



Ajwang v Kenya Chemical Workers Union (Employment and Labour Relations Cause 17 of 2023) [2024] KEELRC 969 (KLR) (3 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 969 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 17 OF 2023**

HS WASILWA, J

APRIL 3, 2024

BETWEEN

FANUEL YOGO AJWANG CLAIMANT

AND

KENYA CHEMICAL WORKERS UNION RESPONDENT

JUDGMENT

1. The claimant herein instituted this claim by a memorandum of claim dated 14th February, 2023, claiming to have been unfairly summarily dismissed and seeking for the following Orders; -
 - a. A declaration that that summary dismissal of the claimant was unlawful, unprocedural and unjustified.
 - b. Damages for wrongful termination equivalent to 12 months' salary at Kshs 88,000 per month with a total of Kshs 1,056,000.
 - c. Three months' pay in lieu of notice at Kshs 88,000 amounting to Kshs. 264,000.
 - d. Gratuity at the rate of one month pay for each of the 36 years served, as per paragraph 6 of his reviewed employment contract of 14th August, 2016, being Kshs 88,000 multiplied by 36 being total of Kshs. 3,168,000
 - e. Accumulated salary arrears of Kshs 800,000.
 - f. General damages for causing the claimant emotional distress and slander.
 - g. Exemplary damages for destruction of the dignity of the claimant.
 - h. The Respondent be ordered to issue a certificate of service to the claimant within fourteen days of these Orders of the Court.



- i. Costs of the suit and interest at Court rates.
- j. Interest on (b)(c)(d) and (e) at Court rates from 26th January, 2022 until payment in full, and
- k. Such others or further relief this Court may deem fit.

Claimant's Case

2. The claimant stated that he was employed by the Respondent in the year 1986 to the position of Area Secretary Rift valley region, which is based in Nakuru and served the Respondent for 36 years until January, 2022 when his services were terminated. That at the time of termination, he was earning a gross salary of Kshs. 88,000.
3. The circumstances leading to his termination is that on the 30th August, 2021, the Claimant was served with a Show cause letter dated 24th August, 2021 for allegedly receiving a bribe of Kshs 25,000 from Mrs. Joan Maube, in order to aide in the following up of her late husband's terminal dues.
4. He avers that the complaint was lodged by one David Onyancha, the Respondent's Branch treasurer in Nakuru, in form of undated and unsigned letter which labeled the bribery allegations as against one 'Mr. Achwang'i'.
5. The claimant was directed to respond to the letter within 4 days of receipt. He wrote back to the Respondent on 30th August, 2021 requesting for more time to put in a response.
6. On 22nd October, 2021, the Respondent wrote to the claimant castigating him for not addressing the contents of the show cause letter and informing him that as a punishment he will not receive his salary for the month of October, 2021.
7. On 26th October, 2021, the Claimant responded to the show cause letter denying all the allegations therein. Subsequently, he was invited for a disciplinary hearing scheduled for 27th November, 2021 to answer to claims of soliciting of bribe for Kshs. 23,000.
8. On the same day, the Respondent informed him that his response to the Show cause letter is disregarded for being submitted late. Further that the claimant was not informed of his right to be represented or be accompanied by a colleague in the disciplinary hearing.
9. On the date of the hearing on 27th November, 2021, the claimant appeared before the disciplinary committee to defend himself. However, that the Committee was not properly constituted. Further that he was not given fair hearing before the committee members had already made up their minds.
10. He stated that he was not allowed to cross examine the complainant, neither was he furnished with evidence of the said money exchanging hands to him. Nonetheless that he was dismissed by a letter of 26th January, 2022, for receiving a bribe of Kshs 25,000.
11. That he appealed against the said decision on 29th January, 2022, however his Appeal was dismissed. He maintained that the dismissal was unfair.
12. He gave the particulars of unlawfulness that; He was not informed the exact allegations leveled against him, his offense kept mutating because he was informed that he received bribe of Kshs 25,000 in the Show cause letter but the invitation letter, subject of the disciplinary hearing, had quoted a sum of Kshs. 23,000; failing to accord the claimant the right to be accompanied by a representative, advocate or even a fellow employee; failing to summon the complaint and be cross examined during the disciplinary hearing; failing to grant him an opportunity to be heard; refusing to pay him his terminal dues upon the summary dismissal and subjecting the claimant to an improperly constituted disciplinary committee.



13. During hearing the claimant testified as CW-1 and adopted his witness statement dated 14.2.2023 and produced the documents of even date as Exhibit 1-14 respectively. In addition, he testified that the complainant letter by one Onyancha had the show cause letter attached however his name was not mentioned in the complaint. He told this court that he was subjected to unfair disciplinary committee and that he was not informed of his rights to have witnesses and also not allowed to cross examine the committee's witnesses.
14. He told this Court that he received the notice to show cause and the invitation for the disciplinary hearing letter and attended the hearing, however he was terminated on 26th January, 2022 by Peter Ouko Onyango and then the Appeal was dismissed by the same person peter Ouko Onyango.
15. Upon cross examination, he testified that he received Kshs 25,200 from Mrs. Maube as Union dues, which he receipted. He testified that he used the said money to process the case of Habel Maube, which case is still in Court. On being cross examined on his position, he testified that he was the Union secretary for Nyanza and Rift Valley. He admitted that there is a treasurer in Nakuru, however that he is allowed to receive money as he is the recruiter. He also admitted that the receipt he issued did not have the treasurer signature.
16. Upon further cross examination, he testified that he received the said money from the member's spouse and the money was used to confirm membership in line with section 3 of the Union Constitution. He testified that he was invited for disciplinary hearing on allegation of bribery. He confirmed that one Mr. Ouko, the National Secretary General was not in the disciplinary meeting. He however maintained that the Disciplinary committee was not properly constituted as provided for under Rule 9 of the Union Constitution.

Respondent's Case

17. The Respondent entered appearance of the 20th March, 2023 and filed a defence to the claim on even date denying the contents of the claim and in particular stated that the claimant was employed by the Respondent for 36 years, however that he was terminated for justified cause.
18. It is averred that the complaint letter is dated 17th July, 2021, while the show cause letter dated 24th August, 2021 was served on the Respondent on 25th August, 2021, which the claimant responded to after several reminders with the last one being 22nd October, 2021.
19. It is averred that the claimant was subjected to disciplinary hearing on 27th November, 2021, where he admitted receiving the Kshs. 25,000 and alleged that it was an oversight on his part. Subsequently, the claimant was given a chance to Appeal his Case, which he did but the Respondent, after discussion, upheld the decision of the disciplinary hearing committee.
20. The Respondent denied allegations that the claimant was denied representation and stated that the claimant attended the meeting by himself on his own volition.
21. The Respondent called Joan Maube, as its RW-1 who adopted her witness statement of 8th January, 2024 which in summary stated that upon the demise of her husband, he went to the Respondent Union to process his dues and on reaching there, he was introduced to the claimant, the then branch secretary, who informed him that her late husband contributions were not up to date and therefore they needed Kshs 25,000 to update his contributions, in order for her to be paid the said dues. That she paid the said money, however, she learnt later that no money was needed to update her late husband's account and therefore the Union refunded her the said Money.



22. Upon cross examination, she testified that she gave the said Kshs 25200 to the claimant in the presence of Gilbert. she testified that the money was allegedly used as Union dues arrears and not as a bribe for processing the Union dues. She stated that she was not issued with any receipt. She also stated that she did not make any complaint before the Union. She maintained that she only paid the said money as she understood that the money was needed to be paid to clear arrears before the Union processes her late husband's benefits.
23. On re-examination, she testified that she has not been paid her late husband's dues. She also confirmed that she was not summoned to any disciplinary hearing and that the money she paid of Kshs 25,000 was refunded to her.
24. The second witness was one Jacob Odundo, the Respondent's Deputy National Secretary General, who testified as RW-2 and adopted his witness statement of 14.8.2023 and produced the Respondents documents as Exhibit 1-9 respectively.
25. On cross examination, he testified that the claimant was subjected to disciplinary hearing for bribery. He confirmed that the complaint emanated from David Onyancha. He also admitted that David onyancha and Joan Maube were not called as witnesses in the disciplinary hearing. He stated that the complaint letter was not signed because it was an email. On the invitation captioning the money as Kshs 23,000, the witness stated that the figure was a typo. He also testified that the disciplinary committee did not find an offense of bribery but found him culpable of fraud.
26. On re-examination, he testified that the offense against the claimant was for fraud of failing to bank money. He also confirmed that due process was followed before termination was effected.

Claimant's Submissions.

27. The claimant submitted on two issues; whether the claimant was wrongfully, unlawfully and unfairly terminated from employment and whether the claimant should be granted the prayers sought.
28. On the first issue, it was submitted that the termination of the claimant on account of an alleged bribery or failure to bank money is unsubstantiated and was conducted in violation of the claimant's right provided for under section 4(3) (g) *Fair Administrative Actions Act*. It was argued that the Respondent did not tender any evidence in support of the allegations that he received a bribe or at least call the complainants to attend the disciplinary hearing for the purposes of cross examination to ascertain the allegations raised. Therefore, that the reason for termination was not proved in line with section 43 of the *Employment Act*.
29. With regard to procedure, the claimant submitted that the dismissal was unprocedural because; Firstly, he was subjected to mutating allegations because the Show cause notice showed he had received a bribe of Kshs 25,000, while the invitation letter shown the amount as Kshs 23,000, while in the termination letter he was found guilty of fraud of failing to bank money received and not bribery as indicated in the show cause letter. Secondly, that the invitation letter did not spell out his right to be accompanied by a representative, advocate and or colleague during the disciplinary hearing. Thirdly, That the complainants were not called as witnesses as such he was not given a chance to cross examine them. Fourthly, that he was terminated in violation of Rule 10(a)&(h) of the Union Constitution that vest disciplinary action on the Central Council and not the National General secretary as was done in this case. Finally, that the same disciplinary committee that heard him in the first instance in the disciplinary hearing, sat on his Appeal, making the process flawed.
30. The claimant submitted that in light of the foregoing, the Respondent has failed in justifying his dismissal and relied on the case of *Walter Ogal Anuro v Teachers Service Commissions* [2013] eKLR



where the Court affirmed that a termination of employment passes the fairness test when there is both substantive justification and procedural fairness.

31. The claimant also relied on the case of *Fredrick Kariuki Kamau v Bank of India* [2015] eKLR where the Court held that:-

“An unfair dismissal may be proved on the grounds that there was no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the *Act*. The reasons can be varied based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer. On the side of the employer, apart from the requirement in section 47(5) of the *Employment Act* to justify the grounds of termination, section 43 demand that the employer prove the reasons for the termination, while section 45(2)(a) and (b) require an employer to prove that the reasons for termination were valid and fair reasons.”

32. On whether the claimant should be granted the reliefs sought, it was submitted that section 49 of the *Employment Act* gives the remedies for wrongful dismissal and therefore he prayed to be awarded 12 months' salary as compensation and cited the case of *Ivetta Mkala v Nation Media Group*, Industrial Cause No. 2367 of 2012.

33. The claimant also prayed to be awarded general damages for being publicly humiliated and labeled as a corrupt person, which labeling dented his reputation. In this he relied on the Court of Appeal case of *Francis Xavier Ole Kaparo v Standard Limited & 3 Others*. He buttress its arguments by citing the case of *The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo* [2018] eKLR where the Court relied on the case of *Gatley on Libel and Slander* 12th Edition para 9.18 at page 353 which dealt with aggravated damages as follows:

“The conduct of the defendant his conduct of the case, and his state of mind are all matters which the claimant may rely on as aggravating the damages in so far as they bear on the injury to him...It is very well established that in cases where the damages are at large the judge can take into account the motives and conduct of the defendant, where they aggravate the injury done to the Plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing appropriate compensation.”

34. Based on the foregoing, it was submitted that a sum of Kshs 800,000 as damages would be sufficient for the humiliation meted against him by the Respondent.
35. In conclusion, the claimant submitted that he has proved his case against the Respondent and is thus deserving of the reliefs sought in the claim, which he urged this Court to allow as prayed.

Respondent's Submissions.

36. The Respondent submitted on three issues; whether the claimant was illegally, unlawfully and unfairly terminated from employment, whether the Claimant is entitled to the prayers sought and who should bear the costs of this suit.
37. On the first issue, it was submitted that under section 45 of the *Employment Act*, termination of employees contract of employment is unfair if the employer fails to prove that the termination was grounded on valid and fair reasons, and that a fair procedure was followed. Similarly, that in this case, Firtly, that the Claimant was terminated after he collected money from RW-1, Joan Maube, who is the



wife to a deceased member of the Respondent. Secondly that he was issued with a show cause letter dated 24/8/2021 and a reminder dated 22/10/2021 that the Claimant replied through his letter dated 26/10/2021 and a further undated letter received by the respondent on 28/10/2021. Thirdly, that the Respondent invited the Claimant for a disciplinary hearing through the letter dated 23/11/2021 and the claimant attended disciplinary hearing held on 27th and 28th November, 2021 as was expressly admitted by the Claimant during the hearing of the suit and as per the minutes filed in court by the Respondent. Further that upon dismissal, the claimant was afforded Appeal mechanism which he utilized by the letter dated 29/01/2022 where he admitted using the money for union expenditures but due to oversight, he did not seek permission from the Respondent's National General Secretary on the receipt and use of the money.

38. Having analyzed the facts as such, the Respondent submitted that it terminated the Claimant's services for illegally collecting money from the wife of one of its late member and failing to account for the said money or receiving the same as is required by the Union. Therefore, that the reason for termination was justified.
39. On procedure, it was submitted that proper procedure was followed as the claimant was subjected to disciplinary hearing all the way to the Appeal. It is also argued that contrary to the claimant's allegations that the disciplinary panel was not properly constituted, the Respondent submitted that Rule No. 9 of the Respondent's Constitution clearly places the responsibility upon the National Executive Board for management of day to day affairs of the union and disciplinary control over the individual officers of the union and the members of staff employed in different departments. Therefore, that since the National General Secretary is the Chief Executive Officer of the Union as is enumerated under Rule 17(c) of the Respondent's Constitution, the CEO, in exercised of his powers, appointed a committee of four which conducted the disciplinary hearing on 27th and 28th November 2021.
40. The Respondent submitted also that the claimant was invited for the disciplinary hearing and informed of the formation of the disciplinary committee and at no time did he object to its formation and or constitution and or appointments both before disciplinary hearing and in the Appeal, therefore the issue is an afterthought.
41. On that basis, the Respondent submitted that the termination of the claimant was done in line with the law and met the requirements of a fair dismissal as stated by the court in the case of *Walter Anuro vs Teachers Service Commission* [2013] eKLR where the court observed thus;

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
42. On the reliefs sought, it was submitted with regards to damages, that the Respondent has shown as per Section 45 (2) of the *Employment Act*, that the reason for termination was valid and the reason for the termination was related to the Claimant's misconduct, which was not unfair in procedure and merits. They thus urged this court to dismiss the claim.
43. On notice pay, it was submitted that the Claimant herein was summarily dismissed in line with section 44(1) of the *Employment Act* on grounds of gross misconduct hence, notice is not required and the claim for notice pay ought to fail.



44. On gratuity, it was submitted that gratuity was only payable under the terms of the contract of employment as per clause 6. Therefore, that since the claimant was terminated for gross misconduct, he is not entitled to gratuity pay.
45. It was also submitted that gratuity is not granted as of right but as a benefit for employees who leave employment honorably. In any event that the Respondent was remitting the NSSF for the claimant as such the claim for gratuity cannot be demanded.
46. On the claim for accumulated salary arrears of Kshs 800,000, it was submitted that it had paid the Claimant all his salary and there was no any pending payment on salary. In any event that the claimant has not particularized and tendered evidence in support of this claim.
47. On the claim for general damages for causing emotional distress and slander, it was argued that it is trite law that general damages are not awardable for wrongful termination. Additionally, that the claimant has not proved the said emotional distress and slander alleged. To support this case, the Respondent relied on the case of *Joseph Njogu Kamunge vs Charles Muriuki Gachari* [2016] eKLR, where the Court was of the view that general damages are not awarded for wrongful termination but are an exercise of the trial court's discretion which should be applied reasonably. Secondly, section 49 of the *Employment Act* does not have provision for general damages in instances of unfair termination.
48. On the claim for exemplary damages, it was submitted that the Claimant has not demonstrated any maliciousness and bad faith in the termination of his services, as such the claim ought to fail.
49. The Respondent stated that the certificate of service is ready for collections in its headquarters
50. On costs and interest, it was argued that the same follow event and since the claimant has failed to prove his case, the claim herein should be dismissed with costs to the Respondent.
51. I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows:
 1. Whether there were valid reasons to warrant dismissal of the Claimant.
 2. Whether due process was followed before the Claimant was dismissed.
 3. Whether the Claimant is entitled to the remedies sought.

(1) Reasons

52. The Claimant was dismissed summarily vide a letter dated 6th January 2022 which indicated that he had been involved in acts that amount to bribery.
53. Before the dismissal, the Claimant had been issued with a show cause letter which he replied to denying involvement in bribery but indicated that he received 25,000/= from one Mrs. Maube to update union dues for her late husband which had fallen in arrears.
54. The Claimant was later invited for disciplinary hearing amid these allegations. The Claimant indicated that he had been accused of bribery yet the incident of bribery was never proved. The accuser of the Claimant who purportedly gave him the bribe was never called as a witness during the disciplinary hearing. It is true that the Claimant was given 25,000 by Mrs Maube which he admitted. He however denied it was a bribe. He also indicated that he receipted it and used the cash to process the case of the late Maube which case is still pending in court.
55. The issue is whether the 25,000 was a bribe or not. Mrs Maube denied she gave the cash as a bribe. She also gave out the cash in the presence of another in the Respondent's office.



56. The Claimant was not dismissed for fraud but for bribery which incident of bribery was not established.

57. Section 43 of the *Employment Act* 2007 state as follows:

43.

- (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.

58. It is imperative that the claim of bribery being the reason for the Claimant's dismissal be established. From the evidence on record, I fail to discern bribery as a valid reason for the Claimant's dismissal and I find there was no valid reason to warrant dismissal of the Claimant.

(2) Due process

59. On issue of due process, the Claimant was indeed invited to a disciplinary hearing forum. The Claimant contends that the process was not fair. He indicated that he was not accorded an opportunity to cross examine his accuser.

60. The Respondents admitted that during the disciplinary hearing the widow, Joan who is alleged to have given the Claimant the bribe was never called as a witness. The person/s who wrote a letter complaining of the Claimant receiving a bribe were also never called as witnesses.

61. Section 41 of the *Employment Act* 2007 states as follows:

41.

- (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.

62. Indeed, that is the process envisaged for a proper disciplinary hearing. In the case of the Claimant this process was not followed and I therefore find that the Claimant was not subjected to a fair disciplinary hearing.

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

- “ 45 A termination of employment by an employer is unfair if the employer fails
- (2). 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 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.”

64. Given that there lacked valid reason to dismiss the Claimant and that he was not accorded a fair disciplinary hearing, I find his dismissal unfair and unjustified.

Remedies

65. The Claimant sought a myriad of remedies. Following the declaration that his dismissal was unfair and unjustified. I find that he is entitled to damages and given the fact that he was a longstanding employee having served the Respondents for 30 years, he deserved to be treated better but was unfortunately bundled out in a shameful manner without payment of his terminal dues. I award him 8 months salary as damages for the unfair termination = $8 \times 88,000 = 704,000/=$.

I also award him one month notice pay – $88,000/=$

As concern gratuity, this is his entitlement as per the letter of contract of 14/8/2016 = $88,000 \times 36 = 3,168,000/=$

Total awarded = $3,960,000/=$

Less Statutory deductions.

The Claimant should also be issued with a Certificate of Service.

The Respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGEMENT DELIVERED VIRTUALLY THIS 3RD DAY OF APRIL, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Musili holding brief Obuya for Respondent– Present

Okiro for Claimant

Court Assistant - Fred

