



Kenya Union of Sugarcane Plantation & Allied Workers Union v Chemelil Sugar Co. Ltd (Cause E081 of 2021) [2023] KEELRC 299 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 299 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E081 OF 2021
CN BAARI, J
FEBRUARY 9, 2023**

BETWEEN

**KENYA UNION OF SUGARCANE PLANTATION & ALLIED WORKERS
UNION CLAIMANT**

AND

CHEMELIL SUGAR CO. LTD RESPONDENT

JUDGMENT

1. The Claimant's Memorandum of Claim is dated 29th October, 2021 and filed on 1st December, 2021. The Claimant filed the suit on behalf of seven of her members formerly employed by the Respondent, seeking their reinstatement to their previous positions with full benefits, or in the alternative, a declaration that the grievants were unlawfully terminated from employment, compensation for the unlawful termination, exemplary damages and any other relief that court may deem fit to grant.
2. The Respondent entered appearance on 20th December, 2021, through the Firm of Amos O. Oyuko & Co. Advocates, and subsequently filed a Statement of Defence on 4th February, 2022.
3. The case was first heard on 30th March, 2022. The Claimant presented all the grievants, namely; Judith Anyango Siwa, Robert Nabwera Nasongo, Arthur Onyango Okoth, Harvey Otieno Walendwa, Enock Nyakwara Nyandwaro, Billy Awino Obel and Thomas Osoro Arodi, who testified in support of the union's case. The Claimant's case closed on 18th July, 2022.
4. The Respondent presented a total of three witnesses, namely; Constance Webale, Japheth Ojwang and Fredrick Odhiambo to testify on her behalf. They adopted their witness statements and produced documents filed in support of the Respondent's case. The Respondent closed her case on 31st October, 2022, paving way to filing of submissions.
5. Both parties filed submissions to the matter.



The Claimant's Case

6. The Claimant states that the Respondent employed the grievants herein, namely; Judith Anyango Siwa, Robert Nabwera Nasongo, Arthur Onyango Okoth, Harvey Otieno Walendwa, Enock Nyakwara Nyandwaro, Billy Awino Obel and Thomas Osoro Arodi on diverse dates between the year 2009 and 2002.
7. The Claimant further states that the grievants were remunerated as follows: Arthur Onyango Okoth was a Machinist earning a monthly gross salary of Kshs.75,505.00, Judith Anyango Siwa a Senior Laboratory Analyst earning a monthly gross salary of Kshs.52,390.00, Robert Nabwera Nasongo, a Motor Vehicle Mechanic earning a monthly gross salary of Kshs.36,441.00, Thomas Osoro Arodi a Mechanic Fitter earning a monthly gross salary of Kshs.142,870.00, Billy Awino Obel, a fabricator welder earning a monthly gross salary of Kshs.51,537.00, Enock Nyakwara Nyanwaro, a Compressor Operator earning a gross monthly salary of Kshs.55,390.00 and Harvey Otieno Walendwa, a Laboratory Recorder earning a gross monthly salary of Kshs.49,055.00
8. It is the Claimant's case that the grievants were all duly elected officials of the Claimant's union by fellow employees of the Respondent in the positions of union branch vice chair, union branch committee members and union shop stewards.
9. The Claimant states that from the date of their employment, the grievants worked diligently for the Respondent until 9th April, 2020, when without any lawful reason, the Respondent indefinitely suspended the grievants from employment without pay, and which suspension was extended on 30th April, 2021, contrary to the terms of the Collective Bargaining Agreement (CBA).
10. The Claimant states that on 8th May, 2020, the grievants appeared for a disciplinary hearing, and on 9th May, 2020, the Disciplinary Committee reached a verdict that the grievants be reinstated to work with a final warning.
11. The Claimant further states that on 6th July, 2020, without any reasonable cause and contrary to the disciplinary committee proceedings and the terms of the Collective Bargaining agreement, the services of the grievants were unlawfully and/or illegally terminated.
12. It is the Claimant's case that the services of the grievants were terminated solely because of their relationship with the union herein. The Claimant further states that the Claimant filed an appeal on behalf of the grievants, but which appeal was ignored.
13. The Claimant's case is that the Respondent failed to pay the grievants their salaries for the months of June, July, August & September 2017, February, March, April, May, June & July 2018, February, March, April, May, June, November & December 2019, and January, February, March, April, May & June, 2020.
14. It is the Claimant's case that a trade dispute was reported by the Claimant in which the Respondent participated and that the Respondent has failed to implement the findings and recommendations of the conciliation report.
15. It is the Claimant's case that under the CBA in force between the parties herein, the grievants were entitled to gratuity depending on the number of years they worked for the Respondent.
16. The Claimant states that as a result of the Respondent's unlawful, unprocedural and unjustified conduct, the grievants have suffered and continue to suffer considerable loss of income to which they were entitled.



17. It is the Claimant's prayer that the court awards them the reliefs listed in their memorandum of claim.

The Respondent's Case

18. The Respondent's case is that the grievants were employees of Chemelil Sugar Company Limited, having worked on diverse dates from the years 1989 and 2009 serving the company in different positions.
19. The Respondent states that on 9th April, 2020, the office of the Head of Human Resource received an incident report from the then Acting Security Officer alleging that on 8th April, 2020, at around 8.30am, seven unionisable employees stormed the Respondent's factory and spares stores and forcefully collected 2 chain blocks and two rolls of winding papers from the stores holding bay.
20. The Respondent states that the grievants unprocedurally and intentionally ignored Company procedures, and forcefully loaded spares in two wheelbarrows and ferried them outside the factory premises and dumped them outside the Supply Chain Managers office door step.
21. It is the Respondent's case that the items aforementioned had been procedurally rejected by the user/ Inspection Committee after being supplied by Indus Suppliers Limited, and were awaiting collection by the Supplier and thereafter replacement as per the packaging note.
22. The Respondent states that the Head of Human Resource initiated a disciplinary process by issuing show cause and suspension letters to the employees/grievants, which letter were dated 9th April, 2020. The Respondent further states that the grievants responded to the show cause and suspension letters on diverse dates.
23. The Respondent states that the Head of Human Resource thereafter wrote a memorandum dated 15th April, 2020, to the Acting Security Officer to carry out further investigations into the matter.
24. It is the Respondent's case that on 20th April, 2020, the Head of Human Resource received a memorandum from the acting Security officer alleging that the seven employees/grievants had refused to record security statements.
25. The Respondent states that the refusal by the grievants to record security statements was brought to the attention of the Union in a meeting held on 23rd April, 2020, where the Union was advised to inform their members to record statements, failure to which their suspension will be extended.
26. The Respondent states that on 30th April, 2020, the Head of Human Resource proceeded with the extension of the suspensions of the grievants since this was the 21st day after their suspensions, and the case had not been concluded as the delay had been caused by their refusal to record statements at the security office in time as advised by the Branch Secretary and the Security Officer.
27. The Respondent states that the Head of Human Resource received a final security report on the incident on 6th May, 2020, and requested the Managing Director to approve the composition of a Disciplinary Committee to deliberate on the cases of the seven employees.
28. It is the Claimant's case that the Head of the Human Resource invited the grievants to appear before the disciplinary committee vide a letter dated 6th May, 2020. It is the Respondent's further case that the grievants attended the disciplinary hearing, and the proceedings of the disciplinary hearing and recommendations were forwarded to the Managing Director for a final decision.



29. The Respondent states that the Managing Director issued directions that services of the seven employees be terminated giving reasons based on the Human Resource Manual and Company rules and regulations.
30. It is the Claimant's case that the grievants lodged an appeal against the decision of the Disciplinary Committee Terminating their services. The Respondent states that the grievants proceeded to court and filed KISUMU E&LRC No. 58/2020 seeking reinstatement before 21 days stipulated in the Human Resource Policy for hearing of the Appeal elapsed leaving the Respondent with no option but to comply with the law and attend the court session wherein the said claim was struck out.
31. The Respondent states that upon the termination of service of the grievants, the grievants were supposed to clear with the Respondent so that Terminal Benefits due to them could be paid.
32. The Respondent further states that since the grievants services were terminated, they have not made any attempt to clear with the Respondent and therefore the Respondent is not in a position to pay the grievants their terminal benefits until and unless they clear, and hence the delay in paying the grievants their terminal benefits. The Respondent states that the grievants are solely to blame for the non-payment of their dues.

The Claimant's Submissions

33. It is submitted for the Claimant that the termination of the grievants by the Respondent was devoid of valid reasons and fair procedure.
34. The Claimant submits that despite there being a disciplinary hearing, there was no evidence availed before the Disciplinary Committee that the grievants committed the acts subject of their termination.
35. The Claimant further submits that none of the Respondent's witnesses availed evidence in court showing the company rules that were allegedly flouted by the grievants.
36. It is submitted that there were no valid grounds to terminate the services of the grievants. The Claimant further submits that failure to supply the grievants with reports which formed the basis of their termination, denied them an opportunity to interrogate the report and defend themselves appropriately.
37. The Claimant submits that the grievants were never accorded a fair hearing before their termination.
38. It is the Claimant's submission that the Respondent flouted the terms of the Collective Bargaining agreement and the law in the course of carrying out the termination of the grievants, which renders their termination unlawful.
39. The Claimant submits that the termination was wrongful for lack of compliance with the Respondent Human Resource Policy Manual and particularly Chapter Six on the rules of conduct and discipline.

The Respondent's Submissions

40. The Respondent submits that the Disciplinary Committee found the grievants guilty of breach of the peace, thereby exceeding their mandate and right under Article 37 of *the Constitution*. It is the Respondent's further submission that the grievants did not adduce any evidence to the contrary and as a result, their action amounts to gross misconduct.
41. It is the Respondent's submission that the grievants were fairly heard before the Disciplinary Committee which in their finding held that the grievants were liable for the offences/charges against



them, and that they ought to be summarily dismissed, but instead, the committee recommended that the grievants be reinstated with final warning.

42. The Respondent further submits that, the Managing Director of the Respondent acted within the Law and the powers given to him under Clause 6.2.6 of the Human Resource Policy Manual, and therefore the termination of the grievants was justifiable and lawful.
43. The Respondent submits that the grievants services were rightfully/legally terminated and therefore they are not entitled to claim exemplary damages and other prayers sought in their claim, and that the claim ought to be dismissed.

Analysis and Determination

44. I have considered the pleading, the witnesses' oral testimonies and the written submissions by both parties. The issues that fall for determination are:
 - i. Whether the grievants were unfairly terminated from the service of the Respondent
 - ii. Whether the Claimant deserves the reliefs sought

Whether the grievants were unfairly terminated from the service of the Respondent

45. It is now settled that for a termination to be said to be fair, an employer must have adhered to the provisions of Sections 41, 43, 45 and 47(5) of the *Employment Act*. These provisions relate to the procedure and the reasons for the termination, otherwise known as the substantive justification for the termination.
46. Section 41 of the *Employment Act*, 2007, requires that an employer, before terminating/dismissing an employee on the ground of misconduct, poor performance or physical incapacity, explains to the employee in a language the employee understands, the reasons for which the employer is considering termination.
47. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal set out four elements that have now been generally agreed to be the minimum standards of a fair procedure as follows:

“.....that four elements must be discernable for the procedure to pass the fairness test:

 - a. an explanation of the grounds of termination in a language understood by the employee;
 - b. the reason for which the employer is considering termination;
 - c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
 - d. hearing and considering any representation by the employee and the person chosen by the employee.”
48. The Claimant's members/grievants, were issued with show cause letters which also doubled up as suspension notices dated 9th April, 2020. They were subsequently invited for a disciplinary hearing which took place on 8th May, 2020.
49. The grievants have also admitted having responded to the show cause letters and appearing before the disciplinary committee for the hearing of the charges leveled against them.



50. A glimpse at the minutes of the Disciplinary Committee, is prove that the grievants' union was in attendance during the hearing, and thus the grievants were dully represented at that hearing.

51. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR the court expounded on the provisions of Section 41 as follows: -

“To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.

27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration.”

52. In respect of procedure, I have no doubt that the Respondent adhered to the requirements of Section 41 of the *Employment Act*, rendering the termination procedurally fair, and I so hold.

53. The grievants were terminated from service on 6th July, 2020, for reasons including, leaving their place of work without permission, unlawfully removing rejected items from the Respondent's stores, causing a breach of the peace at the Respondent's premises and dumping items that were unlawfully removed from the Respondent's stores at the Supply Chain Manager's office door.

54. The Claimant's members who are the grievants herein, were all officials of the Claimant's union elected as such by other employees of the Respondent to various positions, including union branch vice chair, union branch committee members and shop stewards.

55. In their response to the show cause letters, they contend that being union officials, they discovered that some tools of work that had been rejected for being of poor quality, had not been returned to the supplier and which tools could put their members at risk should they end up in the factory and being used by the Respondent's employees whom they represented.

56. It is their contention that the raising of the complaint with management on the possible use of the sub-standard tools resulted in them being issued with show cause letters. The grievants contend that the action leading to their termination was pursuant to their positions as union officials representing other employees of the Respondent.

57. The issue for this court is whether these were fair, valid and justified reasons to terminate the grievants per Section 43 of the *Employment Act*, 2007.

58. Section 47 (5) of the *Employment Act* provides the procedure to be followed in matters of complaints of unfair termination as follows:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”

59. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR stated:

“That, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "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.”

60. It is not in doubt that the grievants herein were terminated from the service of the Respondent. The Claimant contends that the termination is unfair on the premise that the Respondent flouted the terms of the Collective Bargaining agreement, and failure to comply with the Human Resource Policy Manual and particularly Chapter Six on the rules of conduct and discipline. In Nyeri Civil Appeal No. 79 of 2016 Kenya Power and Lighting Company Limited vs. Agrey Lukorito Wasike the court in underscoring the proviso to Section 43 held thus: - “Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services.”
61. From the decision of the disciplinary committee, and which I believe was informed by the investigation conducted by the Respondent, the reasons were not sufficient to terminate the grievants and thus their recommendation that they be reinstated and be instead, issued with warning letters.
62. The minutes of the disciplinary committee produced before this court indicates that the committee recommended that the grievants be reinstated and be issued with final warning letters.
63. The Respondent’s Managing Director however proceeded to terminate the grievants without assigning reasons for his departure from the committee’s recommendations.
64. Clause 6.2.6 of the Respondent’s Rules of Conduct and Discipline produced before court states as follows: -
 - “The role of the Managing Director
 - a. The Managing Director may approve or disapprove the recommendations of the disciplinary Committee.
 - b. In cases where the Managing Director disapproves the recommendations of the disciplinary Committee, the Managing Director may make further recommendations giving reasons thereof....”
65. An entity that takes employees through a disciplinary process and proceeds to deviate from the recommendation (s) of the committee that heard their evidence, would in my view only be doing so to tick their boxes in as far as the requirements of Section 41 of the *Employment Act* on fair hearing is concerned. The deviation from the recommendation without reason, is unjustified and renders the termination unfair.
66. I thus find and hold that the grievants’ termination does not meet the substantive justification test. The termination is unfair.

Whether the Claimant deserves the reliefs sought

67. The Claimant’s claim is for the reinstatement of the grievants to their previous positions with full benefits, or in the alternative, a declaration that the grievants were unlawfully terminated from employment, compensation for the unlawful termination, exemplary damages and any other relief that court may deem fit to grant.



Reinstatement

68. Section 49 (3)(a) of the [Employment Act](#), 2007, provides for the remedy of reinstatement as follows: -

“Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to –

- a) reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated;”

69. Further, Section 12 (3) (vii) of the [Employment and Labour Relations Court Act](#) states: -

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

.....

- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law;...”

70. The Court of Appeal has now settled that the remedy of reinstatement should only be granted in very exceptional circumstances. In *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR the court held that reinstatement should not be given except in 'very special circumstances'.

71. The grievants herein, were terminated on 6th July, 2020. It is two years and seven months today since their termination. Reinstatement is a relief tenable only where the order is made within three years from the date of dismissal/termination. This prayer is thus within the period allowable in accordance with the [Employment Act](#) as read together with the [Employment and Labour Relations court Act](#).

72. In considering a prayer for reinstatement, the Court is expected to determine whether or not it is practicable to grant an order for reinstatement. In the case of *New Zealand Educational Institute v. Board of Trustees Auckland Normal Intermediate School*, the Court of Appeal of New Zealand defined practicability in the following words:

“Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences.”

73. To reinstate therefore, involves balancing the interest of the parties and the justice of the case. The grievants were not reported to have had previous disciplinary issues, save for the one leading to their dismissal and this suit. It would thus be true to say that they had a clean record of service.

74. Further, the Respondent’s disciplinary committee arrived at a decision to reinstate the grievants, but the Respondent’s Managing Director unilaterally decided to deviate from the recommendation without giving any reasons. Finally, the grievants were all without exception officials of the Claimant’s union and their conduct was in relation to their positions in the union. (See *Parliamentary Service Commission v Christine Mwambua* [2018] eKLR)

75. Considering the foregoing grounds and owing to the grievants’ length of service with the Respondent, I deem reinstatement to be the most efficacious remedy.



76. I hereby order that the grievants herein be reinstated to their previous positions in the service of the Respondent without loss of benefits. For the avoidance of doubt, salaries for the period 6th July, 2020 to 9th February, 2023, is not payable as no service was rendered.
77. Further, on reinstatement, the grievants shall be entitled to the salary arrears owed for the period they were on suspension.
78. Having allowed the Claimant's prayer for the reinstatement of the grievants, the alternative reliefs fall by the way side, and are hereby dismissed.
79. Parties shall bear their own costs of the suit in the interest of better labour relations going forward.
80. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF FEBRUARY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Bagada Present for the Claimant

N/A for the Respondent

Ms. Christine Omollo - C/A

