



**Kenya Chemical Workers Union v Dawa Limited (Cause E633 of 2022)
[2024] KEELRC 1440 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1440 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E633 OF 2022**

**J RIKA, J
JUNE 14, 2024**

BETWEEN
KENYA CHEMICAL WORKERS UNION CLAIMANT
AND
DAWA LIMITED RESPONDENT

JUDGMENT

1. This Claim is brought by the Claimant Union, on behalf of its 2 members, former Employees of the Respondent, Gladys Jepkemboi Kandie and Caroline Kweyu [hereinafter, the Grievants].
2. The Statement of Claim was filed on 8th September 2022.
3. The Respondent is engaged in the business of manufacturing of human and veterinary drugs. The Claimant represents Unionisable Employees, in the drugs industry.
4. It is pleaded that Gladys [1st Grievant] was employed as a General Labourer, on 12th February 2006. She was a trade union leader at the shop floor level. She was diligent. She earned a gross monthly salary of Kshs. 26,472.
5. Caroline [2nd Grievant] was employed on 6th August 2012, similarly as a General Labourer. She was a diligent Employee, earning a monthly gross salary of Kshs. 21,815.
6. The 1st Grievant was suspended by the Respondent on 5th June 2020 [not 2022 as indicated in the Statement of Claim], on the allegation that she invited the Claimant's leaders to the workplace, and gathered the Respondent's Employees, to be addressed by the Claimant's leaders.
7. Suspension lasted for about 1 month. She was issued a letter of termination in the end, without any disciplinary hearing. She was advised to appeal against termination by the Respondent, and also told to resign from her role as a shop steward, in order for her appeal to succeed.



8. The 2nd Grievant was suspended on 2nd July 2020. She was alleged to have engaged in acts of insubordination. She was issued a letter to show cause. Before the end of 2 days from the date of the letter to show cause, and the letter of suspension, the 2nd Grievant was issued a Certificate of Service. She was shortly issued a letter, referenced 'end of contract.'
9. The letters were served upon the 2nd Grievant on 7th July 2020, and were followed by the letter of termination, issued the same day. She was told that her contract had expired, and also that her contract had been terminated on account of redundancy.
10. The dispute was referred to the Ministry of Labour. The Conciliator heard representation from the Parties, and concluded that both Grievants' contracts were terminated unfairly.
11. It was recommended that the 1st Grievant is paid terminal dues and compensation for unfair termination, equivalent of 6 months' salary; and, the 2nd Grievant is paid terminal dues and compensation for unfair termination, equivalent of 4 months' salary.
12. The Respondent did not accept the conciliation report, opening the way for the commencement of this Claim. The Claimant prays on behalf of the Grievants, for the following orders: -
 - A. Reinstatement.
 - B. Alternatively: -
 - 1st Grievant –
 - a. 2 months' salary in lieu of notice at Kshs. 52,944.
 - b. Salary for days worked up to 2nd July 2020 at Kshs. 28,508.
 - c. Pro-rata leave, of 7 months at Kshs. 14,308.
 - d. Annual leave at Kshs. 26,562.
 - e. Gratuity over a period of 15 years at Kshs. 321,930.
 - f. Baggage allowance at Kshs. 12,000.
 - g. Compensation for unfair termination equivalent of 12 months' salary at Kshs. 317,664.Total...Kshs. 773,916.
 - 2nd Grievant –
 - a. 2 months' salary in lieu of notice at Kshs. 43,040.
 - b. Salary for days worked up to 2nd July 2020 at Kshs. 27,695.
 - c. Pro-rata leave of 7 months at Kshs. 11,740.
 - d. Annual leave at Kshs. 21,814.
 - e. Gratuity over a period of 15 years at Kshs. 167,800.
 - f. Baggage allowance at Kshs. 12,000.
 - g. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 261,840.



Total ...Kshs. 546,529.

- C. Declaration that the Respondent engaged in unfair labour practice, by victimizing the Grievants, on account of their association with the Claimant.
- D. Costs to the Claimant.
13. The Respondent filed its Statement of Response dated 31st October 2022. It is the position of the Respondent that the Parties have a Recognition Agreement, and that the dispute was escalated to the Ministry of Labour.
 14. The 1st Grievant was employed by the Respondent on 1st September 2009, and dismissed on 2nd July 2020. The 2nd Grievant was employed on 2nd April 2014, and dismissed on 8th July 2020. They were dismissed fairly and lawfully.
 15. The 1st Grievant together with Officials from her Union, gathered Employees of the Respondent on 5th June 2020, and incited them against executing contracts of employment. Operations were interrupted. The 1st Grievant and the Officials insulted and issued threats upon the Production Manager and Group Head of Human Capital.
 16. The 1st Grievant was issued a letter to show cause and suspended, on 5th June 2020. She responded. She was invited for disciplinary hearing, to take place on 30th June 2020. She acknowledged invitation, confirming attendance. Hearing took place as scheduled. The 1st Grievant opted not to be accompanied by a colleague.
 17. A decision was made to terminate her contract. She appealed against the decision. She was invited for hearing on appeal, scheduled for 22nd July 2020. She did not turn up for the hearing, and the appeal was dismissed.
 18. The 2nd Grievant was at the time the dispute arose, on a fixed-term contract of 3 months. Her contract became effective on 1st April 2020, and was to expire on 30th June 2020. She was a packer.
 19. She was assigned duty on or around 2nd July 2020, to do reconciliation at the BRM. She declined to perform the task, in breach of her contract.
 20. She was called for disciplinary hearing. In the process, it was realized that the 2nd Grievant's contract had in fact expired. She could not be subjected to disciplinary process. She was issued a letter informing her that her contract had expired.
 21. The Respondent agrees that Parties went before the Ministry of Labour for conciliation, and that a conciliation report was generated with recommendation, which the Respondent did not agree with.
 22. The Respondent states that the 1st Grievant engaged in an act of gross misconduct warranting summary dismissal. She was dismissed in accordance with Sections 41 and 44 of the *Employment Act*. There was no employer-employee relationship between the 2nd Grievant and the Respondent requiring the Respondent to take her through a disciplinary hearing; her contract had expired.
 23. The Respondent urges the Court to dismiss the Claim.
 24. The Grievants gave evidence on 6th February 2024, closing the Claimant's case. Gabriel Gichure, Respondent's Human Resource Officer, gave evidence on the same date, closing the hearing. The Claim was last mentioned on 4th April 2024, when Parties confirmed filing and exchange of their submissions.



25. The Grievants adopted their respective witness statements and documents filed by the Claimant, as their evidence-in-chief. The witness statements contain the same facts set out in the Statement of Claim, as summarized above.
26. Cross-examined, the 1st Grievant confirmed that she was heard. She opted to attend hearing unaccompanied. On 5th June 2020, she found her Union Officials at the workplace. Employees from the nightshift approached her. They complained that during the night, they had been issued fresh contracts by the Respondent, which they were required to execute. The contracts reduced the period of employment from 1 year, to 3 months.
27. She advised them to continue working as she consulted the Human Resource Office. The Union Officials were seated peacefully waiting for the Management Officers to arrive. The 1st Grievant denied that she confronted and insulted the Production Manager and the Human Resource Manager.
28. She was subsequently taken through the disciplinary process and dismissed. She was asked by the Respondent, to resign as a shop steward. This demand was not documented. She cleared but was not paid terminal benefits.
29. Redirected, she told the Court that she did not call the Union Officials to the workplace. She was not aware about the new contracts before she came to work that morning. The contracts were not featured at the disciplinary hearing. The 1st Grievant was told that she injured the character of the Human Resource Manager. She appealed against the decision and resigned from the role of shop steward. She was issued the letter of dismissal.
30. The 2nd Grievant confirmed that she was on a contract of 3 months, beginning 1st April 2020. It was expiring 30th June 2020. She was not granted another contract. She was informed that her contract had expired. She was offered salary up to 7th July 2020, leave pay, 2 months' salary in lieu of notice, and certificate of service. She did not clear.
31. Gabriel Gichure relied on his witness statement dated 20th September 2023 and documents exhibited by the Respondent as appendix A-L, in his evidence-in-chief.
32. Cross-examined, he affirmed that he had worked for 2 years for the Respondent, and was familiar with the issues in dispute. The 1st Grievant incited Employees from executing new contracts. She invited her Union Officials to the workplace. She threatened the Production Manager and the Group Head of Capital Management. She was disruptive. She was heard and exercised her right of appeal. She did not prosecute her appeal. She was paid notice and salary for days worked.
33. The 2nd Grievant was on a fixed-term contract which expired. She was familiar with BMR reconciliation. She declined to work on BMR, without reason. She was invited for disciplinary hearing, but did not attend, because her contract had come to an end. Redirected, Gabriel restated that the 2nd Grievant could not be taken through the disciplinary hearing, because her contract expired.
34. The issues are whether the Grievants' contracts were terminated fairly and lawfully; and whether they merit the prayers sought.

The Court Finds: -

35. The dispute was subjected to conciliation process, where the facts were tried, findings made, and recommendations given.
36. In disputes escalated to the Court from conciliation, the Parties must in their evidence clearly show the Court why they agree or disagree with the findings and recommendations of the Conciliator.



37. Although the Court is not bound by the findings and recommendations of the Conciliator, it must be persuaded by the Parties, to uphold, vary or depart completely from the findings and recommendation of the Conciliator.
38. The dispute settlement mechanisms at the Ministry of Labour, are not intended to be mere formalities, a detour, a stopover for Parties, before they ultimately come before the Court; at best, those mechanisms ought, and were intended, to resolve disputes completely and effectively; and, at the very least, distil the issues in dispute so that by the time the disputes are presented before the Court, there is clarity, and a lot of judicial time is not wasted in retrial of the same issues.
39. In this dispute, the Conciliator heard the Parties and found that: -
- 1st Grievant: -
She was a shop steward and her troubles with the Respondent started because of her involvement in union activities. The Management [Respondent] acted unprofessionally, by issuing suspension and show cause letter the same day. In the letters the Management did not disclose how the Grievant disregarded, or insubordinated the Office of Chief Executive Officer, or the Human Resource. Instead of the Management investigating why the Employees were hesitant to sign the contract letters, it opted to discipline the 1st Grievant for being a shop steward. The Management failed to educate and explain to the Employees on the importance of signing the contract letters and decided to use the stick, to ensure obedience, which is ‘yesteryears management system.’ Signing of contracts is an individual responsibility and it was not explained why Management decided that the contracts are signed en masse. The Respondent engaged in a witch-hunt against the 1st Grievant.
- 2nd Grievant: -
She was employed on 6th August 2021 as a General Worker. She was assigned BMR assignment by her supervisor, an assignment she was not familiar with. An Employee is supposed to be trained to be able to carry out certain functions. It could not be presumed that if other Employees could perform those functions, the 2nd Grievant too, could perform the functions. Managers, not supervisors are supposed to assign duties. Workers must be mentored and respected. The 2nd Grievant in the circumstances, did not disobey lawful instructions of a superior. It was strange to subject the 2nd Grievant to disciplinary action, while holding that her contract ended on 30th June 2020.
40. Against these findings, the Conciliator made the recommendations captured at paragraph 11 of this Judgment.
41. Are there reasons that would justify the Court in endorsing, departing from, or varying the findings and recommendation of the Conciliator?
42. Procedure. The Conciliator’s finding that termination on both occasions was flawed, is upheld by the Court.
43. The 1st Grievant was issued the letter to show cause, and the letter of suspension simultaneously. Both letters are dated 5th June 2020. The Respondent, while respecting the 1st Grievant’s rights on statement of charges; advice on her right to be accompanied at the disciplinary hearing; grant of an opportunity to state her case; and, advice on her right of appeal, appears to have prejudged the 1st Grievant, by suspending her, even before she had responded to the letter to show cause. There was no weight to be accorded to her response, the Respondent having made up its mind, that the 1st Grievant engaged in gross misconduct by inciting Employees, bringing her Union Officials to the workplace, and threatening and insulting the Production Manager and the Group Head of Human Capital.



44. With regard to the 2nd Grievant, the Court similarly finds no reason to depart from the Conciliator's finding that procedure was flawed.
45. The Respondent suspended the 2nd Grievant on 7th July 2020. She was also advised to avail herself the same day at 3.00 p.m. for disciplinary hearing. The Respondent then had a change of heart, finding that the 2nd Grievant's contract had expired on 30th June 2020, and the Respondent did not therefore, have disciplinary control over the 2nd Grievant.
46. This change of heart was informed by the Respondent's desire to sidestep the rigours of procedural fairness. Adopting a belated stance that the 2nd Grievant's contract had expired, was the easy way out for the Respondent. But, it was a flawed way out. The 2nd Grievant had been in continuous employment from 2nd April 2014 according to paragraph 3 of the Statement of Response, and from 6th August 2012, according to the Statement of Claim. She was a continuous Employee of the Respondent, and it was not an error on the part of the Respondent, to treat her as such when it issued her a letter of suspension, after her contract had allegedly expired.
47. The change of heart by the Respondent, from suspension and intended disciplinary hearing, to advising the 2nd Grievant that in fact, her contract had already expired, was a flawed procedure.
48. Validity of reasons. It was not established that the 1st Grievant incited Employees not to execute contracts. It was curious that the Respondent issued fresh contracts upon its Employees at night. The contracts issued collectively, rather than individually. The Respondent seems to have justified its decision on the emergence of Covid-19 pandemic, but does not appear to have consulted the Claimant with whom it has a Recognition Agreement, before crafting fresh contracts of employment, and issuing them upon Employees under the cover of darkness.
49. It was not established that the 1st Grievant incited the Employees not to sign the contracts, little less that she invited her Union Officials to the workplace, threatened and insulted the Production Manager and the Group Human Capital Manager. There is no record of any evidence, adduced at the disciplinary hearing by these senior managers, establishing threats and insults, coming from the 1st Grievant.
50. The letter of termination gave a generalized accusation against the 1st Grievant: that she, on various occasions in the past, had engaged in acts of insubordination against her superiors including the CEO. It was said that she had been variously warned.
51. This last accusation appears to have been unrelated to the specific incident on alleged incitement of Employees and insulting of superiors. It was a generalized accusation of insubordination, which perhaps was rooted in the 1st Grievant's position as a shop steward, whose activities, were seen to be at cross-purposes with the wishes of the Respondent and its CEO. The generalized accusation would suggest to the Court that the 1st Grievant was justified in feeling she was victimized for her role as a shop steward.
52. The unrelenting pressure exerted on her by the Respondent to dissociate with the Claimant, is underscored by her decision, communicated in her letter of appeal date 3rd July 2020, to resign from the role of shop steward.
53. Article 1 of the *ILO Workers' Representatives Convention, 1971 [No. 135]*, states that, workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal based on their status or activities as workers' representatives, or on union membership, or participation in union activities, in so far as they act in conformity with existing laws, or collective bargaining agreements or other jointly agreed laws.



54. [*ILO Workers' Representative Recommendation, 1971 \[No.143\]*](#), which is an implementing instrument concerning Convention No. 135, stipulates that where there are not sufficient protective measures applicable to workers in general, specific measures should be taken, to ensure effective protection of workers' representatives.
55. The Recommendation calls for detailed and precise definition of the reasons justifying termination of the workers' representatives; consultations between the Employer, with an advisory opinion from, or concurrence of, an independent body, before dismissal of a workers' representative; a special procedural recourse for a workers' representative who considers his / her contract to have been unfairly terminated; and the availability of an effective remedy, including reinstatement.
56. The unrelenting pressure on the 1st Grievant, exerted by the Respondent, which culminated in her dismissal and resignation as a shop steward, violated the 1st Grievant's protection under [*ILO Convention 135*](#) and [*Recommendation No.143*](#). Section 5[2] [c] [ii], of the [*Labour Relations Act, 2007*](#), prohibits Employers from dismissing, or in any other way prejudicing Employees, or potential Employees, for participating in the formation or lawful activities of a trade union. This protection is constitutionally entrenched under Article 41 of the [*Constitution*](#).
57. The Respondent did not have a valid reason, in dismissing the 1st Grievant.
58. The reasons justifying the 2nd Grievant's dismissal were jumbled, as observed in discussing procedure. Initially, the 2nd Grievant was advised that she had been suspended, for insubordination. Details supplied by the Respondent in its evidence, was that the 2nd Grievant had refused to do BMR reconciliation. When it was apparent to the Respondent that this accusation would not hold, she was told that the reason for termination was that her time was up. Her fixed-term contract had expired.
59. The Court again does not find fault with the Conciliator's finding, that it was irregular for the Respondent, to justify the 2nd Grievant's dismissal, on these grounds.
60. The date when the 2nd Grievant's contract was terminated, is correctly stated by the Respondent at paragraph 3 of its Statement of Response. This was on 8th July 2020. The alternative date advanced by the Respondent, 30th June 2020 was a self-serving distortion, based on a fixed-term of convenience, the Respondent alleged to have granted, to the 2nd Grievant. She had been working from 6th August 2012, and left employment on 8th July 2020. The reason that termination was on account of effluxion of some fixed term, was therefore not a valid reason.
61. The alternative reason concerning insubordination, was likewise not justified. The assignment of duty to the 2nd Grievant, which she as was not trained for, by a supervisor, was irregular. Unskilled workers ought not to be assigned roles they are not familiar with. The term 'General Worker,' should not be understood by Employers, as enabling them to assign duties of a general nature, to General Workers, without regard to the ability of the individual Workers to perform the task. Such broad application of the term 'General Worker,' is only likely to lead to accusations of insubordination, failure of performance, or even end up with the Employee suffering work injury or disease.
62. Remedies. The Court is satisfied and declares, that termination was unfair and unlawful in respect of both Grievants.
63. The Conciliator did not recommend reinstatement, and the Court does not think this would be a suitable, reasonable or permissible remedy, granted that over 3 years have passed, since the Grievants left employment.



64. The Grievants expected to work until retirement at the age of 60 years, under clause 23 of the applicable CBA. They did not cause, or contribute to termination of their contracts, before they clocked 60 years. The 1st Grievant is awarded equivalent of 6 months' gross salary at Kshs. 158,832; the 2nd Grievant equivalent of 4 months' gross salary at Kshs. 87,280, in compensation for unfair termination, as recommended by the Conciliator.
65. Clause 13 of the Parties' CBA granted notice pay, at no less than 60 days' salary. The prayer for notice pay is granted at Kshs. 52,944 to the 1st Grievant; and Kshs. 43,640 to the 2nd Grievant.
66. The assessment of compensation at equivalent of 6 months' and 4 months' salary respectively, was prudent, considering other awards offered, including gratuity.
67. The 1st Grievant worked up to 2nd July 2020, and is granted salary for 2 days worked, at Kshs. 2,036. The 2nd Grievant left employment on 8th July 2020. She is granted salary for 8 days worked, at Kshs. 6,547.
68. The Grievants did not articulate their prayers for annual leave and pro rata leave. The Court does not have sufficient evidential material to support the prayers for annual and pro rata leave as pleaded.
69. Clause 17 of the CBA extended gratuity payment to Employees. It stipulates that the benefits would cease, once the Respondent implemented its pension scheme. There was no evidence before the Court or upon conciliation, that the Respondent implemented its pension scheme, disentitling the Grievants to gratuity under clause 17 of the CBA.
70. The 1st Grievant worked from 12th February 2006 to 2nd July 2020, a period of 14 years. She is granted gratuity at the rate of 15 days' salary for 14 complete years of service, at Kshs. 213,812. The 2nd Grievant was employed on 6th August 2012 as confirmed by the Conciliator. She left on 8th July 2020. Her prayer for gratuity based on 15 years of service is erroneous. She worked 7 complete years. She is granted gratuity at 15 days' salary for 7 complete years of service, at Kshs. 88,099.
71. Clause 24 of the CBA conferred the benefit of baggage allowance, at a standardized rate of Kshs. 12,000 for Employees who were retired, or who left employment on redundancy. The Court does not think that the Grievants left employment under the redundancy or retirement [clauses 22 and 23 of the CBA respectively], to merit baggage allowance. The prayer is declined.
72. Prayer [iii] of the Statement of Claim is directed generally to Employees of the Respondent. This Claim was filed on behalf of 2 specific former Employees of the Respondent. This was not a collective dispute, but an individual dispute, brought by the Union on behalf of 2 members. The prayer has no merit.
73. Costs to the Claimant.

In sum, it is ordered: -

74.
 - a. It is declared that termination of the 2 Grievants' contracts of employment was unfair and unlawful.
 - b. The Respondent shall pay to the Grievants through the Claimant –
 - 1st Grievant-
Compensation for unfair termination at Kshs. 158,832. Notice at Kshs. 52,944. Salary for days worked in July 2020 at Kshs. 2,036. Gratuity at Kshs. 213,812.
 - 2nd Grievant.



Compensation at Kshs. 87,280. Notice at Kshs. 43,640. Salary for days worked in July 2020 at Kshs. 6,547. Gratuity at Kshs. 88,099.

c. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

