



**Katumbe v Sapna Bhandary t/a Chowpaty Fast Foods (Cause  
1439 of 2017) [2023] KEELRC 2712 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2712 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1439 OF 2017  
K OCHARO, J  
OCTOBER 5, 2023**

**BETWEEN**

**ESTHER KARIMI KATUMBE ..... CLAIMANT**

**AND**

**SAPNA BHANDARY T/A CHOWPATY FAST FOODS ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant herein filed a Memorandum of Claim dated 13<sup>th</sup> 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 her outstanding leave for ten (10) years, one month's salary in lieu of notice, salary for February 2017 and gratuity for the fifteen (15) 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 13<sup>th</sup> July 2017; List of Witnesses dated 13<sup>th</sup> July 2017; Witness Statement dated 13<sup>th</sup> July 2017; and List of Documents dated 13<sup>th</sup> July 2017.
3. In response to the Memorandum of Claim the Respondent filed a Response dated 5<sup>th</sup> September 2017; Witness Statement of Winston Kaburu Mwendwa, its Operations Manager dated 3<sup>rd</sup> October 2017 which was later substituted with the Witness Statement of Emmanuel Mbali Litumber dated 26<sup>th</sup> January 2023.

#### **Claimant's case**

4. It was the Claimant's that at all material she was an employee of the Respondent, in the position of a supervisor. Her role entailed supervising the other employees of the Respondent. Her gross monthly salary was Kshs. 20,000/- as at February 2017. Further, throughout her tenure as such an employee, she discharged her duties diligently and professionally.
5. She stated that on or about February 2017, the Respondent terminated her employment on unjustified grounds that she had misappropriated funds. Considering her role, of ensuring that the Respondent's customers were well served and sometimes assisting the waiters in taking orders from the customers. She was not receiving money from customers. The accusation was unreasonable.
6. The Claimant further stated that her employment was brought to an end without any written notice. It was done verbally, making it a summary dismissal. The dismissal was unfair, unlawful, unjust, inequitable and an affront to the precepts of the Employment Act and other Labour Laws in Kenya.
7. The Claimant states that she was never given an opportunity to defend herself on any allegations by the Respondent, she was victimized and subjected to unfair labour practices, and the decision to terminate her employment was not made honestly and in good faith.
8. She further stated that if there were any investigations as alleged by the Respondent, then the same was not brought to her attention. Further, she was not given any investigation report flowing from any investigation by the Respondent.
9. That at the time of the termination, the Claimant had worked for the Respondent for fifteen (15) years since 1<sup>st</sup> May 2002.
10. Cross-examined by Counsel for the Respondent, the Claimant asserted that she didn't have any disciplinary issues at any time in the course of her employment. She never received any warning letter at any time.
11. She reiterated that she could at no time receive money from customers.
12. She remembered this incident where it was alleged that a customer was allowed to go out of the restaurant without paying for the services that were rendered to him. The matter was sorted out by the Manager as the same fell squarely within his docket.
13. Reconciliation of accounts was being done by the owner of the business herself. The Claimant further stated that she was sent home a day after the incident abovementioned. It was intimated to her that the action was aimed at allowing the Respondent to carry out investigations.
14. The Claimant stated that following the events, she was summoned to Parklands Police Station to record a statement. She readily did so. Despite this, she was never summoned by the police on the outcome of the investigations.



15. She further contended that one of her colleagues, Mr. Wekesa who had been dismissed under similar circumstances like hers, was called back by the Respondent and paid his terminal dues. The Respondent didn't pay her terminal dues.
16. The Claimant testified that the Respondent used to deduct her salary for NSSF and NHIF, contributions. However, the deductions commenced two years after her employment.

### **Respondent's case**

17. In its Response to the Memorandum of Claim, dated 5<sup>th</sup> September 2017, the Respondent stated that the Claimant wrongfully sued her. She is a Director described of the Company mentioned in her pleadings. It was improper for the Claimant to sue her in her personal capacity.
18. The Respondent presented Mr. Emmanuel Mbai to testify in support of her case. The witness 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.
19. The witness stated that sometime in 2016 - 2017, a trend Respondent 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.
20. 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.
21. 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.
22. 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 daily. The Respondent had lost KShs. 750,000.
23. The conspirators were asked to step aside to enable the Respondent to carry out investigations, and other members of staff, and those implicated were allowed to give their statements. It was concluded that the Claimant and her colleagues were involved in the fraud.
24. 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.
25. 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 her colleagues were never arraigned in court.



### **Claimant's Submissions**

26. The Claimant filed submissions dated 15<sup>th</sup> February 2023. She reiterates the contents of her Memorandum of Claim and submits further that no sufficient defence was mounted against the Claimant's claim by the Respondent through the evidence of its witness.
27. It was argued that the Claimant was only a supervisor who never would handle cash in the discharge of her functions. Additionally, she was not charged at any time with any criminal offence. No disciplinary action was conducted on the accusations that were levelled against her. The termination of her of her employment was unfair. Consequently, the reliefs sought should be availed to her.

### **Respondent's Submissions**

28. On the Respondent's part, she filed submissions dated 10<sup>th</sup> March 2023.
29. It is the Respondent's submission that 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 other 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. That the police had to intervene to disperse the rowdy crowd.
30. The Respondent submits that it is not in dispute that the Claimant was an employee of the Respondent, that statutory deductions including NSSF were being effected when the employment appears to have come to an end, and that the Respondent raised issues concerning suspected irregularities in the Company.
31. It is also submitted that the Respondent's 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. That 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.
32. It is averred by the Respondent that there was no written and detailed terms of conditions of service. They state that the Kshs. 20,000/- per month was above the minimum wage as provided by the law and so nothing is outstanding on this item.
  33. The Respondent states that the Claimant absconded from work when the investigation as to the loss of the company revenue was commenced, deserted and was therefore in breach of contract. she appeared once in the company of other employees who were also suspected of being involved in the fraudulent scheme. That the Claimant and others used abusive and insulting language in a manner threatening to inflict harm to the Directors of the Company which caused or contributed to her termination of employment as provided in section 49 (4) (k) and 49 (4) (l). that the Claimant should have acted prudently and mitigated her losses, per section 49 (4)(l).
  34. 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 when the Company called for police assistance. That the labour office was duly informed and tried to mediate but was not given a chance.
  35. 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*, she is not entitled to service pay or gratuity. That statutory deductions from her salary were made and remitted to the fund. That the Claimant delayed to register for NSSF and at that time women had a choice whether to be members or not.
  36. 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 Respondent is adamant that the Claimant took leave for all the days that she worked for the Respondent and so her claim must fail.
  37. On general damages, it is submitted that the Claimant absconded and committed offences that warrant instant dismissal including being violent and/or threatening breach of peace; deserting her employment; being implicated for a loss of Kshs. 2.5 million in a fraudulent scheme and refusing to be cleared through investigation.
  38. Finally, the Respondent submits that the Respondent should be accorded legal protection, not punishment, for protecting her right to property.

### **Issues for Determination**

39. I have reviewed the pleadings, oral and documentary evidence, and submissions filed by both parties and authorities. The following issues emerge for determination;
  - a. Whether the Respondent unfairly terminated the Claimant's employment;
  - b. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Respondent unfairly terminated the Claimant's employment**

40. It is not in dispute that the Claimant was an employee of the Respondent earning a monthly salary of Kshs. 20,000/-. The contract was verbal.



41. The tone of the Claimant’s pleadings and evidence is to the effect that her employment was brought to an end without any substantive justification and procedural fairness. The allegation that she was involved in the misappropriation of the Respondent’s money stands on shaky ground.
42. It is this court’s considered view that the Claimant was summarily dismissed from employment. The termination was without any notice. Section 44 of the Employment Act 2007 contains provisions on summary dismissal. It states that:

“ 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 her conduct indicated that she has fundamentally breached her 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 her work;
  - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform her work properly;
  - (c) an employee wilfully neglects to perform any work which it was her duty to perform, or if she carelessly and improperly performs any work which from its nature it was her duty, under her contract, to have performed carefully and properly;
  - (d) an employee uses abusive or insulting language, or behaves in a manner insulting to her employer or to a person placed in authority over him by her employer;



- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of her duty to obey, issued by her employer or a person placed in authority over him by her 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 her employer or her employer's property.”

43. 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.
44. 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 her 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].
45. 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.
46. 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.
47. 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.



48. 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 her 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.
49. It has not escaped this Court's sight that the Respondent turns around in her submissions to give two other reasons for the termination of the Claimant's employment, namely, that the Claimant absconded her duties and deserted her place of work; and that the Claimant was violent towards her employers and used abusive and insulting language against them.
50. In my view, the submissions with great respect do not aid the Claimant's case in any manner. Counsel's submissions will never be a substitute for evidence and parties' pleadings, or be allowed to bring on board a case, matters that were never pleaded and testified on.
51. 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.”
52. By reason of the premises foregoing I am not persuaded that the Respondent had a substantive justification to summarily dismiss the Claimant from employment.
53. 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) Subject to section 42(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 her 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.”
54. 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, she; was notified of its intention to terminate her employment and the grounds stirring the intention; given an opportunity to make representations on the grounds; and that it made a conscious decision after consideration of the representations.

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

**Whether the Claimant should be granted the reliefs sought.**

56. The Claimant prays for leave days for 10 years; one month's pay presumably in lieu of notice; salary for February 2017; gratuity for 4 years and general damages for breach of contract/wrongful dismissal.
57. Save for submitting that the Claimant took all her leave days while in the Respondent's employment, the Respondent has not produced evidence disproving the Claimant's claim that she did not. If indeed she utilized her 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 her leave days. I am persuaded that the Claimant didn't utilize her earned leave days during the four years.
58. Having said as I have hereinabove, then the question that pops up is, for what period can she get compensated for the unutilized leave days? Considering the provisions of section 90 of the Employment Act, she can only be for three years immediately before the commencement of the suit.
59. The Respondent asserted that it paid the Claimant all her 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 her salary for the month. She is hereby awarded the same.
60. In the ordinary run of things, the Claimant's employment was one terminable by a 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.
61. The Claimant produced evidence of NSSF payments made by the Respondent during her employment. Per Section 35 (6) of the Employment Act 2007, the Claimant is not entitled to service pay.
62. 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 her 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.
63. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.



64. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the Claimant's dismissal was procedurally and substantively unfair, and unlawful.
  - b. The Claimant be paid as follows: -
    - i. Payment for earned but unutilized Leave days Kshs. 20,999.79
    - ii. Salary for February 2017 Kshs. 20,000.00
    - iii. Compensation for unfair termination pursuant to section 49[1][c] of the Employment Act..... (20,000/- x 6) Kshs. 120,000.00
    - iv. One month's salary in lieu of notice ... KShs. 20,000.00
  - c. Interest on (b) above at Court rates from the date of 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, within 30 days of this Judgment.

**READ, DELIVERED AND SIGNED THIS 5<sup>th</sup> DAY OF OCTOBER, 2023.**

**OCHARO, KEBIRA**

**JUDGE**

