



AVC Management Company Ltd t/a Mnarani Club v Washe (Employment and Labour Relations Appeal 03 of 2022) [2022] KEELRC 4153 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4153 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 03 OF 2022
BOM MANANI, J
SEPTEMBER 27, 2022**

BETWEEN

AVC MANAGEMENT COMPANY LTD T/A MNARANI CLUB APPELLANT

AND

DAVIDSON WASHE RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate
Hon Wasige (Mrs) at Kaloleni dated 18th January 2022)*

JUDGMENT

Introduction

1. The respondent was an employee of the appellant until December 30, 2020 when he was summarily terminated for allegedly reporting to work while drunk. Dissatisfied with the decision to terminate his services, the respondent filed suit before the Magistrate's Court Kaloleni, to seek redress for unlawful termination. The court found in his favour. It is this decision that triggered the current appeal.

Facts of the Case

2. From the record, the respondent was hired by the appellant as a waiter at the appellant's hotel establishment located in Kilifi town on May 31, 2011. On December 26, 2020, the respondent, who had been on duty from 6.00 am or thereabouts, is said to have taken a short break from his work. This was around 3.00 pm in the afternoon. He then proceeded to his home. The respondent was expected to report back for his second shift at 6.00 pm or thereabouts.
3. While at home on the short break, the respondent is said to have taken some traditional alcohol (*mnazi*) before going back to work. As required of him, the respondent reported back to work at 6.00 pm or thereabouts. He then set out to serve the appellant's guests with dinner.



4. As the process of serving guests with dinner progressed, it does appear that something went amiss. Some guests are said to have raised concern about the food portions offered to them by the establishment. At the same time, one particular guest is said to have raised concerns about the respondent's apparent state of inebriation. It is contended that the said guest refused to be served by the respondent and demanded that he be served by another waiter. It is also said that the respondent spilled food on one of the guests.
5. Concerned with this development, the appellant's shift manager is said to have asked the respondent not to serve the guests who had raised concern about his state of inebriation. However, the respondent was allowed to continue working into the night and appears to have remained on duty until 9.30 pm, the end of the second shift.
6. The evidence tendered shows that the shift manager reported the evening incident involving the respondent to the appellant's management. Apparently, this report triggered a series of events that culminated into the respondent's employment being terminated.
7. That very evening of December 26, 2020, the appellant's management summoned the respondent to the appellant's office where he was notified of the report against him. He was asked to offer a written explanation of the events of that evening. He was also notified of the intention by the appellant to take disciplinary action against him.
8. On December 29, 2020, the appellant's management convened a disciplinary session at which the respondent's case was heard. He was eventually terminated on December 30, 2020.
9. The record shows that the respondent appealed the decision of the appellant. However, the appeal was summarily rejected. And hence the case before the trial court.

The Decision of the Trial Court

10. In summary it was the trial court's view that although the respondent may have taken some alcohol, it was not demonstrated by the appellant that he was so intoxicated as to be unable to discharge his duties. Consequently, the ground of intoxication did not meet the parameters for summary dismissal under section 44 of the *Employment Act* which entitles an employer to terminate an employee if during working hours the employee is or becomes intoxicated to the point of rendering himself unwilling or incapable to perform his work properly.
11. The trial court also took issue with the failure by the appellant to call the shift manager who had raised the complaint against the respondent to testify. It is this manager who had indicated that the respondent spilled food on a customer and that he had engaged in an altercation with the customer. Yet, he did not attend court to verify these assertions.
12. The learned trial magistrate also took note of the fact that the respondent worked the entire of the evening shift that he was said to have been drunk. In the trial magistrate's view, the fact that the respondent was able to work the entire shift tended to justify the respondent's contention that even though he had taken some drink, he was not intoxicated as asserted by the appellant's management.
13. To fortify the above position, the learned trial court relied on the evidence of the appellant's witness during cross examination which indicated that it was improbable for an inebriated individual to work through a whole shift as the respondent did. Further, the court took note of the evidence of the appellant that the rudimentary alcohol test they administered on the respondent by requiring him to balance on one leg appeared to have confirmed that though he may have taken some drink, the respondent was nevertheless not intoxicated.



14. Taking all these factors into consideration, the trial magistrate found that there was no valid ground to justify termination of the respondent. As a result, it returned a verdict in favour of the respondent.

Grounds of Appeal

15. Dissatisfied with the trial court's verdict, the appellant has appealed raising, in substance, the following grounds of appeal:
 - a. That the trial court erred in holding that the respondent was unfairly terminated.
 - b. That the trial magistrate misdirected herself on the requisite burden of proof on the question of the respondent's intoxication.
 - c. That the trial court's decision went against the weight of the evidence tendered particularly on the issue concerning the capability of the respondent to continue discharging his duties in view of his alleged inebriation.
 - d. That the trial court was wrong to find that the respondent continued to work even after the alleged altercation between him and one of the appellant's customers.
 - e. That the trial court erred in holding that no evidence was tendered to show that the respondent spilled food on or quarreled with a client.

Analysis of the Grounds of Appeal

16. Being a first appeal I am required to re-evaluate the evidence a fresh with a view to reaching my own independent conclusion. However, as I undertake this exercise, I am required to bear in mind the fact that I did not hear the witnesses in the cause and make due allowance for this reality (see [China Zhongxing Construction Company Ltd v Ann Akuru Sophia](#) [2020] eKLR).
17. It is also important to point out that as an appellate court, I should be hesitant to differ with the findings of fact by the trial court unless such findings are not supported by the evidence on record. This position is underscored in the [China Zhongxing Construction Company Ltd v Ann Akuru Sophia](#) [2020] eKLR case when the High Court quoting with approval the decision in *Peters v Sunday Post Limited* [1958] EA 424 observed as follows: -

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
18. I will begin my analysis by examining whether the trial magistrate misdirected herself on the requisite burden of proof on the question of the respondent's intoxication. Section 44 of the [Employment Act](#) entitles an employer to terminate an employee if the employee is shown to have committed acts of gross misconduct while on duty. Under section 44 (4) (b) of the Act, one of the acts that comprise gross misconduct is if an employee gets intoxicated while at work. However, mere intoxication is not a sufficient reason to terminate an employee. Intoxication becomes a ground for gross misconduct only when it is shown to have rendered the employee incapable of performing his duties. Indeed this fact is acknowledged by the appellant's counsel in his submissions before the trial court.
19. In the current case, the singular reason why the respondent was terminated was that on the material date (December 26, 2020), he reported on duty for his second shift whilst intoxicated. Consequently, the question that was critical in determining whether the appellant was entitled to rely on intoxication



- as a ground for terminating the respondent was whether on the material evening there was evidence that the respondent was so intoxicated as to be incapable of performing his duties properly.
20. Under sections 43 and 45 of the *Employment Act*, the burden of establishing this fact lay with the appellant. Importantly, section 43(2) entitles an employer to terminate if circumstances exist that cause him to genuinely believe that there is a valid ground to terminate the employee. The question therefore is whether this requirement was met by the appellant.
 21. The evidence that was tendered to prove that the respondent had taken alcohol was perhaps his own admission that after he broke from work on the material day, he went home where he was offered some drink by some of his family members. No other evidence was tendered in this respect. I say this because the averment by the appellant's witness that he was informed by the shift manager that the respondent was said to have been drunk was basically hearsay, the said shift manager having not testified either before the disciplinary committee or the court. Indeed, a perusal of the minutes of the disciplinary session shows that although the shift manager attended the session, he did not give any evidence. And neither did Kennedy Obinju, the other possible witness. The only activity at the session is shown to have been the fielding of questions to the respondent and recording his responses to them.
 22. From the evidence of the respondent on alcohol consumption, I understand him to have only admitted to the act of having consumed some glasses of *mnazi*. He otherwise denied that he got intoxicated in the process. The appellant did not call evidence to suggest that the respondent was so drunk due to the alcohol he had taken as not to be able to perform his duties properly. Beyond the respondent's own testimony that he took some alcohol, there was no other evidence to suggest that this rendered him intoxicated to the extent that he was unable to perform his duties.
 23. As indicated above, the duty to provide evidence of some form of disorderliness on the part of the respondent as a result of alcohol consumption lay with the appellant. This duty was not discharged. In the premises, the trial court's finding on this question was correct. And this being the position, it follows that the appellant did not prove the validity of the ground for terminating the respondent.
 24. As was observed in *John Rioba Maugo v Riley Falcon Security Services Limited* [2016] eKLR, the mere fact that an employee smells of or has in fact ingested alcohol is not a ground for summary dismissal. Beyond the foregoing, the employer must demonstrate that the alcohol consumed has rendered the employee incapable of performing his duties properly.
 25. There is nothing wrong in an employer having a policy forbidding employees from taking any form of alcoholic beverages whilst on duty. However, such policy must be communicated to the employees and a record of the communication kept.
 26. The appellant asserted that it had such policy for its workers. However, it was unable to provide evidence of the policy or demonstrate that it had been communicated to its employees. In my view, it would be wrong to punish an employee for violating a policy whose content the employee is not shown as having been aware of. Such action would fly in the face of the employee's right to fair labour practice and fair administrative action as protected under articles 41 and 47 of the *Constitution*.
 27. The record shows that the respondent stated that because of the fact that the plates he was carrying were hot, one of them tipped over and poured rice into another plate he was carrying. However, there was no evidence of food spilling on a guest tendered either before the disciplinary committee or the trial court. Similarly, the record does not demonstrate that anyone was called before the disciplinary committee to testify to the allegation that the respondent got into an altercation with one of the appellant's guests. All the individuals who are said to have recorded statements on the issue including the shift manager and one Kennedy Obinju did not testify. Therefore all assertions about the respondent having



poured food on a guest and having argued with some of them remained mere allegations. The court was therefore right to say that these matters were not proved.

28. The appellant also challenges the trial court's finding that the respondent had capacity to work after he was accused of being drunk and that he in fact continued working on the night of December 26, 2020. These concerns appear unfounded. The evidence of the appellant's witness confirms that when he summoned the respondent to his office after the evening shift on December 26, 2020, the respondent had gone to the changing room to change so that he could leave for home. This alone is proof that the respondent had remained at his work station and continued to work until the end of his shift.
29. Further, during cross examination, the appellant's witness confirmed that the respondent had worked the entire of the 2nd shift on the material date. With this evidence from the appellant's own witness, the trial court cannot be faulted for having held as a matter of fact that despite having taken alcohol, the respondent was not shown as having suffered a disability in executing his duties and that he in fact continued working until the end of the second shift.
30. I have studied the record and it does not show that the respondent was served with a document detailing the charges against him before he appeared for the disciplinary session on December 29, 2020. Indeed, the appellant's witness conceded as much during cross examination. All that this witness says is that he gave the respondent a notice for the disciplinary session. The contents of the notice are not given. It cannot be assumed that such notice to attend a disciplinary session contained details of the charges against the respondent. How was the respondent to prepare for the disciplinary session without clarity of the charges against him?
31. Further, after the disciplinary session, the respondent is shown as having appealed the decision to terminate him. From the record, he was not invited to submit on the appeal. It was rejected summarily. The appellant's witness confirms this when he states that there was no formal hearing of the appeal. That he just looked at the request for appeal and made his verdict. So what was the purpose of filing the appeal?
32. It is also not denied that the appeal was summarily dismissed by the very same individual who presided over the disciplinary session that dismissed the respondent. This may well explain why he handled the appeal in the manner that he did. It is clear to me that the conduct of the appellant's management, in the circumstances of this case, infringed on the respondent's procedural right to fair administrative action.
33. The upshot is that I find that the appeal has no merit. I dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF SEPTEMBER 2022

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Appellant

Opolo for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



B. O. M MANANI

