



**Kenya County Government Workers Union v Managing Director,
Gatamathi Water & Sanitation Company & another (Petition
E018 of 2023) [2024] KEELRC 2446 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2446 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E018 OF 2023
ON MAKAU, J
OCTOBER 9, 2024**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION PETITIONER

AND

**THE MANAGING DIRECTOR, GATAMATHI WATER & SANITATION
COMPANY 1ST RESPONDENT**

GATAMATHI WATER & SANITATION COMPANY 2ND RESPONDENT

JUDGMENT

1. The petitioner is a registered trade union and brings this suit on behalf of its member, Mr.Fred Mwangi Kuria (hereinafter called “the grievant”). By a petition dated 24th November 2023, the petitioner alleged that the grievant was dismissed from his employment by the respondents on 21st November 2023 in a manner that was unfair, unlawful and contrary to his rights under the Constitution and statutes. Therefore, the following reliefs were sought: -
 - a. A declaration do issue that the Respondents violated Mr.Fred Kuria’s constitutional rights as guaranteed under Articles 27,28,41(1), and 47 of the Constitution of Kenya, 2010.
 - b. A declaration do issue that the Respondents violated the Petitioner’s member-Mr.Fred Kuria’s rights as guaranteed under sections 5(3) and 46 (c) of the Employment Act, 2012.
 - c. A declaration do issue that the Respondents violated the Petitioner’s member-Mr.Fred Kuria’s rights as guaranteed under sections 4 and 5 of the Labour Relations Act No.14 of 2007.
 - d. A declaration do issue that the Respondents violated the Petitioner’s member-Mr.Fred Kuria’s rights as guaranteed under section 4 Fair Administrative Actions Act, 2015.



- e. A declaration do issue that the Respondents' 21st November 2023 to the Petitioner's member Mr.Fred Kuria is irregular, unlawful and contrary to the law, hence null and void ab initio.
 - f. An order do issue that the Petitioner's member-Mr.Fred Kuria be reinstated to his former position of employment without any loss of remuneration and/or benefits and without any conditionality.
 - g. An order do issue to the Respondents to pay all pending salaries, benefits and emoluments that are due and owing to the petitioner's member-Mr.Fred Kuria.
 - h. A permanent injunction to issue quashing the termination letter dated 21st November 2023.
 - i. In the alternative to (f) above, an order do issue that the Respondents compensates the Petitioner's member-Mr.Fred Kuria for the unlawful termination being twelve (12) months gross salary as at the time of termination.
 - j. Costs of the Petition.
 - k. Any other orders as the Court may deem just and fit.
2. The petition is supported by Affidavits sworn by the grievant and the petitioner's General Secretary Hon.Roba Duba and it is opposed by the respondents through Affidavits sworn by 1st Respondent.

Factual Background

3. The grievant was employed by the 2nd respondent as a Water Quality Technician at Kihari Treatment Works. He was also the elected Branch Secretary of the petitioner Gatamathi Branch. He was summarily dismissed by the respondents vide the letter dated 21st November 2023. The reasons cited for the dismissal were sabotaging management by inciting other workers to decline performance; and making unilateral decisions without informing other union officials.
4. The petitioner averred that the said allegations were untrue, and accused the respondents of victimizing the grievant for his role as union representative contrary to the Kenyan Laws and International Conventions. It averred that under Article 7.2.3 of the Petitioner's Constitution, the duties of the Branch secretary of the Union are: -
- a. Reporting to the BEC and the BC in the first instance and the NEC through the General secretary.
 - b. Is the spokesperson of the union at the Branch level.
 - c. Issues all notices of the Branch meetings and keep record of proceedings.
 - d. Is eligible to vote in the meetings.
 - e. Keep a comprehensive and up-to-date register of all employees and union members at the Branch level.
 - f. Mobilizes, recruits and retains eligible members
 - g. Ensuring that the Branch Office and the County Government comply with the provisions of the laws and that the collective bargaining agreement is fully implemented.
 - h. Coordinating industrial action in the Branch when called upon.



- i. Ensuring that members are fairly treated by the County Public Service at the water sewerage companies and County specialized companies/agencies.
 - j. Receiving and handle grievances and disputes at the Branch level to the extent possible and refers outstanding disputes to the General Secretary.
 - k. Ensuing that instructions from the national office are carried out.
 - l. Communication with the National office and other stakeholders at the Branch Level.
 - m. Representing the union in all country forums at the branch level in which the union is an interested party.
 - n. Perform other functions assigned by the BES, the BC or the General Secretary.
 - o. The Branch Secretary shall notify the General Secretary of the names and addresses of branch officials elected.
5. It is the petitioner's case that the dismissal of the grievant was meant to stop him from freely agitating for the rights of its members at the Branch. The dismissal was intended to stop him from playing the role of ensuring that the employer complies with law and also to stop him from informing the union Head office about the situations at the Branch level. Consequently, it is the petitioner's case that the dismissal violates Article 1 of the International Labour Workers' Representatives Convention of 1971 (No.135) which guarantees protection of workers' representative from dismissal on account of their status or union activities.
6. The petitioner averred that it wrote a letter dated 17th November 2023 to the respondents protesting the unlawful failure by the employer to implement their Collective Bargaining Agreement (CBA) and instead of the respondents engaging it, it dismissed the grievant accusing him of giving misleading information to the union Head Quarters. Consequently, it prayed for the reliefs sought in the petition because the respondents dismissed the grievant unlawfully contrary to section 46 (d) of the *Employment Act*, 2007 and Article 41 and 47 of *the Constitution* of Kenya, 2010.
7. The respondents maintained that the grievant refused to share the CBA with the unionized employees; that he refused to consult with the management and fellow branch officials before writing letters to the petitioner Headquarters; and that he refused to assist in implementation of the respondents' strategies for increasing revenue collection.
8. The respondents averred that they signed a CBA with the petitioner or when the company had no sufficient revenue, on the understanding that the unionized employees would meet revenue collecting goals to enable the company to fulfil its mandate under the CBA. It is the respondents' case that the revenue situation did not improve due to laxity on the part of unionized employees and therefore the company could not meet its obligations under the CBA. Consequently, it was wrong for the grievant to accuse the company of violating the CBA when he knew the financial status of the company.
9. It is further respondents' case that a fair procedure was followed before dismissing the grievant and he was even given a right of appeal but he declined and filed this suit. They averred that the suit is prematurely before the court because the grievant never exhausted the internal appeal mechanism.



Evidence

10. The grievant testified as PW1 and reiterated the facts as contained in the petition and supporting affidavits. He testified that he worked for the 2nd Respondent for nine (9) years before his dismissal on 21st November 2023. The reasons cited were sabotage to the management; and making of unilateral decisions without informing fellow branch officials of the union. He was not accorded any hearing before the dismissal as required under section 41 of the CBA and clause 11.11 of the respondents HR Manual. He averred that the reason for his dismissal was his agitation for implementation of the CBA, as the Branch union official.
11. The main grievance was the failure by the employer to pay commuter and house allowance which were implemented after the Headquarter intervened. He contended that he held meetings with other Branch officials about the said matters as per the minutes he had produced as exhibits. He testified that the Branch officials were supposed to be nine (9) but due to harassment and intimidation by the employer four (4) resigned and he was then dismissed after the four officials resigned. He maintained that the employer was hostile to union officials causing many members to fear seeking positions in the union.
12. He admitted that he communicated to the union Head office but denied that he gave misleading information. He contended that as the Branch secretary, he was entitled to inform the Head office about intimidation of members and the failure to implement the CBA. He contended that the other officials disowned resolution due to intimidation by the employer. He maintained that the dismissal was unfair and unlawful.
13. On cross examination, he contended that his role as Branch Secretary was to ensure implementation of the CBA. He admitted that there was minimum amount of collections to enable the company to implement the CBA. He contended that he shared the CBA to 18 union members via the WhatsApp texts which he produced as exhibits herein and clarified that the rest of 26 members had left the group.
14. He contended that there were several meetings with the respondents where he attended as the spokesperson of the employees. He admitted that Article 9 of the CBA provided that increment of basic salary would be conditional to meeting revenue collection target. He contended that the rest of the terms were not conditional to meeting such targets. He admitted that he wrote letter “CM6” stating that the CBA has not been implemented.
15. He admitted that the resignation letters by the four union officials never indicated that they resigned due to intimidation. He further admitted that resignation letter (“CM 10”) complained that there was disagreement among union officials leading to quarrel with the management.
16. He also testified that he wrote an appeal on 29th November 2023 after the petitioner filed this suit on 24th November 2023 but clarified that he had no control of the process commenced by the petitioner.
17. In re-examination, he contended that his role did not include revenue collection and maintained that the respondent never followed the proper procedure before dismissing him.
18. The 1st respondent testified as RW1. He confirmed that he is the Managing Director of the 2nd respondent. He admitted that the parties herein had signed a CBA after seeking advice from the Water Regulatory Authority Board. He testified that the agreement with the union was that for the CBA to be implemented, there had to be a minimum revenue collection of Kshs.7 million per month.
19. He further stated that a further agreement was reached for partial implementation of the CBA even before attaining the target of Kshs.7 million in revenue collection. The salary was increased in August



- 2022 and in January 2023 each employee was paid a bonus of Kshs.2000 after Kshs.7.2 million was collected in revenue which equaled to 70% of their revenue collection target. The same happened in February and March 2023 but from April 2023 the staff relaxed and never hit target again.
20. Thereafter, the union Headquarters started writing letters to the respondent and when they held meetings with the branch officials, they started blaming each other. He contended that the problem was the failure by the staff to collect monthly revenue of Kshs.7,000,000.
 21. On cross-examination, he admitted that the grievant was not given a show cause letter before the dismissal. He admitted that the General secretary was also not served with any letter before the dismissal of the grievant. He admitted that the disciplinary procedure provided under Article 41 of the CBA and Article 11.9 of the HR Manual was not followed.
 22. He admitted that grievant was a Laboratory Assistant and second in command in Water Quality Section but was also a revenue collector as his appointment letter provided for assignment of any other duty. He contended that the grievant was dismissed for his conduct and not union activities.
 23. He admitted that there are no union officials or shop steward currently in the company contending that they all resigned on 20th November 2023. He denied that they were intimidated by the employer. He contended that the company is remitting union dues but admitted that the CBA has not been implemented due to failure to meet revenue collection target. He contended that there was written agreement allowing for partial implementation of the CBA.
 24. He contended that the grievant was working alone and that is why the other officials disowned his letters to the union Headquarters and resigned from office. He contended that he advised the grievant severally that he was employed by the respondent and not the union Headquarters. However, he denied that the grievant was blacklisted and clarified that he had problems with his fellow union officials.

Submissions

25. It was submitted for the petitioner that the grievant was dismissed summarily for no valid reason and without being accorded a hearing contrary to Article 11.5 (c) of the respondent's HR Manual and section 45 (2) and (5) of the *Employment Act*, 2007. It was submitted that the two grounds for the dismissal related to the grievant's active participation in the petitioner's union Branch and not his work as Water Quality Technician. The said union activities are not part of the offences described as gross misconduct under Article 11.9 (c) of the respondent's HR Manual. It was submitted that the respondent was intimidating union officials forcing them to resign. Therefore, it was submitted that the grievant was dismissed for his union activities.
26. As regards the procedure for dismissal, it was submitted that no preliminary investigations were done, and no caution or counselling was done to the grievant before dismissal. He was just served with a dismissal letter without any chance to be heard. Consequently, it was submitted that the dismissal was unfair and contrary to the law.
27. For emphasis, several decisions were cited including *Postal Cooperation of Kenya v Andrew K.Tanui* [2019] eKLR and *Cooperative Bank of Kenya Ltd v Banking Insurance & Finance Union* [2015] eKLR where the court held that fair termination is demonstrated by a valid reason and fair procedure.
28. It was further submitted that the respondents violated grievant's rights to be treated with dignity and freedom from discrimination, right to fair labor practices and right to fair administrative action as enshrined under Article 27,28,41 and 47 of *the Constitution*. He was targeted for dismissal on account of his status as the petitioner's Branch secretary and for championing the rights of his fellow workers.



29. He further submitted that he was dismissed without being accorded a hearing for his union status and activities which amounted to inhuman treatment. The dismissal for union status and activities also violated his right to fair labor practices and the right to join a trade union.
30. He also submitted that his right to fair administrative action was violated by being dismissed without following the procedure prescribed under Article 41 of the CBA and Article 11.9 of the respondents' HR Manual. Consequently, it was submitted that the petitioner is entitled to the reliefs sought. Reliance was placed on the case of *Universities Academic Staff Union v Maseno University* [2013] eKLR where the court held that no employee should be subjected to anti-union discrimination because of legitimate union activities.
31. On the other hand, it was submitted for the respondents that the termination was fair as the grievant was informed of the reason for the termination; that the reason was fair; valid and that the grievant was accorded several opportunities to defend himself and thereafter a right of appeal after the termination. It was submitted that the grievant was dismissed for dishonesty and disregard for harmonious relationship between the company management and its employees which amount to valid and fair reasons for termination under section 45 of the *Employment Act, 2007*.
32. For emphasis, reliance was placed on *Judicial Service Commission v Shollei & another* [2014] eKLR and *Samuel Kalomit Murkomen v Telkom Kenya Ltd* [2017] eKLR where the court held that lack of trust and confidence between employee and employer was a valid ground for termination of employment contract.
33. It was further submitted that the court should not consider the alleged constitutional violation because the petitioner has statutory mechanism for seeking remedy for unfair termination. It was submitted that by dint of the doctrine of avoidance, the petition should be dismissed as the issues can be canvassed by way of a claim. For emphasis, reliance was placed on *Okumu v Catholic University of East Africa* [2023] eKLR and *Ongaro v Judicial Serviced Commission & another* [2022] eKLR.
34. It was further submitted that the relief of reinstatement is not suitable because the termination was lawfully done, and further that reinstatement will lead to friction between the grievant and the employer. Reliance was placed on *Kenya Airway Ltd v Aviation and Allied Workers Union Kenya & 3 others* [2014] eKLR.
35. It was further submitted that any award of damages made by the court should be guided by the factors set out under section 49 (4) of the *Employment Act, 2007*. Reliance was placed on the Supreme Court decision in *Kenfreight (E.A) Ltd v Benson K.Nguti* [2019] eKLR.

Issues for determination

36. It is common ground that the grievant was employed by the 2nd respondent until 21st November 2023 when he was summarily dismissed. The issues for determination therefore are: -
 - a. Whether the petition is properly before the court.
 - b. Whether the dismissal of the grievant was unfair and unlawful.
 - c. Whether the respondents violated the grievant's right under Article 27,28,41 and 47 of *the Constitution*.



Competency threshold

37. The respondents contended that the petition is not properly before the court as it involves employment dispute which can be remedied under the *Employment Act*. As such, the respondents submitted that the petitioner should have filed a statement of claim as opposed to a constitutional petition. They urged the court to uphold the doctrine of avoidance and reject the petition.
38. I have considered the petition keenly and noted that apart from the claim for unlawful dismissal from employment, the petitioner has alluded to violations of the grievant rights by the respondents. It is alleged that the grievant was targeted and victimized for being petitioner's Branch Secretary, which office made him the spokesperson for the workers in the respondent's company. His union status and union activities were also not welcome by the employer.
39. RW1 admitted in evidence that all the union's branch officials resigned and there was no shop steward in the company. PW1 contended that the company was hostile to union official and they resigned due to intimidation. The grievant's woes arose from his correspondences with the union's head office in his official capacity as the Branch Secretary reporting that the employer had failed to implement a CBA and was intimidating union members. I find that the petition raises constitutional issues and therefore case in *Okumu v Catholic University*, supra, is distinguishable because in that case the dispute was purely a case of termination of employment without violations of constitutional rights like in this case.
40. Since the reasons cited for the summary dismissal point to violation of rights in the Bill of Rights, I am satisfied that the petition is properly before the court. Such rights are not mere decorations in *the Constitution* but are fundamental rights and freedoms which bind the employers both in the public and private sector.
41. The petition is also elegantly drafted and such it meets the threshold established in *Anarita Karimi Njeru v Republic* [1979] eKLR where the court held that: -
- “We would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to *the constitution*, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”
42. Having considered the petition keenly, I am satisfied that the petitioner has pleaded with the required degree of precision, it's dispute, the provisions of *the constitution* which were violated by the respondents and the manner in which the violation was done. Consequently, I overrule the objection by the respondents that the petition is improperly before the court.

Unfair termination

43. Section 45 (1) & (2) of the *Employment Act* provides that:
- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) 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 employee’s 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.”

44. Flowing from the foregoing provision, it is clear that an employer has every right to terminate a contract of employment provided that there is a valid reason, and that a fair procedure is followed. Section 43 of the Employment Act, 2007 provides that: -

- “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.”

45. The respondents communicated the reasons for dismissing the grievant vide the dismissal letter dated 21st November 2023, thus: -

- a. Sabotage to the management by giving misleading information to union’s head office who in turn writes back to the company.
- b. Making unilateral decisions without informing fellow union officials.

46. The petitioner has denied any wrong doing on the part of the grievant and maintains that Article 7.2.3:11 and 12 of the Union constitution empowers the Branch secretary to be the spokesperson of the workers in his Branch and to communicate with the Head office. I have considered the evidence before the court, and find that the grievant acted within his mandate as the petitioner’s Branch secretary in the respondent’s company.

47. It was within his mandate to agitate for the implementation of the CBA in favour of the union members and to inform the union head office that the employer had failed to implement the CBA. It was also within his powers to inform the union Head office that the employer was being hostile to the branch officials. Consequently, I agree with the petitioner that the alleged union activities by the grievant did amount to a valid and fair reason for dismissing him from employment.

48. Dismissing the grievant for the cited reasons amounted to meddling with internal affairs of the trade union. It also amounted to curtailing the grievant’s right to fair labour practices contrary to Article 41 (2) (c) of the Constitution which renders the dismissal outrightly unfair under section 46 of the Employment Act, 2007.

49. Even if the reasons cited for dismissal were valid, which is not the case here, the dismissal would still be unfair and unlawful because the grievant was dismissed without being accorded a fair hearing as contemplated in section 41 of the Employment Act, 2007. The said section provides: -

- “(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.”

50. Having found that the reason for the dismissal was not valid and fair and that the procedure followed was not fair, I must now hold that, the dismissal of the grievant vide the letter dated 21st November 2023 was unfair within the meaning of section 45 of the *Employment Act*, 2007.

Violation of constitutional rights

51. I have made a finding of fact that the grievant was dismissed for playing his legitimate role as the Branch secretary of the petitioner union. His fellow officials resigned from their positions and they were not dismissed. Dismissing the petitioner in such circumstances amounted to discrimination for exercising his constitutional rights under Article 41 (2) (c) of *the Constitution* of Kenya, 2010 which provides that: -

- “(2) Every worker has the right-
- a. ...
 - b. ...
 - c. to form, join or participate in the activities and programmes of a trade union.”

52. The dismissal on account of legitimate union activities in my view also amounted to negative discrimination contrary to Article 27 which provides for equality of all persons before the law and guarantees all persons freedom from discrimination.

Reliefs

53. Having found that the grievant was dismissed for engaging in legitimate union activities, I hold that the petitioner is entitled to declaration that the respondents violated grievant’s right under Article 27 and 41 of *the constitution*, namely, right to equality before the law and right to fair labour practices. I also find that it has proved on a balance of probabilities that the dismissal of the grievant was unfair and therefore he is entitled to remedy under section 49 of the *Employment Act*, 2007.

54. The prayer for reinstatement has been opposed on ground that it will lead to friction at the work place. The petitioner has not proved that it is practicable to order reinstatement. Consequently, I decline to order reinstatement especially considering the toxic relationship between the grievant and the management before the dismissal.

55. In view of the foregoing matters, the appropriate remedy is award of compensatory damages under section 49(1) of the *Employment Act*, 2007. The grievant worked for nine (9) years and his appointment was permanent and pensionable. He also did not contribute to the dismissal through misconduct. Finally, I have taken judicial notice that jobs are no longer easily available in the country. Consequently,



I award the petitioner the prayer for 12 months gross salary as compensation for the unfair dismissal of the grievant.

56. The respondents are also ordered and directed to pay the petitioner all the pending salaries, benefits and emoluments that are due and owing to the grievant under the terminated contract of employment.
57. The respondents have 30 days from the day hereof to compute and pay the petitioner the damages awarded above less statutory deductions. The petitioner is awarded costs of the suit plus interest at court rates from the date of the judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF OCTOBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

