



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 6 OF 2019

[ORIGINALLY MOMBASA HIGH COURT CIVIL APPEAL NO 71 OF 2013]

GIDEON MUTETI NJAU.....APPELLANT

VS

BROOKSIDE DAIRY LIMITED.....RESPONDENT

(Appeal from the judgment of Hon. B. M Ekhubi, SRM dated 20th May 2013

in Mombasa CMCC No 2632 of 2011)

JUDGMENT

1. This appeal was originally filed in the High Court at Mombasa as Civil Appeal No 71 of 2013.
2. By notice dated 15th January 2019, the Respondent raised a Preliminary Objection on the ground that the High Court lacks jurisdiction to entertain the appeal in light of the express prohibition of Article 165(5)(b) of the Constitution of Kenya, 2010.
2. In a ruling delivered on 14th March 2019, **Chepkwony J** upheld the objection and transferred the appeal to this Court for hearing and final determination.
4. The case in the lower court was commenced by a plaint filed by the Appellant on 17th October, 2011 seeking damages, one month's salary in lieu of notice, salary for September 2011, leave pay for 64.65 days and gratuity.
5. After hearing the parties **Hon. B.M. Ekhubi, SRM**, delivered himself as follows:

“In the result, and having carefully considered all the issues arising, I find the plaintiff has failed to establish its (sic) case beyond a balance of probability. In obiter I find that the plaintiff is entitled to the sum proposed by the defendant of Kshs. 71,532.”

6. Being dissatisfied with the decision of the trial court, the Appellant filed the present appeal. In his Memorandum of Appeal dated 7th June 2013, he raises the following ten (10) grounds:
 - a. That the learned trial Magistrate was totally biased and failed to fairly and objectively evaluate the evidence that was before the court, and hence arrived at a totally wrong decision;
 - b. That the learned trial Magistrate failed to appreciate the nature of the Appellant's case and his evidence, as such he fell into error;
 - c. That the learned trial Magistrate did not evaluate the evidence by the Appellant at all and went into areas that were not pleaded nor evidence produced, hence he fell into error;
 - d. That the Magistrate's appreciation of the concept of gross misconduct and in particular in the case before the lower court was totally erroneous, as such he fell into error;

e. That the Magistrate by alluding to certain facts that were not pleaded nor evidence produced, specifically an email dated 21st December 2005, which was not there, made him arrive at a wrong decision, hence he fell into error;

f. That the Magistrate's conclusion of what constitutes gross misconduct and in particular in the suit, in the lower court was not based on the evidence nor a proper appreciation of the law of contract or employment law, hence he fell into error;

g. That in finding that there were no invoices raised against Voyager Hotel, and no complaint raised with specifics and all the same arriving at the conclusion he did, the learned Magistrate fell into error;

h. That the Magistrate failed to find that any of the allegations raised by the Respondent were substantiated nor proved, as such he fell into error, by arriving at the conclusion he did;

i. That the learned Magistrate's award of KShs. 71,532 was a gross underpayment of the amount due to the Appellant, as such he fell into error;

j. That the whole evaluation of the case before the court below was erroneous and the court arrived at a totally wrong decision, which was not based on any fact or law.

7. This being a first appeal, I am required to reconsider and re-evaluate the evidence adduced before the trial court and draw my own conclusions, bearing in mind that I have had no chance to hear the witnesses first hand (see *Peter M. Kariuki v Attorney General [2014] eKLR* and *Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the Administrators and Personal Representatives of the Estate of Josephine Weyanga Tsuma (Deceased) [2019] eKLR)*).

8. The Appellant was summarily dismissed by letter dated 28th September 2011 stating as follows:

“Dear Gideon,

RE: SUMMARY DISMISSAL

It has been reported that while dispensing your duties as a salesman, you were involved in fraudulent activities at the depot. Investigations by the security team and a subsequent report have revealed that you have been involved in unprocedural activities and fraud to customers where you have colluded with your colleagues to defraud the customers and company through theft. Your actions and behaviour are against the company policy and procedure and are not acceptable.

This amounts to gross misconduct and the management has therefore decided to dismiss you from employment on account of involvement in fraudulent and unprocedural activities with effect from 29th September 2011. Your last date of employment was therefore 28th September 2011.

Here below please find a computation of your final dues:

Earnings

a. Salary for September 2011 28 days @ KShs. 1,016.49 KShs. 28,461.72

b. Prorata leave days 64.65 @ KShs. 1,016.49 KShs. 65,716.07

Gross total	KShs. 94,177.79
<u>Less Deduction</u>	
PAYE	KShs. 22,125.74
NHIF	KShs. 320.00
NSSF	KShs. 200.00

Total deductions	KShs. 22,645.74

Total Net Balance

KShs. 71,532.05

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The above net dues will be paid to you through your bank account upon satisfactory clearance with the company. You are further advised that any subsequent losses discovered in the final report on the fraud will be recovered from your final dues.

Please note that your pension contribution will be paid to you upon receipt from the Pension Scheme administrators.

You are also required to hand over any company property that is in your possession to the Sales Manager – BDL Coast.

You are requested to sign on the duplicate copy of this letter, signifying your agreement hereof and send the same to us.

Yours faithfully

(signed)

GRACE MANUGU

HUMAN RESOURCE MANAGER

9. The dismissal letter accuses the Appellant of involvement in fraudulent activities. At the trial before the lower court however, the scope of accusations against the Appellant was enlarged. At paragraph 11 of the judgment, the learned trial Magistrate states:

“In the present case, it is the Defendant’s contention that the Plaintiff was summarily dismissed for gross misconduct. The evidence led by the three defence witnesses was that the Plaintiff was lawfully terminated by the defendant. The court was told that gross misconduct on the part of the Plaintiff manifested in four main areas namely, failing to reconcile his sales on a daily basis, loss of stock, failing to observe security regulation and raising invoices using another account to reconcile the daily sales. The foregoing is not in dispute and controverted in fact the plaintiff admitted the same.”

10. Section 43 of the Employment Act provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

11. Under this provision, employees leaving employment at the employer’s instance have a right to know the exact reason why they are being let go. I hasten to add that the dictates of Section 43 of the Employment Act can only be satisfied through the procedural fairness requirements set under Section 41 of the Act. As held by this Court in *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR*, for a termination of employment to pass the fairness test, there must be substantive justification and procedural fairness.

12. In the present case, the reason cited in the dismissal letter being involvement in fraudulent activities is different from what was given by the Respondent’s witnesses at the trial. What is more, there was no evidence that any charge related to fraudulent activities was ever served on the Appellant for his response at the shop floor. The allegation of involvement in fraudulent activities was therefore untested and unproved.

13. While the Appellant appears to have had prior issues relating to the performance of his work, these were not cited in the dismissal letter and the trial court had no legal basis to import them as reasons for dismissal. The only relevance of the Appellant’s prior employment record would be in the assessment of compensation for wrongful dismissal.

14. Pursuant to the foregoing, I find and hold that by importing the charges of failure to reconcile sales, loss of stock and failure to observe security regulations, while saying nothing about the charge of involvement in fraudulent activities, the learned trial Magistrate took the wrong path and therefore arrived at an erroneous decision.

15. This appeal is therefore allowed, the judgment by the trial court dated 20th May 2013 is set aside and replaced with an order allowing the Appellant’s claim in the following terms:

a. 6 months’ salary in compensation.....Kshs. 182,970

b. 1 month’s salary in lieu of notice.....30,495

c. Salary for September 2011.....	30,495
d. Leave pay (64.65 days @ 1,016.49).....	<u>65,716</u>
Total.....	309,676

16. The Respondent will pay the costs of the appeal and those in the lower court.

17. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MARCH 2020

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JUDGE

Appearance:

Gideon Muteti Njau (the Appellant in person)

No appearance for the Respondent