



Kenya Union of Commercial Food and Allied Workers v Linco Stores Limited (Employment and Labour Relations Cause E021 of 2023) [2024] KEELRC 2762 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2762 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E021 OF 2023
ON MAKAU, J
NOVEMBER 8, 2024**

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS CLAIMANT

AND

LINCO STORES LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a registered Trade Union and has filed this suit on behalf of its member, one Dancun Njiru (hereinafter called “the grievant”). It averred that the grievant was verbally employed by the Respondent as a loader in 2002 for fixed term ending 2005. His monthly salary was Kshs. 6,000. In 2006, he was promoted to the position of salesman and worked as such until 30th June 2021 when his services were terminated. His monthly salary was Kshs. 12,000 exclusive of housing allowance.
2. The grievant took his annual leave from 7th June 2021 to 24th June 2021 but on 23rd June 2021, he received a call from the Respondent asking him not to report back as scheduled until he was notified. He was never called back and his pay was stopped forcing him to report to the Claimant’s branch office, who wrote to the Respondent on 4th October 2021. The Respondent responded to the same confirming the termination of the grievant’s employment for gross misconduct.
3. The Claimant reported a trade dispute for conciliation and the conciliator found that the termination was justified but recommended that the grievant be paid his underpaid wages, salary arrears and unpaid house allowance from June 2018. The claimant rejected the recommendation and filed this suit seeking the following reliefs:
 - a) Declare that the grievant’s termination of contract was unfair and unprocedural.



- b) Order the Respondent to reinstate the services of the grievant and treat him as if he has never been terminated and pay him his accrued salary arrears:
 - c) In the alternative to reinstatement, the Respondent to pay the grievant as follows: -
 - [i] one month's notice 21,418.50
 - [ii] untaken leave $\frac{21 \times 3 \times 21,418.50}{30} = 14,992.50$
 - [iii] house allowance $\frac{15}{100} \times 3 \times 21,418.50 = 9,638.32$
 - d) Underpayments
 - [i] June 2020 – May 2021 $Kshs. 21,418.50 - 12,000 = 9,418.50 \times 12 = 113,022.00$
 - [ii] June 2019 – May 2020 $21,418.50 - 12,000 = 9,418.50 \times 12 = 113,022.00$
 - [iii] June 2018 – May 2019 $21,418.50 - 12,000 = 9,418.50 \times 12 = 113,022.00$
 - e) 12 months compensation for 21,418.50x12 257,022.00
unlawful termination
Total Kshs.611,080.50
 - f) Costs of the suit to the Claimant
 - g) Any other relief this Honourable Court may deem fit and just to grant.
4. The Respondent filed a Statement of Response dated 28th February 2024 admitting that it employed the grievant as a Loader in 2005 and later promoted him to a General Clerk earning a monthly salary of Kshs.22,000 inclusive of house allowance. It denied that the said salary was an underpayment. It further averred that it dismissed him on 30th June 2021 for gross misconduct, namely performing his duties unfaithfully and breach of payment procedures despite warnings.
5. It also averred that it paid the grievant one-month salary in lieu of notice accrued leave days and issued him with certificate of service. Finally, it averred that the Claimant lacks locus standi to represent the grievant and prayed for the suit to be dismissed with costs.

Evidence

- 6. At the hearing, the grievant, testified as CW1. He adopted his written statement dated 30th November 2023 and produced 13 documents as exhibits. In brief, his evidence was that he was employed by the Respondent as a loader from 2002 to 2005 and his monthly salary was Kshs.6000. In 2006, he was promoted to a Salesman until 30th June 2021 when he was dismissed. His monthly salary then was Kshs. 12000 without house allowance.
- 7. On 8th June 2021 he was directed to proceed on leave until 24/6/2021 but on 23rd June 2021, he was instructed to wait until end of the month when he would be called. When he failed to receive any call from the employer, he reported the matter Claimant's office at Embu. Conciliation was done at the labour office but the recommendation was declined hence the instant suit.
- 8. He denied any wrong doing and averred that there is no evidence of any show cause letter or warning served on him for the whole period he worked for the respondent. He contended that he was paid his salary for June 2021.



9. On cross examination, he confirmed that he joined the claimant as member on 6th June 2022 after his dismissal by the respondent. He changed his testimony to say that he joined the Respondent in May 2004 as a Salesman and he was never promoted. He then clarified that he started with a monthly salary of Kshs. 6,000 which was later increased to Kshs. 12,000 as per his bank statement from Equity Bank for period starting 10.6.2021 to 30.7.2021 (Exhibit 3).
10. He denied that he caused the Respondent suffer a loss of money. He also denied received Kshs. 55,000/= from a client at Karurumo, and contended that the said allegations were errors which were sorted out before his dismissal. He maintained that he never receiving any warning letters for the alleged misappropriation of funds from customers.
11. On being showed a letter from the County Labour Office (exhibit 6), he contended that he was not heard by the labour officer concerning the matters contained in the letter. As regards the claim for salary underpayment, he contended that he had filed general wages order for 2018 to prove claim for underpaid salary.
12. In re-exam he stated that the employer had no right to deduct his salary unless they had agreed. He reiterated that all the allegations of wrong doing against him were settled before the dismissal. He clarified that the conciliation meeting scheduled at the labour office was never held as the Respondent failed to attend and as such he was advised to go to court.
13. Joseph Macharia Mwangi, RW1, the Respondent's HR Manager testified as RW1. He also adopted his written statement dated 8th March 20-24 as his evidence. In brief, his case was that the grievant was verbally employed as a loader in the year 2005 but later he was promoted to the position of a General Clerk earning a monthly salary of Kshs.22000 inclusive of house allowance.
14. He stated that the grievant did not perform his duties faithfully as he continued to receive payment from the respondent's customers through his personal Mpesa account instead of the respondent's bank account or Mpesa till number. He also supplied goods to the customers without issuing invoices or cash sale receipts. Attempts were made to resolve the matter amicably even before the conciliator but then a decision was made to dismiss the grievant.
15. In cross examination, he confirmed exhibit 5 was a letter responding to the Claimant and it raised accusations against the grievant. He stated that the grievant was taken through hearing in all the accusations and warned not to repeat but he ignored.
16. He maintained that the grievant was paid a consolidated salary of Kshs. 22,000/= per month but some of the payments was received by way of vouchers and the rest through the bank. He stated that the copies were kept by the Respondent for accounting but admitted that he did not have them in court.
17. He reiterated that the grievant was paid salary in lieu of notice plus accrued leave and also gave him a certificate of service. He stated that he did not produce bank record to prove the payments. He further stated that the payment voucher was used to recover stolen money. Finally, he confirmed that the respondent never reported the theft to the police.
18. In re-examination, he clarified that the grievant was summarily dismissed from employment as opposed to normal termination of contract. He reiterated that the grievant was paid Kshs. 22,000/= as gross salary through bank. He stated that when they noted the wrongs by the grievant, they called him and warned him against misappropriation of money.



Submission

19. It was submitted for the claimant that the dismissal amounted to unfair labour practices contrary to Article 41 of *the Constitution* and was unfair as it was not grounded on a valid reason and the grievant was not accorded an opportunity to be heard as required under section 43 (1) and 41 of the *Employment Act*. Reliance was placed on the case of Alphonse Maghanga Mwanchanya vs Operation 680 Limited and Samuel Nguru Mutonya v National Bank of Kenya Ltd [2017] eKLR.
20. On the other hand, it was submitted for the respondent that the claimant lacked locus standi to represent the grievant in the suit since he joined the Claimant approximately one year after his dismissal. It was further submitted that the sole purpose of joining the union was for representation by the union in this suit.
21. Reliance was placed on the case of Kenneth Omollo Simbiri & Another v Daniel Ongor [2020] eKLR, Kenya Shoe & Plastic Workers Union v Modern Soap Factory Ltd [2017] eKLR and *Kenya Engineering Workers Union v Africa Metal Works Limited (Employment and Labour Relations Cause 61 of 2018)* [2024] KEELRC 859 (KLR) (16 April 2024) (judgment) to urge the court to find that the Claimant lacked requisite locus standi to institute the suit.
22. It was further submitted that the dismissal of the grievant was lawful and justified since the grievant admitted in cross examination that he received Kshs. 55,000 from Mrs. Lincoln of Karurumo via his mpesa number but contended that the issue had been resolved before the dismissal. The Court was invited to note that the conciliator found that the grievant acted contrary to the Respondent's rules and regulation and as the dismissal was lawful. It further submitted that summary dismissal under section 44 of the *Employment Act* did not require prior notice. For emphasis, reliance was placed on *Mutiso v South Eastern Kenya University (SEKU) (Cause E004 of 2021)* [2024] KEELRC 647 (KLR) (15 March 2023) (judgment).
23. Finally, it was submitted that the claimant is not entitled to any reliefs sought since, the termination was not unfair and the claimant did not have locus standi. It was argued further that the grievant did not prove claim for salary underpayment, leave and housing allowance. The Court was therefore invited to find that the grievant was paid in accordance with the terms of his contract which was way above the minimum salary of Kshs. 16,295.95, which was prescribed by the General Wage Order of 2018. Consequently, the Court was therefore urged to dismiss the suit with costs to the Respondent.

Determination

24. Having considered the Claim, the Response, the evidence tendered, the rival submissions, the issues for determination are:
 - a. Whether the Claimant has locus standi to institute the suit.
 - b. Whether the grievant's termination was unfair and unlawful.
 - c. Whether the grievant is entitled to the reliefs sought.

Locus standi

25. On the first issue, section 22 of the ELRC Act, provides for the representation before the Court as follows:
 - "22. In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be



represented by a legal practitioner, an office bearer or official of that party's trade union or employers' organization and, if the party is a juristic person, by a director or an employee specifically authorized for that purpose."

26. The above section of the law is self-explanatory and does not provide any conditions as to the timelines within which an employee ought to be a member of a trade union for them to be eligible for representation. There is unrebutted evidence that the grievant is a member of the Claimant and therefore I find that the Claimant has the locus standi to institute suit on behalf of its member. (see Court of Appeal decision in *Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR.

Unfair termination

27. On the second issue, the law is clear that for a termination to pass muster, it must be justified by a valid and fair reason and fair procedural must be followed. Sections 45 (1) & (2) and 41 of the [Employment Act](#) provides as follows:

" 45. Unfair termination

- (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."

" 41. 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.”

28. Section 43 however squarely places the burden on the employer to prove the reasons for the termination. It states as follows:

“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.”

29. The grievant denied the alleged misconduct of misappropriation of funds and maintained that he was dismissed for no valid reason. He further stated that he was not accorded a hearing before the dismissal. The respondent maintained that the grievant committed gross misconduct and he was accorded a hearing before the dismissal.

30. Having considered the revival contentions, I did not see any documentary evidence placed before this Court by the Respondent to prove that the reasons for termination were valid and that the grievant was accorded a fair hearing before the dismissal. Rw1 gave details of the cash payments by customers through grievant’s Mpesa number but nothing tangible was produced to substantiate the allegation. Further no minutes of the hearing were produced to prove that the grievant was indeed given a hearing or some other form of evidence before the dismissal. Consequently, I find that the summary dismissal of the grievant was unfair and unlawful within the meaning of section 45 of the Employment Act.

Reliefs

31. In view of the foregoing finding, I am satisfied that the claimant is entitled to compensation for unfair termination under section 49(1) of the said Act. Rw1 acknowledged that the grievant worked for the respondent from 2004, about 17 years. The respondent did not prove that he contributed to the termination through misconduct. The procedure of termination was skewed. He was also not paid any gratuity. In the circumstances, I award him 12 months salary as compensation for unfair termination. He is also awarded one-month salary in lieu of notice because, although the respondent alleged that it paid the same to the grievant after the termination, the grievant contented that it was his salary for June 2021.

32. On the issue of leave days, the claimant prayed for three years’ leave and RW1 testified that the grievant was compensated for leave days that accrued before the termination. No evidence was adduced to support that allegation. I will therefore award the claimant leave of 63 days less 26 days utilized in June 2021 leaving 37 leave days. Hence based on the minimum basic salary under the 2018 General Wage Order $Kshs.21,418.50 \times 37/30 = Kshs. 26,416.15$.



33. The claim for salary underpayment is also merited because he was receiving Kshs.12000 instead of the said minimum basic salary under the 2018 Wages Order of Kshs.21,418.50. The Respondent argued that it was paying the grievant Kshs. 22,000, partly through the bank and the rest through voucher. The claimant produced a bank statement showing receipt of Kshs12,000 but the respondent did not produce any evidence to prove its allegation of payment through voucher. Therefore, I award the claimant Kshs. $21,418.50 - 12000 = Kshs.9418.5 \times 36 \text{ months} = Kshs.257,022$.
34. The claim for house allowance is also merited because the respondent never provided housing to the grievant. Monthly house allowance was $Kshs21418.50 \times 15\% = Kshs. 3,212.77$. My assessment of the unpaid house allowance is more than the Kshs. 9,638.32 sought but since parties are bound by their pleadings, I award the said sum.

Conclusion

23. I have found that the claimant has proved on a balance of probability a case of unfair and unlawful termination. I have further found that the claimant is entitled to more than the sum sought but I will enter judgment for the sum pleaded hence;
- a. Kshs.611,080.50
 - b. The award is less statutory deductions.
 - c. The claimant is awarded costs of the suit plus interest at court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF NOVEMBER, 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

