



REPUBLIC OF KENYA



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**Simba Corporation t/a Acacia Premier Hotel v Oswago (Appeal
E045 of 2022) [2023] KEELRC 2103 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2103 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E045 OF 2022
S RADIDO, J
SEPTEMBER 20, 2023**

BETWEEN

SIMBA CORPORATION T/A ACACIA PREMIER HOTEL APPELLANT

AND

FRANCIS OSWAGO RESPONDENT

(Being an appeal from the judgment delivered on 24th November 2022 at the Chief Magistrates Court, CMELRC Case No. 229 of 2019 by Honourable M. Agutu, SRM)

JUDGMENT

1. In a judgment delivered on 24 November 2022, the Senior Resident Magistrate found that the termination of the employment of Francis Oswago (the Respondent) was unfair and awarded him the equivalent of 1-month salary in lieu of notice and 6 months' salary as compensation.
2. Simba Corporation t/a Acacia Premier Hotel (the Appellant) was dissatisfied with the judgment and it lodged a Memorandum of Appeal with the Court on 22 December 2022, contending:
 - (1) That the learned Magistrate erred in law and in fact in concluding that no disciplinary hearing took place in spite of the evidence adduced to the contrary.
 - (2) That the learned Magistrate erred in law and in fact in holding that the absence of the Respondent's signature in the disciplinary hearing minutes meant no hearing took place.
 - (3) That the learned Magistrate erred in law and in fact in holding that the appellant should have called the union representative who represented the respondent as a witness to the hearing.
 - (4) That the learned Magistrate erred in law and in fact in holding that the termination of the Respondent's services was unlawful and rendering a judgment in favour of the respondent despite the failure of the said respondent to prove its case against the appellant.



- (5) That the learned Magistrate erred in law and in fact in rendering judgment in favour of the respondent despite the respondent having signed the Severance Agreement and Final Release acknowledging receipt of the terminal dues as full and final settlement and that he would not have any further or future claims against the appellant.
 - (6) That the learned Magistrate erred in law and in fact in failing to hold that the chain of events, including the investigation of the offence committed by the Respondent, the disciplinary hearing and the eventual signing of the Severance Agreement and Final Release amounted to the appellant fulfilling its obligations under sections 41, 43, 45 and 47(5) of the [Employment Act, 2007](#) and that the termination was fair.
3. The appellant filed the Record of Appeal on 12 June 2023 and a Supplementary Record of Appeal on 14 June 2023.
 4. The Court gave directions on 14 March 2023, 17 April 2023 and 13 June 2023.
 5. The appellant filed its submissions on 8 August 2023 (should have been filed and served before 30 July 2023) and the respondent on 1 September 2023 (should have been filed and served before 30 August 2023).
 6. The court has considered the Record of Appeal and submissions.

Role of the Court on first appeal

7. This being a first appeal, the court is enjoined to re-evaluate the evidence before the lower court and make its own findings on the evidence and facts but conscious that it did not see the witnesses.

Unfair termination of employment

Procedural fairness

8. In making a finding of unfair termination of employment, the Senior Resident Magistrate noted that the minutes of the disciplinary hearing had not been signed by either the Respondent or a representative of (his) the trade union who attended the hearing and that the representative had not been called to testify in court to corroborate the testimony that a hearing had taken place.
9. This court has reviewed the evidence placed before the Senior Resident Magistrate.
10. In his written witness statement which was adopted as part of the evidence, the respondent stated that he was not given notice before the termination of employment, was never invited to a disciplinary hearing nor given an opportunity to defend himself.
11. During oral testimony, the respondent admitted that he was served with a show-cause notice, he was invited to a disciplinary hearing which he attended (but there was no quorum), he was informed of the right to attend in the company of his trade union representatives, the hearing was postponed and that thereafter he received the dismissal letter.
12. The appellant's Human Resource Manager testified that during the hearing on 29 August 2019, the Respondent attended in the company of a named trade union official but was hostile and requested for more time to prepare, a request which was allowed and the hearing rescheduled to 5 September 2019.
13. According to the witness, the Respondent attended the hearing in the company of the same trade union official but he stormed out of the hearing.



14. The respondent was notified of contemplated disciplinary action, the allegations to confront and he responded in writing. He admitted he was invited to attend a disciplinary hearing scheduled for 29 August 2019, and that the invitation advised him of the right to be accompanied by his trade union representatives.
15. The record shows that the appellant notified the respondent of the right to attend the hearing accompanied by a representative of his trade union.
16. The conclusion by the Senior Resident Magistrate that the appellant did not notify the respondent of the right to attend accompanied by a representative of his trade union is, therefore, not borne out by the evidence and was an erroneous conclusion of fact.
17. The Senior Resident Magistrate also made a finding that the minutes of the disciplinary hearing were not signed by the trade union representative.
18. Ordinarily, minutes are signed by the Chairperson of the hearing/meeting and Secretary. The minutes which were presented before the Senior Resident Magistrate were signed by the Chair and Secretary respectively.
19. There was no evidence put to the Senior Resident Magistrate that it was the custom or practice between the appellant and the trade union of which the Respondent was a member that the trade union representative should sign minutes of disciplinary hearings.
20. Consequently, the Senior Resident Magistrate fell into an error by applying the wrong legal test on the validity of the minutes not supported by the evidence placed before her.
21. After reviewing the evidence, this court is satisfied that the Appellant was in substantial compliance with the elements of procedural fairness as envisaged by sections 35(1)(c) and 41 of the [Employment Act](#), 2007.

Substantive fairness

22. Grounds 4, 5 and 6 of the Memorandum of Appeal challenged the substantive fairness in the termination of the Respondent's employment.
23. The Senior Resident Magistrate did not address the issue of substantive fairness in her judgment.
24. By dint of sections 43 and 45 of the [Employment Act](#), 2007, it is the burden of the employer to prove and justify the validity and fairness of a termination of employment.
25. The reasons given for the termination of the respondent's employment was in brief, aiding pilferage of hotel property by outsiders.
26. One of the Appellant's witnesses produced photos taken by cctv cameras. The photos captured the respondent and some 2 persons within the hotel carrying items. The 2 persons escaped when the guards raised an alarm. The evidence was not challenged.
27. Another witness testified that the respondent was seen in the photos in an area which was not within his assigned work space.
28. The combined effect of the photos and the fact that the respondent was not within his work area, in the view of the court raised reasonable suspicion within the context of section 43(2) of the [Employment Act](#), 2007.



29. This court is of the view that the appellant proved the existence of reasonable grounds to terminate the respondent's employment.

The Discharge

30. The appellant further challenged the judgment of the Senior Resident Magistrate under grounds 5 and 6 by contending that the judgment did not consider the effect and significance of the Severance and Release Agreement signed by the respondent.

31. The appellant contended that by signing the document, the respondent had released it or waived his right to any further claims, liabilities, charges or actions related to the employment.

32. It is true that the respondent signed a Severance and Final Release of Claims. One of the primary purposes of such a Discharge is to serve as a commitment from the employee that upon payment of agreed dues or benefits, the employee waives the right to sue the employer in terms of the commitment.

33. However, the appellant did not expressly plead a defence of waiver/discharge on the part of the respondent.

34. The nearest pleading to a waiver/discharge was at paragraph 7, wherein it was asserted that the respondent concurred in the payment of final dues.

35. Fleet reference was made to the defence of waiver in the witness statement of the appellant's Human Resource Manager while the issue was not explicitly addressed in the submissions.

36. The Court of Appeal had the opportunity to discuss the import of a discharge or release agreements in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR and *Coastal Bottles Limited v Kimathi Mitbika* (2018) eKLR.

37. The principles which emerge from the authorities is that when called upon to determine whether a release or discharge agreement is vitiated, the trial court should consider whether the discharge agreement was freely and willingly executed and whether the employee was seized of all the relevant information and knowledge.

38. Since the judgment of the Senior Resident Magistrate did not turn on the question of the Release or discharge, this Court is of the view that a deep examination of its effects on this appeal is not necessary.

Conclusion and Orders

39. In light of the conclusions reached by the court on the grounds of unfair termination of employment, the court finds merit in the Appeal.

40. The judgment of the Senior Resident Magistrate delivered on 24 November 2022, is set aside and substituted with an order finding the termination of the respondent's employment was fair, and further dismissing the Cause before the trial court.

41. No order on costs as appellant did not file submissions within agreed timelines.

DELIVERED VIRTUALLY, SIGNED AND DATED ON THIS 20TH DAY OF SEPTEMBER 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Owiti, Otieno, Ragot & Co. Advocates



For Respondent Anyumba & Associates Advocates
Court Assistant Chrispo Aura

