



Kenya Shipping Clearing & Warehouses Workers Union v Maya Limited (Employment and Labour Relations Cause 898 of 2018) [2024] KEELRC 2773 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2773 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 898 OF 2018**

**AN MWAURE, J
OCTOBER 31, 2024**

BETWEEN

**KENYA SHIPPING CLEARING & WAREHOUSES WORKERS
UNION CLAIMANT**

AND

MAYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this claim by way of a Memorandum of Claim dated 7th June 2018 and filed in court on 8th June 2018.

Claimant’s Case

2. The Claimant avers that the parties herein have a valid collective bargaining agreement (CBA), therefore, all disputes arising are dealt with in accordance with the CBA.
3. The Claimant states that Mr. Mark Opaye (referred to hereinafter as the grievant) has been working as a supervisor for the Respondent since 2002 without any salary adjustment.
4. The Claimant avers that it filed a trade dispute with the Ministry of Labour regarding promotions and salary adjustments for supervisors and acting supervisors. The grievant was one of the employees seeking adjustments to their salaries and allowances.
5. The Claimant avers that the grievant reported to work on or around 12th May 2018, after receiving a call from the supervisor at Morgan Cargo. The supervisor requested assistance with the stripping role and mental clip, as their supply had fallen short. The grievant then procured the needed items, which were officially returned on 16th May 2018.



6. The Claimant avers that the grievant received a show cause letter dated 15th May 2018 without being served with a suspension letter in accordance with the CBA to pave way for investigations.
7. The Claimant avers that on 17th May 2018, the grievant submitted his response to the allegations outlined in the show cause letter. On the same day, he received a hearing letter requiring him to appear before the disciplinary committee on 21st May 2018, however, the hearing was postponed to 22nd May 2018.
8. The Claimant avers that the grievant was served with a summary dismissal letter dated 25th May 2018 for four major offences including requesting unauthorized items, failing to produce a delivery notice at the gate, using the wrong delivery note serial number, and leaving the company premises without authorization.
9. The Claimant avers that the minutes for the disciplinary hearing that took place on 25th May 2018 were signed on different dates by the attendees, and the grievant was not allowed to carry a copy of the minutes.
10. The Claimant avers that the grievant was dismissed as the respondent failed to investigate the matter properly and that the alleged offences were routine procedures. The Claimant also avers the respondent failed to adjust his salary to reflect his supervisor position.
11. The Claimant prays that a declaration be made that -
 - a. The disciplinary process of summarily dismissing the grievant was unlawful as the grievant was issued with a show cause letter before suspension to pave way for investigations
 - b. The Respondent to reinstate the grievant to his original position as a supervisor.
 - c. The Respondent is to adjust the grievant salary to equivalent to a senior supervisor at Kshs.85,000/= per month
 - d. The Respondent to pay the costs of the suit.

Respondent's Case

12. In opposition to the memorandum of claim, the Respondent filed a memorandum of response dated 8th August 2018.
13. The Respondent avers that clauses 12(g) and 13(a) of the CBA provided that when an employee is suspected of committing an offence, the employee is placed on suspension for up to 30 days pending the outcome of the investigation before an appropriate action is taken.
14. The Respondent avers that the grievant was a porter who was promoted to export supervisor earning a basic salary of Kshs 21,711 which was above the basic minimum for his position as a supervisor which was Kshs.17,000 as per the CBA.
15. The Respondent avers that the grievant was accused of requesting items worth Kshs.3,525/= on 12th May, 2018 which were not delivered to the intended recipient and the grievant signed for the items but the same disappeared in his custody.
16. The Respondent avers that the investigation report concluded that the grievant's conduct is questionable and he cannot be trusted with any responsibility or company property thus the report recommended internal disciplinary procedures and potential criminal proceedings against him.



17. The Respondent avers that it issued the grievant with a show cause letter after the investigation which revealed the grievant's gross misconduct.
18. The Respondent avers that it accused the grievant of requesting items for personal use, not informing the supervisor and failing to disclose the items at the main gate.
19. The Respondent avers that a disciplinary hearing was held and the grievant was found guilty of gross misconduct and he was summarily dismissed.
20. The Respondent avers that it paid the grievant his terminal dues and issued him with a certificate of service.
21. The Respondent avers that there was no mandatory requirement to suspend the grievant upon suspicion of gross misconduct as it was discretionary, and the decision not to suspend was justified.
22. The Respondent denies that the dismissal was due to a dispute over salary adjustment.
23. The Respondent avers that the claimant did not demonstrate exceptional circumstances to warrant reinstatement as provided in Section 49 of the *Employment Act*.
24. The Respondent avers that the claimant disregarded the option to appeal the disciplinary panel's decision and should have exhausted all internal remedies before filing this suit before this Honourable Court.
25. The Respondent denies the claim for a salary adjustment, citing the CBA and the minimum wage requirement.
26. The Respondent avers that the dismissal was lawful and fair and it did not infringe upon the grievant's inherent dignity.
27. The Respondent avers that the grievant was lawfully dismissed in accordance with section 44 of the *Employment Act* for gross misconduct, terms of employment and the CBA.
28. The Respondent avers that there is no legal basis to claim damages for summary dismissal, and that the claim should be dismissed with costs.
29. The suit was canvassed by way of written submissions.

Claimants' Submissions

30. The Claimant's main issue of determination is whether the summary dismissal is unlawful.
31. The Claimant submitted that the Respondent violated clause 32 of the Collective Bargaining Agreement (CBA) by failing to follow the proper procedures for disciplinary proceedings. The grievant's actions were not criminal and the Respondent did not provide clear warnings or outline the procedures that should be followed.
32. The Claimant submitted that the Respondent's summary dismissal of the grievant was unfair and unjustified as the grievant had worked for the Respondent for fifteen years.
33. The Claimant submitted that the grievant's actions were normal and routine within the company as the grievant did not steal the items in question. The Claimant also submitted that it relied on the grievant's protest letter and written submissions to support its argument.
34. The Claimant submitted that the Respondent failed to provide sufficient evidence to justify the grievant's dismissal and did not invite the senior supervisor to the disciplinary hearing. The Claimant



also submitted that the Respondent did not follow the disciplinary procedures stating that the grievant did not commit any offence that warranted his dismissal.

35. The Claimant submitted that the grievant was unfairly summarily dismissed and is entitled to full benefits under Sections 40 and 45 of the *Employment Act*, and clause 14 in regards to termination of employment of the CBA.

Respondent's Submissions

36. The Respondent came up with the three issues for determination as follows:
- i. Whether the claim dated 7th June 2018 is overtaken by events
 - ii. Whether the claimant's termination is lawful
 - iii. Who bears the costs.
37. On the first issue, the respondent submitted that a ruling delivered by this Honourable Court on 3rd November 2023 held that the claim was overtaken by events as time for reinstatement of the grievant had lapsed which can only be done within 3 years as provided under Section 12(3) of the *Employment and Labour Relations Court Act*.
38. In *Chris Oanda V Kenya Airways* [2021] KEELRC 765(KLR) the court held that Section 12 of the *Employment and Labour Relations Court Act* provides that the court shall have powers to order reinstatement to be done within 3 years of dismissal. The Claimant was dismissed on 16th October 2017, and the application for reinstatement was made on 23rd February 2021 exceeding the 3-year limit therefore reinstatement is not feasible.
39. The Respondent also submitted that the grievant was summarily dismissed on 25th May 2018 and it has been over 6 years since his dismissal thus the order of reinstatement is time barred.
40. The Respondent submitted that the Claimant's prayer for adjustment of salary is untenable because the claimant was dismissed in 2018 and is no longer on the Respondent's payroll thus there is no salary to adjust. The Respondent also submitted that parties are bound by their pleadings, and the claimant's memorandum of claim does not seek reinstatement citing the case of *Stephen Ndolo Wambua V Beatrice Mbula Mutilu, Justus Nzau Munywoki & Raphael Mutinda Mulwa* [2019] KEHC 9122(KLR) where the court relied on the Independent Electoral and Boundaries Commission & another *V Stephen Mutinda Mule & 3 others* [2014] eKLR in support of that proposition.
41. On the second issue, the Respondent submitted that the investigation report concluded that the grievant abused his position as a supervisor and that the value of items is KShs. 3,525 is not small when done weekly or monthly.
42. The Respondent submitted that the claimant's dismissal was justified on the grounds of gross misconduct as set out in Section 44(4)(c) and (g) of the *Employment Act*.
43. The Respondent submitted that the gross misconduct is a valid reason for terminating the grievant's employment and the fair procedure was followed as set out in sections 41 and 43 of the *Employment Act*. The Respondent relied on the case of *British Leyland UK Ltd V Swift* (1981) I.R.L.R 91 which cited the case of *Joseph Mwaniki Nganga V United Millers Limited* [2022] eKLR describing the test of reasonableness as follows:

“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer



might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

44. On the third issue, the Respondent submitted that costs follow events and the Claimant has failed to prove its case and thus should not be awarded costs.

Analysis and Determination

45. Having considered the pleadings, evidence presented and submissions of the parties, the main issues for determination were:
- a. Whether the Claimant dated 7th June 2018 is overtaken by events
 - b. Whether the Respondent followed substantive justification and procedural fairness in terminating the grievant.
 - c. Who should bear costs of the suit.

Whether the Claimant dated 7th June 2018 is overtaken by events

46. Section 12(3)(vii) of the Employment and Labour Relation Court Act provides the court has powers to make orders including an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.
47. Section 49 (3) of the *Employment Act* provides reinstatement as follows:
- “Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to —
- (a) reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated; or
 - (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.”
48. In *Kenya Tea Growers Association & Unilever Tea Kenya Limited v Kenya Plantation and Agricultural Workers Union* [2018] KECA 32 (KLR) the Court of Appeal held that reinstatement is one of the remedies under section 49 of the *Employment Act* (the Act) that the court may give to an employee whose services have been terminated by the employer either through wrongful dismissal or unfair termination. However, the remedy is discretionary and before the court can give such remedy, it has to take into account the factors stipulated in section 49(4) of the Act which includes the circumstances in which termination took place including the extent, if any, to which the employee’s conduct caused or contributed to the termination; the practicability of reinstatement and the principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.
49. In this instant case, the claimant was seeking reinstatement of the grievant to his original position as supervisor and his salary to be equivalent to a senior supervisor at Kshs.85,000/=.



50. The Claimant would only deserve to be reinstated if the court found he was unlawfully terminated.

In this case the Claimant took some strapping roll metal which he claimed he was to deliver to Morgan Cargo. There was a procedure to be followed including informing the security company. He denied he did not do so since the two companies used to assist each other. The request he says was verbal and he did not find it necessary to inform the managers. He produced no documents to support this order and clearly the said company Morgan Cargo did not confirm receipt of the strapping and clip metals.

In that case it is clear there was some activities that were not transparent and the Claimant even during the disciplinary hearing failed to prove how he gave out goods to another company merely by a verbal request.

No doubt the respondent had a valid reason to put the claimant through the disciplinary hearing and subsequently to dismiss him from his employment for among other reasons dishonest handling of the respondent's assets.

51. The issue of reinstatement has been overtaken by events since the employee was terminated over three years ago. He was dismissed on 25th May 2018. Section 12(2) VII of Employment and Labour Relations Court (Employment and Labour Relation Court Act) is provided that an order for reinstatement -

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

52. In view of the foregoing, the issue of reinstatement has been overtaken by events and the prayer for reinstatement is not viable.

Whether the Respondent followed procedural fairness in terminating the grievant

53. In *Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR* where the court held that for termination of employment to pass the test of fairness test, there must be both substantive and procedure fairness.

54. In the instant case, the Respondent followed due process and gave valid reasons for terminating the grievant. The Claimant was also involved in the disciplinary process as per the correspondence presented before this Honourable Court and he was informed that he was entitled to a representative of his choice. He did choose a representative of his choice one Joab Asamba. The termination of the claimant from his employment was therefore lawful and procedural.

55. However, the Respondent's letter dated 25th May 2018 stated that the grievant would be paid as follows:

1. Days worked up to and including 25th May 2018.
2. Leave days earned and not utilized up to 25th May 2018
3. Any overtime earned and not compensated up to 25th May 2018
4. No gratuity will be paid
5. A certificate of service will be issued.

56. The Respondent did not avail documentation that it had paid the grievant his terminal dues since the Respondent is mandated to keep records as set out in Sections 10 and 74 of the *Employment Act*.



57. In conclusion the court will not give orders for reinstatement of the claimant to his former employment. He will however be paid his entitlements as follows if not already paid:-

1. Days worked upto and including 25th May 2018
2. Leave days earned upto 25th May 2018
3. Overtime earned and not compensated upto 25th May 2018

58. The respondent to give the accounts and settle the above reliefs if not already paid plus interest from 25th May 2018 at 12% per annum until full payment.

Mention on 3rd December 2024 to confirm the same is settled and also claimant to secure his certificate of service by that date.

59. Each party to meet respective costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

