



**Kenya Engineering Workers Union v Ashut Engineering Limited Plastic
Division (Employment and Labour Relations Cause E6585 of 2020)
[2024] KEELRC 2512 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2512 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6585 OF 2020
AN MWAURE, J
OCTOBER 11, 2024**

BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
ASHUT ENGINEERING LIMITED PLASTIC DIVISION RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Statement of Claim dated 16th December 2020.

Claimant's Case

2. The Claimant avers that it is a duly registered trade union within the meaning of the *Labour Relations Act* and it has a duly signed and valid recognition agreement with the Respondent. And a duly negotiated and registered Collective Bargaining Agreement (CBA).
3. The Claimant avers that the four grievants were engaged on different dates in the same department as quality control assistants but were summarily dismissed on the same day and on similar allegations.



Grievant	Date of engagement	Date of dismissal	Basic salary	House allowance	
1	Nicholas Ondati	1/03/2019	23/07/2019	28,388	5,678
2	Lameck Bundi	1/09/2014	23/07/2019	27,883	5,576
3	Cleophas Oguk	1/11/2015	23/07/2019	25,348	4,200
4	Fullgence Owino	1/09/2014	23/07/2019	27,883	5,576

4. The Claimant avers that grievants reported on duty as usual on 5/6/2019 and found that the colour used to produce Pwani Oil of 3 litres packaging containers was out of stock hence requested the same from the store.
5. The Claimant avers that the grievants were issued with other batch of colours to run trials which they did and gave back a written report to the Head of Quality Control Department stating the colours were not matching. However, the management did not respond to the report and only instructed them to stop the machine from running at night by 7/6/2019.
6. The Claimant avers that the management ignored the grievants complaints and brought back the master colour for use up to 10/6/2019 under the authority and instructions of the Respondent's management who instructed the staff at the store to issue.
7. The Claimant avers that the production manager, Mr. Balaji, having quantified from the store master batch, brought to the floor the same colour batch in question on 8/6/2019. However, on 10/6/2019, the production manager realized the grievants had complained of the unmatched colour batch, he withdrew the same from the floor and replaced it immediately.
8. It's the Claimant's case that the grievants were subjected to a disciplinary hearing on 17/6/2019 where quality issues were raised on the Pwani Oil 3 litre packaging containers but they were not allowed to have their union floor representatives in the said meeting.
9. The Claimant avers that the grievants were subsequently issued with summary dismissal letters on 23/7/2019. The Claimant vide a letter dated 24/7/2019 sought a meeting with the Respondent on 6/8/2019 but the management walked out on its officials.
10. The Claimant avers that the Respondent's action prompted it to report the dispute to the Ministry of Labour which was accepted under reference no. MLSS/LD/IR/13/68/2019 M/S Joyce Kimulu of Industrial Area Labour Office was appointed the conciliator.
11. The Claimant avers that both parties made their submissions and on 23/9/2019, the conciliator gave her findings and recommendation certificate in line with section 69 of the [Labour Relations Act](#).



Respondent's Case

12. In opposition to the Memorandum of Claim, the Respondent filed a Memorandum of Response dated 2nd March 2021.
13. The Respondent avers that the colour used to produce Pwani 3 litres containers was always readily available and was never out of stock as alleged.
14. The Respondent avers that the grievants never tendered it any report and it is not aware of any complaint by the grievant or that there was any instruction to stop the machine running the night of 7/7/2019.
15. It's the Respondent's case that the grievants were issued with notice to show cause letters on 12/6/2019 raising the issue of producing off colour 3 litre pwani products irrespective of the approved sample provided. The Claimants tendered their written responses within the timelines stated in the NTSC.
16. The Respondent avers that the grievants were taken through a disciplinary hearing on 17/6/2019 and subsequently terminated. The grievants were paid benefits due to them upon the date of their dismissal.
17. It's the Respondent's case that the grievants were negligent in performing their duties which led to the disciplinary hearing and ultimately their dismissal on valid grounds and due process was followed.

Evidence in Court

18. The Claimant's witness, Nicholas Andati (CW1) adopted his witness statement dated 6/12/2019 as his evidence in chief and the documents attached in the memorandum of claim as his exhibits marked 1-6.
19. CW1 testified that he worked as a quality controller assistant with his colleagues. The procedure when a new batch colour arrived they would test the colours and report the outcome to the Manager.
20. CW1 testified that on 5/6/2019, they received a small sample to confirm if the colours were matching what they were doing and they informed the manager in charge (quality and production manager) to decide.
21. CW1 testified that on the night of 7/6/2019, the colours were used and the Manager stopped the machine, the same colour was brought to the floor during the day time and he rushed to the quality manager to confirm if it had been approved to which he responded that the production manager had given consent for use.
22. CW1 testified that the production manager checked and ordered the same to be withdrawn from the floor. Subsequently, they were subjected to a disciplinary hearing on 17/6/2019 where they were denied their rights to have their union representatives accompany them.
23. During cross-examination, CW1 testified that his role entailed monitoring quality of production to conform with the client samples. These samples would be given to the production manager.
24. CW1 testified that the grievants reported to the quality manager who supervises quality assistants whereas the quality manager reports to the production manager.
25. CW1 testified that NTSC explained that the grievants were to monitor products belonging to Pwani Oil, they wanted a yellow colour but when they reported to work he noted there was a colour variation as it differed from the client's sample.
26. CW1 testified that in his response to the NTSC, he stated that he stopped the machine after he noticed the colour variation. A new batch was brought in when the old one had finished.



27. CW1 testified that he did not produce the report in the disciplinary hearing. He was paid his July salary but not leave days taken.
28. During re-examination, CW1 testified that the production manager and quality manager had the final say on the colours used, but grievants just followed orders from above.

Respondent

29. The Respondent's witness, Manase Otieno (RW1) stated that he works as the Respondent's group manager. He adopted his witness statement dated 2/3/2021 as his evidence in chief and the attached documents therein were produced as his exhibits 1-23.
30. During cross-examination, RW1 testified that he was employed by the Respondent in 2019 and was not a panel member in the grievants disciplinary hearing.
31. RW1 testified that the grievants were paid all their benefits and the Respondent submitted cheques which were received by them personally.
32. RW1 testified that the Respondent attended the conciliation meetings at the Ministry of Labour and has a copy of the conciliator's report.
33. RW1 testified that the conciliator's recommendation was not acceptable to the Respondent and it was not satisfied with the same. However, there was no room to object as the Ministry of Labour advised it to go ahead.
34. RW1 testified that the quality manager was not found culpable of any wrong doing.
35. RW1 testified that the use of colour comes from the quality manager and production manager but they did not have any new colours.
36. During re-examination, RW1 testified that the grievants as the quality control assistants were on the ground to monitor production. The disciplinary process was because of variation of colour sample produced by the client.

Claimant's Submissions

37. The Claimant submitted that the grievants' role under the CBA was to assist the quality controllers but the Respondent chose not to employ any quality controllers and left them to report directly to the quality controller manager or production manager hence a lapse in the system of which the Respondent's management should be blamed.
38. It's the Claimant's submission that the Respondent has not placed any evidence before this Court that the grievants were paid their terminal dues but rather were paid for the salaries of July 2019.
39. The Claimant submitted that there was no formal invitation of the grievants that they would be given directions that they come with people of their choice or the shop level representative would be available as was routine. This was not done hence no minutes of the disciplinary hearing.
40. The Claimant submitted on the issue of annual leave and leave travel allowance, the Respondent being the custodian of all employment records has not filed any documents to disapprove the same.
41. The Claimant submitted that the grievants having being terminated for non-performance of duties that were not their failure but was their seniors. It was not the fault of the grievants.



Respondent's Submissions

42. The Respondent submitted that the content of the NTSC letters was not ambiguous as they stated with clarity the formal charges against the grievants. The grievants responded to the NTSC letters.
43. The Respondent submitted that the grievants did not explain in detail the level of diligence they undertook to remedy the colour variation and yet they were the first point of call in terms of ensuring that production was in accordance with the customers approved sample.
44. It's the Respondent's submission that a disciplinary hearing was conducted on 17/6/2019 which was acknowledged by the Claimants. The Respondent has demonstrated that they followed due process which was not challenged by the Claimants.

Analysis and Determination

45. Having considered the pleadings, affidavits and submissions, the issues for the Court's determination are:
 - a. Whether the grievants' employment was unlawfully and unfairly terminated.
 - b. Whether the grievants are entitled to the reliefs sought

Whether the grievants' employment was unlawfully and unfairly terminated.

46. For termination of employment to pass the fairness test, an employer must prove it is based on a valid and fair reason and in accordance with fair procedure.
47. Section 45 (2) of the [Employment Act](#), Cap 226, Laws of Kenya states:

“ A termination of employment by an employer is unfair if the employer fails to prove—

 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the 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.”
48. It's the Respondent's case that the grievants negligently performed their duties by failing to raise the issue of producing off colour 3 litre Pwani Oil products irrespective of the approved sample provided.
49. The Respondent deny the grievants assertion that they raised this issue with their direct supervisor that is the quality control manager and production manager. The court however finds the Respondent has not produced the job description of the grievants to clarify what was their role in the production of the colours.
50. As for Substantive justification the same is dealt with under Section 43 of the [Employment Act](#) which reads: -

“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.”

51. The grievants assert that the role of matching the colours for production was by the Quality manager and his boss the Production manager. The grievants were the Assistant Quality officers. The claimants witness one Nicholas Ondati who testified on his behalf and on behalf of his other three colleagues says when he reported on duty on the material day he did note the colour variation but was not very sure what the colour was exactly meant to be since that was the responsibility of his boss the Quality manager. He however says he stopped the machine for abundant precaution. Despite taking that initiative he was still taken through disciplinary process.
52. The court finds that with the scanty evidence from the Respondent it is not clear what the role of the grievants were and the role of their bosses the Quality manager and the Production manager in matching the colours.
53. In that regard the court is emboldened to find that the Respondent did not prove a valid reason to terminate the grievants and so they are given the benefit of doubt as to their wrong doing in matching the colours of Pwani Oil.

The colours variation were according to the grievants the responsibility of the Quality manager and the Production manager and not the grievant's who were Assistant managers.

54. The court as well considered the issue of Procedural fairness which is clearly provided for under Section 41 of the [Employment Act](#) as follows: -

“Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
55. It is not disputed that the grievants were taken through disciplinary hearing, however, they insist that they were denied an opportunity to be accompanied by another employee or a shop floor union representative of their choice.
 56. The Respondent did not produce any evidence in court to demonstrate that the grievants were granted a chance to be accompanied by another employee or a shop floor union representative of their choice to the disciplinary proceedings. Therefore, the same fell short of the prerequisite requirement laid down in Section 41 of the [Employment Act](#).
 57. The court also did not have the benefit of the minutes of the disciplinary proceedings. In that regard the court cannot vouch that the proceedings were procedurally sound. So on this issue as well the court finds the Respondent fell short of proving they took the grievants through fair procedure.



58. The court having considered the pleadings and submissions in this matter the court comes to the conclusion that the dismissal of the grievants was both unlawful and unprocedural. Judgment therefore is entered in their favour.

59. They are awarded the following remedies:

1. Nicholas Ondati Nyaberi

1. July 2019 salary was paid – and grievant acknowledged receipt on 1st October 2019
2. Annual leave pay is declined as is not proved
3. One month pay in lieu of notice ...KShs 34,066/=
4. Travelling allowance is declined as is not proved
5. Service gratuity is also not proved and is declined.
6. Severance pay only applied where an employee is declared redundant and that was not the case in this matter so is declined.
7. The grievant is awarded 10 months salary equivalent for compensation for unlawful and unprocedural termination – KShs 340,660/=
8. The Claimant is awarded costs and interest at the rate of 14% per annum from date of judgments till full payment.
Total award is Kshs 374,726/=

2. Fullgence Owino

1. July 2019 salary was paid – and grievant acknowledged receipt on 1st October 2019
2. Annual leave pay is declined as is not proved
3. One month pay in lieu of notice ...KShs 33,459/=
4. Travelling allowance is declined as is not proved
5. Service gratuity is also not proved and is declined.
6. Severance pay only applied where an employee is declared redundant and that was not the case in this matter so is declined.
7. The grievant is awarded 8 months salary equivalent for compensation for unlawful and unprocedural termination – KShs 267,672/=
8. The Claimant is awarded costs and interest at the rate of 14% per annum from date of judgments till full payment.
Total award is Kshs 301,131/=

3. Lameck Nyariki Bundi

1. July 2019 salary was paid – and grievant acknowledged receipt on 1st October 2019
2. Annual leave pay is declined as is not proved
3. One month pay in lieu of notice ...KShs 33,460/=



4. Travelling allowance is declined as is not proved
 5. Service gratuity is also not proved and is declined.
 6. Severance pay only applied where an employee is declared redundant and that was not the case in this matter so is declined.
 7. The grievant is awarded 8 months salary equivalent for compensation for unlawful and unprocedural termination – KShs 267,680/=
- The Claimant is awarded costs and interest at the rate of 14% per annum from date of judgments till full payment.
- Total award is Kshs.301,140/=

4. Cleophas Were Oguk

1. July 2019 salary was paid – and grievant acknowledged receipt on 1st October 2019
 2. Annual leave pay is declined as is not proved
 3. One month pay in lieu of notice ...KShs 33,460/=
 4. Travelling allowance is declined as is not proved
 5. Service gratuity is also not proved and is declined.
 6. Severance pay only applied where an employee is declared redundant and that was not the case in this matter so is declined.
 7. The grievant is awarded 8 months' salary equivalent for compensation for unlawful and unprocedural termination – KShs 267,680/=
- The Claimant is awarded costs and interest at the rate of 14% per annum from date of judgments till full payment.
- Total award is Kshs 301,140/=.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH 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.

