



REPUBLIC OF KENYA



KENYA LAW
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**Gas Kenya Limited v Odhiambo (Appeal E006 of 2022)
[2022] KEELRC 3930 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3930 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E006 OF 2022
CN BAARI, J
SEPTEMBER 22, 2022**

BETWEEN

GAS KENYA LIMITED APPELLANT

AND

GEORGE ABUOR ODHIAMBO RESPONDENT

*(Being an appeal from the Judgment and Decree of the Chief
Magistrate at Kisumu Chief Magistrates Court (Hon. P.M Gesora)
delivered on January 28, 2022 in Kisumu CMELRC NO 11 OF 2020)*

JUDGMENT

1. The appeal herein arises from the judgment delivered on January 28, 2022, by Hon P M Gesora (CM), where he found the termination of the Respondent unlawful, and proceeded to make an award of 12 months' salary as compensation for unfair termination, severance pay, costs of the suit and interest in favour of the Respondent.
2. The Appellant being dissatisfied with the decision of the Trial Court, lodged this appeal on February 2, 2022.
3. The appeal is premised on the grounds that:
 - i. The Learned Magistrate erred in failing to hold that there were fair and valid reasons to terminate the Respondent's employment;
 - ii. The Learned Magistrate erred in disregarding the photographs produced as evidence which prove that the Respondent was indeed sleeping while on duty;
 - iii. The Learned Magistrate erred when he failed to take into consideration that during the disciplinary hearing held on July 30, 2018, the Claimant's representative admitted that the Claimant was sleeping while on duty as detailed in the minutes produced before court;



- iv. The Learned Magistrate erred when he held that the fact that the Respondent knew the placement of the CCTV cameras in the ATM lobby meant that he could not have allowed himself to be caught on camera sleeping on duty. This was not a relevant consideration in this case;
 - v. The Learned Magistrate erred in making an award for compensation for unlawful termination;
 - vi. Without prejudice to the foregoing, the award of 12 month's pay as compensation for unlawful termination is in any event inordinately high and excessive in the circumstances of this case; and
 - vii. The Learned Magistrate erred in making an award of severance pay in favour of the Respondent when the Claimant was summarily dismissed for a lawful cause and not terminated from employment on account of redundancy. No evidence was led to prove that the Respondent was entitled to severance pay.
4. The Appellant prays that the appeal be allowed and the judgment of the Chief Magistrate (Honourable PN Gesora) delivered on January 28, 2022, be set aside, and substituted thereof with an order dismissing the suit against the Appellant with costs.
 5. Parties canvassed the appeal through written submissions. Both parties filed their submissions.

The Appellant's Submissions

6. It is submitted for the Appellant that the learned Magistrate fell into error when he disregarded the photographs produced in evidence of the Respondent sleeping while on duty. It is further submitted that the learned Magistrate's finding that the Respondent's face as shown in the photographs was not well captured for anybody to conclude that he was asleep is erroneous.
7. The Appellant submits that the Court of Appeal has settled the position when considering whether an employer had valid grounds for termination of employment, where it concluded that a court must not substitute its own views for those of the employer, but instead, simply consider whether a reasonable employer could have dismissed on those facts. They sought to rely in [*CFC Stanbic Bank Limited V Danson Mwashako Mwakuwona*](#) [2015] eKLR to buttress this position.
8. It is the Appellant's submission that considering all the evidence adduced, including the still images and the Respondent's admission that the produced still images are his, the Appellant reasonably and genuinely concluded that the Respondent had slept while on duty contrary to clause 8.7 of the disciplinary code which makes it an offence of a security guard to sleep while on duty.

The Respondent's Submissions

9. It is submitted for the Respondent that the Appellant did not prove the reasons for his termination contrary to Section 44(4) of the [*Employment Act*](#), 2007. He sought to rely in the holding in [*Nicholas Otinyi Muruka v Equity Bank Limited*](#) (2013) eKLR where the court stated thus:

“...disputes of summary dismissal will always be subjected to the test of Section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reason of gross misconduct.”
10. The Respondent further submits that he satisfied his burden of proof as required under Section 47(5) of the [*Employment Act*](#). He further submits that the Appellant failed to meet the dictates of Section 41 of the [*Act*](#) on procedural fairness. He had reliance in [*David Gichana Omuya v Mombasa Maize Millers Limited*](#) (2014) eKLR to support this position.



11. The Respondent finally submits that the trial court rightly found his dismissal wrongful, unlawful and unfair.

Analysis and Determination

12. I have considered the Appellant's Record of Appeal, the supplementary record of appeal and the submissions by both parties. The many grounds for appeal herein, are summarized as follows:
 - a. The Learned Magistrate erred in failing to hold that there were fair and valid reasons to terminate the Respondent's employment.
 - b. The Learned Magistrate erred in making an award of severance pay in favour of the Respondent when the Claimant was summarily dismissed for a lawful cause and not terminated from employment on account of redundancy.
 - c. The Learned Magistrate erred in making an award for compensation for unlawful termination.
13. The Respondent is said to have been summarily dismissed from the service of the Appellant for sleeping while at work and for reason that he was not reachable through his mobile phone. Mr. William Nyandong testifying for Appellant, told the Trial court that the Respondent was not alert at work and that he had covered his face and it was on this basis that the Appellant arrived at the conclusion that the Respondent was a sleep at work.
14. The witness' further testimony is that no incident was reported on the material day/night but the impression that the Respondent was sleeping at work was not good for their client.
15. The evidence before the trial court in my view, did not entirely prove that indeed the Respondent was a sleep at work at the material time. Covering one's face is not an obvious indication that one is a sleep.
16. The court notes that the Respondent was summarily dismissed from service. Summary dismissal under the *Employment Act*, 2007 is dismissal without notice or with less notice than that prescribed in the employment agreement. Although the Act does not define summary dismissal, it gives situations that may amount to gross misconduct that then warrants summary dismissal.
17. In *National Union of Water and Sewerage Employees v Meru Water & Sewerage Service* ELRC Cause No 44 of 2012, Abuodha J defined gross misconduct as an act of misconduct serious enough to justify the employee's immediate dismissal. The evidence produced before the trial court, only indicated that the Respondent was seated while leaning against the wall in the ATM lobby.
18. Without a doubt, a guard sleeping while on duty compromises the security operations of the client, the client's property, and puts the life of the guard at risk. As correctly held by the Trial Court, nothing indicates that the Respondent was asleep at the material time.
19. In my opinion, premised on the ground that the Appellant has not discharged its burden of proof in relation to the reasons for the Respondent's summary dismissal, I find the reason given for the summary dismissal invalid and unjustified, considering that no incident or loss occurred that resulted in loss or damage of the Respondent's employer/client's property.
20. The charges leveled against the Respondent aforesaid, do not constitutes the grounds set out under Section 44 (4) of the *Employment Act* as acts of gross misconduct to warrant summary dismissal.
21. Further, although the *Employment Act* allows an employer to make regulations expanding the grounds that may constitute acts of gross misconduct over those set out in Section 44(4), there is no prove that



- the Appellant had formulated additional grounds, and whether the additional grounds if any, were brought to the attention of the Respondent.
22. In light of the foregoing, I find the grounds given for the Respondent's summary dismissal unreasonable, invalid and unjustified. Consequently, I uphold the finding of the Trial Court in this respect.
 23. On the issue of the award of 12 months' salary as compensation for unfair dismissal, the Trial Court upon finding the dismissal unfair, proceeded to allow all the prayers in the Respondent's claim. No reason (s) were attached to the awards given.
 24. The Court of Appeal has now settled that courts must justify the awards they make by providing reasons for the award. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the trial judge must justify or explain why a claimant is entitled to the maximum award.
 25. Further, in the case of *Ol Pejeta Ranching Limited v David Wanjau Muboro* Civil Appeal No 42 of 2015, the Court of Appeal expressed itself as follows on compensatory awards:

“..Was the award of Kshs 3,489,084/- representing the Respondent's 12 months gross salary as compensation for unfair termination justifiable” Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such asthe conduct of the employee which to any extent caused or contributed to the termination.....”
 26. The finding of unfair dismissal no doubt entitled the Respondent to compensation in accordance with Sections 49 and 50 of the *Employment Act*. (See *Benjamin Langwen v National Environment Management Authority* (2016) eKLR.)
 27. The question for this court is whether the 12 months salary awarded as compensation is reasonable. In *Alfred Muthomi & 2 Others v National Bank of Kenya Limited* [2018] eKLR the Court held that in granting 12 months salary as compensation for unfair termination, it considered the Claimants long service.
 28. The Respondent was in the service of the Appellant for about 12 years (2006-2018). Other than the issues giving rise to this case, nothing shows that the Respondent had disciplinary issues in the many years he was in the service of the Appellant.
 29. Owing to the Respondent's long service, I uphold the award of 12 months' salary in compensation for unfair and unlawful dismissal.
 30. In regard to the award of severance pay, the Appellant's position is that for reason that the Respondent was summarily dismissed, he is not entitled to severance pay.
 31. Under section 40(1)(g) of the *Employment Act*, 2007, only employees separating with an employer on account of redundancy are entitled to payment of severance pay. On this ground, the award of severance pay is hereby set aside.
 32. In conclusion, the court makes orders as follows:



- i. That the Trial Court's award of 12 months' salary as compensation for unfair and unlawful dismissal is upheld.
- ii. The Trial Court's award of severance pay is hereby set aside.
- iii. The interests awarded by the Trial Court in respect of severance pay is set aside.
- iv. The other awards by the Trial Court remain undisturbed.
- v. Each party shall bear their own costs of the appeal.

33. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2022.

CHRISTINE N BAARI

JUDGE

Appearance:

Mr. Sheikh h/b for Ms Odiero for the appellant

N/A for the Respondent

MS Christine Omollo - Court Assistant.

