



**Kenya Union of Domestic Hotels, Educational Institutions and
Hospitals Workers (KUDHEIHA) v KSLH Mombasa Beach Hotel (Cause
E035 of 2023) [2023] KEELRC 3170 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3170 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E035 OF 2023
M MBARŪ, J
NOVEMBER 30, 2023**

BETWEEN

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

AND

KSLH MOMBASA BEACH HOTEL RESPONDENT

JUDGMENT

1. The grievant was employed by the respondent as a casual employee in December 1993 and then given a written contract dated 1st May 1994. The grievant worked until 12 May 2022 when his employment was terminated. At the time he was earning Kshs. 44,651 per month.
2. The claim is that on 1st April 2022 the grievant was suspended from duty following a management security report that items suspected to belong to the respondent were found inside a van Registration number KDE 945V on 31st March 2022 belonging to Top in Town laundry service. He was issued a show cause notice dated 16 April 2022 on allegations that he was involved in the confiscated hotel items found in the vehicle on 31st March 2022. On 19 April 2022 the grievant responded that he was not aware of how the suspected items were found in the van.
3. On 27 April 2022 the disciplinary meeting was held leading to summary dismissal of the grievant on 12 May 2022 on the grounds of theft. He appealed against the decision but the summary dismissal was upheld. The claimant made a report to the Minister with a decision that the grievant should be reinstated back to his employment but there was no compliance.
4. The claim is that there was unfair termination of employment and the following dues should be awarded;
 - a. Compensation for unfair termination of employment Kshs. 535,812;



- b. 4 months' salary in lieu of notice at Kshs. 178,604;
 - c. Service gratuity for 29 years Kshs. 647,439;
 - d. Annual leave for 2022 Kshs. 11,904;
 - e. Leave travelling allowance Kshs. 5,600;
 - f. 10 pending leave days Kshs. 14,880;
 - g. Compensation for 10 years' shoes allowances;
 - h. Damages for malicious prosecution; and
 - i. Costs of the suit.
5. The grievant testified that he worked for the respondent for 29 years without a disciplinary record as head linen keeper. His duties were to keep stock and monitor all linen in the hotel. On 31st March 2022 while waiting for the service provider to receive towels, he did his duties as required but when he was leaving work and shift at 4.15pm he found the same vehicle KDE 945V at the gate. The staff called him and noted that several items of the respondent were found inside the vehicle. He was then allowed to leave but the next day he was served with notice of suspension on the grounds that the service provider was found with hotel goods in the vehicle used to deliver linen at the hotel.
6. The claimant testified that he was issued with a notice to show cause, he replied and denied knowledge of the items and later he was called to the disciplinary hearing. The items alleged to have been stolen were found in the vehicle but these did not relate to his work. He was dismissed by the respondent and when the matter was reported to the Minister, a finding was that there was no evidence to link him to the stolen items and he should be reinstated but the respondent refused.
7. Upon cross-examination, the grievant testified that he was in charge of linen in the hotel. Cleaning was outsourced to Top in Town laundry services. They would pick and deliver all linen for the hotel and he was required to confirm. On 31st March 2022 while he was on duty, the company delivered towels and he did as required. He was not aware of any theft leading to the summary dismissal. The CCTV footage used by security did not show him stealing or issuing the allegedly stolen items to the team that delivered towels.
8. The grievant testified that he had access to the kitchen only to collect linen. He gave the delivery team a hotel bag that had been disposed but the food items alleged to have been stolen were not part of the linen he received there was a security guard who confirmed the delivery made. He did not note anything missing. This was a delivery day only and nothing else left his office.
9. The grievant also testified that upon the summary dismissal, he applied to the respondent and has since received several payments including the following;
- On 5 August 2022 he was paid Kshs. 50,000;
 - On 19 October 2022 he was paid Kshs. 25,000;
 - On 14 November 2022 he was paid Kshs. 25,000;
10. The cheque number 24315 dated 28 December 2022 for Kshs. 40,000 he did not receive the payment.
11. The cheque issued in April 2023 for Kshs. 34,990 he did not receive the payment.



12. The respondent's case is that the grievant had a written contract of employment and his employment was regulated under the law and the code of conduct and the CBA. Employment terminated lawfully on 12 May 2022 through summary dismissal. At the time, the grievant was earning Kshs. 30,370 and a house allowance of Kshs. 8,687.03 total being Kshs. 39,057.03 per month.
13. The grievant enjoyed a service charge which was not part of his salary and varied from month to month.
14. As the head linen keeper, the grievant's duties were to oversee, plan and coordinate all activities at the linen section. He was responsible for receiving all laundry. He had a duty of care and to safeguard the financial interests of the respondent.
15. Attempted theft incident occurred at the respondent's premises on 31st March 2022 and upon investigations a report dated 5 April 2022 indicated that around 15.34 hours, at the supplies gate, a guard Mr Wambua while conducting a search on a top in Town laundry services van number KDE 945V found items wrapped with blue linen used to wrap towels tied off with a white bag belonging to the respondent. The items found were;
 - 9 packets of milk;
 - 2 spaghettis and
 - sugar tied in a blue bag.
16. Upon enquiry, the delivery team said they had bought these items at Naivas Supermarket but had no receipt. The items were in a bag belonging to the respondent and they told Wambua that a staff of the hotel had given them the bag being the grievant. He then handed over the matter to the security manager, Mr Orwa.

Upon instigations, the items found in the van were established to be;

 - 9 x 500ml of fresh milk (Daima);
 - 2 x 400gm of spaghetti (Santa Maria);
 - 3kg of sugar wrapped in an old blue bag.
17. The delivery team, Samson Juma Baya, the driver and Safari Charo Kiyeye, the loader had just delivered linen to the respondent. The items found in the delivery van are similar to items in the respondent's food store. The security team called the office and confirmed that the manager had not sent his team to the supermarket to buy them as alleged. There was no receipt for the purchase.
18. The security team recovered the CCTV footage for the investigations and which revealed that at 1138hours, Erick Chepkuony of maintenance department was at the chef's dry good store and he came out holding a carton of milk. At 1246hours, the grievant entered the kitchen and exited through the linen offices and at 1312hours he was captured carrying some linen which looked weighty. At 1314hours he was seen carrying a carton. At 1352hours the delivery team is seen carrying luggage from the laundry and at 1532 the laundry van is stopped at the gate for inspection where the food items were discovered
19. The grievant violated the code of conduct through theft and dishonesty, he was issued with a notice to show cause and taken through the disciplinary process and found culpable for gross misconduct leading to summary dismissal. He was allowed an appeal but this had no merit.
20. The grievant has since been paid the sum of Kshs. 224,990, he had no untaken leave days and a certificate of service was issued. On the claim for service gratuity, the grievant is a member of NSSF.



On the claim for annual leave for 2021 and 2022, all such leave days' had been fully utilised. The shoes allowance was paid and the claim for malicious prosecution is without evidence and the claim should be dismissed with costs.

21. In evidence, the respondent called Bernard Odhiambo Orwa the security officer who testified that he is in charge of security matters and on 31st March 2022 he was called back to work following an incident of attempted theft. He investigated the matter and submitted a report that looked at the CCTV footage and established that the grievant had suspicious movements from the kitchen to his office and he gave the delivery team a bag that had wrapped the food items found in the vehicle KDE 945V. The team alleged they had purchased the items at the supermarket on behalf of their director. A call was made but indicated no such purchase was done. The team were asked to give a receipt, they went to the supermarket and got different items different from what was in the bag. The items found by the security team belonged to the respondent and the grievant was the only employee in connection with this team. When called to the disciplinary hearing, he could not explain his movements and this led to his summary dismissal.
22. The respondent also called Eunice Nzilani the human resource manager who testified that following attempted theft incident on 31st March 2022, the grievant was suspended to allow for investigations. Security confirmed that the outsourced company for linen cleaning had delivered linen on this day but when exiting, security found various items and foodstuffs in the vehicle. The team could not explain how these related to the delivery for the day and further investigations demonstrated that this was the property of the respondent.
23. The grievant was invited to show cause and attended disciplinary hearing. He was found culpable and summary dismissal issued.
24. The grievant has since been paid a total of Kshs. 224,990 as part of the terminal dues.
25. The grievant had worked for 29 years without any record. The CBA allowed for payment of gratuity. Following the introduction of pension scheme, payment of gratuity stopped and the grievant had 21 years for service pay. At the close of the hearing, both parties filed written submissions.

Determination

26. Through notice dated 12 May 2022, the respondent dismissed the grievant from his employment on the grounds that on 31st March 2022, various goods were impounded from the delivery van of Top in Town laundry company that had been sourced to clean linen for the respondent. The case was that there were food items found in the hotel laundry bag, the bag had been given by the grievant whereas there was no linen collection of this day. The CCTV footage recovered showed the grievant had visited the kitchen area which was out of bounds for non-kitchen staff, the hotel bag showed it had something inside and the grievant was the only employee dealing with the delivery team.
27. It is not contested that the grievant was issued with a show cause notice and he replied. He denied any involvement in theft as alleged. He was invited for disciplinary hearing and again, he declined knowledge of being involved in theft. He admitted that indeed, the old blue bag was given to the team, but this being a day for delivery of linen, it had nothing inside.
28. The CCTV footage was played in court. The grievant was able to explain his movements from one point to the next.
29. The investigations report by the security team revealed that the delivery team were adamant that the food items were from a supermarket and their boss, Miriam had sent them, but this was discounted when Miriam was called;



30. The receipt for the purchase of the food items had different good than those found in the van. It was from Carrefour and not Naivas as alleged;
31. The food items were fundamentally different from what was received and had a link to the items from the respondent's food store;

But what was the link to the grievant?

In the investigations report; the following it noted;

... at 1138hrs Mr. Erick Chepkuony of maintenance department is seen entering the kitchen through the main door and heads to the right. This is where we have the Chef's dry goods store, deep freezer and the vegetable store.

He comes out three minutes later but this time through Gazebo kitchen. On his hands is a carton of milk with the seal still intact, most likely it was full.

He took his time and even had one minute chat with Esatia who was at the Gazebo kitchen. During this tie the carton was firmly in his hands.

He comes out of Gazebo at around 1143hrs and heads to his right, the direction of the senior staff canteen.

The report further noted the following;

At 1246 hrs Mr Mutta meets Dorothy (PA Attendant) at the Gazebo kitchen corridor and both of them walk to the right. A few minutes later, Dorothy is seen heading to the junior staff canteen alone (not with Mutta).

Mutta on the other hand enters the kitchen through the main door and comes out via Gazebo at 1249hrs and heads to the stairs to the housekeeping/linen office

At 1312hrs Mutta is captured carrying what look like some linen on his left hand and body. He is from the direction of laundry. The white linen looks weighty/sagging

At 1314hrs, Mutta is seen heading to the stairs while carrying what looks like a carton with the white linen seen earlier on top of the carton. The top is covered with a red cloth. He is holding the carton from bottom with both hands ...

A very subjective approach to investigations.

32. The person investigating noted that a Mr Erick Chepkuony was seen with a carton of milk with the seal intact. The grievant is seen with Dorothy. The grievant is seen carrying linen that looks weighty/sagging. The grievant is seen carrying a carton of milk covered with a red cloth.
33. The food items found in the linen delivery van are said to belong to the respondent from the Chef's dry food stores. That this store and kitchen areas was out of bounds for other staff. The grievant admitted that he had access to the kitchen to collect linen. Did the Chef responsible for the dry food store explain whether there were missing food staff items missing? Who is this Erick Chepkuony who was seen carrying a carton of milk with seals intact? Where is Dorothy who was seen walking with the grievant to the kitchen door?
34. I take it, the respondent has put in place systems and strategies to address workplace movements. An account for every item that is issued and entered. Movements and related matters hence the availability of CCTV cameras at different points in the event of security breaches.



35. There is nothing in the entirety of the footage submitted in court to link the grievant to the items found in the delivery van KDE 945V.
36. The grievant admitted that on 31st March 2022 was a delivery day. No linen was leaving the premises. He also admitted that he gave the delivery team an old blue bag.
37. Was the grievant captured giving the blue bag with the food items found in the delivery van?
This was left grey.
38. Wambua witnessed the linen delivery. Nothing else. It was noted that the delivery team refused to reveal their accomplices. This called for the respondent to undertake thorough investigations. To pick on the grievant who admitted to his role of giving out a blue bag without taking stock of the kitchen stocks, the movement accounts for all other employees was to victimise him for no good cause.
39. The grievant had served the respondent for over 29 years. He had a clean record. This should have accounted for something.
40. Taking the grievant through the due process of allowing him to respond to the show cause notice and attend disciplinary hearing does not sanitise the lack of a justified reason that was valid and reasonable in the circumstances of this case.
This resulted in unfair termination of employment.
41. The claimant has claimed for notice pay at 4 months based on the CBA. The subject CBA is not attached. This is a grave missing link with regard to the assessment of the claims made.
42. In the absence of the CBA, award of 30 days' notice pay is due in terms of Section 35 of the [Employment Act](#), 2007 (the Act).
43. On the finding there was unfair termination of employment, compensation is hereby awarded at 3 months' gross wage. The grievant was earning Kshs. 39,057.03 per month. This amounts to Kshs. 117,171 in compensation.
44. On service gratuity, the respondent admitted that this was due before the pension scheme was introduced and the grievant had 21 years thereof.
45. Without the CBA with details as to how service was tabulated, the minimum threshold is Section 35(5) of the Act at 15 days for every completed year. At the last wage of Kshs. 39,057.03 per month this amounts to Kshs. 19,528.50 x 21 = Kshs. 410,099 in service gratuity.
46. On the claim for annual leave for the year 2021 and 2022, there is no record filed by the respondent as to whether the grievant had taken all his leave days and had a nil balance. The claim of Kshs. 11,904 for leave pay due in 2022, Kshs. 5,000 for leave travelling allowance and 10 days pending leave for 2021 is found justified at Kshs. 14,880.
47. On the claim for damages for false prosecution, this matter relates to employment and labour relations, the finding that there was unfair termination of employment which addressed and redressed is found sufficient.
48. The claim successful, the claimant is hereby awarded costs assessed at Kshs. 100,000.
49. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. A declaration that employment terminated unfairly;



- b. Compensation Kshs. 117,171;
- c. Notice pay Kshs. 39,057.03;
- d. Service gratuity Kshs. 410,099;
- e. Leave pay for 2022 Kshs. 11,904;
- f. Leave pay for 2021 Kshs. 14,880;
- g. Leave travelling allowance Kshs. 5,000;
- h. Costs of Kshs. 100,000
- i. The dues above shall be paid less what the grievant has since been paid in terminal dues for service pay and owed leave days without compromise on the awards for compensation.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

