



**Diamond Industries Limited v Mwale (Appeal E028 of 2022)
[2023] KEELRC 1235 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E028 OF 2022**

**M MBARÚ, J
MAY 25, 2023**

BETWEEN

DIAMOND INDUSTRIES LIMITED APPELLANT

AND

PHILIMON NYAMBU MWALE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D. O. Mbeja, Principal
Magistrate in Mombasa CMELRC No. E284 of 2021 delivered on 8th April 2022)*

JUDGMENT

1. The background of the appeal is the respondent was the employee of the appellant under a contract of employment as a boiler operator from July 1, 2020 at a gross wage of Kes 22,000 per month and he worked until February 13, 2021 when his employment was unlawfully dismissed over alleged theft without due process. He claimed for Kes 13,000 for days worked in February, 2021, Kes 8,884 being pro-rata leave days earned, overtime pay and compensation for unfair termination of employment.
2. In response, the appellant as the employer's case was that on February 6, 2021 there was an incident of theft of a mobile phone at the shop floor which phone belonged to Bernard Mutuku the Laboratory analyst who immediately informed security, George Adeya and together with him proceeded to the boilers operations room where the claimant was because he had just left the Lab place. The claimant denied having the phone but later admitted to having it and he gave it back. Following the theft incident, a report as made to the human resource department and a show case notice issued to the respondent on the same day, February 6, 2021. He responded on February 9, 2021 and admitted to stealing the phone and hence remorseful about the misconduct. The claimant was invited to a disciplinary hearing through letter dated February 10, 2021 and he attend on February 12, 2021 and further admitted to the offence and a decision was taken to dismiss him from employment on February 13, 2021.



3. The response was also that the appellant paid the respondent his terminal dues as follows;
 - i. February salary Kes 19,130 less absent hours – Kes 12,416.37;
 - ii. Overtime worked from 24th January to February 13, 2021 Kes 5,173;
 - iii. House allowance Kes 5,173;
 - iv. Leave days accrued Kes 11,000; and
 - v. Notice pay Kes 19,130.
4. The terminal dues were paid less the balance the respondent owed to the Sacco of Kes 37,897.80 and a certificate of service was issued.
5. The trial court heard the parties and delivered judgment on April 8, 2022 with findings that the respondent was not accorded a fair hearing and the alleged theft was not proved and the person said to have lost his phone was not called to testify and therefore the claim for unfair termination of employment was justified and the court awarded the respondent all his claims.
6. Aggrieved by the judgment, the appellant filed this appeal on the grounds that the findings that there was unfair termination of employment was contrary to the evidence presented before the trial court and had this been looked at properly, the claim should have been dismissed and hence seek to have the appeal allowed and the judgment of the trial court be set aside.
7. Both parties attended and agreed to address the appeal by way of written submissions which are analysed and the issues which emerge for determination are whether there was justified reasons leading to termination of employment; whether the respondent was taken through the due process and whether the appeal is with merit.
8. This being a first appeal, the mandate of the court is to re-evaluate the record, evidence and findings of the trial court and make own conclusions.
9. The respondent's claim as analysed above taken into account, his case was that a phone was stolen at the Lab and this was traced to him and he returned it. he was issued with a show cause notice, he replied and admitted to the facts and apologised for his conduct. That when he picked the phone, his intention was to hand it over to the security officer.
10. Part of the records filed by the appellant before the trial court is letter dated February 12, 2021 where the respondent admitted that;

... after the incident – I apologised with Bernard and sorted out his issue. He also assured me that he doesn't have any issue or grudge with me.

When why other individuals have taking for much interest in this matter? ...
11. Theft is a criminal act. when theft happens at the shop floor, an employer is allowed to summarily dismiss the employee for gross misconduct subject to hearing the employee representations pursuant to section 44(4) of the [Employment Act](#), 2007 read together with section 41(2) thereof.
12. An employee who on their own volition opts to commit a criminal act cannot blame the employer for taking action. Called to account through the show cause notice, the respondent admitted to the fact that he had taken the phone and he did apologise save, the appellant as the employer was legally bound to address such gross misconduct accordingly despite the respondent and the subject employee whose phone had been stolen having settled the matter amicably. For gross misconduct, the respondent



having been called to account and upon which he admitted and offered an apology, the need to call evidence beyond such admission was not necessary. It would have been a waste of valuable time. what was there to proof after the admissions? Nothing absolutely.

13. The appellant acted on the theft and summary dismissal should have issued but the respondent was invited to a disciplinary hearing where he further admitted and in his terminal dues, he was paid including of notice pay. That was a generous award.
14. The finding by the trial court that due process was not adhered to was erroneous. Termination of employment in the given circumstances was justified. Notice pay and compensation were remedies removed from such matter.
15. With regard to claims for overtime pay, accrued leave pay and work for 13 days in February, the appellant paid the respondent a full month wage for February, 2021 together with pro-rated leave days and overtime earned. To claim beyond the record held by the employer would be contrary to the provisions of section 10(6) and (7) of the Employment Act, 2007.
16. The awards assessed by the trial court are not justified on the face of terminal dues paid by the appellant including notice pay which was not legally due in a case of gross misconduct.
17. Even where due process was to be challenged, which is not the case here, the trial court should have looked at the entire work record of the respondent in terms of section 45(5)(2) of the Employment Act, 2007. Before assessing the compensation due to an employee upon sound findings of unfair termination of employment, the previous misconduct of the employee must be applied because this has a bearing overall. The record has cases of previous warnings for sexual harassment against a fellow employee on 3rd August, 2019 and had this been taken into account, compensation assessed ought to have taken this into account.
18. The appeal is hereby found with merit. The judgment in CMELRC E284 of 2021 delivered on April 8, 2022 is hereby set aside on its entirety. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

