

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E406 OF 2022

**BAKERY CONFECTIONERY FOOD
MANUFACTURING & ALLIED WORKERS UNION (K)
....CLAIMANT**

-VERSUS-

**KENAFRIC INDUSTRIES LIMITED.....
RESPONDENT**

JUDGMENT

Introduction

1. The Claimant lodged this suit through a Memorandum of Claim dated 15th June, 2022, and filed in court on even date on behalf of its member named Thomas Komu Ndunda (the grievant). It seeks the following reliefs as against the Respondent:-
 - i. A declaratory order that the termination of the grievant's services was unfair, based on invalid reasons, procedurally flawed, hence illegal, null, and void.
 - ii. An order for the award of terminal dues and benefits as computed under part F of the claim in the sum of Ksh.346,350.00 with interest at court's rates from the date of filing suit until payment in full.
 - iii. An order for costs of the Suit.

2. The Respondent entered an appearance on 24th August, 2022, and subsequently filed a Statement of Response to the Memorandum of Claim dated 27th February, 2023.
3. Both the Claimant's and the Respondent's cases were heard on 28th April, 2025. The grievant, one Thomas Komu Ndunda testified in support of the Claimant's case, adopted his witness statement and produced the list and bundle of documents filed as exhibits in the matter.
4. The Respondent presented the evidence of Julius Angoli in support of its case. Julius adopted his witness statement and produced the Respondent's documents as exhibits in support of the Respondent's case.
5. Both parties filed submissions in the matter, and the submissions have been duly considered.

The Claimant's Case

6. The Claimant states that it has with the Respondent a valid recognition agreement and have also signed multiple collective agreements that set out the terms and conditions of service for unionisable employees and govern the relationship between the parties.
7. The Claimant avers that the grievant, a unionisable employee and member of the Claimant union, was employed by the Respondent as a Store Assistant from 1st September 2000 and was later confirmed in June 2001. It states that at the time of termination, the grievant earned a

basic salary of KShs.14,700.00, a house allowance of Kshs.6,505 and a transport allowance of Ksh.2,788.00, making it a gross salary of Kshs.23,090/-.

8. The Claimant states that the grievant had an exemplary employment record.
9. It is the Claimant's case that on 13th November 2019, the grievant was issued a show cause letter accusing him of unauthorized buying and selling of company drums. It avers that he responded to the letter, explaining that selling drums was part of his assigned duties, carried out under his supervisor's instructions and properly documented with valid invoices and delivery notes.
10. It is the Claimant's case that despite his response to the show cause letter, the Respondent found his explanation insufficient and held a disciplinary hearing on 18th November 2019. The Claimant states that during the hearing, no evidence of misconduct was produced, yet the grievant was summarily dismissed on 21st November 2019.
11. The Claimant avers that following the dismissal, the Claimant reported a trade dispute to the Minister on 5th March 2020, and a conciliator was appointed. It states that upon reviewing the matter, the Minister issued recommendations on 10th November 2019, finding that the grievant had not engaged in misconduct and recommending reinstatement or payment of terminal dues.

12. The Claimant states that it accepted the Minister's recommendations on 2nd February 2021, and proceeded to compute the grievant's dues, but the Respondent rejected the conciliator's findings through letters dated 18th December 2020 and 22nd February 2021, prompting the filing of this suit. The Claimant avers that the Respondent then issued the grievant a cheque for only Ksh.12,886.00 and a Certificate of Service, which the Claimant considers grossly inadequate.

13. The Claimant maintains that there were no valid grounds for the grievant's termination, and asserts that the sale of the company drums was an assigned duty from the grievant's supervisor, and that valid delivery notes and invoices were produced and never disputed, and no evidence showed the grievant benefited personally. The Claimant further states that the supervisors who issued the instructions were neither disciplined nor called to testify.

14. The Claimant further argues that the disciplinary process was unfair, biased, and designed to ensure the grievant's dismissal without proper consideration of his defense. It is its case that given the grievant's 20 years of clean service, the termination was unjust, disproportionate, and contrary to principles of fairness and equity.

15. The Claimant argues that the Respondent failed to act in accordance with the principles of justice and equity when terminating the grievant, thus violating Section 45(4)(b) of the Employment Act, 2007. It avers that the termination was

based on invalid reasons, was disproportionate, and was procedurally improper.

16. It is the Claimant's position that, as a result of the unlawful termination, the grievant has suffered loss of income, social disruption, and difficulty securing alternative employment after 15 years of service. The Claimant asserts that the grievant is entitled to appropriate remedies, including three months' salary in lieu of notice under the Collective Agreement, given his 20 years of service, and compensation for unfair termination under Section 49 of the Employment Act, considering the flawed process and the grievant's long tenure.

17. On cross-examination the grievant told the court that he was allowed to buy the items/drums by his supervisor named Maharaj who also approved the purchase. He further told the court that he had no documents evidencing the approval.

18. It is the grievant's testimony that invoices were issued and one would remain with him as the others were taken by the customers. He indicated that he did not have the invoices before court.

19. The grievant further told the court that he took drums from the Respondent's premises for use at his house, sometimes on credit with intention to pay for them later. It is his testimony that the Respondent Company knew about the items, but did not know whether the sale was official or not.

20. The grievant's position is that the company knew the customers who bought the items/drums. He stated that he signed the delivery notes for the goods to be delivered. He confirmed that the Respondent's company lost trust in him.

21. On re-examination, the witness told the court that he was not given any document indicating the assignment of duties. He further stated that he was not the one who prepared the delivery notes, and further that he was allowed only 24 hours to respond to the show cause.

22. The Claimant prays that its claim be allowed.

The Respondent's Case

23. The Respondent denies the Claimant's allegations that the grievant was ever given authorization to use or sell company property. It states that the grievant faced only one disciplinary hearing on 18th November 2019, where he was charged with unauthorized use of company property.

24. It is the Respondent's case that the delivery notes cited by the Claimant do not amount to authorization to sell drums or jerricans, nor do they permit personal business within company premises. The Respondent states further that the Claimant failed to produce evidence showing that the grievant was authorized to use company drums for personal gain.

25. The Respondent states that the invoices presented by the Claimant were not stamped or sealed, suggesting they were

illegally obtained. It further maintains that the summary dismissal was lawful, as the grievant used company property for personal benefit without permission.

26.The Respondent states that the grievant confessed to unauthorized use and attempted to blame his supervisor. The Respondent denies that selling drums was part of the grievant's job description, and reiterates that due procedure for authorization was not followed.

27.The Respondent asserts that the payment of Kshs.12,886.00 made to the grievant fully covered all dues owed up to 22nd November 2019.

28.The Respondent states that the Claimant is not entitled to the remedies sought under the Statement of Claim, arguing that the grievant is not entitled to notice pay because his employment ended through summary dismissal. It further states that the grievant is not eligible for compensation for unfair termination on account of the circumstances leading to his dismissal.

29.On cross-examination, the RW1, told the court that orders by customers go to the Sales and Procurement department where documents are prepared to accompany the order. He confirmed that an invoice and a delivery note are then prepared.

30.It is RW1's position that the grievant's role in the procurement chain was to release the goods, and had no

direct role in receiving orders from customers. RW1 asserts that goods can leave the Respondent's premises without documentation where there is collusion between workers, and that such a scenario would amount to theft. He stated further that no one was charged for theft.

31. RW1 further told the court that disciplinary proceedings were taken against the persons who were named by the grievant, but no evidence of the proceedings is before the court.

32. It is RW1's testimony that the other persons disciplined will not testify in the matter, as they were already dismissed, though their dismissal letters have not been produced in evidence.

33. The Respondent finally prays that the court strike out the suit with costs.

Analysis and Determination

34. Having considered the pleadings, oral testimonies, documentary evidence, and the rival submissions, the following issues arise for determination:-

- i. Whether the Claimant's dismissal is fair
- ii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant's dismissal is fair

35. In determining the fairness of a termination/dismissal, the court considers both the process and the grounds for the termination/dismissal. A dismissal is considered lawful and

fair, where the employer adheres to the twin tenets of fair process and the substantive justification test.

36. Section 41 of the Employment Act, 2007, requires that an employee is notified of charges against them in a language they understand and in the presence of a fellow employee or shop floor steward, an opportunity to respond to the charges, and to be heard in respect of the charges. In ***Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR***, the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

37. The undisputed facts in this matter are that the grievant received a show cause letter dated 13th November 2019, he responded to the letter in writing, and attended a disciplinary hearing convened on 18th November 2019.

38. The Claimant contends that the disciplinary hearing was unprocedural, premised on the fact that the grievant was only allowed 24 hours to respond to the show. Indeed, the show cause letter produced in evidence allowed the grievant only 24 hours to respond to the issues raised against him.

39. In my considered view, a 24 hour response window to a show cause letter renders the dismissal procedurally unfair, even if the employee made it to respond to the show cause within the time. An employee must be allowed reasonable time to respond.

40. In ***Nyambu v Consolbase Limited [2025] KEELRC 260 (KLR)***, the court held that reasonable time should never be below 3 clear days, though more may be required depending on circumstances. The court proceeded to characterize a show cause letter and a disciplinary hearing scheduled the next day, with no real time to respond or prepare, as “both casual and unfair.”
41. It is evident from the court record that the grievant was issued a show cause letter on 13th November, 2019, invited for a hearing on 18th November, 2019, and summarily dismissed on 21st November, 2019.
42. In light of the foregoing, I find and hold that the procedure adopted in summarily dismissing the grievant does not meet the procedural fairness test threshold set under Section 41 of the Employment Act, 2007.
43. The dismissal is procedurally unfair, and so I hold.
44. On the substantive fairness test, the question is whether the Respondent had fair, reasonable, and justified grounds to dismiss the grievant. Under Section 43 of the Employment Act, the employer bears the burden of proving the reason for termination, and failure to do so renders the termination unfair.
45. In ***Charles Musungu Odana v Kenya Ports Authority [2019] eKLR*** the Court stated:-

“It is now clear that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment...”

46. The Respondent asserts that the grievant used company drums for personal use without authority, and that the invoices and delivery notes relied upon were not stamped or officially issued.

47. The grievant admitted under cross-examination that he took the subject drums to his home for personal use, that he had no written authorization, and had no documentary proof of the supervisor's alleged instruction.

48. From the evidence before the court, the Claimant failed to produce any written authorization, documented approvals, and official company invoices or delivery notes confirming the grievant's position that he had instructions to take the drums. Further, the grievant's claim that he was "allowed by his supervisor" is unsupported, and the alleged supervisor was never called as a witness.

49. The Respondent produced consistent testimony (RW1) showing that the grievant had no role in receiving customer orders, and that delivery notes alone do not authorize sale. The Respondent also confirmed that goods can leave the premises without documentation where collusion exists amongst employees.

50. The grievant further admitted personal use of company property both in his response to the show cause and during cross-examination, which admission strengthens the Respondent's reasonable suspicion. In ***Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR***, it was held that the employer must demonstrate a reasonable basis for believing misconduct occurred.

51. Based on the totality of evidence herein, I find and hold that the Respondent had a genuine, reasonable, and lawful basis to believe that the grievant engaged in unauthorized use of company property, constituting misconduct under Section 44(4)(g).

52. I further find that the Respondent has established a valid and fair reason for dismissal.

53. In whole, the court finds the grievant's dismissal unfair only on account of procedure.

Whether the Claimant is entitled to the remedies sought

54. The Claimant prayed for a declaration that the grievant's dismissal is unfair, 3 months' notice pay, 12 months' compensation for unfair termination, and costs of the suit.

Compensation

55.The court found the grievant's dismissal wrongful on account of procedure, having been allowed only 24 hours to respond to the show cause letter.

56.The Court, at the same time, found the grievant's dismissal substantively fair, and on this basis, it is apparent that the grievant contributed a great deal to his own dismissal.

57.In the circumstances, I find an award of three months' salary sufficient compensation for the unfair dismissal.

Notice Pay

58.For the reason that the grievant's dismissal has been held to be wrongful, it entitles him to pay in lieu of notice.

59.The CBA between the parties herein provides a 3-month notice period for employees who have served for over 10 years. The grievant served the Respondent for more than 20 years, which confirms his claim of 3 months' pay in lieu of notice. It is merited and allowed as prayed.

60.In conclusion, the Claimant's claim succeeds in terms of the following orders:-

- a) A declaration that the grievant's dismissal is unlawful and wrongful on account of procedure.
- b) That the Respondent shall pay the grievant 3 months' salary as compensation for the wrongful dismissal at Kshs. 69,270/-
- c) That the Respondent shall pay the grievant 3 months' salary in lieu of notice at Kshs 69,270/-
- d) The Respondent shall bear the costs of the suit.

ORIGINAL

61. It is so ordered.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 18TH DAY OF DECEMBER, 2025.**

**C. N. BAARI
JUDGE**

Appearance:

Mr. Amalemba present for the Claimant

Mr. Waweru h/b for Mr. Juma for the Respondent

Ms. Esther S- C/A