



Kenya Plantation & Agricultural Workers Union v Bilashaka Flowers Limited (Cause E028 of 2022) [2024] KEELRC 13422 (KLR) (13 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13422 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E028 OF 2022
DN NDERITU, J
DECEMBER 13, 2024**

**BETWEEN
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT
AND
BILASHAKA FLOWERS LIMITED RESPONDENT**

JUDGMENT

I. Introduction

1. The claimant, a trade union representing workers in the agricultural sector, commenced this cause for and on behalf of Peter Mbui Muhoro (the grievant) by way of a memorandum of claim dated 13th July, 2022 filed in court on 26th July, 2022.
2. As it is the procedure, the statement of claim is accompanied with a verifying affidavit, a list of witnesses, a witness statement by the grievant, a list of documents and a bundle of copies of the listed documents.
3. The claimant is seeking for the following reliefs –
 1. An order directing the Respondent to do the following;
 - a. To unconditionally reinstate the grievant herein;
 2. Should prayer 1 above fail, an order directing the respondent to do the following: -
 - a. Pay the grievant gratuity for the years he has served with the Respondent at the rates provided for in the CBA;
 - b. Pay the grievant monthly salary for a period of twelve (12) months;
 - c. Pay the grievant in lieu of leave;
 - d. Pay the grievant travelling allowance;



- e. Pay the grievant an equivalent of two months' salary in lieu of notice of termination;
 - f. Pay the grievant damages for unlawful, illegal and unfair dismissal;
 - g. Pay the grievant the costs of the cause;
 - h. Certificate of service;
 - i. Interest on (a), (b), (c), (d), (e), (f), (g) and (h) above.
 - j. Any other relief this honourable court deems fit to grant
4. The respondent entered appearance through the Agricultural Employers' Association on 11th October, 2022 and filed a memorandum of defence on 28th November, 2022, a list of witnesses, witness statements by Grace Mongina (RW1) and Isaac Kinuthia (RW2), a list of documents and a bundle of copies of the listed documents.
 5. In the memorandum of defence the respondent denies liability and prays that the claimant's cause be dismissed with costs for want of merits.
 6. The claimant's case came up for hearing in open court on 18th October, 2023 when the grievant (CW1) testified and the claimant's case was closed his.
 7. The defence was heard on 15th November, 2023 when RW1 and RW2 testified and the respondent's case was closed.
 8. Counsel for both parties addressed the court by way of written submissions. Miss Omwaka for the claimant filed written submissions on 29th November, 2023 while Miss Wachira for the respondent filed on 5th December, 2023.

I. The Claimant's Case

9. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence adduced by the grievant (CW1), and in the written submissions by his counsel.
10. In the memorandum of claim, the claimant avers that the grievant was engaged by the respondent on 1st February, 2002 as a general worker and served until his dismissal on 14th September, 2022.
11. It is further pleaded that on 12th September, 2020 the grievant was arrested by the guards of the respondent on allegations of stealing a roll of binding wire and was subsequently handed over to police officers from Kongoni Police Station. However, the grievant was released from police custody on 13th September, 2020 as the respondent failed to press its case against him with the police.
12. On 14th September, 2020 the respondent summarily dismissed the grievant on alleged gross misconduct. The claimant intervened and appealed the dismissal but the dismissal was upheld.
13. A conciliator appointed by the cabinet secretary for labour recommended reinstatement of the grievant and payment of compensation for unfair and unlawful dismissal. However, the respondent failed, refused, and or neglected to comply rendering the filing of this cause necessary.
14. It is pleaded that as at the time of dismissal the claimant was on a basic monthly pay of KShs13,807/=.
15. In his testimony in court, the grievant adopted the contents of the memorandum of claim and his filed written statement as his evidence-in-chief and produced copies of his filed documents as exhibits 1 to 4. He denied stealing or attempting to steal binding wire from his employer, the respondent. He stated that he was released from the custody of the police after the respondent failed to press criminal charges



against him, but on reporting back to work on 14th September, 2020 he was wrongfully, unfairly, and unlawfully dismissed.

16. He stated that he was not given a hearing before the dismissal but was only asked, at the gate of the farm, to explain what had transpired on 12th September, 2020 when he reported back to work on 14th September, 2020. He stated that he was thereafter sent away only to receive a letter of dismissal nine months later through postal address.
17. On cross-examination the grievant maintained the foregoing position.
18. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.

II. The Respondent's Case

19. The respondent's case is contained in the memorandum of defence to the claim, the oral and documentary evidence adduced through RW1 and RW2, and the written submissions by its counsel.
20. In the memorandum of defence, the respondent states that it is a limited liability company carrying out business of growing and exporting fresh cut flowers based in Naivasha, Nakuru County.
21. It is pleaded that on 12th September, 2020 a store-keeper reported the loss of a 25kg roll of binding wire valued at Kshs3,500/=. Upon search the security guards located the stolen item hidden within the farm and strategically decided to wait for the thief to show up to collect the stolen property and lay ambush. It is pleaded that later in the day the grievant attempted to pick the stolen binding wire and the security guards apprehended him and handed him over to the police.
22. It is pleaded further that on 14th September, 2020 the grievant was issued with a show-cause letter to which he gave unsatisfactory response. It is pleaded that the grievant was invited for a disciplinary hearing on the same date wherein he appeared with a shop-steward. It is pleaded that after the hearing the respondent decided to summarily dismiss the grievant for gross misconduct under Section 44(4) (g) of the *Employment Act* (the Act).
23. It is pleaded that the grievant was served with the letter of dismissal but he refused to acknowledge receipt of the same as a result of which a copy was sent to the area labour office and the original sent to the grievant to his last known postal address via registered mail.
24. It is admitted that the grievant filed an appeal which was unsuccessful. It is pleaded that the respondent did not agree with the recommendation by the conciliator and that its failure to press criminal charges against the grievant was in good faith as it decided to apply internal disciplinary mechanism. It is stated that the grievant was accorded fair hearing both in substance and procedure before, during, and after the dismissal.
25. In her testimony in court, RW1, the human resources manager, adopted her filed statement dated 25th November, 2022 as her evidence-in-chief. She produced the documents filed by the respondent as exhibits 1 to 8.
26. RW1 reiterated that the grievant was served with a show-cause and he responded thereto. She stated that a disciplinary hearing was conducted wherein the claimant came along with a union representative. It is thereafter that a decision was taken that he be summarily dismissed.
27. In cross-examination she emphasized that the grievant was given a hearing a per the show-cause letter, his response thereto, and the disciplinary hearing as per the minutes produced in court. She stated that



she visited the scene where the grievant was arrested by the security guards and saw the allegedly stolen roll of barbed wire.

28. In his testimony, RW2, a security supervisor, adopted his filed statement dated 25th November, 2022 as his evidence-in-chief. He stated that he discovered the stolen barbed wire just outside the farm and allocated guards to keep an eye and when the grievant showed up to collect the stolen property he was arrested.
29. In cross-examination, RW2 stated that the grievant was arrested after he picked the stolen roll of barbed wire as he prepared to load it onto his bicycle. He stated that the grievant offered no explanation as to why he was at that place at that particular time and why he was loading the stolen barbed wire onto his bicycle.
30. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs. The submission by the respondent's counsel shall be considered in the succeeding parts of this judgment alongside that by counsel for the claimant.

III. Submissions

31. On the one hand, counsel for the claimant submitted on the following two issues for determination – Whether the grievant's termination was wrongful and unjustifiable; and, Whether the grievant is entitled to the relief(s) sought in the memorandum of claim.
32. On the first issue, it is submitted that as at the time of the dismissal the grievant had served the respondent for over 18 years with a clean disciplinary record. It is submitted that no evidence was availed that the grievant was involved in the alleged theft, a criminal act, and hence the respondent failed to establish a reason for the dismissal as required under Section 43(1) of the Act and ILO Convention No. 158.
33. Further, it is submitted that the grievant was denied a fair hearing as envisaged under Article 50 of the Constitution and Section 42(1) of the Act. It is submitted that the evidence on record is that on 14th September, 2020 when the grievant reported to work he was denied access beyond the gate area whereupon he was served with a show-cause and ordered by RW1 to respond thereto there and then. It is submitted that it is inconceivable that the disciplinary hearing is purported to have been conducted on the same day that a decision was arrived at to summarily dismiss the grievant.
34. It is submitted that the hurried disciplinary process described above is not commensurate with what is envisaged in the law cited above. It is submitted that the claimant was not given adequate time to prepare and submit his defence. It is submitted that the grievant was not issued and served with the show-cause letter but rather the same was read over to him by RW1. It is further submitted that the grievant was not informed of his rights before, during, and after the disciplinary hearing and that it is RW1 who invited and came along with the shop-steward to the security gate whereby the alleged disciplinary hearing was conducted. It is submitted that the grievant was denied an opportunity to call witnesses and or to present his evidence in defence.
35. It is further submitted that the respondent issued the grievant with a letter of dismissal immediately after the unfair and unlawful disciplinary hearing demonstrating a predetermined decision to dismiss him. It is submitted that the entire process offended the provisions of Section 41 of the Act.
36. The court is urged to be persuaded by the holdings in Peter Onyango Nyabongo V Citadelle Security Limited (2015) eKLR and Raymond Cherokewa Mrisha V Civicon Limited (2014) eKLR.



37. On the second issue, the court is urged to be guided by the Court of Appeal in *Kenfreight (EA) Limited V Benson K Nguti* (2016) eKLR and Section 45 of the Act and find that the respondent failed to comply with the law in summarily dismissing the grievant and failing to compensate him as directed by the conciliator.
38. Further, the court is urged to be persuaded by the reasoning in *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR and *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* (2014) eKLR and find that the respondent blatantly, unfairly, and unlawfully denied the grievant all the parameters of due process and relief him accordingly as pleaded and prayed.
39. It is further submitted that the reason why the respondent failed to press criminal charges against the grievant is that it had no evidence to pursue such charges after causing the unlawful arrest.
40. On the other hand, counsel for the respondent raised the following issues for determination – Whether the arrest of the claimant (grievant) was without probable cause; Whether the claimant’s (grievant’s) termination was fair and lawful; and, Whether the claimant (grievant) is entitled to the prayers (reliefs) sought.
41. On the first issue it is submitted that the grievant was arrested on reasonable suspicion of stealing property belonging to his employer, the respondent. It is submitted that based on the reasoning in *Silvia Kambura V George Kathurima Japhet & 2 Others* (2021) eKLR the respondent had reasonable and probable cause in initiating the arrest.
42. It is submitted that the decision by the respondent not to press criminal charges against the grievant and opting to take internal disciplinary action did not exonerate the grievant from the criminal conduct or bar the respondent from dismissing him for the gross misconduct. It is further submitted that the respondent enjoyed the prerogative of disciplinary action against the grievant independent of criminal charges or proceedings. The court is urged to be persuaded by the decisions in *Gregory Kwabi Wekulo & 2 Others V Musoni Kenya Limited* (2021) eKLR and *Abdi Mohamed Daib V Kenya Ports Authority* (2016) eKLR.
43. On the second issue it is submitted that based on the gross misconduct of the grievant the respondent was justified in dismissing the grievant based on Section 44(4)(g) of the Act. It is submitted that the respondent had reasonable and sufficient grounds to believe that the grievant had committed a criminal offence against its property to its detriment. The court is urged to follow the reasoning in *Peter K. Kabau & 2 Others V Riley Services Limited* (2022) eKLR amongst other decisions on this issue.
44. It is further submitted that the procedure adopted by the respondent was fair and just in the circumstances. The court is urged to be persuaded by the reasoning in *Anthony Mkala Chivati V Malindi Water & Sewerage Company Limited* (2013) eKLR in that regard.
45. It is further submitted that since the dismissal was fair and lawful, both in substance and procedure, the claimant is not entitled to any of the reliefs sought.
46. It is therefore submitted that the cause is without merits and the court is urged to dismiss the same with costs.

IV. Issues for Determination

47. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for the parties. The following issues commend themselves to the court for determination –



- a. Whether the dismissal of the claimant was unfair and unlawful.
- b. Whether the claimant is entitled to the reliefs sought.
- c. Who should bear the costs of the cause?

V. Termination/Dismissal

48. The facts on the employment and the terms thereof are largely not in dispute. The grievant was engaged by the respondent on 1st February, 2002 and remained in employment until 14th September, 2020 when he was dismissed. His last monthly gross pay was Kshs21,155.75 as per the pay-slip for July, 2020.
49. However, the parties disagree on the reason(s) for the dismissal and the fairness and lawfulness thereof. According to the claimant the dismissal was wrongful, unfair, and unlawful but the respondent holds the diametrically opposed view.
50. According to the respondent a roll of binding or barbed wire was reported missing or stolen by a storekeeper on or about 12th September, 2020. The security department led by RW2 was mobilized and the lost property was located just outside the respondent's farm hidden in bushes. RW2 instructed the guards not to pick the stolen item but rather keep an eye as the thief would be coming to collect the same. It is the respondent's case that on the same date at about 1930hrs the grievant came along and parked his bicycle by the stolen property and picked the same for loading onto his bicycle. It is alleged that it is at that point that the guards of the respondent arrested the grievant and subsequently handed him over to the police.
51. According to the grievant he was arrested by the guards as he was going to buy some milk and once handed over to the police the respondent failed to press criminal charges against him as a result whereof he was released from custody unconditionally.
52. The respondent's position is that it was decided not to press criminal charges against the grievant but instead opted to take internal disciplinary action against him which culminated in his dismissal.
53. The court has considered and weighed the clearly contradicting evidence from both sides. Theft is a criminal offence which may only be proved in a criminal trial to the required standard of beyond reasonable doubts. While the respondent, as the complainant in the criminal allegations, had the option to either pressing or dropping the complaint, there is no evidence that indeed the claimant had stolen or participated in the disappearance of the subject property.
54. Besides, while in the pleadings the respondent stated that what was lost was a roll of binding wire, RW1 and RW2 in their respective testimonies stated that it was a roll of barbed wire that had been stolen or lost. It is also important to note that none of the guards who allegedly arrested the grievant was called as a witness to indeed confirm the events leading to the said arrest. RW2 stated in his evidence that he was not present when the grievant was arrested.
55. Another important aspect of this issue is this - if the respondent did not wish to press criminal charges against the grievant why did it cause his arrest by the guards and his handing over to the police wherein he remained in custody for close to 24hrs?
56. The court finds and holds that in the circumstances expressed above the respondent lacked lawful and reasonable foundation for taking disciplinary action against the grievant. The court takes cognizance of the fact that disciplinary proceedings are neither civil nor criminal and as such are not subject to the strict rules of procedure and evidence that apply in court proceedings. However, an employer who



- takes out disciplinary action against an employee must establish prima facie evidence and reason for such action.
57. But then, even if the court was to assume that the respondent had reasonable grounds for taking disciplinary action against the grievant under Section 43(2) of the Act, which is however not the case as noted above, was the procedure adopted proper, fair, and lawful?
 58. This court (ELRC) has by now settled the jurisprudence on the substantive and procedural requirements and ingredients that an employer shall meet for the ultimate decision to be considered fair and just – see *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, *Pamela Nelima Lutta V Mumias Sugar Co. Ltd (2017) eKLR*, and *Beatrice Nyambune Mosiria V Judicial Service Commission (2019) eKLR*.
 59. The evidence on record is that the grievant was served with a show-cause letter on 14th September, 2020, directed to respond thereto on the same day, an alleged hearing was held on the same day, a decision to dismiss him was arrived at on the same day, and a letter of dismissal issued and served upon the grievant on the same date. While it is not the amount of time taken that matters but the quality thereof, one cannot help but marvel at the speed and the hurry in which the respondent executed this process. No reason whatsoever was advanced by the respondent as to why there was such a haste in execution of the disciplinary process.
 60. The unchallenged evidence by the grievant is that the entire exercise took place in the security office at the gate of the farm. Articles 47 & 50 of the *Constitution*, Sections 35, 41, 43, & 45 of the Act, and Sections 4, 5, & 6 of the *Fair Administrative Action Act* provide for application of rules of natural justice in all administrative actions, and disciplinary process at the workplace is such one action. The subject has to be informed of the specific allegations/charges facing him/her; (s)he has to be informed of his/her rights before, during, after the process; (s)he has to be informed of his/her right to gather and call evidence and witnesses; and most importantly (s)he has to be given adequate time and facilities to prepare for the defence. The facilities here include supply of any documents or evidence to be used against the subject.
 61. Applying the foregoing standards, did the respondent afford the grievant a fair hearing? The emphatic answer is no. The unchallenged evidence by the grievant is that he was not afforded any of the rights spelt out above. The court makes the finding and holding that the hurried disciplinary process failed to meet the threshold. For example, the evidence by the grievant is that it is the respondent who came along with the shop-steward without consulting the grievant at all. The minutes of the disciplinary hearing do not indicate that the grievant was given an opportunity to question the witnesses and or that he was allowed to call his own witnesses.
 62. The minutes of the purported disciplinary hearing clearly indicate that the respondent treated the grievant as an accused person instead of applying the rules of natural justice to arrive at the proper decision. For example, the last page of the minutes reads that – “Ruling will be done later... Peter (the grievant) was asked to report to the office on the same day on 14th September 2020 at 2.00pm to get the ruling of the case.”
 63. The court has said enough in demonstrating that the entire disciplinary process as undertaken by the respondent lacked both in substance and procedure. It is so held and hence the ultimate dismissal was wrongful, unfair, and unlawful.



VIII. Reliefs

64. Flowing from the finding and the holding above the court shall now proceed to consider the reliefs sought as hereunder.
65. Prayer (a) is for gratuity for the years worked as provided for in the CBA. No evidence was adduced by the claimant in demonstrating how much this relief entailed. Further, no submission was made on the quantification of the same. The court abhors this pedestrian approach by the claimant's counsel. It is the duty of a party and counsel to plead and prosecute a cause in the best and most professional style and manner. Evidently, that was not the case here.
66. However, the copies of the same CBA availed by both parties provide for payment of gratuity at the rate of 23 days basic pay for each completed year of service. The grievant served the respondent from 2002 to 2020, a period of 18 years. The gratuity is calculated thus – $Kshs21,155.75/30 * 23 * 18 = Kshs291,949.35$.
67. Prayer (b) is for "Pay the grievant month salary for a period of twelve (12) months." No evidence was adduced in support of this prayer and no submission was made on the same by the claimant's counsel. The same is denied for ambiguity and for lacking in particulars and quantification.
68. Prayer (c) is for "Pay the grievant in lieu of leave." Again, no evidence was adduced in support of this claim and no submission was made by counsel in support of the same. The same is hereby denied.
69. Prayer (d) is for "Pay the grievant travelling allowance." Again, no evidence or submission was made in support of this relief and the same is denied.
70. Prayer (e) is for two months pay in lieu of notice. Again, no submission or evidence was offered in support of this relief. However, as per the law applicable, the grievant was a month to month employee and hence he is entitled to at least one month's notice under Section 35 of the Act and he is thus entitled to Kshs21,155.75 as notice pay.
71. Prayer (f) is for damages for unfair and unlawful dismissal. The court understands this to mean compensation under Section 49 of the Act. The maximum awardable under this head is compensation equivalent to 12 months gross salary. The court has evaluated the evidence adduced in the foregoing parts of this judgment and established that as at the time of dismissal the grievant had served the respondent for over 18yrs. The court has found and held that the grievant was denied both substantive and procedural fairness and that he did not contribute to his dismissal. The parties did not express an interest to re-engage. There is no evidence of the claimant obtaining another job after the dismissal.
72. For all the foregoing reasons the court awards to the grievant compensation equivalent to 10 months gross salary calculated at $Kshs12,155.75 * 10 = Kshs121,557.50$.
73. Prayer (g) is for the costs of the cause and the claimant is awarded the same.
74. Prayer (h) is for a certificate of service and the same is allowed under Section 51 of the Act.
75. Prayer (j) is for interest on the award made and the same is allowed.

IX. Costs

76. Costs follow the event and the claimant is awarded the costs of the cause as stated above.



X.Orders

77. For all the foregoing reasons the court makes the following orders –

- a. A declaratory order be and is hereby issued that the dismissal of the grievant by the respondent was wrongful, unfair, and unlawful.
- b. The grievant is awarded the following –
 - i. Gratuity Kshs291,949.35
 - ii. Notice pay Kshs21,155.75
 - iii. Compensation Kshs211,557.50
 - Total Kshs524,662.60This award is subject to statutory deductions.
- c. Costs of the cause plus interest to the claimant from the date of this judgment till payment in full.
- d. The respondent shall issue a certificate of service to the grievant and cause the same to be delivered to the claimant within 30 days of this judgment.
- e. All the other reliefs and prayers are denied.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 13TH DAY OF DECEMBER, 2024.

.....
DAVID NDERITU
JUDGE

