Kenya Engineering Workers Union v Ashut Engineering Limited (Cause E362 of 2023) [2025] KEELRC 1941 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1941 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E362 OF 2023

BOM MANANI, J

JUNE 30, 2025

BETWEEN

KENYA ENGINEERING WORKERS UNION ..... CLAIMANT

AND

ASHUT ENGINEERING LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant is a Trade Union registered under the relevant law in Kenya. It represents unionisable employees in the engineering sector within the Republic.

2. The Respondent is a limited liability company registered in Kenya. Its operations are in the engineering sector in the Republic.

3. Manwa Mosoti (hereafter called the Grievant) was an employee of the Respondent having been engaged as a machine operator with effect from 20th June 2003. He was also a member of the Claimant.

4. The evidence on record shows that the Claimant and Respondent had entered into a Collective Bargaining Agreement (CBA) in the year 2016. The validity period for the instrument was two years.

5. The foregoing implies that the Claimant and Respondent had a subsisting Recognition Agreement. This is because it is a legal requirement for an employer and a Trade Union to have a subsisting Recognition Agreement for the two to undertake the process of collective bargaining.

6. The evidence on record shows that the Grievant was appointed as a shop steward to represent the Claimant and its members at the shop floor (the Respondent's workplace). In this position, he was the bridge between unionisable employees within the Respondent's workforce, the Claimant and the Respondent.

7. The Claimant has filed these proceedings on behalf of the Grievant to challenge the Respondent's decision to terminate the Grievant's employment. It contends that the decision was unjustified and therefore unlawful.

8. The Grievant contends that on 28th August 2020, the Respondent issued him with a notice to show cause letter accusing him of having convened an unauthorized meeting at the workplace on the afternoon of 24th August 2020. The meeting was allegedly called to raise funds for the Grievant's workmate who was unwell.

9. The Grievant avers that the Respondent accused him of having convened the meeting in contravention of the guidelines on social distancing which were meant to contain the spread of the Covid 19 virus which was ravaging the world at the time. He avers that the Respondent asserted that the alleged meeting did not provide for social distancing of the attendees as there was crowding.

10. The Grievant denies that he convened the alleged meeting. He contends that his colleagues wrote to the Respondent to deny that there was such a meeting but the Respondent ignored this communication.

11. The Grievant contends that the Respondent subsequently subjected him to a disciplinary hearing which resulted in termination of his employment through summary dismissal. The Grievant avers that he was not given adequate notice for the disciplinary hearing.

12. The Grievant further contends that he challenged the decision to terminate his services through an appeal. However, the appeal was allegedly declined without him having been heard.

13. The Claimant avers that after the Respondent declined to vacate its decision to terminate the Grievant's employment, it reported a trade dispute to the Ministry of Labour and a Conciliator was appointed to arbitrate the dispute between the parties. It contends that although the Conciliator recommended that the Respondent reinstates the Grievant, this was not done. And hence this suit.

14. The Grievant asserts that the Respondent's decision to dismiss him from employment was not only unfair but also discriminatory. He avers that the decision infringed on his rights to fair labour practice and fair administrative action.

15. The Grievant further alleges that the Respondent's actions violated clauses 25 and 26 of the CBA between it and the Claimant. As such, he contends that the summary dismissal was illegal.

16. The Respondent has contested the suit. It avers that the decision to relieve the Grievant of his employment was informed by valid reasons. It further avers that it adhered to fair procedure whilst processing the dismissal.

17. The Respondent avers that the Grievant convened a physical meeting at the workplace on the afternoon of 24th August 2020 against a directive banning physical meetings because of the prevailing health conditions at the time. It contends that the Grievant acted in defiance of lawful directives and was thus liable for disciplinary action.

18. The Respondent contends that it issued the Grievant with a notice to show cause letter asking him to explain why disciplinary action should not be taken against him for the alleged misconduct. It contends that after the Grievant offered his response to the letter, it convened a disciplinary hearing where he was heard before the decision to terminate his contract was made.

19. The Respondent contends that the Grievant was given a chance to appeal the decision. It contends that the appeal was heard and the decision to terminate the Grievant's services upheld. As such, it contends

that it not only had valid reasons to terminate the Grievant's employment but also accorded him fair procedure.

Issues for Determination

20. After evaluating the pleadings and evidence on record, I consider the following to be the issues for determination:-

    a. Whether the Respondent's decision to terminate the Grievant's employment was lawful.

    b. Whether the Grievant is entitled to the orders that he seeks in the suit.

Analysis

21. The parties do not contest the fact that in the year 2020, the world was afflicted by the Covid 19 pandemic which paused a serious health risk to humanity. This is self-evident from the Respondent's letter of show cause to the Grievant dated 28th August 2020 and the response by the Grievant dated 28th August 2020. In the letters, both the Respondent and the Grievant refer to the pandemic and the serious health risks it paused to humanity.

22. Both parties also affirm that during this period, restrictions were imposed on gatherings in order to control the spread of the virus. This is, for instance, implied in the Grievant's letter dated 28th August 2020 when he stated as follows:-

> ''...if I were to hold any meeting, I know the procedure. During this period of Covid 19, we have been observing social distance since March 2020 to date.''

23. Further, the minutes of the meeting of 4th September 2020 demonstrate that the Grievant was aware that the Respondent had banned social gatherings around this time. In the premises, it is apparent that the parties were both aware of the restrictions on gatherings at the time.

24. The contest in the case is whether the Grievant convened the contested meeting on 24th August 2020 in contravention of the aforesaid restrictions. Whilst the Respondent's case is that the Grievant convened the impugned meeting and did not ensure social distancing by the attendees, the Grievant denies that he convened the meeting.

25. Convinced that the Grievant had contravened the guidelines on social distancing, the Respondent convened a disciplinary session on 4th September 2020 to determine his (the Grievant's) fate. Although the letter inviting the Grievant to the session suggests that the meeting was to have been held on 3rd September 2020, the minutes indicate that it was held on 4th September 2020.

26. The minutes demonstrate that during the session, the Claimant and the Grievant were represented by two officials of the Claimant. In addition, the Grievant called a co-employee as a witness.

27. The minutes further show that the Grievant denied that the impugned meeting took place. In response, the Respondent played a CCTV video clip which showed that there had indeed been a gathering at the workplace on the afternoon of 24th August 2020. The minutes also show that the Respondent called other employees who confirmed that the impugned meeting took place contrary to the assertions by the Grievant that there was no such a meeting.

28. When the Grievant was cross examined on the issue during the trial, he confirmed that the Respondent indeed played a CCTV footage during the disciplinary hearing and that the footage showed that there had been a meeting on the impugned date. He further affirmed that he watched the footage at the time.

29. The fact that the Grievant conceded during cross examination in court that there had been a meeting on 24th August 2020 when he had initially denied this fact discredits his evidence. It renders him an unbelievable witness.

30. As such and having regard to the foregoing, I believe the Respondent's evidence that the Grievant convened the aforesaid meeting. Further, I come to the conclusion that the Grievant convened the meeting despite being aware that this was in contravention of the prevailing guidelines prohibiting public gatherings.

31. The foregoing being the case, it is clear to me that the Respondent was justified to consider terminating the Grievant's contract of service. The Grievant's conduct contravened the Respondent's express instructions against physical meetings by employees in order to contain the spread of the Covid 19 virus. Such conduct amounted to gross misconduct in terms of section 44 (4) (e) of the *Employment Act*.

32. There is evidence that the Respondent issued the Grievant with a notice to show cause letter. There is evidence that the Respondent subsequently convened a disciplinary hearing during which the Grievant was not only heard but also allowed to call witnesses. The evidence further shows that the Grievant was represented by two officials of the Claimant.

33. During trial before this court, the Grievant confirmed that he was allowed to challenge the decision to terminate his contract on appeal. He confirmed that he attended the appeal session on 21st October 2020 when his appeal was declined.

34. The above evidence demonstrates that the Respondent upheld due process whilst processing termination of the Grievant's contract of service. As such, I am satisfied that the Respondent complied with the requirements of fair procedure.

35. The Claimant avers that the Respondent's decision to terminate the services of the Grievant was discriminatory. It contends that if there was a meeting, it implies that it involved other employees. Yet, only the Grievant was targeted for disciplinary action. As such and in the Claimant's view, this amounted to discriminatory treatment.

36. In response, the Respondent avers that it took action against the Grievant because he was the organizer and convener of the impugned meeting. In the Respondent's view, the other employees who attended the meeting were innocent participants having been summoned to the session by their shop steward who had considerable influence over them.

37. The court takes cognizance of the fact that the employer enjoys managerial prerogative to determine how he should run the workplace. In this regard, he is entitled to decide whom to punish at the workplace and what kind of punishment to mete out so long as this is done within the boundaries of the law.

38. The court cannot intervene in the process to insist that if the employer has taken action against one employee, he must do so against another employee. That is left to the employer to handle. As such, the Claimant's assertion that the Grievant was discriminated because other employees who attended the impugned meeting went unpunished is rejected.

39. In the Statement of Claim, the Claimant has lodged several claims on behalf of the Grievant. These include:-

    a. Pay in lieu of notice.

b. Pro-rata leave for ten months.

c. Twenty three unpaid work days.

d. Service gratuity.

e. Compensation for unfair termination of the contract of service.

f. Certificate of Service.

40. Although these claims are pleaded in the Statement of Claim, they are not mentioned in the witness statement by the Grievant which he adopted as his evidence in chief during the trial. It is also noteworthy that Grievant did not speak to the reliefs during his testimony in chief. As the court record shows, he only prayed for reinstatement back to employment without loss of benefits.

41. The foresaid being the case, it is evident that although the Claimant seeks: pay in lieu of notice; pro-rata leave; unpaid work days; and service gratuity, no evidence has been tendered to support these claims. So to speak, the Claimant appears to expect that the court will enter judgment for the Grievant on the aforesaid claims on the basis of the bare averments in the Statement of Claim minus evidence to support them. This will be irregular for averments in pleadings are not evidence (see China Henan International Corporation Group v Tobias Oburu t/a Oduru Enterprises [2022] eKLR and Cannon Assurance (Kenya) Limited v Mohansons (Kenya) Limited & Another [2020] eKLR).

42. Be that as it may, although the Grievant has prayed for notice pay, the evidence on record shows that he was summarily dismissed from employment. This fact is admitted by him at paragraph 8 of his witness statement.

43. The law on summary dismissal is encapsulated in section 44 of the *Employment Act*. This provision entitles an employer to summarily terminate the services of an employee without notice if the employee is guilty of gross misconduct.

44. In the instant case, it has been demonstrated that the Grievant was dismissed from employment on account of failure to follow lawful instructions issued by the Respondent. As noted earlier, this conduct amounted to gross misconduct under section 44 of the *Employment Act*. As such, the Grievant was summarily dismissed for this misconduct.

45. Having regard to the foregoing, it is apparent that the Grievant would not, in any event, have been entitled to notice before his contract was terminated. As such, his plea for pay in lieu of notice cannot be granted.

46. On service pay, the Grievant's pay slip for August 2020 shows that he was a registered contributor to the National Social Security Fund (NSSF). As a matter of fact, he confirmed this fact during cross examination. He further confirmed that it is the Respondent who used to remit the monthly NSSF contributions on his behalf.

47. Section 35 (1) of the *Employment Act* deals with the issue of termination of a contract of service with notice. Under section 35 (1) (c) thereof, an employee who is paid salary periodically at intervals of or exceeding one month is entitled to notice terminate his contract of service of not less than twenty eight (28) days unless the contract is summarily terminated under section 44 of the Act. If the employer is not able to issue this notice, he must pay the employee an amount which is equivalent to the employee's salary for one month (see section 36 of the Act).

48. Section 35 (5) of the Act provides as follows:-

> ''An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.''

49. In effect, an employee is only entitled to service pay if his services have been terminated with notice of at least twenty eight (28) days. The provision does not entitle an employee who has been terminated summarily without notice to service pay. In this context, the Grievant's claim for service pay must fail since his contract was terminated without notice on account of summary dismissal.

50. But even assuming that I am wrong in the above interpretation of the statute, the Grievant would still not be entitled to pursue the claim for service pay. As has been demonstrated earlier, he was a contributor to the NSSF. By virtue of section 35 (6) (d) of the Act, employees who are contributors to the NSSF are not entitled to claim service pay on termination of their employment. As such, this relief is not available to the Grievant.

51. The Claimant has argued that the claim for service gratuity is premised on the CBA between the parties. The Claimant relies on clause 31 of the CBA to push this argument. However and in my view, that clause cannot be invoked to oust section 35 (6) (d) of the *Employment Act* which specifically disentitles employees who are contributors to the NSSF from pursuing service pay as a standalone benefit.

52. The Grievant also claims pro-rata leave and salary for days worked but not paid for. However, he did not provide evidence to support the claims. In the absence of this, the court cannot grant the reliefs.

53. The Grievant has also sought reinstatement back to his position. However, the evidence on record shows that the decision to terminate his services was rendered in September 2020, more than three years back.

54. Under section 12 (3) (vii) of the *Employment and Labour Relations Court Act*, the remedy of reinstatement is only available to an employee whose services have been unfairly terminated within three years of termination of the contract of service. As such, since the Grievant's contract was terminated more than three years back, this remedy is no longer available to him. In any event, the remedy would still not have issued in favour of the Grievant since the Respondent's decision to server the employment relation with him has been found to have been legitimate.

55. The Grievant has also prayed for compensation for the alleged unfair termination of his contract. However, this remedy is not available to him since his contract was validly terminated.

56. Section 51 of the *Employment Act* entitles an employee who has left employment to a Certificate of Service irrespective of the circumstances under which he left employment. In the premises, the Respondent is obligated to issue the Grievant with a Certificate of Service.

Determination

57. The upshot is that I arrive at the conclusion that the Respondent lawfully terminated the Grievant's contract of service.

58. The foregoing being the case, I find that the Grievant is not entitled to the reliefs that he seeks through the Statement of Claim save for the one relating to Certificate of Service.

59. As such, this suit is dismissed.

60. Nevertheless, the Respondent is ordered to provide the Grievant with a Certificate of Service.

61. Each party to bear own costs.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JUNE, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI