Delta Point Distributors Ltd t/a Milele Lounge v Ndichu (Employment and Labour Relations Appeal E169 of 2021) [2023] KEELRC 865 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 865 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E169 OF 2021

SC RUTTO, J

APRIL 14, 2023

BETWEEN

DELTA POINT DISTRIBUTORS LTD T/A MILELE LOUNGE ..... APPELLANT

AND

GEOFFREY NDICHU ..... RESPONDENT

(Being an appeal against the judgement and decree delivered by Hon A N Makau (PM) on November 26, 2021 in the Chief Magistrate's Court at Milimani Commercial Courts in CMEL Cause Number 2466 of 2019)

JUDGMENT

1. The respondent filed a Memorandum of Claim dated December 18, 2019 at the Chief Magistrate's Court at Milimani being ELRC No 2466 of 2019, through which he averred that he was employed by the appellant as an Operations Manager with effect from March 17, 2017. That he worked diligently and faithfully until June 14, 2019 when he was sent on compulsory leave by the appellant for 21 days pending audit investigations on alleged embezzlement of funds. That upon resuming work after the lapse of 21 days, the appellant without availing him the outcome of the audit investigations nor preferring charges against him arising from the audit, verbally, unfairly and unlawfully dismissed him summarily from employment. That he was not given a chance to defend himself. It is for this reason that he sought against the appellant several reliefs being salary for the month of June, 2019, 4 days salary for the month of July, 2019, one month's salary in lieu of notice, unpaid annual leave days, unpaid rest days, public holidays worked and not paid, overtime, unremitted NHIF, house allowance, service pay and compensatory damages.

2. Opposing the Claim, the appellant filed a Statement of Response dated February 14, 2020 through which it denied that the respondent worked diligently and faithfully as expected of his position. That the respondent failed to perform his duties diligently and or performed his work carelessly, failed and/or refused to obey lawful orders from his employer and misused and/or misappropriated his employer's

funds entrusted to him and further caused his employer to incur loss by gross negligence and non-performance of his duties. That the respondent was sent on compulsory leave and was recalled to work on July 4, 2019 to respond to the issues of missing funds, reduced profits despite high sales volume arising from an audit of the appellant's business. That despite being given an opportunity to address the issues by a show cause letter, the respondent unceremoniously left his place of work and refused to accept the show cause and ever since, absconded work. Consequently, the appellant asked the Court to dismiss the claim with costs.

3. The matter proceeded by way of oral evidence and production of exhibits and subsequently, written submissions. Thereafter, the trial Court evaluated and analyzed the record and delivered its Judgement on November 26, 2021, thereby allowing the Claim with costs.

The Appeal

4. The appellant was aggrieved by the Judgment of the trial Court hence lodged the instant Appeal through which it raises the following nine grounds: -

    1. That the Learned Magistrate erred in law and in failing to find and hold that the Claimant had not proved his case against the Respondent to the required standard and more specifically to warrant the award of the prayers sought.

    2. That the Learned Magistrate erred in law and fact by misdirecting herself on the wrong principles of law applicable in all circumstances of the case and thereby failed to apply her judicial mind and expertise accordingly.

    3. That the Learned Magistrate erred in law and facts by entering Judgment in favour of the Claimant's dismissal from employment.

    4. That the Learned Magistrate erred in law and fact by considering extraneous factors and proceeded to award the same despite not being proved by the Claimant at the hearing of the case.

    5. That the Learned Magistrate erred in law and fact by departing from the pleadings and failed to consider the issues as pleaded by the Respondent and thereby arrived at a wrong decision.

    6. That the Learned erred in law and fact by disregarding the submissions tendered by the parties especially on the Respondent's part and thereby arriving at her decision and/or final judgment without any legal basis in support of the position taken by the court.

    7. That the Learned Magistrate erred in law and fact in failing to consider the Respondent's evidence on record and written submissions as a guiding tool towards arriving at her final decision and which judgment is devoid of arguments made by the Appellant.

    8. That the Learned Magistrate erred in law and fact by going over bond that which was pleaded and proved and thus arriving at an erroneous conclusion by making awards not supported by the Claimants pleadings.

    9. That the trial Magistrate erred in law by departing from the pleadings as filed, evidence tendered, documents as produced and failed to consider the issues as pleaded by the Appellant and thereby arrived at a wrong decision entirely.

The Submissions

5. The Appeal was canvassed by way of written submissions. On November 2, 2022, parties took directions on the filing of written submissions. Both parties complied and I have considered their respective submissions.

6. It was the appellant's submission that the respondent was summarily dismissed on grounds of gross misconduct and continued absenteeism. That prior to the respondent being sent on compulsory leave, the company had been losing stock, funds and or reduced profits which were not corresponding to the volume of sales yet being the overall Operations Manager, he could not explain the unusual occurrence prompting the audit process. That the respondent was served with a notice to show cause, audit report and given various opportunities to attend to his employer's place of work and provide insight into the audit queries. That the respondent willingly and deliberately ignored to attend or respond adequately under the false hope of deriving a generous benefit through the Courts.

7. It was the appellant's further submission that a hearing anticipated under Section 41(2) of the *Employment Act* need not be an oral hearing as other means such as the exchange of letters can still be construed as an opportunity given to an employee to be heard. On this issue, the appellant placed reliance on the case of *Kenya Revenue Authority vs Menginya Salim Murgani*, Civil Appeal No 108 of 2009. In further submission, it was argued that the respondent was provided an opportunity to be heard through correspondence but still no responses as to the queries raised against him was forthcoming.

8. That further, the action taken by the appellant of summary dismissal was substantively valid, lawful and fair. The case of *CFC Stanbic Bank Limited vs Danson Mwashako Mwakuwona* (2015) eKLR, was cited in support of this argument. That in this case, the Court ought to take into account the reasonableness of the employer's conduct vis a vis whether a reasonable employer could have decided to dismiss the employee based on the said conduct. To this end, the case of *Kenya Revenue Authority vs Reuwel Waithaka* (2019) eKLR was cited in further support of this position.

9. On the other hand, it was submitted on the part of the respondent that the appellant's pleadings were totally at variance with the oral and documentary evidence they tendered before the trial court. That the appellant's evidence did not in any way support the allegations made against the respondent and in particular, the evidence given at the hearing by RW1 which was all hearsay. That the appellant's witness could not tell from his own knowledge what led to the respondent's exit and those who briefed him were not called to testify.

10. It was further submitted that the respondent's employment stood dismissed from July 4, 2019 and his evidence that no one reached out to him was not controverted at all. That the Audit Report and Recommendations produced by the appellant was an attempt to deceive the trial court that an audit was conducted that proved financial impropriety by the respondent.That further, the reasons for dismissal given by the appellant of gross misconduct and absconding of duty were not proved at all.

11. The respondent further urged that the evidence before the trial court satisfied the threshold under Section 47(5) of the *Employment Act* that he was unfairly and un-procedurally summarily dismissed while the appellant failed to prove and justify the reasons for dismissing him.

Analysis and determination

12. This being the first appellate Court, it has the duty to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. In doing this, the Court is cognizant

that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was reaffirmed in *Abok James Odera t/a A J Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, as follows: -

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

13. With the above determination in mind, I am enjoined to revisit the evidence presented before the trial Court afresh and analyze it in order to arrive at my own independent conclusion but noting that I did not see or hear the witnesses as they testified.

14. Having considered the record before me, the opposing submissions, the authorities cited and the law, I find the issues falling for determination by this Court as being: -

    a. Whether the appellant proved that there was substantive justification for the respondent's summary dismissal.

    b. Whether the dismissal of the respondent was in line with fair procedure.

    c. Whether the remedies awarded to the respondent by the trial Court lie in law.

Substantive justification?

15. On this issue, Section 43(1) of the *Employment Act* (Act) places the burden of proving the reasons for termination on the employer and in default, such termination is rendered unfair. In addition, Section 45 (2) of the *Act*, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.

16. In the instant case, there is a letter of summary dismissal dated October 7, 2019 on record. The said letter which is addressed to the respondent through the firm of Mugwe & Company Advocates lists the grounds for his summary dismissal. I will reproduce it in part: -

> "You are hereby notified of your immediate dismissal from employment with us in the position of (illegible) manager with effect from August 31, 2019 on the following grounds: -
>
> 1. Your failure to provide sound leadership and supervision over the company business and failure to report financial misappropriation to the management.
>
> 2. Your absence from duty from July 4, 2019 after you had been recalled from your suspension and your refusal to furnish information in regard to a business float amount of Kenya shillings One Hundred Thousand (kshs 100,000/=) entrusted to you to the management during the probe into financial misconduct and misappropriation of funds and audit of the company accounts.
>
> 3. Failing to keep up to date, accurate and correct account and financial records in respect of the company business and in particular the kitchen financial records and accounts.
>
> 4. Failure to give proper and sound financial advice to the management in regard to its financial position and obligation and failure to maintain and manage

accounts for mandatory statutory deductions/contributions and remittances including Pay as You Earn (PAYE), NHIF and NSSF for the company staff.

5. Your failure and refusal to show cause why disciplinary action should not be taken against you for absconding work, misappropriation of funds, failure to secure your employer's funds and failure to keep correct and accurate financial records..."

17. Essentially, the respondent was dismissed from work on grounds related to record keeping, absconding duty, failure to provide sound leadership and supervision and reporting of financial misappropriation, failure to give proper and sound financial advice to the management and failure to show cause why disciplinary action should not be taken against him.

18. At the trial Court, the appellant exhibited a copy of what it termed as the Audit Report which raised various issues ranging from shortages, stock losses at the bar, kitchen and the store, variance between expected cash and cash at hand, failure to properly account for petty cash vouchers, lack of cash reconciliation and record keeping for instance payment of staff.

19. In short, the audit report raises serious issues of financial impropriety and points to mismanagement of the appellant's business. Essentially, this was the appellant's smoking gun against the respondent seeing that he was the Operations Manager of its business.

20. Nonetheless, the Audit Report is not signed and indeed, it is not owned hence it is hard to attribute it to the appellant's business. Save for the heading which bears the appellant's name, it may as well belong to another entity running the same kind of business as the appellant. In addition, it is not known who or which firm of auditors carried out the audit and whether they were qualified to do so. As it is, the report just contains information which may very well be termed as generic. What's more, the period covered by the audit is not indicated.

21. No doubt, these are serious gaps which the appellant ought to have covered noting that it was the basis for which it dismissed the respondent from its employment. In the end, these gaps lowered the probative value of the audit report and it did little to prove that the appellant was justified in dismissing the respondent from its employment.

22. If indeed, the appellant undertook an audit exercise which revealed glaring issues touching on mismanagement on the respondent's part, then it was only prudent for it to ensure that the attendant report was regular in both form and substance.

23. In light of the foregoing, I am not persuaded that the respondent discharged its burden at the trial Court by proving that it had a valid and fair reason to summarily dismiss the respondent from employment.

24. The respondent's termination was therefore substantively unfair and the finding by the learned Magistrate cannot be faulted to that extent.

Procedural fairness?

25. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the Act sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of 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. To put it succinctly, the employee must be notified of the reasons that

may result in his or her for termination from employment and must be given an opportunity to be heard prior to such termination.

26. From the record, it was the appellant's case at the trial Court that it issued the respondent with a notice to show cause and gave him an opportunity to address the issues arising from the audit it had undertaken, but he left his place of work unceremoniously and refused to accept the said show cause letter.

27. On his part, the respondent stated that he was summarily dismissed on July 4, 2019 when he resumed work after his compulsory leave. That on that day, he went to work and stayed from 10 am to 5 pm when he was verbally terminated by one of the appellant's directors by the name Mr Mwangi. To this end, he denied being given an opportunity to be heard.

28. Therefore, what presented at the trial court was a credibility contest hence I must resort to the record before me.

29. Despite the appellant's assertions that it issued the respondent with a letter to show cause, there was no evidence to this effect. There was also no evidence that the appellant shared the audit report with the respondent and asked him to respond to the issues raised therein. It was therefore impossible to ascertain that the respondent was indeed asked to explain his infractions.

30. The appellant has submitted that the hearing anticipated under Section 41 (2) of the *Employment Act* need not be an oral hearing hence exchange of correspondence can still be construed as an opportunity given to an employee to be heard. In this regard, I pose to ask, where is the correspondence? There is none on record.

31. Indeed, there was no evidence in whatever form or manner to prove that the respondent was notified of the reasons the appellant was contemplating terminating his employment. There was further no evidence that the respondent was required to present his defence to the allegations being levelled against him. In absence of such evidence, I am led to conclude that the appellant did not undertake the process contemplated under Section 41 of the *Employment Act*.

32. It is worth mentioning that Section 41 is couched in mandatory terms and cannot be applied selectively. In terms of subsection (2), the requirement applies to instances of summary dismissal thus: -

> " [(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." Underlined for emphasis

33. In assessing the import of Section 41, the Court of Appeal in the case of *Postal Corporation of Kenya vs Andrew K Tanui* [2019] eKLR, had this to say:-

> " It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with...Four elements must thus be discernible for the procedure to pass muster: -
>
> i an explanation of the grounds of termination in a language understood by the employee;
>
> ii the reason for which the employer is considering termination;

iii entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

iv hearing and considering any representations made by the employee and the person chosen by the employee..."

34. My position accords with the above determination by the Court of Appeal and I find and hold that Section 41 of the Act sets the minimum requirements an employer ought to comply with prior to dismissing an employee. There ought to be nothing short of the same.

35. The upshot of the foregoing is that the respondent's dismissal was not in compliance with the requirements of a fair process as demanded by Section 41, hence fell outside the legal parameters and on that basis, the resultant dismissal was procedurally unfair hence unlawful.

36. To that extent, the Court is unable to fault the finding by the learned trial Magistrate.

37. All in all, I am convinced that the appellant did not prove to the requisite standard before the learned trial Magistrate, that the respondent's dismissal was fair and lawful in terms of Sections 41, 43 and 45 of the *Employment Act*.

Remedies

Compensatory damages

38. The trial Court having found that the respondent's termination was unfair and unlawful, awarded him compensatory damages equivalent to six months of his salary. From the record, the Court took into account the length of service by the respondent. I find no reason to disturb the said award which notably, is largely discretionary.

One month's salary in lieu of notice

39. The award of one month's salary in lieu of notice is sustained as the Court has found that the respondent's termination was procedurally unfair hence unlawful.

Salary for the month of June and July 2019

40. With regards to the salary for the month of June, 2019 and 4 days in July, 2019, the same is sustained. Here is why. It is common ground that the respondent was sent on compulsory leave for 21 days with effect from June 14, 2019. Be that as it may, no letter was exhibited to this effect hence there was no evidence that the leave was without pay. Further, it is notable that during the period the respondent was to be on compulsory leave, he was out of work involuntarily and not on his own volition. In the event the appellant intended the leave to be without pay, then nothing stopped it from putting the same in writing or providing for the same in its Human Resource Manual or such other policy, which in any event was not produced in evidence.

Annual leave days

41. With regards to the claim for leave days, the appellant averred that the respondent utilized his annual leave days by taking extra off days during the off peak season and in the course of his employment as is the trend in the hospitality industry. An employee's leave entitlement under Section 28 of the *Employment Act* is couched in mandatory terms. Therefore, it is a right that cannot be diminished merely because of the industry the employer operates in.

42. In any event, where an employee takes off days on account of such operations like peak and off peak season, the employer is expected to maintain appropriate records. In this case, no record was exhibited before Court to indeed prove that the respondent took off days at whatever period and the same was deemed to constitute his leave. In this regard, pursuant to Section 28(4) of the Act, the respondent is entitled to recover leave days for 18 months preceding his exit from the appellant's employment.

Rest days and Overtime

43. As to the claim for compensation for rest days and overtime, the trial Court awarded the same as pleaded. This is despite there being no proof that the respondent worked overtime and during the rest days as alleged. The Court in *Rogoli Ole Manadiegi vs General Cargo Services Limited* [2016] eKLR had this to say in regards to the issue: -

> " It is true the employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he worked on public holidays or even rest days....he did not justify the global figure claimed in overtime showing specifically how it was arrived at...."

44. I reiterate the determination in the above case and find that in absence of evidence to prove that the respondent worked on the rest days and overtime as claimed, the finding by the trial Court on this relief was unsupported and cannot be sustained.

Service pay

45. The trial Court further awarded service pay as pleaded. From the record, the respondent was a registered member of the National Social Security Fund (NSSF). What this means is that the respondent fell under the exclusions under Section 35(6) of the *Employment Act* which provides as follows: -

> " 6 This section shall not apply where an employee is a member of-
>
> .....
>
> d the National Social Security Fund.

46. Therefore, the award was made in error and was not available to the respondent.

Unremitted NHIF

47. With regards to the unremitted National Hospital Insurance Fund (NHIF), the trial Court found that the respondent had proved membership to the Fund and that his contributions were not remitted hence his claim to this extent was awarded as pleaded. The statement exhibited by the respondent was limited to the months of June, July and August, 2018 which indicate that remittances were made. As a matter of fact, the statement did not state the month when remittances were allegedly not made. Therefore, the basis for the award was not justified. In any event, the appropriate award to make was to direct the appellant to make the remittances to the Fund seeing that this is a statutory deduction. The same was not payable to the respondent in the form of an award.

Orders

48. The totality of my consideration is that the Appeal is partially allowed as follows:-

    a. The finding by the trial Court that the respondent's dismissal was unfair and unlawful is sustained.

    b. The award of 6 months' salary as compensatory damages to the respondent, is sustained in the sum of Kshs 360,000.00.

    c. The award of one month's salary in lieu of notice to the respondent is sustained in the sum of Kshs 60,000.00.

    d. The award of salary for the month of June, 2019 is sustained in the sum of Kshs 60,000.00

    e. The award of salary for 4 days in the month of July, 2019 is sustained in the sum of Kshs 8,000.00.

    f. The award of annual leave is sustained but is limited to 18 months hence is Kshs 63,000.00.

    g. The awards in respect of unremitted NHIF, service pay, rest days and overtime are set aside.

    h. The decretal amount in the sum of Kshs 1,308,168.00 is hereby set aside and the award is determined at Kshs 549,000.00.

    i. Interest on the amount in (h) at court rates from the date this Judgement until full payment.

49. As the Appeal has substantially collapsed, costs in this Court and at the trial Court shall be borne by the appellant and shall be pegged on the final award.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Appellant Mr Omondi

For the Respondent Mr Mugwe

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE