



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**APPEAL NO. E014 OF 2021**

**DOSHI & COMPANY (HARDWARE) LIMITED .....APPELLANT**

**VERSUS**

**KARISA CHARO MWAYAYA .....RESPONDENT**

*(Being an Appeal from the judgment and decree of the Learned Principal Magistrate Hon. Lesootia A.S in Mombasa CMELRC No. 479 of 2019 delivered on the 26<sup>th</sup> February 2021)*

**J U D G M E N T**

1. Vide a Memorandum of Claim dated 2<sup>nd</sup> April 2019 and filed in the Chief Magistrate’s Court at Mombasa on 30<sup>th</sup> May 2019, the Respondent herein, Karisa Charo Mwayaya (hereinafter interchangeably referred to as **Karisa**) sued the Appellant herein and pleaded, *inter alia*,:-

- a) that he (Karisa) was employed by the Appellant as a Machine Operator from 1<sup>st</sup> June 1993, and retained continuous employment as such upto the time of termination of employment on 22<sup>nd</sup> March 2017.
- b) that his employment was terminated vide a letter dated 22<sup>nd</sup> March 2017 on grounds of absenteeism for one (1) day on 9<sup>th</sup> March 2017, a day of which he (Karisa) had gone to file DOSH Forms as per the Respondent’s instructions.
- c) that he was not given any warning nor a hearing to defend himself, and that the criteria applied in arriving at such decision to summarily dismiss him from employment was unlawful and unfair.
- d) that his initial and terminal earnings were ksh.24,500 per month.
- e) that he diligently worked for 24 years and his termination was wrongful, unlawful, abrupt and in total contravention of Sections 41, 43, and 44 of the Employment Act in that he (Karisa) was not subjected to substantive and procedural justice afforded to all employees in summary termination process.
- f) that the Appellant did not act in accordance with Justice and equity in dismissing him summarily without just cause.
- g) that he (Karisa) was not granted concise information on the charges levelled against him and/or relevant time to mount his defence before he was summarily dismissed.

2. The Respondent herein (Karisa) prayed for the following reliefs against the Appellant.

- a) 12 months compensation for unfair and unlawful termination .....ksh.294,000
- b) Pay in lieu of notice .....ksh.24,500
- c) Accrued annual leave for 24 years worked .....ksh.558,000
- d) House allowance 24 years worked @15% ( 3657x12 months x24) .....ksh.1,058,400

e) Severance pay (ksh.12,250x24).....ksh. 294,900

Total ksh.2,228,900

3. The Respondent further prayed for a declaration that termination of his employment was unfair and unlawful, issuance of a Certificate of Service, costs of the suit and interest.

4. Along with the Memorandum of Claim, the Respondent filed his witness statement dated 25<sup>th</sup> October 2018 and a list of documents dated 2<sup>nd</sup> April 2019, listing some ten (10) documents which included a letter by the Respondent to the Appellant dated 9<sup>th</sup> March 2017, warning letter by the Appellant to the Respondent dated 14<sup>th</sup> March 2017, termination letter dated 22<sup>nd</sup> March 2017, a hearing notice dated 10<sup>th</sup> March 2017 inviting the Respondent for a hearing on 14<sup>th</sup> March 2017 over a DOSH I form issued to him on 19<sup>th</sup> November 2016 and a Certificate of Service.

5. The Appellant defended the suit vide a Response to the Memorandum of Claim dated 11<sup>th</sup> June 2019 whereby the Appellant denied the Respondent's claim and pleaded, *inter alia*,

**a) that the Respondent was employed on casual basis before his fixed term engagements with his wages being settled daily.**

**b) that the Claimant's dismissal from employment on 22<sup>nd</sup> March 2017 was just and lawful and in accordance with Section 44(4) of the Employment Act 2007.**

**c) that the Respondent was not entitled to the terminal dues claimed as he was paid all his terminal dues in full and in accordance with the Employment Act 2007.**

**d) that the Respondent absented himself from work without leave on 9<sup>th</sup> March 2017 and on 10<sup>th</sup> March 2017 and was consequently issued with a letter to show cause on his misconduct as per section 41 of the Employment Act.**

**e) that the Claimant was invited for a disciplinary hearing on 21<sup>st</sup> March 2017 when he was given an opportunity to be heard, and to call a colleague of his choice to the hearing, and that the disciplinary committee established that the Respondent was guilty as alleged and recommended his dismissal from employment.**

**f) that the Respondent was issued with a termination letter on 22<sup>nd</sup> March 2017.**

**g) that the Claimant's claim was a sham, lacked merit and was an abuse of the Court's process.**

6. Along with the said Response to the Memorandum of Claim, the Appellant filed a list of documents dated 24<sup>th</sup> July 2019, listing eight (8) fixed term contracts between itself and the Respondent covering the period 1<sup>st</sup> August 2011 to 31<sup>st</sup> May 2017.

7. The Appellant also filed a witness statement by one Masila Ngungu (dated 12<sup>th</sup> July 2019) which basically replicated the averments made in the Appellant's Response to the Respondent's Memorandum of Claim.

8. When trial opened before the trial Court on 6<sup>th</sup> November 2019, the Respondent herein (being the Claimant in the lower Court suit) adopted his filed witness statement as his testimony. He further produced as exhibits the documents listed on his filed list of documents.

9. Under cross examination by the Appellant's Counsel, the Respondent testified that the Appellant asked him to go and look for a DOSH 1 Form which he had left at home. That as he could not trace the DOSH 1 Form in good time, he called his supervisor and told him that he (the Respondent) could not trace the form in good time and return to work. This evidence was not rebutted by the Appellant.

10. The Respondent further testified (under cross examination) that he later wrote a letter to explain the position. That he was paid for the last month worked plus one month salary in lieu of notice.

11. The Respondent produced in evidence a letter by him to the appellant dated 9<sup>th</sup> March 2017, explaining that he had been unable to trace the DOSH 1 Form which he had kept with his other documents. That he would search for it and would take it to the Appellant once he found it. The appellant did not deny having received the said letter, and did not deny having sent the Respondent home on 9<sup>th</sup> March 2017 to find the DOSH 1 Form mentioned in the letter.

12. Indeed, the Appellant wrote a letter to the Respondent on 14<sup>th</sup> March 2017 referring to a discussion in the Human Resource Manager's office on 8<sup>th</sup> March 2017 where it was alleged:-

***"...that on 19<sup>th</sup> November 2016, you were issued with a covering letter and DOSH Form to be filled by the doctor in charge and you did not turn up with any feedback from the doctor despite numerous reminders from the HR department notwithstanding... This letter therefore serves as warning to you giving you another opportunity to correct yourself. Should there be repeat of a similar offence in future, the management shall not hesitate in taking a severe disciplinary action against you."***

13. The foregoing warning seems to have come after an earlier letter by the Appellant dated 10<sup>th</sup> March 2017 titled "invitation for hearing"

which stated in part:-

**“...we refer to the discussion in the Human Resource Manager’s office on 8<sup>th</sup> March 2017 where it is alleged that on 19<sup>th</sup> November 2016 you were issued with a covering letter and DOSH Form to be filled by the doctor in charge...A written explanation was sought from you by the Human Resource Manager on 8<sup>th</sup> March 2017. Your response was received and noted however not satisfactory to the management. You are hereby invited for a disciplinary hearing on Tuesday 14<sup>th</sup> March 2017 at 2pm in the Conference Room. Please note that you may come with at least one person as your witness.”**

14. The Respondent’s employment was subsequently terminated by the Appellant vide a Termination of Service Letter dated 22<sup>nd</sup> March 2017, which stated in part:-

**“Reference is made to the incidence on 9<sup>th</sup> March 2017 where you failed to report to work after informing your supervisor that you will report late. You decided never to show up and thereafter disrupting the normal shift operations. You resumed duty on 10<sup>th</sup> March 2017 and when asked of your not reporting on duty you claimed that you were send to go for the DOSH 1 forms. You never bothered to complete the leave forms as per the laid down company procedure and policy even after resuming.**

**A show cause was issued to you to explain the reasons as to why disciplinary action should not be taken against you and your response was received however not satisfactory to the management. A hearing was conducted on the 21<sup>st</sup> March 2017 where it was confirmed that you indeed absconded duty...The company has been lenient and decided to terminate your services with effect from 22<sup>nd</sup> March 2017. You will be paid the salary earned upto and including 22<sup>nd</sup> March 2017, pay in lieu of notice, accrued leave days, overtime and shift differential if any.”**

15. It is to be noted that although the Appellant was by law the custodian of all employment documents relating to the Respondent’s employment, it did not produce any letter, notice or show cause letter accusing the Respondent of absconding duty on 9<sup>th</sup> March 2017 and calling upon him to respond to the same in the manner mandatorily provided for under Section 41 of the Employment Act. The accusation of absconding duty first surfaced in the termination letter dated 22<sup>nd</sup> March 2017.

16. Further, minutes and/or proceedings of the disciplinary meeting alleged in the termination letter to have taken place on 21<sup>st</sup> March 2017 were not produced in Court by the Appellant.

17. The disciplinary hearing that is alluded to in the Appellant’s letter dated 14<sup>th</sup> March 2017 is implied to have taken place regarding the Respondent’s alleged failure to return to the Appellant the DOSH 1 Forms, alleged to have been issued to the Respondent by the Appellant on 19<sup>th</sup> November 2016. I use the terms alluded and implied because again, no minutes and or proceedings on such a meeting were produced in Court by the Appellant.

18. Possibly aware that it was terminating the Respondent’s employment unfairly on purported grounds that had not been explained to the Respondent and on which he had not been heard in the manner set out in Section 41 of the Employment Act, the Appellant inserted the following clause in the Respondent’s termination letter dated 22<sup>nd</sup> March 2017:-

**“the management wishes to remind you that it is not the first time you are committing a work related offence. A week ago you were issued with a warning letter for ignoring the safety requirements.”**

19. The insertion of the foregoing clause in the Respondent’s letter of termination of employment does not, and cannot atone for the Appellant’s transgression of failing to comply with Section 41 of the Employment Act in terminating the Respondents’ employment. It was held in the case of DR JOSEPH MAINGI MAITHA –VS- PERMANENT SECRETARY MINISTRY OF MDICAL SERVICES & ANOTHER [ 2015] eKLR that once some form of disciplinary action is shown to have been taken against an employee, offences forming the subject matter of the concluded disciplinary process cannot be used against the employee at a future date. An employer cannot, therefore, use warning letters as a basis for terminating an employee’s contract of employment.

20. Whatever disciplinary process culminated in the issuance of the warning letter dated 14<sup>th</sup> March 2017 after disciplinary proceedings on that date and on the issue involved ended with the warning letter shown to have been issued on the said date (14<sup>th</sup> March 2017).

21. This being a first appeal, this Court is obligated to evaluate the evidence adduced before the trial Court, and where possible arrive at its own findings that may not necessary agree with the trail Court’s findings, though bearing in mind that this Court did not observe the witnesses as they testified.

22. The trial Court framed three issues for determination. These are:

- a) whether termination of the Respondent’s employment was unfair.**
- b) whether the Respondent was entitled to the reliefs and remedies sought.**
- c) who should bear the costs of the claim.**

23. The trial Court determined the foregoing issues and rendered its judgment on 26<sup>th</sup> February 2017. The present appeal has been lodged

against the said judgment. A total of twelve grounds of appeal have been raised in the Memorandum of Appeal dated 15<sup>th</sup> March 2021.

24. In my view, the aforesaid issues are the same issues that fall for determination in this appeal.

25. On the first issues, the Appellant herein did not, in terminating the Claimant's employment on account of absencing himself from duty on 9<sup>th</sup> March 2017, comply with the mandatory procedural requirements of Section 41 of the Employment Act.

26. In the case of JANET NYANDIKO –VS- KENYA COMMERCIAL BANK LIMITED [2017] eKLR, the Court of Appeal summarized the mandatory procedure of terminating an employee's employment as follows:-

***“Section 45 of the Act makes provision, inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity. The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee upto the date of termination, the extent to which the employer has complied with Section 41. Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer.”***

27. The foregoing position was again adopted by the Court of Appeal in the case of NATIONAL BANK OF KENYA VS- SAMUEL NGURU MUTONYA [2019] eKLR as the correct position in law that an employer ought to invoke when contemplating termination of an employee's employment.

28. In the present case, none of the procedures outlined above were shown to have been undertaken by the Appellant in terminating Karisa's (the Respondent's) employment on account of alleged absenteeism from duty without leave on 9<sup>th</sup> March 2017.

29. Indeed, it is to be noted that the Respondent's evidence that it was the Appellant who asked him (on 9<sup>th</sup> March 2017) to go and get the DOSH 1 Forms issued to him by the Appellant on 19<sup>th</sup> November 2016 was never rebutted by the Appellant. Further, the Appellant did not rebut the Respondent's evidence that the Respondent called his supervisor and informed him that he could not get the said form and could not, therefore, get back to work in time.

30. Termination of the Respondent's employment by the Appellant was unprocedurally done, and was not based on any valid reason. The termination was both procedurally and substantively unfair. I so find hold, and uphold the trial Court's finding in that regard.

31. On the second issue, the trial Court awarded the Respondent:

a) Ksh.474,923.08 being payment for accrued leave days.

b) Ksh.245,000 being the equivalent of ten months salary as compensation for unfair termination of employment.

32. Taking into account the period of twenty four (24) years for which the Respondent had worked for the Appellant and the unfair manner in which the employment was terminated, and the circumstances thereof, I find no reason to disturb the equivalent of ten months' salary award made by the trial Court as compensation for unfair termination of employment.

33. On the award of ksh.474,923.08 made by the trial Court as payment for leave days accrued over the undisputed period of twenty four(24) years that the Respondent worked in the Appellant company, and which award is disputed by the Appellant vide ground nos. 7 and 8 in the Memorandum of Appeal filed herein, I make the following findings:-

a) The Respondent was in the Appellant's employment for an undisputed continuous period of twenty four (24) years.

b) Although the appellant, being the employer, was the custodian of all employment records regarding the Respondent's employment, no evidence was adduced by the Appellant to show that the Respondent ever took annual leave during the entire period of employment.

c) Accrual of untaken annual leave days was a continuing accruing benefit during the entire period of employment which resulted from the employer's default and neglect, which default and neglect did not stop and or cease at any given time during the entire period of employment. The benefit became payable upon termination of the Respondent's employment on 22<sup>nd</sup> March 2017. The issue of limitation under Section 90 of the Employment Act does not, and cannot arise.

34. I find no reason and /or basis to disturb and/or to vary the award of ksh.474,923.08 made by the trial Court. I uphold the same.

35. On the third issue, costs will always, unless the Court otherwise directs, follow the event.

36. In view of all the forgoing, and having considered written submissions filed herein by counsel for both parties, I find no merit in this appeal. The same is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF FEBRUARY 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**APPEARANCE:**

**MR. ADEDE FOR APPELLANT**

**MISS MASINDE FOR RESPONDENT**