



**Kenya Engineering Workers Union v Sewak Engineering Works Limited  
(Cause 2 of 2021) [2023] KEELRC 321 (KLR) (14 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 321 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 2 OF 2021  
HS WASILWA, J  
FEBRUARY 14, 2023**

**BETWEEN**  
**KENYA ENGINEERING WORKERS UNION ..... CLAIMANT**  
**AND**  
**SEWAK ENGINEERING WORKS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant Union instituted this claim *vide* a memorandum of claim dated August 16, 2018, claiming that one of its member, Mourice Wesonga, was unlawfully locked out of employment by the Respondent and later dismissed. The Union prayed for the following reliefs;
  - a. The Court to award the grievant 12 months' salary for the wrongful termination as provided for under section 49(1)(c) of the [Employment Act](#).
  - b. An order for payment of one month's salary in lieu of notice.
  - c. Four days worked from 19<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup>.
2. The Claimant's case is that the grievant was employed by the Respondent on the 22<sup>nd</sup> July, 2015 as a welder earning a monthly salary of Kshs 20,000. A position that he held till his termination.
3. It is stated that the misunderstanding between the grievant and the Respondent began sometimes in September, 2016 when the grievant joined the Claimant Union. It is averred that as soon as the grievant joined the Union and informed his employer, the Respondent's director became hostile towards him and directed the grievant to resign from the Union or face termination.
4. The grievant and other employees who were members of the Union raised the issue with the Respondent and the County Labour Office through the letter 27<sup>th</sup> October, 2016.



5. It is stated that the Respondent did not respond to the letter but instead intimidated the grievant and called for his arrest on allegations of stealing the Respondent's property and detained him at police cells from 29<sup>th</sup> October, 2016 to 31<sup>st</sup> October, 2016 without any charges preferred against him. He was released and directed to report on duty the next day.
6. The grievant, who fell ill while in detention, sought for permission from the Respondent to get medical attention as he was unwell due to sleeping in the cold at the remand. It is stated that permission was granted by the Respondent's managing director.
7. Upon reporting back to work on 3<sup>rd</sup> November, 2016, he was locked out of the Respondent's premises and directed to wait till the director of the company arrives. When the said director arrived, he sent him away without giving reason in effect firing him.
8. The grievant informed the Claimant of the issue and the Union wrote a letter to the Respondent on the 14<sup>th</sup> November, 2016 demanding answers and explanation for the lock out. A formal dispute was later reported by the Union to the County Labour Office who appointed conciliator but the issue between the Claimant and the Respondent were never resolved leading to the filing of this suit.
9. In response to the defence, the Claimant denied that the grievant admitted to stealing the Respondent's device or at all and the letter of admission is a forgery. On the allegation that the suit is premature, the Claimant stated that a conciliator was appointed who presided over the meeting but the parties could not agree and a certificate of disagreement issued on the 1<sup>st</sup> March, 2017. He added that the Respondent was invited to the meeting but failed to attend, informing the decision of the Conciliator.
10. During hearing the grievant, Maurice Wesonga Omata testified as CW-1 and adopted his witness statement of August 16, 2020 which reiterated the claim. Upon cross examination, he testified that he was employed by the Respondent as a welder and that there were Four welders.
11. He narrated the circumstances that led to his arrested and testified that on October 28, 2016 he reported to work at 8am and soon after he was called by his employer Mr Singh and given a broken aluminium Cover to weld. Ordinarily that he could be given a rod to use for the welding but on that particular day he did not receive one. He requested for the rod but the director did not have one and therefore informed him to keep the Aluminium cover. At 12 noon he was called by the office and asked about a seal that was attached to the Aluminium Cover. That he informed the director that he never saw any seal and proceeded back to his work. Few minutes later he was summoned to the office of the Director by Cobra Security guard. He went straight to the said office and found the director in company of two other people, who demanded for the seal and alleged that they saw the grievant through CCTV Footage take the seal.
12. A thorough search was carried out but the seal was not traced, he was then arrested by police and taken to Central police station for further interrogation. He maintained that the seal was never found. He stated that the letter dated 29<sup>th</sup> October, 2016 was not written by him neither did he append his signature. He testified that Paul Omollo and Elijah were his colleagues but did not know who Tito was.
13. On re-examination he stated that the seal that was lost was for Hydraulic cover. He stated that he was remanded for 4 days at Central Police station and was never charged or asked to give his statement. He stated that he fell sick and upon release he sought for medical attention after seeking permission from the Respondent.



### **Respondent's case.**

14. The Respondent filed a response to claim on the September 28, 2019 denying the entire claim and in particular stated that the grievant admitted on October 30, 2016 to stealing the customer's device.
15. It is stated that the Claimant has filed this case in Court prematurely when there are pending conciliatory proceedings. Also that no demand or Notice of intention to use was served upon them.
16. The Respondent summoned four witnesses to testified in support of its case. The first witness was Emma Kawayo Kathoki,(RW-1)the Respondent's Receptionist who adopted her witness statement dated 21<sup>st</sup> October, 2022. On cross examination she testified that she received work from a customer, recorded it and assigned to the welders. On October 28, 2016 she received work from a customer and assigned it to One Elijah Odhiambo to do welding, however a few minutes later, the said Elijah reported that part of the device was missing and on viewing CCTV camera, the Respondent's director and the Security guard suspected the grievant for stealing the said Pump Bracket. She maintained that she was the one that signed Elijah the welding of the Aluminium cover.
17. Paul Omollo testified as RW-2. He stated that he is employed by the Respondent as a turner and collaborated the events that led to the loss of the Pump bracket on October 28, 2016. He stated that the CCTV camera captured the grievant as the main suspect leading to his arrest. On cross examination he testified that the grievant was suspected and arrested by police. He stated also that the person who received the bracket was not questioned for the lost. He then avers that the Pump bracket was found in the workshop. On re-examination the witness testified that the grievant was the one that pointed out where the item was hidden.
18. Jassony Kalachi Alphayo, testified as RW-3 and stated that he is a security guard at the Respondent's employ. He stated that the grievant was the one suspected for stealing the missing pump bracket, that they suspected the grievant after watching the CCTV footage, He however stated that the police did not see the CCTV Footage when they came for further investigation. He added that the grievant was brought back to the Respondent's premises where he pointed out the missing item.
19. The forth and the last witness was Sukhdey Singh, the director of the Respondent who testified as RW-4. In his testimony, the witness told this Court that the grievant was arrested for stealing Hydraulic Cover pump bracket, which had been brought by a customer for repairs. He stated that the security guard was the one that called the police to arrest the Claimant after viewing the CCTV footage and confirming that he was the one that has taken the missing part. He stated further that the grievant called him and asked for forgiveness and wrote an apology letter. On re-examination the witness stated that the letter was not written by the grievant but that the grievant was the one that signed it.

### **Claimant's Submissions.**

20. It was submitted for the Claimant that the brawl between the grievant and the Respondent began when the Respondent asked the grievant to resign from the Claimant Union. It was argued that the accusations levelled against the grievant were made up to ensure the grievant is fired when the real cause of termination was failure by the grievant to resign from the Union.
21. The Claimant submitted that the actions by the Respondent to force the grievant to resign from the Union was in violation of article 36 of the Constitution on the freedom of association. It was argued further that the move by the Respondent to lock out the grievant from accessing his place of work was in violation of section 76(c) of the Labour Relations Act. Also that the use of the police to intimidate and lock out the said employee was in violation of section 3(1)(b) of the Employment Act.



22. The Claimant submitted that the witnesses that testified in support of the Respondent's case gave hearsay testimony and none of the witnesses saw the alleged theft of the respondent's property. It was argued further that if indeed the grievant was found capable by the police who arrested him he sought to have been arraigned in Court and charged for the criminal offense.
23. The Claimant in conclusion, urged this Court to allow the claim as prayed.

### **Respondent's Submissions.**

24. The Respondent submitted on three issues; whether the grievant's employment was terminated wrongfully, whether he is entitled to the reliefs sought and who should bear costs of this suit.
25. On the first issues, it was submitted that the grievant deserted employment after stealing from the Respondent and was not dismissed as alleged. It was his submission that the grievant stole a customer's Pump Bracket that had been brought to the Respondent for repairs, which was recovered when the grievant was arrested and detained at the police station. It was argued that the grievant was the one that retrieved the said missing part and handed over to the Respondent's director. Furthermore, that the apology letter by the grievant, witnessed by two of his colleagues, demonstrate that indeed he was the one that stole the part that went missing.
26. On the reliefs sought, it was argued that the claim for compensation is not warranted because the grievant left the Respondent's employ on his own volition and not as a result of termination as pleaded. The Respondent also argued that the claim for one month in lieu of notice is not tenable because the termination was not instigated by them. On the prayer for 19<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> sought, the Respondent argued that the same is ambiguous as no month or year is indicated, also that basis for payment of the Four days has not been demonstrated by the Claimant.
27. On costs of suit, the Respondent submitted that costs follow event and submitted that the Claimant has not tendered any proof of the wrongful termination, thus the claim should be dismissed with costs to the Respondent.
28. I have examined all the evidence and submissions of the parties herein. The Claimant has sought to be paid his terminal dues being 1 month salary in lieu of notice, salary for 4 days worked and not paid and compensation for the unlawful termination.
29. The Claimant contends that he was unfairly terminated.
30. The Respondent's content that the Claimant was lawfully terminated for stealing. The Claimant avers that he was not involved in any theft.
31. The Respondent called 4 witnesses who testified to Court that indeed the Claimant had been involved in stealing of the Respondent's goods. He was arrested but was never charged.
32. They aver that CCTV cameras pointed to the Claimant stealing but also agreed that the police were never shown the CCTV camera and neither was it shown to the Claimant.
33. The accusation against the Claimant of stealing were therefore never established.
34. The Claimant's contention is that he was asked to resign from his union and he declined thus the accusation against him.
35. Despite the Respondent alleging theft, there is no evidence that the Claimant was subjected to any disciplinary hearing. There is an allegation that the Claimant left the Respondent's employment on his own accord.



36. There is however no evidence that he was asked to attend a hearing for desertion and he declined.
37. That being the position and in view of the provision of section 45 (2) of the Employment Act, the claimant was terminated as indicated and his termination was unfair and unjustified.
38. Section 45 (2) of Employment Act 2007 states as follows;

“(1).....

- (2) A termination of employment 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”.

39. Having found the termination of the Claimant unfair, I award him;-

1. 1 month salary in lieu of notice = 20,000/=
  2. 8 months’ salary as compensation for the unfair termination = 20,000 x 8 = 160,000/=
- Total = 180,000/=
- Less statutory deductions
3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Araka for Claimant – present

Wanjiru Kairu for Respondent – present

Court Assistant – Fred

