



**Julius v Sapna Bhandary t/a Chowpaty Fast Foods (Cause 1356 of 2017)
[2023] KEELRC 2584 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2584 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1356 OF 2017
K OCHARO, J
OCTOBER 5, 2023**

BETWEEN

MORRIS MUTIA JULIUS CLAIMANT

AND

SAPNA BHANDARY T/A CHOWPATY FAST FOODS RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein filed a Memorandum of Claim dated 13th July 2017 seeking:-
 - a. A declaration that the Claimant's dismissal was unjust, inequitable and unfair and in breach of the *Employment Act*;
 - b. The Claimant's terminal benefits, including his outstanding leave for four (4) years, one month's salary in lieu of notice, salary for February 2017 and gratuity for the four (4) years;
 - c. General Damages for breach of contract and wrongful dismissal calculated at an amount equal to 12 month's salary;
 - d. Service pay together with issuance of Certificate of Service.
 - e. Interest on (b) and (c)
 - f. Costs of the suit
 - g. Any other/further relief that this Honourable Court deem fit to grant in the interest of justice
2. The Memorandum of Claim was accompanied by the Claimant's Verifying Affidavit sworn on 13th July 2017; Claimant's List of Witnesses dated 13th July 2017; Witness Statement dated 13th July 2017 and Claimant's List of Documents dated 13th July 2017.



3. In response to the Memorandum of Claim dated 13th July 2017, the Respondent filed a Response dated 5th September 2017; Witness Statement of Winston Kaburu Mwendwa, its Operations Manager dated 3rd October 2017.

Claimant's case

4. The Claimant stated at all material times he was an employee of the Respondent, having been employed on the 18th of December 2012 in the position of a waiter at a monthly salary of Kshs 10,000.
5. She contended that throughout his tenure as an employee, she discharged his duties diligently and professionally. This notwithstanding, on or about February 2017, the Respondent terminated his employment on unjustified grounds that he had been involved in defrauding its funds. The Claimant contended that the accusation was unfounded as his job description didn't at all entail dealing with the Respondent's funds.
6. The Claimant states that before he was summarily dismissed, he had been placed under an investigatory suspension pending investigations into the fraud, for 14 days. When he went back to his place of work after 14 days, he was instructed to be off the workplace until he was called back by the Respondent. It became apparent that the Respondent was not keen to call them back. He and other employees of the Respondent who were also under suspension, decided to report the matter to the area Chief.
7. That help didn't come from the Chief as they had anticipated. Sub subsequently, when he heard that the Police were looking for him, he presented himself to the Police station before he would be arrested. The police investigated the matter, but they neither arrested him nor arraigned him in Court.
8. In the course of his duties, he would sometimes receive money from customers and present the same to the cashier.
9. He Contended that he was dismissed from employment without any notice. This amounted to summary dismissal. The dismissal was unlawful, unfair and unjustified.
10. He contended further that he was not accorded an opportunity to defend himself against the accusations. He was victimized and subjected to unfair labour practices. The decision to dismiss him was not free from ill faith.
11. In his evidence under cross-examination, the Claimant testified that the instant suit is against the business and its owner. Further, cross-examined on his past employment history, he stated that prior to joining the Respondent he was working at Eastleigh. He separated from his former employer after he secured a job with the Respondent.
12. The Claimant further testified that between 18th December 2012, to June 2013, he was working with the Respondent as a trainee. Though he was a registered member with NSSF, he was not receiving his statements of account regularly.
13. He further testified that a customer would only make payments upon receiving a bill. The bills were system-generated. Sometimes he would pick up the bills from the cashier and hand the same over to the customer for settling. All the settled bills were to be recorded manually in a manual register that existed for that purpose.
14. The Claimant testified that at the end of the day, there wouldn't be any reconciliation of accounts between the Cashier and waiters. Reconciliations were only done between the owner of the business and the cashier.



15. He further stated that the employer instructed them to proceed for leave and report back only after being called to so do. This followed an allegation that was made against him and other workers that they had stolen the Respondents' money.
16. When he heard that the police were looking for him, he presented himself to the police station. Interrogated him, asking him very general questions and released him without any charge.
17. In the absence of the teller, a waiter could take an order from the customer, and input it on the system. He asserted that he was not at any time told that these remained uncleared in the system. Any money that he received was handed over to the cashier.

Respondent's case

18. On the 6th February 2023, when this matter came up for defence hearing, the parties recorded consent to the effect that, the witness statement of Emmanuel Mbai, and his evidence in Cause No 1439 of 2017, be adopted and deemed his evidence in this matter.
19. In the above-mentioned cause Mr. Mbai presented himself as the Operations Manager, of the Respondent's business. He came into the position after taking over from one Winston Mwenda, in 2019.
20. The witness stated that sometime in 2016- 2017, the Respondents noted an unexplainable trend in its business. The sales were dwindling, while it was apparent that the number of customers visiting the Respondent's business was high, and therefore disproportionate to the daily sales. It was concluded that there was something not adding up as regards its cash control, pricing and structure.
21. It was noted that large sums of money were being lost. It became imperative that external auditors be engaged. They rendered a report. Besides the audit by the external auditors, internal investigations were conducted by the Respondent. The investigations revealed that a number of employees including the Claimant were conspiring with the cashiers in financial malpractices. Customers could pay for the services rendered, but the money paid would not reach the Respondent. Bills could be deleted from the system. Consequently, the bill proceeds were never booked in the system.
22. The Respondent asserted that Sundays were when it would receive the highest number of customers. However, this number of customers would not correlate adequately with the sale proceeds of the day. This stirred suspicion. The Respondent decided to lay an ambush. On one Sunday, the Claimant as an order taker received money from a customer, the customer settled the bill while seated at his table and was even given change. The bill remained unsettled in the system for some time. This prompted the manager to ask the cashier why the bill remained on the system unsettled yet the customer had paid. The cashier asserted that the cash had not been handed to him. The Claimant insisted that she had handed over the cash. However, they eventually settled the bill.
23. An in-depth audit revealed that the perpetrators of the financial impropriety were deleting bills from the system without realizing that the same were being stored in a backup system, at the back office. The bills were retrieved. It was discovered that the Respondent was losing approximately 60,000 on a daily basis. The Respondent had lost Kshs 750,000.
24. The conspirators were asked to step aside to enable the Respondent to carry out investigations. Those implicated were allowed to give their statements. It was concluded that the Claimant and his colleagues were involved in the fraud.
25. The witness stated that the matter was reported to the police, who promised to carry out investigations. They never got back to the Respondent with any investigation report.



26. Cross-examined by Counsel for the Claimant, the witness stated that the Respondent didn't have any formal letter inviting the Claimant to a disciplinary hearing. Further, the Claimant and his colleagues were never arraigned in court.

Claimant's Submissions

27. In his submissions the Claimant largely reiterated the factual matters raised in his Memorandum of Claim. He submitted that the Respondent's witness, RW1, while giving evidence could not explain how the termination of the Claimant's employment occurred.
28. The Claimant asserted that it is clear from the evidence on record that there were no disciplinary proceedings undertaken against him. The termination was without any justifiable reasons. Consequently, he is entitled to the reliefs he has sought against the Respondents.
29. Throughout the four years he was in the service of the Respondents, he was not accorded an opportunity to proceed with his annual leave. He should be awarded compensation for the earned but unutilized leave days. Under the head, he claims Kshs 40,000/. As his dismissal was without notice, he is entitled to one month's salary in lieu of notice, Kshs 10,000/-. Further, for the unfair termination of his employment, he should be granted a compensatory relief, equivalent twelve months gross salary (Kshs 120,000/-), making up a total amount of Kshs 170,000/-.

Respondent's Submissions

30. On the Respondent's part, she filed submissions dated 10th March 2023.
31. It is the Respondent's submission that the Claimant was an employee of Chowpaty Fast Foods Limited, a limited liability company, but not the Respondent in this claim. From the year 2015 to around the later months of 2016, the Respondent noticed decreased and/or unsynchronized business earnings in that: -
- a. The value of the orders at the table which prompts the issuance of products was at a variance;
 - b. The variance between the table orders and issuance tilted towards the value of the actual takings being lower than the orders taken.
 - c. The numerical and financial accounting systems were synchronized such that the table orders were matched with the back room/kitchen records that prompted issuance.
 - d. The variance i.e. the unsettled bills became of great concern and the company employed a two-pronged investigative approach to the issue by questioning and requiring all concerned employees to record a statement on specific bills; and by requesting the Company's external auditors to audit the records for the period in question.
 - e. As to individual bills that were in question, the Claimant and others were found culpable.
 - f. That the Claimant chose not to cooperate with the Company and the External Auditors. Instead, the Claimant and the other implicated employees came to the company's premises in a rowdy manner shouting and hurling insults at management demanding their dues. The police had to intervene to disperse the rowdy crowd.
32. The Respondent submits that its witness testified that orders would be placed by the Claimant or an Order Taker and each one recorded both in the front machine and back/kitchen machine. There were some deletions in the front machine but the same remained unsettled at the back/kitchen records which the chain of fraudsters could not reach/tamper with. The fraudsters were able to pocket the



amounts so deleted, in so far as front machine cash reconciliation was concerned. That the Auditor's report disclosed that the Respondent had lost a whopping Kshs 2.5 Million. That the Claimant and others were requested to step aside to facilitate detailed individual audit of bills, and to avail themselves for questioning, and scrutiny.

33. The Respondents submitted that there were no written and detailed terms and conditions of service. Further, at all material times, the Claimant's salary of Kshs 10,000/- per month was above the minimum wage as provided by the law. Nothing can be availed to him under this head.
34. It was further submitted that when the investigations on the misappropriation commenced, the Claimant absconded duty, thereby breaching the contract of service. After deserting duty for some time, the Claimant appeared at the Respondent's premises with a group of other employees who had been accused of fraudulent activities. They became rowdy. It took the intervention of the police to have them disbursed. They used abusive and insulting language and made threats against the Directors of the Company. This incident supplied a further ground for the termination of employment his employment.
35. On whether the Claimant was given an opportunity to be heard, the Respondent reiterates that the Claimant and others came to the Company's premises in a rowdy, confrontational manner, and were forced to leave the premises. They were not heard, therefore.
36. The Respondent submits that the Claimant was a contributor to the National Social Security Fund (NSSF) and so per Section 35 (6) (d) of the Employment Act, he is not entitled to service pay or gratuity. That statutory deductions from his salary were made and remitted to the fund.
37. On leave pay, the Respondent submits that unless otherwise agreed, an employee is entitled to 21 days leave pay for each completed year of service. Most importantly, leave must not be accumulated, and in any event not beyond 18 months per Section 28 (4) of the Employment Act. The Respondents asserted that at all material times, the Claimant took his annual leave. He has no outstanding unutilized leave days.
38. The Claimant having deserted duty and consequently breaching the contract of service cannot be heard to claim compensation for unfair termination. The termination of his employment was justified.
39. Finally, the Respondent submits that the Respondent should be accorded legal protection, not punishment, for protecting his right to property.

Issues for Determination

40. I have reviewed the pleadings, oral and documentary evidence, and submissions filed by both parties and authorities. The issues for determination are as follows: -
 - a. Whether the Claimant has sued the wrong party, and therefore the Respondent should be struck off from these proceedings;
 - b. Whether the Respondent unfairly terminated the Claimant's employment;
 - c. Whether the Claimant is entitled to the reliefs sought.



a. Whether the Claimant has sued the wrong party, and therefore the 1st Respondent should be struck off these proceedings

41. The Respondent argues that she has been wrongfully sued before this Court and that the Claimant's employer was actually a duly incorporated limited liability company, Chowpaty Fast Foods Limited, which has its own legal personality.
42. It was incumbent on the 1st Respondent to establish that the 2nd Respondent was a legal person and the employer of the Claimant at the material time. This is what Sections 107 and 109 of the *Evidence Act* Cap 80 of the Laws of Kenya enjoined her to do. He who alleges must prove. The Respondent did not place forth evidence in the form of a certificate of incorporation, employment contract or any employment document, from which the incorporation of the 2nd Defendant as a company, and the employee-employer relationship between the Claimant and it, can be discerned. In my view, the assertion by the 1st Respondent was just that bald assertion.
43. Be that as it may, I take notice of the fact that the Claimant's job identification and NSSF Statements which are both attached to his Memorandum of Claim read "Chowpaty" and "Chowpaty Fast Foods". It is impossible to ascertain whether Chowpaty is registered as a business name, or a limited liability company as alleged by the Respondent.
44. In the circumstances, I decline to strike out the Respondent's name from these proceedings.

b. Whether the Respondent unfairly terminated the Claimant's employment

45. It is not in dispute that the Claimant was an employee of the Respondent earning a monthly salary of Kshs 10,000/-, parties having entered into a verbal contract of employment.
46. The tone of the Claimant's pleadings and evidence is to the effect that his employment was brought to an end without any substantive justification and procedural fairness. The allegation that he was involved in the misappropriation of the Respondent's money stands on shaky ground.
47. It is this court's considered position that the termination of the Claimant's employment falls within the ambit of summary dismissal, owing to the fact that the termination appears to have been verbal without notice.
48. Section 44 of the *Employment Act* 2007 provides for summary dismissal, thus;

" 44. Summary dismissal

- (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.



- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
- (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
 - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
 - (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
 - (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
 - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
 - (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
 - (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

49. In order for the employer's decision to summarily dismiss his or her employee to be considered valid and fair, the employee's conduct, the basis for the dismissal must either be in the nature of those or any of them appearing on the catalogue under sub-section 4, or any conduct whose gravity could be similar to the listed conduct[s]. Imperative to say that section 44[4] does not provide an exhaustive list of the



employee's acts of commission and/or omission that can attract the sanction of summary dismissal. The test is the impact of the conduct on the employment relationship between the two. The conduct must be one that signifies that the employee has fundamentally breached his or her obligations under the contract, thereby repudiating the contract.

50. Section 43 of the *Employment Act* places a burden on the employer to prove the reason[s] for the dismissal. The Respondent asserted that the dismissal of the Claimant was stirred by his involvement in an elaborate conspiracy with other employees to defraud the Respondent. As a result of the conspiracy and fraudulent activities, the Respondent lost huge sums of money. This reason fits in the category of those contemplated under section 44[4].
51. However, this Court has time and again stated that it is not enough for the employer to just state that he or she dismissed the employee for this or that reason under the provisions of section 44 of the Act. He or she must go further to demonstrate that the reason was valid and fair. Indeed, this is what section 45[2] of the Act commands. Where the employer fails to demonstrate that the reason was fair and valid, the summary dismissal shall be deemed unfair.
52. The Respondent contended that the Claimant was placed under an investigatory suspension so that investigations into the conspiracy and fraud would be carried out without impediment. Further, that the investigations revealed the Claimant's hand in the conspiracy and the financial malpractice. Surprisingly, the Respondent failed to place any document before this Court whence it can be discerned that indeed investigations were carried out and that the Claimant was found to be part of the perpetrators of the fraudulent activities.
53. The Respondent further asserted that an external audit was carried out side by side with the above-stated investigations. What flowed out of the process cannot be ascertained from any document as the Respondent filed none.
54. An allegation of fraud against an employee is a serious allegation as indeed fraud is a felony. Where the employer alleges that he or she laid a report with the police to investigate a suspected criminal offence against its employee[s], reasonably the Court could expect the employer to indicate to it what the outcome of the investigations was. The expectation gets heightened when the employee asserts like it was in this matter, that the investigations were concluded, and the same vindicated his or his innocence. In this matter, all that the Respondent did was assert that the matter was reported to the police for investigation. The tone of the Respondent's witness's testimony was one that could lead to a safe conclusion either that there was a non-interest in following up on the progress of the investigations by the police or that the investigations exonerated the Claimant.
55. It has not escaped this Court's sight that the Respondent turns around in his submissions to give two other reasons for the termination of the Claimant's employment, namely, that the Claimant absconded his duties and deserted his place of work; and that the Claimant was violent towards his employers and used abusive and insulting language against them.
56. In my view, and with great respect, the submissions do not aid the Respondent's case in any manner. Counsel's submissions will never be a substitute for evidence and parties' pleadings, or be allowed to bring onboard a case matters that were never pleaded and testified on. This view finds support in the apt statement by the Court of Appeal in *IEBC & another v Stephen Mutinda Mule & 3 others* [2014] eKLR citing The Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002.



57. In *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

58. By reason of the premises foregoing, I am not persuaded that the Respondent had a substantive justification to summarily dismiss the Claimant from employment.

59. I now turn to consider the aspect of procedural fairness in the termination of the Claimant’s employment. Procedural fairness is a statutory prescript. Section 41 of the Act supplies the foundation and essence of procedural fairness in matters of termination of an employee’s employment. An employer contemplating terminating an employee’s employment or summarily dismissing him or her must adhere to the procedure set out therein. The provision is couched in mandatory terms. The section provides;

(1) an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, 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.

(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.”

60. In a dispute concerning the termination of an employee’s employment, the onus is on the employer to demonstrate that he or she adhered to the procedure contemplated under section 41 of the *Employment Act*. I have carefully considered the evidence by the Respondent’s witness, and conclude that it does not in any sufficient manner or at all demonstrate that before reaching the decision to terminate the employment of the Claimant, he; was notified of Respondent’s intention to terminate his employment and the grounds stirring the intention; given an opportunity to make representations on the grounds; and that a conscious decision was made after consideration of the representations.

61. For the above reasons, I return that the termination of the Claimant’s employment by the Respondent was procedurally and substantively unfair.

c. Whether the Claimant is entitled to the reliefs.

62. Save for submitting that the Claimant took all his leave days while in the Respondent’s employment, the Respondent has not produced evidence disproving the Claimant’s claim that he did not. If indeed he utilized his leave days, nothing would have been easier for the Respondent than to tender before the Court any documentary evidence for instance a leave application form or daily register for the material times to help the Court deduce that during various periods within the years, the Claimant picked and fully utilized his leave days. I am persuaded that the Claimant didn’t utilize his earned leave days during the four years.



63. Having said as I have hereinabove, then the question that pops up is, for what period can he get compensated for the unutilized leave days? Considering the provisions of section 90 of the Employment Act, he can only be compensated for three years immediately before the commencement of the suit.
64. The Respondent asserted that it paid the Claimant all his dues inclusive of the February 2017 salary. However, with great respect, this was just but a bald assertion without any proof. I am convinced that the Claimant was not paid his salary for the month. He is hereby awarded the same.
65. In the ordinary run of things, the Claimant's employment was one terminable by twenty-eight days' notice pursuant to the provisions of section 35 of the Act. Having found that no notice was issued by the Respondent and that the summary dismissal was unfair, I am convinced that notice pay in lieu of notice is deserved. To fail to make the award would be tantamount to rewarding the Respondent for her misdoing.
66. The Claimant produced evidence of NSSF payments made by the Respondent during his employment. Per Section 35 (6) of the Employment Act 2007, the Claimant is not entitled to service pay.
67. Section 49 (1) (c) of the Act, bestows on this Court power to grant a compensatory relief in favour of an employee who has successfully assailed his or her employer's decision to terminate his or his employment or summarily dismiss him or her from employment. Exercise of the power is discretionary, influenced by the circumstances of each case. This Court has keenly and carefully considered the manner in which the Claimant was terminated from employment, the casual disregard of the Respondent for fair labour practices and Sections 41 and 43 of the Employment Act, and the length of period the Claimant served the Respondent, and the fact that it was not demonstrated to the satisfaction of this Court that the Claimant contributed to the dismissal, and conclude that the Claimant is entitled to the relief contemplated under the section and to the extent of six months' gross salary.
68. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.
69. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the Claimant's dismissal from employment was unfair inequitable and in breach of the provisions Employment Act.
 - b. The Claimant be paid terminal dues as follows: -
 - i. Payment for unutilized leave days Kshs 10,333. 23
 - ii. Salary for February 2017 Kshs 10,000.00
 - iii. Compensation for unfair termination six months gross salary. Kshs 60,0000
 - c. Interest on (b) above at Court rates from the date of this Judgment until payment in full.
 - d. The Respondent bears the costs of this suit.
 - e. The Respondent is ordered to issue the Claimant with a Certificate of Service.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF OCTOBER, 2023.

OCHARO KEBIRA

JUDGE



In the Presence of:

Mr. Masese for 1st Respondent

Ms Wangui for the Claimant

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

