



**Kihato v BOC Kenya Limited (Cause 1233 of 2018)
[2024] KEELRC 2202 (KLR) (13 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2202 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1233 OF 2018
J RIKA, J
SEPTEMBER 13, 2024**

BETWEEN

JEREMIAH G. KIHATO CLAIMANT

AND

BOC KENYA LIMITED RESPONDENT

JUDGMENT

Court Assistant: Bernard Kirui

Mogeni & Company, Advocates for the Claimant

J.A. Guserwa & Company Advocates for the Respondent

1. The Claimant filed his Statement of Claim, on 25th July 2018.
2. He states that he was employed by the Respondent, on 23rd July 1997, as an Assistant to P600 Plant Operator.
3. He was summarily dismissed by the Respondent on 6th September 2017. Dismissal was unfair and unlawful. His last salary was Kshs. 118,243, monthly.
4. There was a work-review meeting on 4th September 2017. The Managing Director attended. She expressed her disappointment with the performance of some Employees. She vowed to terminate the contracts of those Employees, to teach the others a lesson.
5. The Claimant was a Shop Steward and raised objection to the Managing Director's approach. The Managing Director was unhappy, and turned against the Claimant, alleging that he was disrespectful to her. She warned him of dire consequences. She alleged that the Claimant had clicked at her, in a show of insubordination.



6. He did not click and was not involved in any act of insubordination. He was victimized by the Respondent, on account of his activities as a Shop Steward.
7. The Respondent issued the Claimant a hurried letter to show cause, and 6 trumped-up charges. He was given 1 day, to appear for disciplinary hearing. The process was merely academic. He was heard on 6th September 2017, and his contract terminated the same day.
8. He was dismissed before he could enjoy the full benefits of a CBA concluded between his Trade Union and the Respondent.
9. He received Kshs. 66,537 as terminal benefits. He was not involved in its computation. He was not issued his Certificate of Service.
10. He prays for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 2 months' salary in lieu of notice at Kshs. 257,358.
 - c. Salary arrears for the period January –September 2017 as per the CBA, at Kshs. 93,924.
 - d. 12 months' salary in compensation for unfair termination at Kshs. 1,544,158.
 - e. Certificate of Service to issue.
 - f. Costs.
11. The Respondent filed its Statement of Response on 13th December 2018. It is admitted that the Claimant was employed by the Respondent. He was not unfairly and unlawfully dismissed.
12. The Respondent held a meeting on 4th September 2017, where performance was reviewed. The Claimant was subsequently, issued a letter to show cause, and given adequate time to respond. He did not respond.
13. He was disciplined as an Employee. His averment that he was a Shop Steward, had no bearing on the disciplinary process. He was not victimized.
14. He was paid all his rightful dues. Termination was fair and lawful. The Claim is frivolous and misconceived. The Respondent prays for its dismissal, with costs.
15. The Claimant filed a Reply to the Statement of Response, on 18th March 2019. He reiterates the averments in his Statement of Claim.
16. He gave evidence, and closed his case, on 27th January 2023. The Respondent called 2 Witnesses, Head of Operations, James Njoroge, and Human Resource Officer Catherine Kamau. They gave evidence on 12th March 2024, closing the hearing.
17. The Claim was last mentioned before the Court on 3rd July 2024, when the Parties confirmed the filing and exchange of their Closing Submissions.
18. The Claimant adopted his Witness Statement on record, which repeats the averments in the Statement of Claim, as summarized above. His role entailed overseeing production of oxygen and other gases. He did not know why the Managing Director was annoyed with the Employees.
19. Cross-examined, the Claimant told the Court that he worked for the Respondent, for over 20 years. In 2016, he received warning over various issues. He was still a Shop Steward at the time. No victimization took place at the time. He received the charges leading to his dismissal. He was given a chance to answer



- each of the 6 charges. The minutes of the disciplinary hearing indicate that he conceded 4, out of the 6 charges. If it is true that he admitted, the Respondent would have been justified, in sending him home. His Claim was not filed through his Trade Union, although he was a Shop Steward. Notice period or pay of 2 months, on termination, was provided for under the CBA. The CBA was not exhibited before the Court. He did not know when the CBA was registered. It was after he left employment.
20. Redirected, he told the Court that disciplinary minutes on record, were not the actual record of the proceedings. He did not see the actual record. He participated in negotiating the CBA. It became effective, 1st January 2017 to December 2018. It was applicable during his period of employment.
 21. James Njoroge, relied on his Witness Statement, in his evidence-in-chief, underscoring that, the Claimant's contract was terminated fairly and lawfully.
 22. Cross-examined, he told the Court that the Claimant worked with him, for about 7 years. The Claimant started as an Assistant. He later went into plant maintenance. He was heard and dismissed on 6th September 2017. The letter to show cause, issued on 4th September 2017. There was a period of 48 hours to prepare for the hearing. The reasons justifying termination were given.
 23. Redirected, Njoroge told the Court that disciplinary proceedings were recorded in the minutes exhibited before the Court. 48 hours' notice of the disciplinary hearing was sufficient. The Claimant accepted 4 of the charges. Termination was based on valid grounds.
 24. Catherine Kamau told the Court that the Claimant had a warning in 2016. In 2017, he was placed on Performance Improvement Plan. He was issued a letter to show cause with charges; invited for disciplinary hearing; heard; and, dismissed. He shook his head and clicked at the Managing Director, in the full view of other Employees. He did not improve, after the PIP.
 25. Cross-examined, Kamau told the Court that she had worked as the Human Resource Officer for 2 years. She did not work with the Claimant, and gave evidence from his personnel records. He worked for over 20 years. It was unlikely that he performed poorly for a period stretching over 20 years. He had been promoted. Kamau was not present when the Claimant clicked at the Managing Director. He was heard and dismissed. He was given a right of appeal. Redirected, Kamau told the Court that the decision to terminate the Claimant's contract, was made after, not during, the hearing. The Claimant was not promoted; he made lateral movement, from department to department.
 26. The issues are whether, the Claimant's contract was terminated for valid reason[s]; whether procedure was fair; and whether the prayers sought are merited. The relevant applicable law, is contained mainly in Sections 41, 43 and 45 of the [Employment Act](#).

The Court Finds: -

27. The Claimant was employed by the Respondent as an Assistant Plant Operator, on 23rd July 1997. He was not clear about his subsequent job titles, but in his Performance Improvement Plan dated 27th September 2016, he was described as a Maintenance Fitter.
28. He was presented with a Notice of Disciplinary Enquiry, dated 4th September 2017. There were 6 charges: failure to submit tools register; delay in completion of removal of old dispensers from the washrooms; late reporting for weekly barazas; failure to repair on time, the staircase barrier at nitrous oxide filling area; delay in completion of door closure at one of the offices; and clicking at the Managing Director, and shaking of his head, in the presence of other Employees. The last allegation was deemed to have been an act of insubordination.



29. Reason[s]: Both Witnesses availed to the Court by the Respondent, James Njoroge and Catherine Kamau, state at paragraph 3 of their respective Witness Statements, that the Claimant was summarily dismissed on 6 grounds, stated at paragraph 28 of this Judgment above.
30. According to this evidence, all the charges against the Claimant were established.
31. The evidence establishing the 6 charges was helter-skelter. The Respondent alleged that the Claimant admitted 4 charges and denied the rest. It was not made clear in the evidence of the Respondent, which charges were admitted and which were denied.
32. The Respondent told the Court, that admission was captured in the minutes of the disciplinary hearing. The minutes are indicated to be exhibit 3, in the list of the documents filed by the Respondent, dated 13th September 2018. Exhibit 3 is a warning letter dated 25th August 2016. The Court has not seen a record of the disciplinary proceedings, where the Claimant is shown to have admitted any charges.
33. There is no record of evidence adduced at the disciplinary hearing, establishing any of the 6 charges.
34. The Respondent also alluded to warning letter, which was issued on 25th August 2016, and which was accompanied by advice that the Claimant would be placed on PIP. The PIP is dated 27th September 2016, and review was meant to take place, on 9th January 2017.
35. The Respondent did not disclose to the Court if review took place, and what was the result of the review, on 9th January 2017. The charges communicated to the Claimant on 4th September 2017, did not allude to PIP. The PIP outcome was left hanging. Instead, the Claimant was presented with 6 charges, relating to events that happened between July 2017 and September 2017.
36. The charge of insubordination against the Managing Director, was not supported by any form of evidence from the Managing Director. The Claimant was said to have clicked and shaken his head in disrespect for the Managing Director, in the full view and hearing of other Employees. There was no Employee brought before the Court, as a Witness to these acts of insubordination, by the Respondent.
37. The Claimant was a Shop Steward, and was not expected to agree to everything said by the Managing Director, even when it was against the interest of his fellow workers. The Court does not see how a simple act of shaking ones' head, and even clicking, in the face of a verbal barrage from an irate Managing Director, would result in an act of insubordination.
38. The Respondent did not establish valid reasons, justifying termination. It was curious that an Employee with over 20 years of service, doing the same or similar work, would suddenly become a poor performer, warranting to be placed on a PIP that in the end, had no known outcome. There was no valid reason shown to support termination, under Sections 43 and 45 of the *Employment Act*.
39. Procedure: The Court finds fault, in the warning letter issued to the Claimant on 25th August 2016. It advised the Claimant that he had been found guilty of 4 charges at a disciplinary enquiry, held on 24th August 2016. He was placed on PIP, which does not appear to have been conclusive.
40. He was issued a Notice of Disciplinary Enquiry dated 4th September 2017. The Notice rehashed accusations about delay or failure in performance of certain tasks by the Claimant.
41. The notice, was not a letter to show cause. He was not required to show cause why disciplinary action should not be taken against him. He was instead, invited to a hearing within 48 hours, on 6th September 2017.
42. He attended the hearing on 6th September 2017. He was heard and dismissed on the same date.



43. The letter of summary dismissal again, repeats the position that the Claimant accepted the charges against him. It does not give details of his admission of the charges.
44. He was advised that he could appeal against the decision, within 3 days. The letter of summary dismissal does not specify where the 3-day right of appeal, is to be found, within the labour instruments regulating the Parties.
45. It does not appear that the Respondent took time to consider what was said at the disciplinary hearing. The panellists appear to have gone to the hearing, ready to get rid of the Claimant, after he angered his Managing Director, by clicking and shaking his head, while she engaged in fit of rage.
46. In this Court's Cause Number E 633 of 2022, between Kenya Chemical Workers Union v. Dawa Limited [2024] e-KLR, the Court emphasized that Employers have a special duty of care, in handling termination of the contracts of Employees who serve as Workers' Representatives at their undertakings.
47. The Court anchored its proposition on ILO Workers Representative Convention 1971, [No. 135] and the implementing ILO Workers Representatives Recommendation, 1971 [No. 143]. The Convention demands that Workers' Representatives working in an undertaking, shall enjoy effective protection against any act prejudicial to them, including dismissal based on their status or activities. The Claimant's click and shaking of the head, was an expression of his deprecation of the Managing Director's diatribe against the Workers the Claimant represented. A Shop Steward is placed at the shop floor level, to among other things, ensure Workers are free from abuse, and other forms of hostile work environment, originating from their Management. The Claimant's reaction to the Managing Director's diatribe, was a protected activity. The mouth, is oftentimes, the only weapon Shop Stewards have, and whether they use it to click, or say something their Management does not like, ought to be protected, so long as it is done within the bounds of the law, decent work agenda, and the industrial relations charter. The ILO Recommendation, calls for detailed and precise definition of the reasons justifying dismissal, of the Workers' Representatives.
48. Procedure was faulty, and did not conform to the minimum standards of fairness, under Sections 41 and 45 of the *Employment Act*.
49. Remedies: It is declared that termination was unfair and unlawful.
50. The Court has not been availed any individual or collective agreement, fixing the notice period at 2 months. The prayer for 2 months' salary in lieu of notice is rejected. The Claimant is allowed the statutory minimum of 1-month salary in lieu of notice, at Kshs. 118,243.
51. There is no evidential support for salary arrears of Kshs. 93,924 as per the negotiated CBA. The CBA in question was not submitted before the Court. The prayer is rejected.
52. The Claimant was employed on 23rd January 1997, and left employment on 6th September 2017. He worked for a creditable period of 20 years and 7 months. His problems with the Respondent only emerged, from around the year 2016, and appear largely to have been related to his role as a Shop Steward. He was not shown to have caused, or contributed to the events leading to his summary dismissal. He told the Court that he resided at a place called Saika, but did not disclose what he did for living, and whether he mitigated loss of employment, by securing other sources of income. He was paid Kshs. 66,537 in terminal benefits, after working for over 20 years. He is granted compensation equivalent of 12 months' salary at Kshs. 118,243 x 12 = Kshs. 1,418,916.
53. Certificate of Service to issue.
54. Costs to the Claimant.



55. No order has been sought on interest, and no interest shall accrue.

In sum, it is ordered: -

- a. It is declared that termination of the Claimant's contract by the Respondent was unfair and unlawful.
- b. The Respondent shall pay to the Claimant 1-month salary in lieu on notice at Kshs. 118,243 and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,418,916 – total Kshs. 1,537,159.
- c. Certificate of Service to issue.
- d. Costs to the Claimant.

DATED, SIGNED AND RELEASED ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020 THIS 13TH DAY OF SEPTEMBER 2024.

JAMES RIKA

JUDGE

