Mulla v Unga Farm Care East Africa Limited (Employment and Labour Relations Cause E038 of 2022) [2024] KEELRC 1790 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1790 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS CAUSE E038 OF 2022

HS WASILWA, J

JULY 10, 2024

BETWEEN

REUBEN MULLA ..... CLAIMANT

AND

UNGA FARM CARE EAST AFRICA LIMITED ..... RESPONDENT

JUDGMENT

1. This suit was commenced by a memorandum of claim 18th October, 2022 and Amended on 26th October, 2023, seeking for the following reliefs; -

    a. A declaration be and is hereby issued that dismissal of the claimant was unfair as it was not based on valid reasons.

    b. A declaration be and is hereby issued that the procedure of his dismissal was unfair.

    c. A certificate of service do issue to the claimant.

    d. The Respondent be order to pay the Claimant a sum of Kshs 4,101,948.76 broken down as follows;

        i. Two months gross pay *in lieu* of notice of Kshs 308,417.20.

        ii. 12 months gross pay for unfair termination of Kshs 1,850,503.20.

        iii. 84 months housing allowance of Kshs 1,943,028.36.

    e. Costs of the suit.

    f. Interests on (d) and (e) above.

2. The summary of the case herein is that the claimant was employed by the Respondent by the Appointment letter dated 18th December, 2014 as the Raw Material and Packing Supervisor and

deployed to the Respondent's Nakuru plant. His gross salary at the time of termination was Kshs 154,208.60.

3. He stated that he worked diligently for the Respondent without any disciplinary issues and due to his sterling performance, he was awarded bonuses for the months of October and November, 2021.

4. That in the same month of November, 2021, he was served with a show cause letter on three issues; allegedly aiding in receiving non-conforming raw materials to the stores, receiving complaints from farmer and shelving them and for sitting in a disciplinary hearing of an outsourced labour provider, Mwanecko, without authority.

5. On the non-conforming material, the claimant states that the details of contamination and the extent was never disclosed to him, neither were test result shared with him. Also that he did not receive any recall of products from the market by the Respondent on the basis of the alleged contamination.

6. The claimant also stated that his role as a Raw and Packing material supervisor entails harmonizing supply chain activities and coordinating its activities to ensure availability of raw materials in the production, a job that he had undertaken with Zeal.

7. On the allegations that raw materials were offloaded without proper checks, the claimant stated that he adhered to the set rules at all material times and in instances were offloading areas was changed, the plant manager was informed and he consented to the same. Further that the allegations that his Turn around Time was abnormal was an afterthought, because meetings were held in regular basis and the issue was never raised in these meetings. Further that he only heard of the alleged non-conforming materials in stores on 5th November, 2021 when he was advised by the Quality Assurance team. In any event that the quality assurance officer are the ones mandated with detecting non- conforming raw materials before and during offloading. Therefore, that non-conforming materials cannot be offloaded without a green light from the quality assurance officers.

8. He, however, stated that there were instances were these checks were bypassed such as when there was machine availability, low stock levels that needed to be boosted, increased flow from contracted suppliers or on bin availability per production requirement. He added that, at all these times, the plant manager was consulted and consented.

9. On the allegations that he had shelved farmer complaints, the claimant states that all complaints received were dully forwarded to the plant manager for action.

10. On the offense of favouring some suppliers over others in offloading of their produce and breaching FIFO, the claimant stated that, all the produce was offloaded on first come, first serve basis.

11. It is averred that despite giving these explanations to the issues raised, the Respondent was not satisfied with the responses and summoned the claimant for a disciplinary hearing scheduled for 24th November, 2022 , however he was not allowed to attend with any employee from the Raw and Packing Material Department, essentially denying him to be accompanied by a colleague of his choice.

12. Nonetheless, that he attended the disciplinary hearing and responded to the charges as listed in the Show cause letter. In addition, that he was stanned by the fact that the Respondent stated that his Turn around Time was abnormal, when, the same Respondent had made targets for him and upon meeting them, he was punished for alleged 'abnormal Turn Around Time (TAT).

13. After that hearing the claimant was dismissed from his employment as communicated by the letter of 2nd December, 2021. That he appealed the decision of the Respondent giving an explanation of

each of the grounds of dismissal once again and reiterating that the reason for termination, had not be substantiated.

14. On the reliefs sought, the claimant stated that through out his employment, he was not provided a house, neither was he paid House allowance in accordance with the law. Further that his contract and pay slip, did not indicate the pay received was inclusive of the house allowance.

15. The Respondent entered appearance on 9th November, 2022 and filed a response to the Amended statement of claim on 31st October, 2023 admitting to employing the claimant and stating that the Claimant was governed by the Rules and Regulations at the Respondent company.

16. It is stated that the claimant breached the Respondent's terms of engagement and thus his termination was procedural and legal and done in accordance with section 44(4) of the *Employment Act*.

17. On procedure, it is stated that the claimant was issued with a Show cause letter, invited for disciplinary hearing, accompanied by a colleague of his choice and heard on his defence. However, that his defence was found wanting in material substance, leading to his dismissal.

18. On house allowance, the Respondent stated that the claimant was paid a consolidated salary, a fact that was brought to his attention on appointment and thus the claim is misplaced.

Evidence

19. During hearing, the claimant testified as CW-1 and adopted his witness statement dated 18/10/2022. He then produced the lit of documents as his exhibits 1-14 respectively, while the certificate of Electronic Evidence produced as Exhibit 15. In addition, he testified that he was unfairly termination. That he was denied proper representation as he was not allowed to be accompanied by a colleague from his department who understood how the department works. He testified that the meeting was scheduled for 2pm but that the Respondent commenced the same at 4pm and run to 7 pm denying him any representation at all as the colleague he secured from another department left to pick his child from school.

20. On reasons for termination, he testified with regard to offloading substandard maize, that he was in charge of department but Paul Kiragu was in charge of the plant and tasked with approving offloading the maize. On the kickback and Mwanecko issue, the claimant testified that he was aware of the turmoil and even called the outsourced company but that they denied allegations.

21. On the alleged complaints shelved, he stated that it was a quality related matter which, he shared with the quality department in charge only, as he did not see it necessary to bring it to the attention of the plant manager. He reiterated that he has never allowed farmers to offload maize without quality checks. He added that the weigh bridge could not be opened before the quality checks are done. He also testified that he never allowed processing of non-conforming raw material. He concluded by stating that he worked hard, earning a bonus for the months of October and November and was surprised with the dismissal when his rating was high.

22. Upon cross examination, he testified that currently, he is employed on contract basis by Cosmos farm. He testified that, he worked for the Respondent for 7 years from 6/1/2015 to 3/12/2021. That before termination, he was served with a Show cause letter which he responded. He testified that he was given an employment letter at the beginning of his employment. He stated that he does not know the meaning of consolidated salary but confirmed that the letter of appointment at paragraph *4* indicate salary will be a consolidated gross pay. He also stated that he never complained of housing or an allowance during his employment.

23. On re-examination, he testified that he is complaining of unfair termination because it was not done in accordance with due procedure and for substantiated reasons. He added that he was employed on consolidated salary of Kshs 78,500 which was increased to Kshs 134,000, however that the pay slip never indicated that he was paid any House allowance.

24. The Respondent called, Doris Kivuti, its Human Resource manager as RW-1. She adopted her witness statement of 25/4/2023 and further statement of 9/11/2023. She produced the Respondent documents dated 16/11/2023 as Respondent's Exhibit 1-4 respectively and stated that she has worked for the Respondent as the in charge of operations and recruitment for the last 5 years. She testified that the claimant worked for the Respondent as the supervisor of Raw materials. She told this Court that the claimant was terminated for justified reason after being subjected to due procedure, thus the claim is not merited.

25. Upon cross examination, she testified that the claimant was entitled to 60 days' notice, however, since she was summarily dismissed, no notice was required. She admitted that she is the one that directed the claimant not to choose an employee from his department. She testified that the claimant secured a witness by the name Amimo who was the supervisor of the finished goods. She admitted that the meeting was scheduled for 2 pm, however, the same started at 4:30 pm, when the said Amimo was engaged elsewhere and thus unable to attend the meeting. She also admitted denying the witness to be heard virtually and insisted on physical attendance. She stated that the claimant did not appeal his dismissal.

26. On terminal dues paid, the witness testified that the claimant was paid 10 days leave not taken and salary up to the time of dismissal. She admitted that they never paid the claimant house allowance. On the issue of FIFO (First In First Out), the witness testified that the procedure is applied on arrival of the raw materials in production area and in case of any exception, the same was to be approved by the plant manager, Paul Kiragu.

27. On second reason for dismissal of being aware of kickback paid to Mwanecko staff, the witness testified that the issue was not in the Show cause letter because the complaint had not been received by the time the claimant was issued with the Show cause letter. On shelving complaints, the witness stated that the reason given was that the issue was shared with quality department because it was a quality issue.

28. On the last reason of dismissal of allowing substandard raw materials for production, the witness testified that, there were several step for checking quality of the raw material and that the same was done by quality officer and not the claimant. On the claimant performance, the witness testified that his department was rated 100% an indicative that the department was doing well.

29. On re-examination, the witness testified that notice pay was only paid to employee who exited the employment on proper termination and not those summarily dismissed like the claimant herein. She testified that the claimant confirmed in the disciplinary hearing that he was the one in charge of FIFO and also that the Turn Arround Time (TAT) for maize was 30 minutes. On complaints from farmers, the witness testified that the claimant ought to have reported the issue to the Plant manager and not take it up with Quality Department. She also told this Court that the claimant failed in that he was the one in charge of ensuring the quality assurance people follow due procedure before the maize was submitted for production.

30. On the issue of munecko, she testified that these company was tasked with also receiving raw materials, however that there were allegations that they used to received substandard maize upon getting kickback. A fact that the claimant knew about and never raised with the Respondent. She admitted that the issue was not listed in the Show cause letter.

31. She clarified that the claimant was not entitled to House allowance because he was earning a Consolidated salary. She added that the claimant was paid all his terminal dues on termination. She testified also that she was not aware of instances when he was allowed to offload raw material without following procedure for boosting production. She stated that the Respondent had not received any Appeal from the Respondent.

Claimant's Submissions.

32. The claimant submitted on four issues; whether the claimant is entitled to the prayer for House allowance, whether the claimant's dismissal was procedurally fair, whether valid reasons existed for dismissal of the claimant and whether the claimant is entitled to the prayers sought in the Amended claim.

33. On the first issue, it was submitted that section 31 of the *Employment Act* requires all employers to provide reasonable housing accommodation to employees at the employer's expense or in the alternative pay house allowance and the only exception to this requirement is when the contract of employment consolidates this pay with the basic salary or where the allowance is covered by a Collective Bargaining Agreement.It was argued that even if the Respondent allege that the claimant was paid gross pay, Section 20 of the *Employment Act*, requires the employer to particularize the payment made to its employees, while section 74(1)(i) of the *Employment Act*, require that the particulars and rates of housing pay be provided by the Respondent, therefore that since the pay was only gross without any particulars on both the Employment contract and the Payslip or evidence tendered in this Court as to the amount allocated for the House Allowance, the claim for House Allowance is merited. To support this, the claimant relied on the case of *Grain Pro Kenya Inc Ltd v Andrew Waithaka Kiragu* [2019] eklr where the Court of Appeal was of the view that House Allowance cannot be presumed to have been part of gross pay without such an express term. The court held that;-

> " Looking at the letter of appointment which is subject contract against the above provision of the law and while conscious that it is not within the scope of courts to re-write a contract but merely to interpret, we find the contract of employment did not indicate whether the sum of USD 600 included house allowance and specifically provided that the respondent was to be paid "other benefits as required by law ". The Judge interpreted that contract although she did not specifically mention this particular clause to mean that the appellant was liable to pay the respondent house allowance. We cannot fault the Judge for that interpretation because house allowance is a benefit that is required under the Employment Act and the contract did not provide that house allowance was consolidated in the basic wage. Counsel for the appellant invited us to look at the payslip that indicated the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause "other benefits as required by law" in the contract to award house allowance. We would have applied *Section 31 (2) (a) of the Employment Act* to exclude it."

34. Similarly, the Claimant relied on the case of *Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eklr where the Court was of the view that where an employee contest being paid House allowance,

its is not enough for the Employer to alleged the remuneration was consolidated. The Court held as follows;-

> " Having regard to the provisions of *sections 9 and 10 (7) of the Employment Act* and *section 97 of the Evidence Act*, it becomes difficult to proceed on the assumption that merely because the word ''consolidated'' is used in the letters of salary increment, the Respondent was receiving house allowance. This is particularly so because no documentary evidence was availed to demonstrate that what constituted the ''consolidated'' salary included the benefit of house allowance. I have considered the authorities relied on by the Appellant on this issue. Most of them state that because the claimants' salaries had a provision for a consolidated salary, the claims for house allowance would not be allowed. However, none of the authorities state as a matter of law and fact that merely because an employee's salary is classified as ''consolidated'' will it be considered as automatically having incorporated the element of house allowance. To the contrary, the general trend in the decisions is that the use of the word ''consolidated'' simply raises a presumption of fact that the salary includes all allowances including house allowance. However, this presumption can be rebutted by evidence to the contrary. For instance, in *Charity Wambui Muriuki v M/s Total Security Surveillance Limited [2017] eKLR*, the court suggests that an employee can rebut this presumption by providing a pay slip to demonstrate that house allowance is not part of the allowances that are included in the consolidated salary. A similar position is expressed in Evans Gato Orina v Aggreko International Project Limited [2019] eKLR when the court states thus: -
>
> ''In my view, the description of the salary as consolidated meant that it was the claimant's constant gross salary and the burden of proving otherwise rests on the employee who has any other interpretation of the said written term of the contract.'' Emphasis added.
>
> In the cases, I understand the court as stating the view that consolidated salary usually includes all allowances unless the employee shows otherwise.Further on this issue, I would like to borrow the interpretation given to the phrase ''consolidated salary'' by Abuodha J in the *Charity Wambui Muriuki v M/s Total Security Surveillance Limited [2017] eKLR* case. The learned Judge suggests that the term denotes ''the basic salary and allowances payable to an employee.'' These allowances may include house allowance. Of importance is that from the definition aforesaid, ''basic salary'' does not include allowances. It is to the basic salary that allowances are added to constitute ''consolidated salary.''A look at the pay slips produced in evidence shows that the salary that the Appellant describes as consolidated only had the ''basic pay'' and allowances other than house allowance. If the definition of consolidated salary adopted by Abuodha J is correct, then it cannot be said that the Respondent's basic salary included house allowance merely by describing it as consolidated. I would perhaps have considered the issue differently if the contract of employment under consideration was an oral one as implied under *section 8* as read with *section 9 of the Employment Act*. In such case, the oral evidence of the parties would perhaps have impacted differently."

35. Accordingly, that the ratio in the above cases applied in all fours to the case herein because the Respondent merely alleged that the House allowance was inclusive of the gross pay but no particulars was given. Therefore, that since the payslip showed the claimant was only paid Basic pay and bonus, the claim of House allowances has been demonstrated and therefore the same should be allowed as prayed at the rate of 15% of the basic pay.

36. On whether the termination was procedural, it was submitted that the claimant was denied a chance to have a representative of his choice in the disciplinary hearing contrary to section 41 of the *Employment Act*, a fact that RW-1 admitted that, she disallowed the claimant to call a witness in the Raw Material Packaging Department. That the denied to be accompanied by a witness with relevant information impeded his fair hearing. Further that the meeting was commenced in the evening at 4:30 pm as opposed to 2pm when the same was scheduled, causing the claimant to loose the only other witness, he secured, who became engaged elsewhere due to the time changes. Additionally, that, the request to have the witness testify virtually was met with an opposition from the Respondent. Cumulatively, that despite convening a disciplinary hearing, the Respondent impeded fair hearing. To support this, the Claimant relied on the case of *Postal Corporation of Kenya v Andrew K Tanui* [2019] eklr, where the Court of Appeal held that;-

> " In this case, the letter inviting the respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular."

37. On reason for termination, the claimant submitted that on the first reason of failing in the management of FIFO and stated that there was instances when FIFO was bypassed and it only occurred with request of plant operator and approval of Plant manager, a fact that was supported by WhatsApp conversation between the claimant and Mr. Paul Kiragu, the Plant manager, in which the said Mr. Kiragu gave the claimant a go ahead to offload the Raw material to production. Hence the first reason for termination was unfounded.

38. On the second reason of failing to the inform the plant manager of the issue of the staff of Mwanecko receiving kickback, it was submitted that the issue herein was not part of the reason listed in the show cause letter and that it was an ambush to the claimant during hearing. Further that details of this offense was never disclosed as such could not be responded to adequately and thus cannot be a reason for termination.

39. On allegation of siting in Mwanecko staff disciplinary hearing, the claimant submitted similarly, that this issue was not listed in the Show cause letter, neither was it considered by the panel in the disciplinary hearing and during hearing in this Court, thus the issue was never substantiated at any point in this case and thus cannot be a reason for termination. In support of this, the claimant relied on the case of *Lwoba v Parlimanentary Service Commissions* (Cause 2357 of 2017) [2022] KEELRC 13096(KLR), where the Court held that;-

> " The Court has considered the evidence adduced by the respective parties, the submissions and the pleadings and find the Respondent has brought conflicting charges against the Claimant. They accuse him of signing form S11 for receipt of goods which were never delivered. There is no evidence to clearly show whether those goods were received and what was the loss if any to the Respondent. he Respondent further accuses him of participating in irregular tendering process and also he is accused of tender opening process as per memo dated May 20, 2015 and once again he responded by his letter of May 29, 2015. He was also accused of blocking the committee from inspecting the goods and his response is that the goods were stored near the stair case and not in the store as there was no room in the store. He

says at no time did he obstruct the goods from being inspected. All these seems to point to inaccuracy if not falsehood from the Respondent because in one breath they claim the goods were not delivered and then allege the Claimant obstructed the committee from inspecting them.The report by the various witness in the disciplinary meeting also seem contradictory. One Mr Arum stated Henry Lwoba altered summary of tender/quotation documents to add E solution. David Kithua said he was not aware when the solution was added and Alloys Tinega said Lwoba signed S11 form. All these contradictions raises eyebrows as to what transgressions the Claimant had committed to warrant summary dismissal."

40. On allegations of receiving complaints from farmers and failing to share with the plant manager, it was submitted that the claimant informed the Respondent that there was complaints received regarding rejections, delay in sampling, offloading, prioritizing of trucks and delayed payment which he discussed with Mr Hiram and Juma therefore that no issue remained unaddressed to warrant his dismissal.

41. On allegations of failing to alert Quality Assurance of vehicle offloading without being tested as shown by the abnoramal Turn Around Time, it was submitted that the claimant worked around the clock to ensure that they meet their timelines on offloading, a fact that the Respondent confirmed that the quality of the raw materials was always 100% while the Turn Around Time(TAT) was 5 minutes for tea, which was within timelines, therefore that the allegations remain unproved, considering also that the Respondent refused to have anyone from his department and Quality Assurance as a witness, who could have addressed some do these issue. It was argued further that the claimant's role was interfered with by the production and the plant manager, therefore he cannot be blamed for action taken by the said departments. In support of this, the claimant relied on the case of *John Jaoko Othino v Intrahealth International* [2022] eklr where the Court held that;-

> " There was an elaborate process of approvals not by one person but more than two of the procurement documents for any goods or services. The Claimant only initiated the process and received quotations from the suppliers. That at the various stages each of the officers through whom the documents passed in course of the approval process, had a specific role to pray as regards the documents. The only reason that attracted the sanction against the Claimant in these circumstances was that he was the senior most in the procurement department. Considering the elaborate process that the witness testified on, I am of the view that this reason makes no sense, with due respect. The Respondent didn't act with justice and equity here.I am of a firm view that a reasonable employer would not visit the admitted systemic gaps or consequences thereof on the Claimant in the circumstances of the matter, but seek to fix the gaps."

42. On the reliefs sought, the claimant submitted that he has proved his case to the required standard and thus, the reliefs sought should be granted.

Respondent's Submissions

43. The Respondent on the other hand submitted on three issues; whether the claimant has established any claim for unlawful termination against the Respondent, whether the claimant is entitled to the reliefs sought and who should bear costs of the suit.

44. On the first issue, it was submitted that the claimant was terminated for various reason including failing to manage the First In First Out (FIFO) system and in effect knowingly allowed direct offloading of Maize into production without the required authorization in breach of his duty as a Raw Material packaging supervisor. It was argued that aflatoxin test was done in 30 minutes however his turn around time was 36 Minutes from the weight bridge to offloading, a clear indication that the aflatoxin test

process was not completed before the said Maize were offloaded causing the Respondent to process bad maize, especially in line 2, when he did not seek any authorization from the Plant manager as is required by procedure when seeking to skip FIFO procedure. He added that the direct production led to production of substandard maize that costed the Respondent loss of 22.7 Million and risk to consumers who purchased contaminated end products.

45. Secondly that the Claimant was aware of Mwanecko staff receiving kickback to process substandard raw material and never reported this issue to the plant manager. Also that, the claimant sat in the disciplinary hearing of Mwanecko employee, when he was not authorized to sit in such meeting, considering that they were outsourced employees.

46. The the reason of receiving complaints of favouritism from farmers and failing to share these complaints with the plant manager. It was argued that in failing to report these issue, with the Respondent's management, the claimant was seen to be aiding and colluding with the rogue employees in total negligence of his roles as a supervisor and in effect caused huge losses to the Respondent, thus the reason for termination was justified.

47. It was argued in addition that the claimant was the one in charge of raw materials and Silos to ensure that the raw materials released for production were safe and free from error and also that the buck stopped with him as the in charge of the department and thus the Respondent was justified in finding him negligent in his duties. In any event that the law under section 44(4) of the *Employment Act*, allows for such dismissal on account of negligence.

48. Accordingly, that having discharged its burden under section 47(5) of the *Employment Act*, by giving reasons for termination , the claimant was tasked with demonstrating that the reason for dismissal was not justified, which he failed. In support of this, the Respondent relied on the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eklr where the Court held that;-

> "We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under *section 43 (1) of the Act*. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test. In the case of *Bamburi Cement Limited v William Kilonzi* [2016] eKLR this Court expressed itself on the nature of proof required as follows: "The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to *section 47(5)* the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing..... The test to be applied is now settled. In the case of the Judicial Service Commission v Gladys Boss Shollei, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in *Mc Kinley v B.C.Tel. (2001) 2 S.C.R. 161*."

49. The Respondent also relied on the case of *Johnson Githinji Kamau v Maridadi Flowers Limited* [2019] eklr where the Court held that;-

> "In this case, the court finds that the claimant was issued with both verbal and written warnings, he accepted these warning and did not appeal or cause to be notified his disapproval as to the lawfulness of the subject of the warnings. The claimant cannot now turn on these warnings and be found to say that they were forced on him. following the issued warnings, there is no challenge to the fact that on 27th January, 2014 the claimant as a sprayer was found to have skipped several lines in praying pesticides. As his duty required him to spray such pesticides, he was trained in the performance of such duties and issued with a certificate of participation, the wilful failure and neglect to undertaken his duties as directed directly frustrated his own employment. There were valid reasons leading to termination of employment. The claimant was paid his terminal dues inclusive of a one (1) months' pay in notice which is a term agreed upon in the collective agreement.On the remedies sought, compensation is not due in a case where termination of employment is found lawful and justified."

50. It was argued that whereas the claimant's performance appeared to be good, it was largely attributed to the fact that, his department by-passed crucial quality assurance tests in order to beat the Turn Around time, an issue that affected the quality of production and caused losses to the respondent while risking the consumers that purchased the end products.

51. On whether procedure for termination was followed, it was submitted that the claimant was issued with Show cause letter, given time to respond before being invited for disciplinary hearing that he appeared and defended himself unsuccessfully.

52. It was argued that even though the claimant alleged that the Show Cause letter did not have sufficient particulars, the same served its cause as the claimant did not protest the alleged insufficient particulars. In any case, that he responded fully to the show cause letter. In support of this, the Respondent relied on the case of *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eklr, where the Court held that;-

> "the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing. In the case of *Local Government Board v Arlidge [1915] A.C. 120*, 132-133, *Selvarajan v Race Relations Board [1975] I WLR 1686*, 1694, and in *R v Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 481* it was held:-"the hearing does not necessarily have to be an oral hearing in all cases .There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing."

53. On allegations that he was no allowed to have his witness in the disciplinary hearing, it was submitted that the claimant was informed in the disciplinary hearing that the hearing will be held physically and thus, he ought to have made arrangement to have his witness attend physically. In any event that there is not procedure in law on how a disciplinary hearing is to be conducted, thus as long as a proper procedure can be deduced and objective of having the employee heard, the procedure in not standard.

In support of this, the Respondent relied on the case of *Selvarajan v Race Relations Board* [1976] 1 ALL ER 12 at 19 where lord Denning held that;-

> " In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it."

54. It was argued further that the claimant's witness one Amimo had been indicated to represent the claimant but bolted the last minute. Nonetheless that the claimant proceeded with hearing willingly in absence of his witness.

55. On the time of commencement of the disciplinary proceedings staring at 4 pm instead of 2pm, the Respondent submitted that the Claimant has not stated how the said time affected his hearing. Additionally, that even though all particulars of allegations were not listed in the Show cause letter, the basis of termination was on negligence of duty, which was clearly stated in the Show cause letter and finer particulars provided during hearing and extensively discussed, thus the cause of termination was known and the claimant defended himself on each allegations levelled against him.

56. From the foregoing, the Respondent submitted that it has proved that the termination was justified in both reason and procedure and thus the claim is without basis in all the claims sought.

57. On the reliefs sought, the Respondent submitted with regard to Notice pay that the claimant was not entitled to notice because he was summarily dismissed.

58. On claim for House allowance, the Respondent submitted that the claimant was paid a consolidated as per clause 4 of the Employment contract and consolidated pay include House allowance and all other allowances. In any event that the claim for such an allowance is statute barred under the provisions of section 90 of the *Employment Act*.

59. On costs, it was argued that the claimant has not proved his claim and thus the Claim should be dismissed with costs to the Respondent.

60. I have examined all evidence and submissions of the parties herein. Thee are 2 issues for this court's determination.

    1. Whether the dismissal of the Claimant was fair and justified.

    2. Whether the Claimant is entitled to the remedies sought.

1. Issue No. 1

61. The Claimant was dismissed vide a letter dated 2/1/12/2021 on the grounds listed therein as per paragraph 35 of the memo of claim.

62. Basically the Respondent indicated that the Claimant though a supervisor failed to implement the Respondents FIFO policy in overseeing storage and transportation prerequisite program and knowingly giving instructions to directly offload maize to production without authorization, being aware of kickbacks issue at Mwanecko and failing to inform the Plant Manager, and sitting on Mwanecko staff disciplinary hearing instead of the HR Business partner or plant manager; receiving a

complaint and not sharing with the plant manager and failing to detect and alert the Quality Assurance Team on vehicles being offloaded without testing as evidenced by abnormal turnaround time.

63. Before the summary dismissal of the Claimant he was served with a show cause letter dated 18/11/2021 accusing him of being negligent in his duties and for conflict of interest. It was indicated that he aided in receipt of raw material that did not have UFCEA Quality specification based on analysis results of different samples drawn by the Quality Assurance Officer. The affected products were listed in the said letter. All complains raised against him were listed and he was expected to respond accordingly.

64. In his response he admitted that as part of his duty, he was to ensure that only quality material is offloaded and made available for use at any given time. He admitted that there were lapses in the system continuous quality check for RM when receipting to ensure uniformity is maintained. He indicated that his team has been above board and has not knowingly receipted material without seeking the right authorization.

65. The Claimant was thereafter invited for a hearing to be held on 24th November 2021.

66. From the evidence adduced by the Claimant, he attended the disciplinary hearing but he indicated that the same was flawed. He submitted that he was denied proper representation during the hearing as he was not allowed to be accompanied by an employee of his choice from his department.

67. To this allegation, the RW1, admitted in her evidence that she is the one who directed the Claimant not to choose an employee from his department.

68. The Claimant also indicated that another witness he wished to call could not testify because the Respondents scheduled the meeting at 2 pm but commenced it late at 4 pm to 7pm when the colleague had left to pick his child from school.

69. The Respondents also admitted that the meeting though scheduled to start at 2 pm started at 2.30 pm when the witness Amimo was engaged elsewhere and thus was unable to attend the meeting.

70. She also admitted that the request for the witness to be heard virtually was also denied.

71. The hearing expected of a disciplinary process is as provided for under Section 41 of the *Employment Act* 2007 which states as follows:

> "*41.(l). Subject to section 42 (l)*, an employer shall,before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical grounds of incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of. an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

72. The process for a fair hearing is also provided for in *ILO Recommendation 166. 1982 (No 66)* ILO Article 9 which states as follows;

> "A worker should be entitled to be assisted by another person when defending himself in accordance with *Article 7 of the Termination of Employment Convention, 1982*, against the

allegation regarding his conduct or performance liable to result in the termination of his employment. This right may be specified by the methods of implementation referred to in paragraph 1 of this Recommendation".

73. *ILO Convention 158 Termination of Employment Convention 1982*, Article 7 state as follows:

> " Article 7
>
> The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

74. It is apparent that the law is clear on the mode of hearing allowable in disciplinary hearing which the Respondents flaunted and have admitted to the same.

75. In view of this shortcoming, the establishment of the validity of reason for dismissal of the Claimant remain wanting.

76. The Respondents even admitted that some of the reasons leading to Claimant's dismissal i.e issue of kick backs were not shared with him in the show cause letter but were only introduced during the hearing.

77. The Respondents in my view failed to discharge their mandate to prove the validity of reasons in view of the flawed disciplinary process.

78. The Respondent's witness, RW1 also in his evidence indicated that there was no proof that the Claimant by passed FIFO. The RW1 also admitted that the issue of the Claimant sitting in disciplinary hearing contrary to service agreement was also never raised in NTSC.

79. Section 45 (2) of the *Employment Act* 2007 states as follows:

> (2) A termination of employment by an employer is unfair if the employer fails to prove—
>
> (a) that the reason for the termination is valid;
>
> (b) that the reason for the termination is a fair reason— related to the employees conduct, capacity or compatibility; or
>
> (ii) based on the operational requirements of the employer; and
>
> (c) that the employment was terminated in accordance with fair procedure".

80. Having found that the disciplinary process was flawed and that some of the reasons for dismissal of Claimant were not proved, I find the dismissal of the Claimant unfair and unjustified as per section 45 (2) above.

Remedies

81. The Claimant sought a number of remedies in this claim. I find that he is indeed entitled to some compensation for the unfair termination. Having been terminated without due process and without establishment of the existence of valid reasons, I exercise my discretion and award him 8 months' salary as compensation being

    8 x 134,529.90

    = 1,076,239.2

82. The Claimant is also entitled to 2 months' notice pay as per his employment contract

= 2 x 134,529.90

= 269, 059.8

Total = 1,345,299/=

Less statutory deductions

83. Claim for house allowance is not payable as Claimant was given a consolidated pay as per his contract of employment.

84. The Claimant should be issued with a certificate of service. The Respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGMENT DELIVERED VIRTUALLY THIS 10TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Kiplangat for Claimant – Present

Odwa for Respondent - Present