



**Saina & another v Kenya Ordinance Factories Corporation  
 (Employment and Labour Relations Cause Eo32 & E033 of 2021  
 (Consolidated)) [2024] KEELRC 1570 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1570 (KLR)

**REPUBLIC OF KENYA  
 IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
 EMPLOYMENT AND LABOUR RELATIONS  
 CAUSE EO32 & E033 OF 2021 (CONSOLIDATED)**

**MA ONYANGO, J**

**JUNE 13, 2024**

**BETWEEN**

**BARNABAS SAINA ..... CLAIMANT**

**AND**

**KENYA ORDINANCE FACTORIES CORPORATION ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE E033 OF 2021**

**BETWEEN**

**NICOLAS BARNO ..... CLAIMANT**

**AND**

**KENYA ORDINANCE FACTORIES CORPORATION ..... RESPONDENT**

**JUDGMENT**

1. This judgment relates to two suits: Eldoret ELRC No E032 of 2021 and Eldoret ELRC No E033 of 2021 which were consolidated pursuant to the directions of the court issued on 7th February 2022. File No E032 was designated as the lead file.
2. The Claimants were both employed by the Respondent as support staff at the time material to this suit.
3. The Respondent is a state corporation under the Ministry of Defence mandated to manufacture hardware, machinery and equipment.



4. For purposes of this Judgement Barnabas Sainashall be referred to as the 1<sup>st</sup> Claimant while Nicolas Barno shall be referred to as the 2<sup>nd</sup> Claimant.

#### **1<sup>st</sup> Claimant's Case**

5. Vide his Claim dated 7<sup>th</sup> August 2017 and filed in court on even date, the 1<sup>st</sup> Claimant Barnabas Saina avers that the Respondent unfairly terminated his employment.
6. The 1<sup>st</sup> Claimant states that he worked diligently at the Respondent's institution and was surprised on 9<sup>th</sup> June 2017 when he received a letter of termination from the Respondent dated 8<sup>th</sup> June 2017.
7. It is the 1<sup>st</sup> Claimant's case that he was neither issued with warning letters nor accorded a fair hearing before termination as provided in the *Employment Act*.
8. The 1<sup>st</sup> Claimant particularized the unlawfulness of the termination as follows: -
  - a. Unfairly terminating the Claimant's employment without giving them any warning or fair hearing
  - b. Unfairly terminating the Claimant's employment without according them tangible reasons known by law
  - c. Failing to issue the Claimant with a certificate of service contrary to section 51 of the *Employment Act*
  - d. Dismissing the Claimant wrongfully and unfairly contrary to section 45 of the *Employment Act*
  - e. Unfairly refusing to pay the Claimant his legal dues.
9. The Claimant prayed for the following reliefs:
  - a. A declaration that the termination of the Claimant's appointment was unfair, illegal, wrongful and unlawful
  - b. An unconditional order of reinstatement
  - c. Compensation for loss of employment for the past 2 months the Claimant has been unemployed, the projected years left up to the statutory age and compounded by monthly salaries.
  - d. Costs of the Claim
  - e. Interest on (c) above assessed at the Court's rate

#### **2<sup>nd</sup> Claimant's Case**

10. In Eldoret ELRC No 033 of 2021, the 2<sup>nd</sup> Claimant, Nicolas Barno filed a Claim against the Respondent, Kenya Ordinance Factories Corporation alleging that he was unfairly, unlawfully and wrongfully terminated from employment. He sought for the following orders:
  - a. A declaration that the termination of the Claimant's appointment was unfair, illegal, wrongful and unlawful
  - b. An unconditional order of reinstatement



- c. Compensation for loss of employment for the past 2 months the Claimant has been unemployed, the projected years left up to the statutory age and compounded by monthly salaries.
  - d. Costs of the Claim
  - e. Interest on (c) above assessed at the Court's rate
11. In response, the Respondent filed a Statement of Response dated 22<sup>nd</sup> November 2017 in respect of each of the two claims which responses are similar in content. The Respondent denied the assertions by the Claimants that their employment were terminated unfairly. According to the Respondent, the Claimants connived and stole 160 litres of herbicide SENCUR (SC 480) worth Kshs 410,400 from the Corporation. At paragraph 6 of the Statement of Responses the Respondent states that the Claimants connived with others by signing a delivery note on 24<sup>th</sup> November 2016 yet they were present during the receipt of the chemicals on 16<sup>th</sup> November 2016.
  12. The Respondent maintained that the actions of the Claimants amounted to gross misconduct that led to their dismissal from the Corporation.
  13. It is the Respondent's case that the Claimants were taken through a fair and impartial disciplinary hearing process and found guilty prior to their dismissal.
  14. The suit was fixed for hearing on various dates. The 1<sup>st</sup> Claimant testified on 2<sup>nd</sup> June 2022 as CW1 in furtherance of his case. He adopted his witness statement recorded on 17<sup>th</sup> August 2017 as his evidence in chief.
  15. It was the 1<sup>st</sup> Claimant's testimony that on 9<sup>th</sup> June 2017 he was working for the Respondent as a farm attendant when he was accused of stealing some chemicals that had gone missing. He stated that he was not responsible for keeping the said chemicals as there was a department responsible for its storage. The Claimant testified that the termination process as carried out by the Respondent was unfair.
  16. On cross examination, the Claimant stated that he was taken through a disciplinary hearing and that he defended himself. He told the court that he appealed against the decision to terminate his employment.
  17. On 13<sup>th</sup> July 2023 when the matter was in court for further hearing the Claimant testified further and closed his case.
  18. Nicholas Barno, the 2<sup>nd</sup> Claimant testified on the said date as CW2. He adopted his witness statement recorded on 17<sup>th</sup> August 2022 as his evidence in chief. CW2 in his testimony stated that on the day that the chemicals were delivered, he was called to escort the driver to the inner gate, that he handed over the vehicle to the security and the store person when he was called by the farm manager. It was his testimony that he handed over the vehicle to the security and the store keeper.
  19. On cross examination, the CW2 stated that he appeared before the disciplinary committee which recommended his dismissal. He testified that he appealed against the dismissal to the Board of Directors but there was no response to the said appeal.
  20. The Respondent called three witnesses. David Kipchirchir Kandie, the Respondent's Farm Supervisor who was stationed at Eldoret at the time material to this suit testified as RW1. He adopted his witness statement dated 7<sup>th</sup> July 2022 as his evidence in chief.
  21. He testified that around August 2016 he requisitioned for chemicals to be used in the farm in the next crop season which was in 2017. That in March 2017, while the Respondent was preparing for the season he tasked the Claimants to check on the chemicals only for them to report back that the



- chemicals were missing from the store. He stated that the Goods Receipt and Issue Voucher dated 25<sup>th</sup> November, 2016, Local Purchase Order and the Delivery Note confirmed that the chemicals were purchased and received.
22. RW2 was Reuben Rotich the Respondent's storekeeper. He adopted his witness statement dated 7<sup>th</sup> July 2022 as his evidence in chief. RW2 told the court that the chemicals that were lost were stored in Building 17 within the factory. He stated that according to the receiving document, the chemicals were indeed delivered as evidenced by the Local Purchase Order, delivery note and invoice.
  23. On cross examination, he stated that from the records, the people who received the chemicals when they were delivered were a Mr. Ligame and Victoria Sang.
  24. Reuben Sang testified as RW3. He introduced himself as the Respondent's Chief Human Resource Officer. He adopted his witness statement recorded on 7<sup>th</sup> July 2022 as his evidence in chief. RW3 told the court that the Respondent has a staff manual that stipulates all the rules. He explained the procedure undertaken by the Respondent when a disciplinary issue arises to wit; that a board of inquiry/an investigation committee is constituted; the committee conducts investigations and submits its report to the Managing Director; if it is recommended that a person responsible be charged, the employee is given a letter informing the employee that they will be required to appear before the disciplinary committee; the Managing Director forms a disciplinary committee which carries out the hearing and prepares a verdict based on the evidence.
  25. He stated that the procedures were followed in the instant cases and that there was a report by the disciplinary committee which recommended that the Claimants be dismissed.
  26. He testified that in the dismissal letters, the Claimants were informed of their right to appeal through the Managing Director within 6 weeks and that they did not appeal. He explained that the appeal is to be addressed to the Board of Directors through the Managing Director by the employee.
  27. RW3 stated that the Respondent has a Provident Fund under which the employee is paid all his contributions but a portion of employer's contribution is retained until the employee is 50 years old, which was done in the instant case.
  28. On cross examination, RW3 reiterated that the Claimants did not appeal against the decision of the disciplinary committee to terminate their employment. He stated that it is his office that dispatches appeals to the Board of Directors.

### **The Claimants submissions**

29. In their submissions, the Claimants framed the issues for determination to be:
  - i. Whether the termination of the Claimants appointment was unfair, illegal, wrongful and unlawful
  - ii. Whether Claimants should be compensated for loss of employment
  - iii. Whether the Claimant are entitled to costs.
30. On the first issue, the Claimants submit that they were unfairly, illegal, wrongful and unlawful. According to the Claimants, they were accused of conniving to steal chemicals from the Corporation yet there is no evidence produced that links them to the disappearance of the said chemicals.
31. The Claimants submit that when the alleged delivery of the said chemicals was done, Mr. Nicholas Barno was in the farm office when he received a call from the main gate about the arrival of the chemicals



- and his only role was to book the supplier who was then escorted by the military police to the inner gate. That he did not go past the inner gate. With regard to Mr. Barnabas Saina, it is submitted that he was supervising wheat drying, dusting and stitching when he was called and his only role was to ascertain whether the chemicals were correct as ordered, he was with the store representative, the acceptance committee representative and the supplier and when back to continue working.
32. The Claimants have faulted the disciplinary hearing as conducted. They allege that they are the only ones who were called to the disciplinary hearing yet there were other employees who were present when the said chemicals were delivered.
  33. The Claimants submit that the termination of their employment was not procedurally and substantively fair.
  34. They submit that RW1 who testified in court confirmed that he requested for the chemicals in the year 2016 then proceeded on leave and when he came back from leave he did not physically confirm whether indeed the chemicals had been delivered. That RW2 who was a store man stated in his testimony that he did not do a physical stock take to confirm that indeed the chemicals were in the store as the same arrived when he was away.
  35. The Claimants submit that they appealed the decision to terminate their employment through the Managing Director as stipulated by the Corporation terms and conditions of employment but their appeals were never considered.
  36. On the second issue as to whether the Claimants should be compensated for loss of employment, they submit that in instances where a Court finds that termination of employment was unfair, Section 49 of the *Employment Act*, 2007 gives adequate remedies. The Claimants urged the Court to compensate them for loss of employment in terms of an award of maximum compensation taking into consideration the period that they had been out of employment.
  37. Regarding costs, it is the submission of the Claimants that before filing this suit, they appealed against their termination through the Corporation internal appeal mechanism but were not given a hearing. They urged the Court to exercise its discretion and award them costs of the cause.

### **Respondent's submissions**

38. The Respondent in its submissions identified the issues for determination for to be:
  - i. Whether the termination of the Claimant's appointment was unfair, illegal , wrongful and unlawful
  - ii. Whether the appeal to the managing director was as per KOFC TCOS
  - iii. Whether the Claimant is entitled to reinstatement and loss of employment and benefits
  - iv. Whether the Respondent refused to issue the Claimant with Certificate of Service
  - v. Who to bear costs of suits
39. On the first issue, the Respondent submitted that the Claimants were taken through fair and legal procedures. That investigations were carried out by a Board of Inquiry which established that 160 litres of herbicides SENCUR was stolen and recommended disciplinary action against the Claimants. According to the Respondent, a disciplinary Committee was then constituted in line with KOFC TCOS which established that Nicholas Barno signed in the lorry to deliver the chemicals while Barnabas Saina was in the acceptance committee.



40. The Respondent further submitted that from the disciplinary proceedings, the Claimants were accorded a fair hearing in conformity with the rules of natural justice as envisaged by the *Employment Act*.
41. On the second issue, it is the Respondent's submission that paragraph 10.15.6.1 of the Respondent's Conditions and Terms of Service provides that, "an appeal to whom anyone or more of the punishment stated in regulation 10.14 have been meted shall have the right to appeal to the Board through the Managing Director. Any such appeal shall be made in writing within six (6) weeks from the date of the letter communicating the disciplinary action."
42. It is submitted that the Claimants ought to have appealed to the Respondent's Board of Directors but in this case, the Claimant appealed to the Managing Director who was the same person issuing the dismissal letter.
43. The Respondent cited Sec 9 (3) of the *Fair Administrative Act*, which provides that-
- "The High Court of Subordinate Court under Subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."
44. The Respondent also relied on the case of *Greggory Magare v University of Nairobi & another* (2017) eKLR. In the case the Court stated as follows:
- "The Law is now settled that where there is an internal mechanism for dealing with administrative issues, that internal process must be concluded before one can move to court to seek redress in overturning administrative action or decision."
45. From the above, the Respondent argued that this Court lacks jurisdiction to entertain this Claim as the Claimants did not appeal against the decision of the Managing Director to the right forum, that is the Board of Directors.
46. Regarding the issue whether the Claimants are entitled to reinstatement and loss of employment and benefits, the Respondent submitted that section 12 of the *Employment and Labour Relations Court Act*, 2011 bars this Court from reinstating an employee after lapse of three years from the date of dismissal.
47. On the issue of loss of employment, the Respondent submitted that an aggrieved party has the obligation to mitigate his or her losses and not sit back waiting to enjoy anticipatory remuneration. In support of this position, the Respondent cited the case of *Jane Juma Aloo v Hon The Attorney General* [2013] eKLR
48. On the issue of benefits, it is submitted that Para 11.3.1 of Conditions and Terms of Service requires that all permanent employees shall join the Corporation Provident Fund Scheme and shall contribute a percentage of their basic salary through monthly deductions.
49. In this regard, the Respondent submits that the Claimants were paid their benefits after being surcharged for the loss of chemicals and are therefore not entitled to any benefits.
50. On whether the Respondent has refused to issue certificate of service to the Claimants it is the Respondent's submission that Para 10.19 of the Respondent's Conditions and Terms of Service



requires that all employees leaving the employment of Respondent for whatever reason complete a certificate of clearance which is a mandatory document required to generate a Certificate of Service.

51. It is submitted that the Claimants have never cleared with the Respondent to enable them to be issued with a certificate of service. The court was urged not to mete the Claimants inefficiencies on the Respondent.
52. Lastly, on the issue of costs, the Respondent submitted that the Claimants have not proved their cases and their claim against the Respondents. The Respondent therefore prayed that the suits be dismissed with costs.

### **Determination**

53. From the evidence and submissions of the parties herein, the issues that fall for the court's determination are:
  - i. Whether the Claimants were unlawfully and unfairly terminated from employment;
  - ii. What reliefs should issue?

### **Whether the Claimants were unlawfully and unfairly terminated from employment**

54. The law relating to fair termination is contained in Sections 41, 43 and 45(2) of the *Employment Act*. It requires that before an employer terminates an employee's employment, the employer must not only prove that it has valid reasons for the said termination but must also ensure that the procedure set out in section 41 of the Act is complied with.

55. Section 43 of *Employment Act* 2007 provides inter alia:

“ 43. Proof of reason for termination

- (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

56. The burden of proof in termination of employment is on the employer who is required to prove that the reasons for the termination are valid and the procedure was fair.

57. Section 45(1) of the *Employment Act* provides that:

“No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove: -

- a) That the reason or reasons 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 was that the Employment was terminated in accordance with fair procedure”.

58. The Claimants in this case were accused of conniving to steal chemicals from the Respondent where they were employed as support staff. In their testimonies, they denied stealing the chemicals. They explained that they were present when the said chemicals were delivered and mentioned several other people who were present as well. Among them were the driver of the vehicle delivering the chemicals and the store keeper, Mr. Ligame.

59. The Respondent on its part maintained that the Claimants connived with others to steal the chemicals. RW2 in his testimony stated that the chemicals were indeed delivered and recorded in the delivery note meaning that the chemicals were delivered and received in the store.

60. I have analyzed the evidence on record against the Claimants as submitted by the Respondents in detail. According to the Disciplinary Committee Minutes, the only evidence against the Claimants was that they received the chemicals on the date of delivery on 16<sup>th</sup> November, 2016 and were also the ones who discovered the same was missing from the store on the day they were sent to collect it from the store for use on 28<sup>th</sup> March, 2017. At no point in these proceedings did the Respondent attempt to link the Claimants with storage of the said chemicals. They were not store keepers and neither has it been established that they had exclusive custody of the keys to the said store. Both Claimants stated during the hearing that the keys to the particular store were kept at the farm office in building 57 and signed for from security by any of the farm staff who arrived first for duty. No evidence was adduced to the satisfaction of the court that connected the Claimants to the loss of the chemicals or to collusion in the loss. There was further no evidence that the Claimants were responsible for security of goods in the store where the chemicals were kept. Further no evidence was adduced relating to movement of goods from the said store. There is further no proof whether the chemicals were kept in store in building 17, store No 62 or the container.

61. Mr. Nicholas Barno informed the Disciplinary committee that:

“Sir, I was at the farm office when I received a call from barrier gate through the landline informing me about the supplier of chemicals. I proceeded to the gate where the supplier was booked under my name and then he was escorted to the inner gate by the military police. The vehicle was then booked at the inner gate and I directed them to deliver the items to store 62 to meet with the store representative as I was called to the former HRM Lt. Col Korir's office to address issues concerning harvesting. I did not go past the inner gate at the particular time.

62. Mr. Barnabas Saina informed the Committee that:

“Sir, on this particular day I was at store 62 supervising wheat drying, dusting, weighing and stitching when I received a call informing me that SENCUR chemicals were to be delivered at store 17 by Eldoret Packers and I was therefore required to be there being the user- In five minutes I was at the store 17 where I met Mrs. Victoria (store representative), Mr. Mwakai (Acceptance Committee Rep) and the supplier. I ascertained the chemicals to be correct but in the process I did not sign form 7110 as is supposed to be, simply because the store lady had not prepared the form in time. After the verification process, I went back to store 62 and carried on with my work.”



63. Section 43 of the *Employment Act* obligates an employer to have valid and sufficient ground to believe that an employee is guilty of misconduct. In the instant case I find that the Respondent did not discharge its obligation to prove the grounds of termination of the employment of the Claimants. No evidence was adduced to link the Claimants to the loss. Curiously also, none of the other employees of the Respondent who handles the delivery and the storage of the chemicals was either charged or called upon to explain the loss.
64. I find that the Claimants have proved that the termination of their employment was without a valid reason.
65. The second issue that I need to address is whether there was procedural fairness in the termination of the Claimants. It is not in dispute that the Claimants were taken through a disciplinary hearing by a committee. However, the Claimants have faulted the disciplinary process on the basis that their appeals were not considered. The Respondent on its part has contended that its Terms and Conditions of Service provides for the procedure to be followed by an employee seeking to appeal against the decision of the disciplinary committee. However, apart from quoting the relevant paragraphs, the Respondent did not produce that document in court.
66. From the record in court there is evidence that the Claimants filed an appeal against the termination of their employment through their counsel Ham Lagat and Associates. The title of the letter is: Appeal and Protest Against Unconstitutional, Illegal and Mischievius Termination From Employment of Mr. Nicholas Barno and Barnabas Saina. The letter is dated 19<sup>th</sup> June 2017 and was produced by the Respondent.
67. The Respondent avers that because the letter was addressed to the Managing Director it is not an appeal. It was the responsibility of the Respondent to either advise counsel of the Claimants about the proper procedure of appeal or to refer the appeal in the form in which it was to the Respondent's Board and let the Board decide whether or not the format was acceptable.
68. The averment of the Respondent that there was no appeal by the Claimants is therefore an affront to the dignity of the court and a display of arrogance that the court must strongly express its disappointment with. The Respondent went to the extent of submitting that the Claimants came to court prematurely without exhausting the appeal process under its Terms and Conditions of Service which was not availed to the court.
69. The court further notes that there is no evidence that the Claimants were informed of their right to be represented at the disciplinary hearing by a fellow employee or a union shop floor official as provided in section 41 of the Act.
70. In the absence of the said terms and conditions of service document, I find that the Respondent failed to demonstrate that the Claimants were taken through due process as envisaged in section 41 of the Act.

### **Whether the Claimant is entitled to the reliefs sought**

71. Having found that the termination of the employment of the Claimants was unlawful and unfair, the Claimants are entitled to compensation. In their respective claims, the Claimants sought for various reliefs which I proceed to address below:
  - a. A declaration that the termination of the Claimant's Appointment was unfair, illegal, wrongful and unlawful

The termination of the Claimants was unfair and unlawful and I declare as such.



- b. An unconditional order of reinstatement

Section 49 (3) (a) of the *Employment Act* provides for reinstatement if the termination or summary dismissal is found to be unfair. However, section 12 (3) (vii) of the *Employment and Labour Relations Court Act* provides that an order for reinstatement is only permitted within 3 years of the separation. The Claimants' employment was terminated in June 2017. It now seven years since. This prayer is therefore not available to the Claimants.

- c. Compensation for loss of employment for the past 2 months the Claimant has been unemployed, the projected years left up to the statutory age and compounded by monthly salaries.

Having found that the termination of the employment of the Claimants was unfair, this court is clothed with jurisdiction to award compensation. Section 49 of the *Employment Act* provides for remedies for wrongful dismissal and unfair termination. Section 49(1) (c) of the Act caps the maximum compensation for wrongful dismissal or unfair termination at twelve months of gross salary. Barno had worked from July 2007 while Saina was employed in September, 2010. Having found that the termination of their employment was on unsubstantiated grounds and taking into account the length of their service as well as all the grounds under section 49(4) of the Act, I award Mr. Saina compensation equivalent to 12 months' salary and Mr. Barno 10 months' salary.

- d. The court further orders that the Respondent refunds the monies that were surcharged to the Claimants and pays them all money and terminal benefits due to the Claimants up to the date of termination.
- e. The Respondent shall issue certificate of service to the Claimants.
- f. The Claimants are awarded costs and the decretal sum shall attract interest at Court's rates from date of judgment.

72. In view that no specific sum was claimed by the Claimants, the Respondent is directed to tabulate the amount due to the Claimants and file the same in court within 14 days after consensus with the Counsel for the Claimants. Should parties not agree each of them shall file their computation for determination by the court.

73. Mention date shall be taken at the time of delivery of judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**MAUREEN ONYANGO**

**JUDGE**

