduct and invited to a disciplinary hearing and present was his representative Mr Elijah Michira. The complainant Mr Muhoro did not attend the disciplinary hearing. He was issued with letter of summary dismissal and allowed to file an appeal but those hearing it were the same.
9. The show cause notice dated April 16, 2018 is not contested. It related to the respondent being accused of using abusive language and threatening a fellow employee. The respondent denied these allegations through his letter dated April 20, 2018. He was invited to a disciplinary hearing and allowed to attend with his representative, Elijah Michira but the appellant found he was of gross misconduct and dismissed him from employment.
10. Section 44(4)(a) of the *Employment Act*, 2007 (the Act) allow an employer to dismiss an employee for gross misconduct particularly where the employee is found to use abusive language or threatens other employees. In the case of *Benjamin Biko Mongatte v Rubycut Enterprises Limited also trading as Rubycut Gardens* [2021] eKLR the court held that an employee who uses abusive language at work



cannot justify such conduct and is subject to summary dismissal. See also *Pheoby Aloo Inyanganga v Stockwell One Homes Management Limited & another* [2022] eKLR.

11. In this case, the respondent admitted that following reduced service charge for employees, as the employees' representative he got agitated over the matter. Since there were ongoing CBA negotiations, he was victimised. Being agitated at work can be demonstrated in various ways but an employee using abusive language against a fellow employee or going ahead to threaten other employees is unacceptable conduct defined under section 44 of the Act as subject to summary dismissal. The respondent was not dismissed instantly but was allowed a hearing in the presence of his representatives and the appellant called witnesses and he was found to be of gross misconduct. He was allowed right of appeal which was dismissed.
12. At the point of the disciplinary hearing, the appellant as the employer called other employees who were present when the respondent was using abusive language and threatening another employee. This much is not contested by the respondent. Such conduct well defined in law as being subject to summary dismissal, the appellant was justified to sanction the respondent accordingly.
13. The due process under section 45(5) of the Act allowed the respondent as the employee a right of appeal which he was accorded save, his case is that the same people who attended his disciplinary hearing were the same. The persons attending to such matter are not stated. It cannot be surmised from the record as to who these people were. As the one alleging the composition of the appeal panel was the same, the respondent had the duty to prove his assertions which he has not discharged.
14. The right of appeal secured, the appellant as the employer cannot be faulted and the finding that there was unfair termination of employment on the face of the given facts cannot be justified. The rationalisation by the trial court that the appellant denied the respondent a fair hearing on the grounds that the letter to show cause was the same as the letter of suspension is a common practice in employment and labour relations where the employee is removed from the shop floor to allow him to respond to allegations made against him. Investigations with regard to utterances made by the respondent related to what other employee heard him utter and these employees were called at the disciplinary hearing and the respondent allowed to cross examine them and such administrative matters were well addressed in this case.
15. The basis and justification of the award of 12 months' pay in compensation on the face of a summary dismissal that is hereby found justified is not warranted. There was due process and on the given facts, the appellant was justified to summarily dismiss the respondent from his employment. To this extend the appeal succeeds.
16. The court finds the appeal justified and is hereby allowed and the judgment delivered on March 5, 2020 in Mombasa CMCC ELRC Case No.419 of 2018 hereby set aside in its entirety save each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 20TH DAY OF APRIL, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

.....and.....

