



**Kenya Union of Domestic Hotels, Educational Institutions and Hospitals  
Workers (KUDHEIHA) v KSLH Mombasa Beach Hotel (Cause E029 of 2023)  
[2023] KEELRC 2302 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2302 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E029 OF 2023  
M MBARŪ, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS  
AND HOSPITALS WORKERS (KUDHEIHA ..... CLAIMANT**

**AND**

**KSLH MOMBASA BEACH HOTEL ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a registered trade union and filed this claim on behalf of Bernard Angatia (the Grievant). The respondent is registered as a business providing hospitality, hotel and catering services.
2. The claim is that the respondent employed the grievant on causal terms in December 1999 and then employed as a glass-hand earning Ksh. 31,498.86 and on 24 March 2022 the grievant was assigned duties by his supervisor since there were few waiters. The grievant served guests in his allocated shifts.
3. On 1<sup>st</sup> April 2022, the respondent suspended the grievant on allegations that a report had been made that while acting as a waiter on 24 March 2022 he gave out his personal mobile number to a guest at the hotel with intentions of receiving payment for a meal consumed. On 4 April 2022 the grievant was served with a show cause notice over the matter and on 7 April 2022 the respondent convened a disciplinary hearing. The grievant was found culpable and on 16 April 2022 his employment was terminated but this was an unfair termination of employment.
4. The grievant reported the matter to the claimant who reported to the Minister for conciliation but there was no agreement.
5. The claimant is seeking payment of terminal dues as follows;
  - a. 4 months' notice pay Kshs. 125,996;



- b. Service gratuity at 15,749 x 23 years worked at Kshs. 362,238.50;
  - c. Annual leave for 2021/2022 Kshs. 31,499;
  - d. Leave traveling allowance Kshs. 5,600;
  - e. Compensation for shoes for 10 years 700 x 12 x 10 years Kshs. 84,000;
  - f. Damages for malicious prosecution; and
  - g. Costs.
6. The grievant testified that on 24 March 2022, his supervisor allocated him duties of a waiter due to shortage of staff. The reception staff called him to serve a guest in room 360, which he did and he left his phone number so that the guest could call him to collect utensils. The guest did not call him and the grievant decided to call the guest and check if it was good time to collect the same since this was 9.30pm and his shift was about to close at 10pm. The guest opted not to have the same collected.
7. The grievant testified that the next day when he reported back to his shift he was suspended from duty on the grounds that he was paid by a guest and on 4 April 2022 he was issued with a notice to show cause and on 16 April 2022 issued with notice for a disciplinary hearing which resulted in termination of his employment which was unfair. He lodged an appeal seeking hearing before a different panel but this was dismissed.
8. Upon cross-examination, the grievant testified that when the guest in room 360 called seeking to be served, he did not know that the booking was bed and breakfast because he was not a waiter. Guests booked in the hotel may request for room service which should be charged. The respondent does not allow waiters to give hotel guests their personal phone numbers but in this case he needed to collect utensils before his shift closed.
9. The respondent has since paid the grievant various amounts in terminal dues;
- On 14 April 2023 the respondent paid Kshs. 25,000;
  - On 8 March 2023 the respondent paid Kshs. 25,000
  - On 19 January 2023 the respondent paid Kshs. 40,000
  - On 28 December 2022 the respondent paid Kshs. 25,000
  - On 14 March 2023 the respondent paid Kshs. 40,000
  - On 12 October 2022 the respondent paid Kshs. 25,000
  - On 8 March 2022 the respondent paid Kshs. 50,000.
- A total of Kshs. 228,407 has been paid.

The grievant was a member of NSSF and the respondent did remittances.

10. In response, the respondent's case is that the grievant was employed from 1<sup>st</sup> August 2009 as a glass-hand and given a written contract with terms and conditions of his employment together with policies and regulations of his employment through letter dated 25 July 2009 and 4 February 2010 respectively.
11. The grievant worked until 16 April 2022 when his employment was determinant for good cause while earning Kshs. 28,133.76 per month. A service charge would be paid based at the discretion of the respondent.



12. While handling guests, the grievant was expected to ensure that all monies received would be through the correct channels and that these would be recorded and reconciled for purposes of maintaining books of account. The grievant had a duty of care and fidelity to safeguard the financial interests of the respondent but on 24 March 2022, a hotel guest in room 360 made an order for food and the reception informed the grievant. The guest asked that the food should not be taken to the room to avoid room service charges but the grievant went ahead and served the same in the room and told the guest to pay for the food in cash. The guest did not have cash and requested for the hotel Paybill number but the grievant through deception said the respondent did not have a Paybill and instead gave his personal phone number 0702089047 written down on a piece of paper. The guest declined to make a payment and reported the matter at the front desk.
13. The response is that giving of personal phone numbers for settlement of hotel bills is a grave breach of policy and trust by the grievant. His intention was to defraud the respondent contrary to policy clause No. 6 and 7 on stealing/theft and dishonesty and fabrication of company records and information which is prohibited. The grievant was dishonest in his attempt to defraud the respondent.
14. The attempt by the grievant to defraud the respondent was reported to Solomon Langat on 26 March 2022 and also involved Edward Karisa and on 1<sup>st</sup> April 2022 the grievant was suspended to allow for further investigations. The grievant was issued with a show cause notice on 4 April 2022 on the grounds of his attempted theft and fraud and invited to a disciplinary hearing where he attended on 7 April 2022 and present was a shop steward. The respondent terminated the grievant on his employment through letter dated 16 April 2022 for misconduct of attempted theft on 24 March 2022.
15. The grievant was allowed an appeal but this was dismissed for lack of any good grounds. He has been paid several dues amounting to Kshs. 228,407 and acknowledged the same. The grievant was registered with NSSF and hence the claim for gratuity is not due; following termination of employment for a good cause no compensation or notice pay is due; the grievant had no untaken leave days, compensation for shoes was paid and the claims made be dismissed with costs.
16. The respondent called Eunice Nzilani the human resource manager who testified that the grievant had a gross wage of Kshs. 28,134 per month and his employment was terminated for good cause when he attempted to steal and defraud the respondent when he was asked to serve a guest on 24 March 2022 but he went ahead and did what had been asked of him by serving the guest in the room contrary to what the guest wanted to avoid room service charges. While in the guest's room, the grievant said that bills could be paid in cash and when the guest asked to pay through the Paybill, he said the respondent did not have the same and offered his personal number for the payment. The guest got suspicious and reported the matter at front desk. The respondent took up the matter and suspended the grievant, issued him with a show cause notice and invited him to a disciplinary hearing but he had not justified reasons for his conduct which resulted in termination of his employment. The grievant was found to be in breach of the clear provisions of the policy against theft, dishonest conduct and fraud.
17. The grievant was allowed an appeal. He has since been paid several payments through cheques amounting to Ksh. 228,407
18. Solomon Langat testified that as the front desk manager, a guest of the hotel reported to him that on the evening of 24 March 2022 the grievant served a meal which had been requested for at the dining area but this was brought to the room. The guest had wanted to avoid payment of room service charges and when the guest wanted to pay, the grievant offered this be paid in cash. The guest did not have cash. As the alternative, the grievant offered his personal number written on a piece of paper. The guest found this practice strange and offered to report to the witness. The matter was taken up by management and the claimant taken through the due process leading to termination of his employment.



19. Mr Langat testified that the respondent has a policy on room service and payment of bills through designated channels. This was not the first time the grievant was serving as a waiter. Offering of his personal phone number to a guest to make payments was fraud, attempted theft and dishonest and the termination of employment was justified.
20. At the close of the hearing, both parties filed written submissions.
21. From the written submissions, the evidence and pleadings the twin issues which emerge for determination are whether there was unfair termination of employment and whether the remedies sought should issue.
22. The claimant does not dispute the fact that upon the grievant's employment, he was issued with contract of service and the policy regulations. Such formed the basis of his terms and conditions of service. The grievant was also issued with a code of conduct, which defined various matters if committed amounted to misconduct or gross misconduct particularly dishonest conduct and fraud. The failure to carry out legitimate instructions of a supervisor was also defined as gross misconduct. All employees were forbidden from giving guests their personal phone numbers for the purpose of making payments due to the respondent.
23. The grievant testified to being aware of the policy and the Code of Conduct regulating his employment.
24. The grievant does not deny that on 24 march 2022 he served a guest in room 360 and did not know that the guest had requested to be served at the dinning area. He only got instructions that the guest was on full board but later he learnt the guest was on half board.
25. The grievant also testified to the fact that his shift was coming to an end and he needed to collect utensils from the guest's room and hence he left behind his phone number to allow the guest to call him to collect the same and so, he was shocked to later learn of accusations that he had given his phone number for the purpose of the guest making food payments through his personal number.
26. What the court could deduce from the evidence is that the guest called the reception and ordered food. The reception called the kitchen and the grievant who was holding in as the waiter was asked to serve the guest, but he left his phone number with the guest written on a piece of paper. The guest reported to the Front Desk Manager that the grievant had wanted to be paid for the food through his phone number.
27. From these facts, the grievant was at all material times aware that the guest had accessed the reception to make the food request. The same guest could therefore call the reception and request for the utensils to be picked from room 360 instead of the grievant having to leave his personal phone number.
28. The explanation by the grievant is not plausible at all. The need to leave his phone number to with the guest in room 360 is not honest at all. The purpose for such conduct is then as explained by the guest, that the grievant wanted to be paid for the food directed through his phone number.
29. The grievant was aware that giving of personal phone numbers to guest was not allowed under the policy. He had served in his employment for many years. Things could not have suddenly changed when he was asked to serve as a waiter. Indeed, the grievant testified that this was not the first time he was asked to step in as a waiter.
30. Conduct that was contrary to the set policy and particularly attempted theft is defined under Section 44(4) of the *Employment Act*, 2007 as gross misconduct. The employer is allowed to summarily dismiss



- the employee found to have committed gross misconduct. The grievant was invited to a disciplinary hearing and he failed to give satisfactory explanation over his gross misconduct.
31. The respondent opted to terminate the grievant's employment through notice dated 16 April 2022 with immediate effect despite the option of a summary dismissal that was available for his conduct in terms of Section 44 of the Act.
  32. The sanction issued is important as the respondent has recognised the claimant and there exists CBA with terms and Conditions of employment. Where there is termination of employment, terminal dues should be paid in accordance with the CBA. Payment of gratuity is one such terminal benefit where there is termination of employment.
  33. Save, upon the court finding that the conduct of the grievant justified summary dismissal, notice pay and compensation are assessed at zero (0).
  34. On the claim for service gratuity for 23 years worked, clause 20(b) of the Collective Agreement (CBA) allow an employee who is terminated in his employment the benefit of gratuity pay. under clause 20(b) (ii) of the CBA, parties agreed that;  

Over ten years of service one-half of one month's salary and one half of the house allowance at the rate of pay applicable at the time of termination, for every completed year of service. provided that: -

...
  35. The grievant worked from December 1999 to 16 April 2022 a period of 22 full years. the last wage paid was Kshs. 31,498.86 and a house allowance of Kshs. 8,502.76. on the CBA terms, his gratuity pay is hence half salary per month for 22 years plus half house allowance per month for 22 years. The separation of salary and house allowance hence relates to the grievant's basic salary of which the added benefit is that of the house allowance.  

The basic pay is Kshs. 19,631 and half is Kshs. 9,815.50 x 22 years = Kshs. 215,941.

The house allowance is Kshs. 8,502.76 and the due benefit is Kshs. 4,251.50 x 22 = 93,533.

Total gratuity pay is Kshs. 309,474.
  36. On the claim for payment for annual leave due in the year 2021/2022, the respondent as the employer is the custodian of work records. The respondent filed various work records but none with regard to the leave taken by the grievant. Leave days earned and not taken are a right due to the employee despite the reasons leading to termination of employment in terms of Section 18 and 28 of the [Employment Act](#), 2007.
  37. The grievant is entitled to a basic pay of Kshs. 19,631.94 for leave days not taken in the year 2021/2022. The payment statement filed by the grievant confirms the basic pay as Kshs. 19,631.94.
  38. On the claim for leave travelling allowances, as noted above, a benefit under the contract of service and the CBA is due as agreed by the parties. The grievant is entitled to Kshs. 5,600 in leave travelling allowance.
  39. On compensation for shoes, the respondent admitted to having paid this benefit. On the payments of Kshs. 228,407, the grievant is well compensated.
  40. On the claim for damages for malicious prosecution, on the finding that the grievant was taken through the due process and the sanction of summary dismissal is justified, a claim for damages for alleged



malicious prosecution is not justified. Under the CBA, the parties agreed to address any misconduct and gross misconduct through a disciplinary process at the shop floor. The grievant was taken through the disciplinary process and a shop steward attended. A claim for damages for alleged malicious prosecution cannot stand.

41. Taking into account the provisions of Section 45(5) of the *Employment Act*, 2007;
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- (b) the conduct and capability of the employee up to the date of termination;
42. The court finds the respondent applied the due process and heard the grievant in his response and found him culpable over his gross misconduct of attempted theft. The payment of Kshs. 228,407 in various amounts upon requests by the grievant is a generous compensation.
43. Accordingly, the claims made are hereby dismissed save for the award of leave pay at Kshs. 19,631.94; leave travelling allowance of Kshs. 5,600; gratuity pay Kshs. 309,474. The respondent has since paid the grievant Kshs. 228,407 and the dues unpaid shall be taken into account. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.**

**M. MBARŪ**

**JUDGE**

