



**Kansai Plascon Kenya Ltd v Choudhry (Appeal 13 of 2020)
[2022] KEELRC 13266 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13266 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 13 OF 2020
S RADIDO, J
NOVEMBER 23, 2022**

BETWEEN

KANSAI PLASCON KENYA LTD APPELLANT

AND

SAIQA SHAKIL CHOUDHRY RESPONDENT

*(Being an Appeal from the judgment/decree of the hon Gesora, Chief Magistrate,
delivered on 9th July 2020 in Kisumu CMELRC Cause No. 11 of 2018)*

JUDGMENT

1. Saiqa Shakil Choudhry (the respondent) sued Kansai Plascon Kenya Ltd (the appellant) before the chief magistrates court, alleging unfair termination of employment.
2. In a judgment delivered on July 9, 2020, the honourable chief magistrate found that the respondent was not afforded an opportunity to be heard and that the audit report relied on for the decision to terminate his contract had gaps.
3. The honourable chief magistrate concluded the termination of employment was unfair and awarded the respondent:
 - i. 2 months' salary *in lieu* of notice amounting to Kshs 60,000/-.
 - ii. 25 days accrued leave amounting to Kshs 30,000/-.
 - iii. 12 months compensation amounting to Kshs 360,000/-.
 - iv. Wages for May 2018 amounting to Kshs 3,333/-.
4. The respondent was also granted savings at the pension scheme and a certificate of service.
5. At the same time, the honourable chief magistrate dismissed the appellant's counterclaim.



6. The appellant was aggrieved, and it lodged a memorandum of appeal with the court contending that:
 - (1) The learned magistrate erred in law and fact in finding that the respondent's summary dismissal was unfair and not in line with the procedure provided for in the *Employment Act* when the evidence on record shows that the respondent was given an opportunity to explain the loss of Kshs 993,275/86 under her watch.
 - (2) The learned magistrate erred in law and fact in finding that no disciplinary proceeding and/or hearing was conducted against the respondent and that the appellant did not consider the explanation of the respondent when the evidence on the court's record shows that the respondent was given an opportunity to give an account of the lost funds of Kshs 993,275/86 under her watch.
 - (3) The learned magistrate erred in law and fact in finding that the respondent's termination was unfair, and that the claimant deserved compensation when the claimant had confessed and admitted to having stolen the sum of Kshs 993,275 belonging to the appellant and even giving a proposal for the repayment of Kshs 993,275/86 to the appellant.
 - (4) The learned magistrate erred in law and fact in finding that no action was taken to have the loss of Kshs 993,275.86 belonging to the appellant, investigated by the police for further action in the realms of the criminal justice system, when the evidence adduced by the appellant showed that a complaint had been made at Kisumu police station over the theft of Kshs 993,275.86, a police abstract issued and produced into the court's evidence, and investigations commenced against the respondent. This matter was in any case irrelevant to the case before the trial court and the appellant was not enjoined to pursue the complaint, in the face of an admission of the debt by the respondent and the decision to pursue the matter as a civil dispute.
 - (5) The learned magistrate erred in law and fact in dismissing the appellant's counterclaim in the face of an express admission by the respondent that the funds of Kshs 993,275.86 which was the subject matter of the counterclaim, were lost in her hands, and the respondent failed to prove that the undertaking to refund the money was extracted from her unlawfully.
 - (6) The learned magistrate erred in law and fact in dismissing the appellant's counterclaim, when the evidence on record shows that vide a letter dated March 6, 2018, the respondent admitted that the funds of Kshs 993,275.86 were lost in her hands, yet the respondent alleged to have been coerced and/or threatened by the appellant's officials on March 15, 2018.
7. The appellant filed a record of appeal on June 7, 2022 and submissions its submissions on October 21, 2022 (should have been filed and served on or before October 14, 2022). The respondent filed her submissions on November 4, 2022.
8. The court has considered the record and submissions.

Role of the court on first appeal

9. This being a first appeal, the court is enjoined to re-evaluate the evidence before the lower court and make its own findings on the evidence and facts but conscious that it did not see the witnesses.



Unfair termination of employment

Procedural fairness

10. Sections 35(1) and 41 of the *Employment Act, 2007*, sets out the basic protections due to an employee under threat of termination of employment. These are a written notice (unless it is a case of summary dismissal) and an opportunity to make representations in the presence of a colleague or trade union representative (where applicable).
11. When reaching the conclusion that the respondent's dismissal was unfair, the honourable chief magistrate considered the respondent's testimony that she was not issued with a show-cause notice nor afforded an opportunity to be heard.
12. The record of evidence shows that the respondent made a written explanation dated 6 March 2018 explaining the circumstances of the loss of Kshs 993,276/86.
13. However, there was no documentation placed before the honourable chief magistrate that the respondent was notified of the allegations to confront.
14. The respondent also stated in her written statement adopted as part of the hearing and during oral testimony that she travelled to the appellant's head office in an attempt to reconcile her records.
15. The appellant did not maintain a complete record of how it dealt with the respondent's case during this visit.
16. It is unclear whether the visit was a fact-finding/investigative endeavour or a disciplinary hearing as contemplated by section 41 of the *Employment Act, 2007*.
17. The lack of clarity arises from the fact that the appellant did not demonstrate that it informed the respondent of the right to be accompanied by a colleague during the oral proceedings. There was no mention of a colleague of the respondent's choice being present.
18. The appellant made some attempt to hear out the respondent, but in the view of the court, the attempts fell short of the statutory requirements of procedural fairness as contemplated by sections 35(1) and 41 of the *Employment Act, 2007*.
19. The court finds the honourable chief magistrate did not fall into error in his conclusions on procedural fairness.

Substantive fairness

20. On the element of substantive fairness, the honourable chief magistrate dismissed the justifications offered by the appellant on the ground that the audit report produced in court, which had unravelled the loss was not signed, and so its author/auditor was unknown.
21. The honourable chief magistrate further discounted the appellant's case because it did not cause the police to conduct criminal investigations.
22. Starting with the issue of criminal investigations and action, it is not true that the appellant did not involve the police since the appellant produced, in court, a copy of an occurrence book (OB) entry dated 7 March 2018.



23. Criminal justice and disciplinary proceedings have distinct objectives, and the mere fact that an employer has not involved the police where there are allegations of theft by itself should not render a dismissal substantively unfair.
24. The honourable chief magistrate consequently fell in error in his conclusions on the criminal action.
25. With respect to discharging the burden of proving valid and fair reasons to terminate the respondent's employment, the audit report produced before the trial court was not signed by the person who prepared it. It was not on the appellant's letterhead or logo either.
26. The second witness presented by the appellant testified that although the audit report was not signed, he did the reconciliation with the respondent before preparing the audit summary.
27. Nevertheless, the court is confronted with the question of whether the audit report produced in the court met the threshold for admissibility and, if so, what weight it should have been given.
28. The High Court dealt with the question in *Mugo Mungai & 4 Ors v Official Receiver & Provisional Liquidator (Capital Finance Ltd & Pioneer) & 2 Ors* (2019) eKLR wherein it stated:

"an unsigned document has no probative value as the contents' genuineness cannot be proved. It is worth noting that documents do not prove themselves; a witness must be examined to prove the documents. The evidence of the contents of the document is hearsay evidence unless the author thereof is known or identifies himself as owning the document."
29. The documentary evidence relied on by the appellant did not meet the admissibility test. The honourable chief magistrate was, therefore, right to disregard the audit report.
30. For all the above, the court is of the view that the appellant failed to discharge the burden placed on employers by sections 43 and 45 of the *Employment Act, 2007*.

Compensation

31. The award of compensation is predicated on the factors set out in section 49(4) of the *Employment Act, 2007*.
32. The trial court did not disclose which of the factors it considered in awarding maximum compensation.
33. The trial court fell into error as it did not exercise its discretion to award compensation judiciously.
34. It is not in dispute that the respondent had served the appellant for about a year.
35. In consideration of the length of service, this court is of the view that the equivalent of 2 months' salary as compensation would have been appropriate.

Salary in lieu of notice

36. The contract between the appellant and the respondent provided for 1-month notice or pay in lieu of notice, but the honourable chief magistrate awarded the equivalent of 2 months' salary *in lieu* of notice.
37. The trial court fell into error by awarding 2-months' pay *in lieu* of notice without any legal or evidential foundation.



May 2018 salary

38. The honourable chief magistrate awarded the respondent Kshs 3,333/- being earned wages for May 2018. The appellant produced records showing that it paid the respondent Kshs 3,870/- earned wages.
39. The award was an error of both law and fact.

Accrued leave

40. The appellant also produced records demonstrating that it paid the respondent accrued leave amounting to Kshs 22,442/-.
41. The trial court made no reference to the evidence; it, therefore, fell into an error of both law and fact.

Counterclaim

42. The appellant counterclaimed against the respondent for Kshs 993,275.86 stated to have been lost under the custody of the respondent.
43. Unfortunately, the appellant did not place before the trial court admissible evidence to prove the loss.

Conclusion and Orders

44. Flowing from the above, the court finds no error of law or fact in the finding by the honourable chief magistrate that the termination of the respondent's employment was unfair.
45. The court, however, finds the award of maximum compensation was made without consideration of the material factors and substitutes it with an order awarding the equivalent of 2 months' salary as compensation in the sum of Kshs 60,000/-.
46. The court also finds the award of 2 months' salary in lieu of notice contrary to the contract and substitutes it with an order awarding the equivalent of 1 month salary in lieu of notice in the sum of Kshs 30,000/-.
47. The appeal succeeds only to the extent set out in paragraphs herein above.
48. The appellant did not file submissions within the agreed timelines. Each party, therefore, to bear its own costs of the appeal and proceedings before the trial court.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23RD DAY OF NOVEMBER, 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For appellant Owiti, Otieno & Ragot Advocates

For respondent L.G. Menezes Advocates

Court Assistant Chrispo Aura

