



**Kenya Union of Commercial Food and Allied Workers v Marumi Farmers Co-operative Society Limited (Cause E011 of 2023) [2024] KEELRC 851 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 851 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E011 OF 2023  
ON MAKAU, J  
APRIL 5, 2024**

**BETWEEN  
KENYA UNION OF COMMERCIAL FOOD AND ALLIED  
WORKERS ..... CLAIMANT  
AND  
MARUMI FARMERS CO-OPERATIVE SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a registered trade union and brings this suit on behalf of its member, Mr. John Mwangi Mbugua (grievant) seeking the following reliefs:
  - a. One month notice =24,060.00
  - b. Accrued Annual Leave for 4 years =24,060/26 X 21 X 4 =77,699.00
  - c. Public Holidays for 4 years =24,040.60/26 x 10 days x 4 years=36,984.60
  - d. Service Gratuity 24,040 x 3months x 4 years=288,487.20
  - e. Underpayment of wages
    - 2017 October to 2018  
22,985-7000=15,895.90x7=111,271.30
    - 2018 May to April 2019  
24,060.60-7000=17,040.60 x 12=204,487.60
    - 2019 May to April 2020  
24,040.60-7000=17,040.60x12=204,487.60



2020 May to October 2021

$24,040.60 - 7000 = 17,040.60 \times 18 \text{ months} = 306,730.00$

Total Amount Kshs.1,254,178.50 (one million two hundred and fifty-four thousand one hundred and seventy-eight fifty cents).

- f. Interest in (i) –(v) above at court rate.
  - g. Any other relief the court may grant to meet the natural justice.
  - h. Costs of the suit in favour of the claimant.
2. The respondent has denied liability and maintained that it dismissed the grievant for gross misconduct during his Probation period. Therefore, it prayed for the suit to be dismissed with costs.

### **Factual background**

3. The facts of the case are fairly straight forward. The claimant alleged that the grievant was employed by the respondent in October 2017 as a Cherry Recorder for a monthly salary of Kshs.7,000.00 without house allowance. He was not given written contract but he worked continuously for four (4) years until 30<sup>th</sup> August 2021 when he was issued with a written contract to sign. The contract was for a fixed term of three years renewable and the salary remained Kshs.7,000.00 per month.
4. Subsequently, he worked until 30<sup>th</sup> September 2021 when his contract was terminated. In the claimant's view the termination was unlawful because the reason cited was false and the procedure followed was not fair. It is the claimant's case that the grievant was not served with prior notice of one month and he was not accorded any hearing.
5. The claimant sought amicable settlement with the respondent concerning the reliefs sought herein but the respondent declined. The claimant lodged a trade dispute with the Labour Cabinet Secretary but again they failed to cooperate. Hence the instant suit in which the claimant avers that the grievant is entitled to the benefits provided in the Collective Bargaining Agreement (CBA) between it and the respondent.
6. The claimant contended that the salary of Kshs.7,000.00 paid to the grievant was far below the salary of a Cherry Recorder both in the CBA and the General Wage Order. Besides the grievant was never given annual leave for four years and he worked during public holidays without pay.
7. During the hearing, the grievant denied the alleged fraud and maintained that he was never accorded any hearing before the termination. He denied that he was served with the letter dated 25<sup>th</sup> October 2021 which was inviting him to disciplinary hearing. He denied defrauding the respondent by tampering with the Cherry Records for Francis Ng'ang'a and Cyrus Mwitii. He maintained that he was dismissed unlawfully.
8. The grievant further testified that he worked continuously but he was not paid according to the CBA. He relied on his bank statement to prove that he was paid salary through the time he was in employment before signing the written contract on 30<sup>th</sup> August 2021.
9. On the other hand, the respondent's case is that the grievant was employed from 2017 to August 2021 as a casual employee but he did not serve continuously. On 10<sup>th</sup> August, 2021 the grievant was successful in an interview and on 30<sup>th</sup> August 2021, he was given an appointment letter subject to two (2) months' Probation period. The Probation contract was terminable to by a notice of seven (7) days or payment of salary in lieu of notice.



10. The respondent further averred that during the probation period, it discovered that the grievant was involved in fraud by recording double entries in favour of Mr.Tirus member Number 4166 and Mr.William member Number 5711. The said exaggerated entries were done through collusion with the said persons in order for them to earn undeserved allowances. The said misconduct caused a loss of Kshs.1,500,000.00 to the respondent.
11. The Respondent averred that the grievant was directed to leave to pave way for investigations. The investigation revealed certain anomalies implicating the grievant. After the grievant's leave ended, he was invited to appear before the Management Committee on 27<sup>th</sup> October 2021 vide a letter dated 25<sup>th</sup> October 2021.
12. The respondent further averred that the grievant failed to give written explanation as required and when he appeared before the committee, he stated that he had nothing to say because the alleged offence was computer error. The respondent maintained that it was entitled to dismiss the grievant for the fraud. It averred that the grievant had stolen its property and wrote an apology letter dated 26<sup>th</sup> February 2021 while still working as Cherry Recorder on casual basis.
13. During the hearing, respondent's chairman Mr.Peter Kamau Mwangi (RW1) testified that the fraud by the grievant was discovered in September 2021 and when he was called for hearing on 27<sup>th</sup> October 2021 he denied the offence. However, he was dismissed because his fraud caused the employer a loss of Kshs.1,500,000.00. He contended that the dismissal took effect on 28<sup>th</sup> October, 2021 during the probation period.
14. He contended that the grievant was not a member of the claimant union during his employment hence it never invited the union during the hearing on 27<sup>th</sup> October 2021. He admitted that the dispute herein was referred to a conciliator but the parties disagreed. He denied that the grievant was in continuous service for four (4) years and maintained that he worked as casual until August 2021 when he was given appointment letter.
15. The Respondent's Secretary Manager Mr.Peter Irungu Kimani (RW2) has worked for the respondent since 2017. He testified that the grievant caused the respondent a loss of Kshs.1,500,000.00 through fraud between 2017 and August 2021. He further testified that the grievant was called to a hearing but declined to explain the cancellations and alterations in the farmers' cherry records. The grievant stated that there was nothing to explain since it was computer error. He contended that the claimant was not invited to the hearing because the grievant was not a member of union. He contended that the termination was done during the probation period.
16. He testified that the grievant started on casual basis and thereafter he was engaged under a contract of probation. He confirmed that the grievant was working daily except on Sundays and public holidays. He admitted that the grievant was being paid monthly salary through the bank.
17. He confirmed that the dispute over grievant's terminal dues was referred to a conciliator but there was no settlement. He maintained that the claimant joined the claimant union after the dismissal. He however admitted that clause 18 of the CBA provides for Temporary Workers for six (6) months but upon the terms prescribed by the General Wage Order in force.

## **Submissions**

18. From the onset, the claimant clarified that the reason why the parties are before the court is not about unlawful termination but the refusal by the respondent to pay terminal benefits to the grievant upon



termination. Nevertheless, it submitted that there is no evidence adduced to prove the alleged fraud or that the same was ever investigated before the termination.

19. It submitted that there is no dispute that the grievant worked continuously for four (4) years without going for leave and his salary was underpaid. It contended that the grievant was a member of the union and as such he is entitled to benefit from the CBA including service gratuity under clause 4. It further relied on clause 18 of the CBA which provided for temporary employee on specific period not exceeding six months and their salary/wages in accordance with the General Wage Order in force.
20. He further submitted that section 28 of the *Employment Act* and clause 11 of the CBA provided for annual leave but the grievant was not given for the four (4) years he was in employment. He also worked during public holidays but he was not paid double rate as provided under the CBA.
21. It submitted that the conciliator recommended for payment of his terminal dues (see page 57 of the claim) and it accepted but the respondent failed to pay. Therefore, it prayed for judgment in the sum of Kshs.1,254,178.50 as prayed in the claim.
22. The respondent mainly submitted on the alleged unlawful termination. It maintained that the grievant committed fraud against it as a result which it suffered a loss of Kshs.1,500,000.00 it maintained that it produced evidence to show that it conducted investigation and discovered that the grievant had committed fraud through false entries of coffee cherry. It submitted that the ground for termination was solid and sound. For emphasis, it cited the case of *British Leyland UK Ltd v Swift (1981) I.R.L.R 91*.
23. The respondent further submitted that, the dismissal was done through a fair procedure as required by section 41 of the *Employment Act*. It maintained that the grievant was accorded a hearing on 25<sup>th</sup> October 2021 and defended himself by blaming the alleged false entries on computer error.
24. Finally, the respondent submitted that the claimant is not entitled to the reliefs sought because termination was done during probation period. He has also not tendered evidence to prove that he worked on public holidays and it has not also pleaded any particulars of the public holidays worked. As regards gratuity, the respondent submitted that the grievant was a casual employee and he has no right to that benefit. It denied the alleged salary underpayment contending that there was no legal or contractual basis for granting the said relief. Therefore, the court was urged to dismiss the suit with costs.

### **Issues for determination**

25. There is no dispute that the grievant worked for the respondent without a written contract from October 2017 to August 2021 when he was given a written contract. There is further no dispute that the grievant worked continuously and was drawing a monthly salary of Kshs.7,000.00 through the bank. Finally, it is a fact that the grievant was dismissed from employment by the respondent effective from 28<sup>th</sup> October 2021.
26. The issues falling for determination are: -
  - a. Whether dismissal was unlawful.
  - b. Whether the Claimant is entitled to the reliefs sought.



## Unlawful dismissal

27. Section 45 (1) & (2) of the [Employment Act](#) Provides that:-

- “(1) No employer shall terminate the employment of an employee unfairly.
- (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—
    - i. related to the employee’s 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.”

28. Section 43 of the [Employment Act](#), provides that:-

- “ 1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

29. Section 41 of the [Employment Act](#), 2007 provides that:-

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical 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.”

30. In this case, the respondent produced documentary evidence showing the minutes of the Management Committee meeting held on 20<sup>th</sup> and 27<sup>th</sup> October 2021. In the later meeting the grievant did not expressly admit or deny that there were false entries in favour of some farmers. The minutes confirm what RW1 and RW2 stated during the hearing, that the grievant blamed the false entries on computer



error. Based on the said minutes, I find that the respondent has proved the reason for the dismissal on a balance of probability.

31. As regards the procedure followed, I find that the grievant was accorded a fair opportunity to defend himself. He attended a hearing before the Management Committee on 27<sup>th</sup> October 2021.
32. Having considered the evidence before the court, I must hold that the dismissal of the grievant was fair both substantively and procedurally. It is now well settled in our jurisprudence that termination of employment by an employer is only unfair if the employer fails to prove that it was grounded on a valid reason and that a fair procedure was followed.

### **Reliefs sought**

33. In view of the foregoing finding, the claimant is not entitled to salary in lieu of notice and compensation. Such benefit is only availed to an employee whose dismissal is wrongful or unfair within the meaning of section 45 of the *Employment Act*.
34. However, the claimant is entitled to leave for the four years he worked from October 2017 to October 2021. He was denied leave in the pretext that he was a casual employee but there is evidence on record showing that he worked continuously and earning a monthly salary.
35. The preamble to the CBA stated that the agreement covered all the unionisable employees of the Cooperative Society. It did not state that it covered only the union members. It follows that whether or not the grievant was a member of the union, he was entitled to the same terms and conditions of service as the other unionisable employees of the respondent.
36. The only exclusion, was temporary employees under Clause 18 of the CBA whose benefits were regulated by the General Wage Order in force. The grievant was not a temporary employee for six months but a permanent employee engaged verbally or by an operation of the law under section 37 of the *Employment Act*.
37. Section 37 of the *Employment Act*, 2007 provides that: -
  - “ 1) notwithstanding any provision of this Act where a casual employee: -
    - a. works for a period or number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
    - b. Performs work which cannot be reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service.
  - (2) In calculating wages and the continuous working days under subsection (1) a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
  - (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the



date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.”

38. Flowing from the above provision, I find that, even if the grievant started as a casual employee in October 2017, he converted to a regular employee due to his continuous service running into four years. The claimant prayed for 21 days leave which is the minimum leave under section 28 of the *Employment Act*. Clause 11 of the CBA provides for more favourable leave. However, parties are bound by their pleadings.
39. Between October 2017 and September 2020 when the current CBA took effect, the grievant’s salary was Kshs.7000/-. The claimant has not produced any other CBA to prove that the grievant was entitled to a pay higher than Kshs.7000 during that period. Hence  $Kshs.7000 \times 3 \times 21/30 = 14,700/-$ . However, under the CBA filed, the salary of a Cherry Recorder (Group D) was Kshs.14,000.00. Hence leave for the last year was  $Kshs.14000 \times 21/30 = Kshs.9,800.00$ . The total leave earned in the four years is equal to Kshs.24,500.00.
40. The claim for underpayment is allowed in the following terms. The first three years, the underpayment proved is only with respect to unpaid house allowance. Conventionally, courts in the land award house allowance at the rate of 15% of the basic pay. Hence  $Kshs.7000 \times 15/100 \times 12 \times 3 = Kshs.37,800.00$ .
41. As regards the fourth year, his basic salary was Kshs.14,000 plus house allowance of 15% of Kshs.14,000 equalling to Kshs.2,100/-. This makes the gross pay Kshs.16,100.00 compared to Kshs.7,000/- paid to the grievant. The under payment that year is  $Kshs.16,100 - 7,000 = Kshs.9,100 \times 12 = Kshs.109,200/-$ . The total underpayment is equal to Kshs.147,000.00.
42. The claim for service gratuity is allowed on the basis of clause 4 of the CBA which entitles an employee to three months current basic salary for each completed year of service. Hence  $Kshs.14000 \times 3 \times 4 = Kshs.168,000.00$ .
43. The claim for public holidays worked lacks material particulars and supporting evidence. Consequently, it is declined.

## Conclusion

38. I have found that the dismissal of the grievant was lawful. However, I have found that the claimant is entitled to some of the terminal benefit sought. Consequently, I enter judgment for the claim in the following terms: -

- a. Leave..... Kshs.24,500.00
- b. Gratuity.....Kshs.168,000.00
- c. Salary underpayment.....Kshs.147,000.00
- Kshs.339,500.00

The sum awarded is subject to statutory deductions. The claimant will have costs and interest at court rates from the date of filing suit.



**DATED, SIGNED AND DELIVERED AT NYERI THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.

