



Kenya Union of Sugar Plantation and Allied Workers v Muhoroni Sugar Co Limited (In Receivership) (Cause E065 of 2021) [2023] KEELRC 332 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 332 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E065 OF 2021
CN BAARI, J
FEBRUARY 9, 2023**

BETWEEN

**KENYA UNION OF SUGAR PLANTATION AND ALLIED
WORKERS CLAIMANT**

AND

MUHORONI SUGAR CO LIMITED (IN RECEIVERSHIP) RESPONDENT

JUDGMENT

1. Before Court is the Claimant's Memorandum of Claim dated 20th September, 2021, and filed on similar date. The Claimant seeks reinstatement of the grievant without loss of benefits or in the alternative she be compensated through payment of her full salary with profit for the period she has been out of employment, Three months salary in lieu of notice, gratuity, compensation for economic suffering at the court's rate, and that the Respondent be restrained from dismissing employees on grounds of their union activities.
2. The Respondent entered appearance through the Firm of Owiti, Otieno & Ragot Advocates, and subsequently filed a Response to the Memorandum of Claim on 18th January, 2022.
3. The suit was first heard on the 21st February, 2022, where the Claimant presented the grievant, one Judith Adhiambo Onyango to testify in support of her case. Ms. Onyango adopted her witness statement and produced a bundle of documents filed in support of the Claimant's case.
4. The Respondent's case was heard on 12th July, 2022, when the Respondent presented one Ms. Pauline Achieng, her Human Resource Officer to testify on her behalf. Ms. Achieng adopted her statement, and produced a bundle of documents in support of the Respondent's case.
5. Both parties filed submissions in the matter.



The Claimant's Case

6. The Claimant's case is that the aggrieved person in this matter was employed by the Respondent on 1st January, 1999, as a Clerk in the Agricultural stores, a position she held up to 18th June, 2020. The Claimant states that the grievant earned a basic salary of Kshs.32,648.
7. It is the Claimant's case that the grievant once held the position of branch treasurer of the Kenya Union of Sugar Plantation and Allied Workers Muhoroni, as well as that of Branch Committee member.
8. The Claimant states that on the 18th June, 2020, while the grievant was as at her workplace, and without prior communication or permission from the grievant's Head of Department, a stranger accompanied by an employee who is a machinist based at the agriculture workshop entered the stores, and without engaging or introducing herself to the staff in the stores, walked directly to one of the room at the stores and started marking some items in the room without involvement of staff at the store.
9. The Claimant states that the staff at the stores are custodians of everything therein, and in case of any loss, they are held accountable. The Claimant further states that the grievant, together with her immediate supervisor took the initiative to enquire from the stranger who she was, and what her mission in the stores was.
10. The Claimant states that after a short confrontation between the staff and the stranger with an aim of establishing who she was, the stranger realized that she had skipped protocols, hence an offence had been committed and she apologized and introduced herself as Ms. Consolata Muhindi, a newly employed Management Accountant. The Claimant states that upon introduction, the staff in the stores allowed her to perform the exercise without any further interference.
11. The Claimant states that the grievant and her supervisor were shocked eight days later, on 25th June, 2020, when they were served with a show cause letter accusing her of portraying unprofessional behavior, verbal abuse, offensive language, verbal threats, bullying and offensive gestures to Ms. Consolata Muhindi; accusations which were not true.
12. It is the Claimant's case that despite the fact that the confrontation was between the grievant, her supervisor and Ms. Consolata Muhindi, there was an act of discrimination for reason that only the two of them were given show cause letters, while no action was taken against Ms. Consolata Muhindi.
13. The Claimant states that the grievant replied to the show cause letter on the same day stating clearly what had transpired on the 18/6/2020.
14. It is the Claimant's case that after replying to the show cause letter, the Respondent suspended the grievant vide a letter dated 26th June, 2020, for 14 days effective 29th June, 2020, to pave way for further investigations.
15. The Claimant states that on 8th July, 2020, the grievant was invited to a disciplinary committee hearing, which she attended and that she continued being kept on suspension. The Claimant further states that the minutes of the disciplinary meeting were not shared with the union despite the union being part of the disciplinary committee.
16. It is the Claimant's further case that on 6th August, 2020, the grievant was summarily dismissed, while her immediate supervisor whom she was implicated with, was terminated.
17. The Claimant states that the grievant wrote a personal appeal letter to the Receiver Manager on 9th December, 2020, requesting for a chance to be heard, but which letter was not acted upon by the Receiver Manager.



18. The Claimant states that on 17/03/2021, their Branch Secretary wrote to the Joint Receiver Managers requesting for a meeting on 25/03/2021, with the aim of discussing an appeal against wrongful summary dismissal of the grievant, but were not accorded the chance.
19. The Claimant states that the matter was referred to the Minister, and a Conciliator was appointed by a letter dated 16th June, 2021.
20. The Claimant states that the Conciliator invited both parties to two meetings on 13th July, 2021 and 4th August, 2021. The Claimant further states that all parties attended the meetings and a report prepared with findings and recommendations to the parties.
21. It is the Claimant's position that the grievant herein, has been a target of management for harsh disciplinary action based on her past record of agitating for workers rights during her tenor as the union's branch treasurer and committee member.
22. The Claimant state that there is no grave mistake committed by the grievant as to amount to the heavy punishment given to her of dismissal.
23. The Claimant prays that her claim is allowed and the grievant awarded the reliefs listed in her statement of claim.

The Respondent's Case

24. The Respondent's case is that the grievant was employed on 1st January, 1999, as a Clerk in Time Office, Human Resource Department, and was on 29th June, 2000, transferred to the Factory Department in the same capacity. The Respondent further states that later on 15th November, 2000, the grievant was transferred to Finance Department, Agriculture Stores in the same position, where she served until 6th August, 2020, when she was summarily dismissed.
25. The Respondent states that during the period beginning 1st January, 1999 and 6th August, 2020, when the grievant worked with the Respondent, her basic income was not constant.
26. The Respondent states that on 18th June, 2020, while on duty at the Respondent's agricultural offices, the grievant portrayed unethical behavior to the Respondent's Management Accountant, one Ms. Consalata Muhindi, by use of insulting language, which action amounted to gross misconduct.
27. The Respondent states that in light of the grievant's gross misconduct, a show cause letter dated 25th June, 2020, was written to her, and which she responded to on similar date. The Respondent further states that upon consideration of the grievant's response to the show cause letter, the Respondent's management found that the grievant had a case to answer, and was suspended for 14 days with effect from 29th June, 2020.
28. The Respondent states that upon investigations, the grievant was vide notice dated 8th July, 2020, invited for disciplinary hearing on 10th July, 2020, before the disciplinary committee which was scheduled to take place in the Company's Boardroom at 10.00am.
29. It is the Respondent's case that the grievant was duly informed of the purpose of the disciplinary hearing, which was to table the allegation of gross misconduct against her, and that she would be given an opportunity to respond and also put forward her case.
30. The Respondent states that the grievant was informed of her right to be accompanied by a representative of her choice to the disciplinary hearing.



31. The Respondent states that upon deliberation and consideration of the the offence committed by the grievant, the disciplinary committee resolved to summarily dismiss her vide a letter dated 6th August, 2020. The Respondent further states that the grievant was given an opportunity to appeal against the disciplinary committee’s decision within 14 days from the date of the letter of summary dismissal.
32. The Respondent denies that the grievant or the Claimant ever filed an appeal against the decision to dismiss her from service, and that if she ever did, the laid down procedure for appeal was never followed.
33. The Respondent denies that the aggrieved is entitled to the prayers sought in the Memorandum of Claim. The Respondent further denies being issued with a demand before this suit was filed.

The Claimant’s Submissions

34. The Claimant submits that whenever there is an exercise to be conducted in the Respondent’s stores, staff are notified in advance through a memo by either the Head of Department, Store’s Manager or the Supervisor accompanies and introduces the person to staff and ask that he/she is accorded the necessary cooperation, which was not the case on the 18/6/2020.
35. The Claimant further submits that the grievant was suspended on 29th June, 2020, and that she stayed on suspension until 6th August, 2020, when she was issued with a summary dismissal letter, which came thirty five days later contrary to Clause 9(ii)a of the CBA.
36. It is the Claimant’s further submission that the procedures laid down in the *Labour Relations Act* were adhered to by the Claimant up to reporting a dispute to the Ministry, and a conciliator was picked who recommended reinstatement of the grievant without loss of benefits, but the Respondent did not adhere to the recommendations.
37. The Claimant submits that the grievant was discriminated against by reason of termination of her supervisor with benefits, while she was summarily dismissed. The Claimant further submits that this was an issue also picked by the Conciliator in his report.
38. The Claimant submits that the action of Respondent was premised on the grievant’s past records as a union official, and not the offence claimed to have been committed. They sought to rely in ELRC Cause No. 593 Of 2015 Kenya National Union of Nurses v Nairobi County Government to buttress this position.
39. The Claimant finally submits that the management in the sugar industry have perfected the art of fabricating offences for workers who are perceived to be supporters of the labour movement with an aim of killing the labour movement.

The Respondent’s Submissions

40. The Respondent submits that the grievant verbally abused and insulted and/or behaved in a manner that was insulting to a person placed in authority over her. It is their submission that the grievant abused and/or insulted RW3, one Consolata Mmbone Muhindi, when in the process of undertaking an asset verification exercise in the Respondent Company.
41. The Respondent further submits that the grievant specifically confronted Consolata Mmbone Muhindi in Swahili before continuing to hurl insults in her vernacular language, a language RW3 was unfamiliar with, and could therefore not comprehend what the aggrieved person was saying.



42. It is submitted for the Respondent that on a balance of probabilities, the Respondent has persuaded this court to find in their favour, that the grievant's actions are well in line with the provisions of Section 44 (4) (d) of the *Employment Act*.
43. It is submitted for the Respondent that the Claimant did not produce evidence to show that the grievant was discriminated against, even when the burden of proof was squarely on her shoulders.
44. The Respondent further submits that she acted in compliance with Section 41 of the *Employment Act*, and gave the grievant a fair opportunity to be heard, before dismissing her summarily. The Respondent further submits that this is a case of a justified and procedural summary dismissal made in accordance with the provisions of the *Employment Act*.
45. The Respondent submits that having failed to satiate the burden of proof for the claim of unlawful dismissal, the Claimant became disentitled to the reliefs sought.

Analysis and Determination

46. I have considered the pleadings, the witnesses' testimonies and the Parties' written submissions. The issues for determination are:
 - i. Whether the grievant was wrongfully dismissed.
 - ii. Whether the grievant was discriminated against
 - iii. Whether the grievant is entitled to the reliefs sought

Whether the grievant was unfairly dismissed.

47. A dismissal from service is deemed to be fair where the employer meets a just cause standard by prioritizing fair treatment of an employee through adherence to procedural fairness, and the substantive justification for the dismissal.
48. A dismissal is procedurally fair where the employer affords an employee an opportunity to state his case, and have a representative of his choice present during a disciplinary hearing.
49. Section 41 of the *Employment Act*, demands that an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity, explains to the employee, in a language the employee understands, the reasons for which termination is being considered. In *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR, fair procedure was explained thus:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee....Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

50. In *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR, the Court held that the *Employment Act* has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an



- employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present
51. Section 41 of the *Employment Act*, 2007, further requires that an employer should proceed to hear and consider any representation that an employee may wish to make, and inform the employee of his right to be represented by a fellow employee or a shop floor steward.
52. In *Silvester Malei Kyengo v Kenya Meat Commission* (2019) eKLR, the court held:
- “In this case the Claimant was first served with a show cause letter stating the charges against him, interdicted pending investigation, accorded an oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for reasons cited in the letter. Such procedure in my view passes the test of procedural fairness and I so hold.”
53. It is not disputed that the grievant was issued with a show cause letter which she responded to. It is also not in dispute that she was invited to a disciplinary hearing, and further informed of her right to appear with a representative of her choice. The grievant further told court that she chose not to have a representative during the hearing.
54. I find and hold that the grievant’s dismissal met the procedural fairness test.
55. On the question of substantive justification for the dismissal, the law demands that the employer proves that the reasons upon which a dismissal/termination is premised, are fair, valid and justified. In *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR the Supreme court stated:
- “Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair”
56. Further, in Nyeri Civil Appeal No.97 of 2016 *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another*. The Court of Appeal held:
- “In a claim such as this, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer. See Section 47(5) of the *Employment Act*...”
57. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR, the Court stated,
- “It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.”
58. The charge against the grievant was portrayal of unprofessional behavior, verbal abuse, offensive language, verbal threats, bullying and offensive gestures towards one Ms. Consolata Muhindi.
59. In her response to the show cause, the grievant stated that the said Ms. Consolata, who was a stranger to her, walked into the stores where the grievant worked accompanied by a Mr. Tom Opiyo, who was a machinist, and begun marking furniture without speaking to them. The question then is whether this was reason enough to hurl insults, and which the grievant did not deny, and whether the grievant’s conduct amounts to gross misconduct as to warrant summary dismissal.



60. By section 44(4)(d) of the *Employment Act*, 2007, use of abusive or insulting language, or behaving in a manner that insults an employer or a person placed in authority by the employer, is conduct that amounts to gross misconduct, and which warrants summary dismissal.
61. The question is whether a reasonable employer could have been justified to dismiss on these facts. In *British Leyland v Swift* (1981) I. R. L.R. 91, Lord Denning describe the test of what a reasonable employer could or could not do in the following words:
- “The correct test is: was it reasonable for the employers to dismiss? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.....”
62. In my view, the grievant’s dismissal was substantively fair as the Respondent/employer had on a preponderance of probability, sufficient reason to believe that the accusations levelled against the grievant were true. A witness, RW2 confirmed that the grievant hurled insults at them, yet this was a person that was known to the grievant. Furthermore, not knowing someone cannot be reason to use abusive and offensive language against them.
63. I thus find the grievant’s dismissal substantively fair.

Whether the grievant was discriminated against

64. The Claimant contends that the grievant was discriminated against on the basis that she faced similar charges with her supervisor one Mr. Moses Okota, but who was terminated and paid his terminal benefits, while the grievant herein was summarily dismissed and denied her terminal benefits.
65. It is now settled that this court has the jurisdiction to hear and determine Constitutional issues as and when they arise before it. In *International Centre for Insect Physiology and Ecology (ICPE) vs Nancy Minally* [2018] eKLR the Court of Appeal held;
- “27. There cannot be any argument that the ELRC clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) vs Attorney General [2012] eKLR which was upheld by this Court in Daniel N. Mugendi vs Kenyatta University & 3 others.”
66. For starters, a summary dismissal cannot in my view disentitle an employee to her terminal benefits, as most of the terminal benefits are usually rights that have already accrued, and denying an employee such entitlements, is in my unconstitutional.
67. The Respondent’s witnesses told this court that the grievant and her supervisor, faced similar charges but received different penalties. They further told the court that they did not know why the decision was reached to summarily dismiss the grievant, while at the same time, terminating her supervisor, who was then paid his terminal benefits.
68. This is a clear indication that the grievant was treated differently from someone in similar circumstances.
69. I find and hold that the grievant herein was discriminated against contrary to the express provision of Article 27 of *the Constitution*.
70. Although the Claimant did not seek compensation for violation of the grievant’s rights, there can be no wrong without a remedy. In this regard, I order that the grievant’s summary dismissal be and is



hereby converted to a termination and she be paid all the terminal benefits accrued to her as at the time of her dismissal.

Whether the Grievant is entitled to the reliefs sought.

71. The Claimant has sought a myriad of reliefs on behalf of the grievant, most of which are premised on the assertion that the grievant was wrongfully and unfairly dismissed.
72. Specifically, the Claimant seeks that the grievant is reinstated to her position without loss of benefits, or in the alternative she be compensated through payment of her full salary with profit for the period she has been out of employment, three months salary in lieu of notice, gratuity, compensation for economic suffering at court's rate and that the Respondent be restrained from dismissing employees on grounds of their union activities.
73. To start with, the prayer for reinstatement collapses on the finding that the grievant's dismissal was procedurally and substantively fair, and so does the claim for compensation for unfair dismissal.

Three months salary in lieu of Notice

74. The grievant's contract with the respondent at clause 7, gives a two months' notice period and no three as claimed. The Respondent's letter summarily dismissing the grievant did not provide for notice, nor pay in lieu thereof.
75. The Claimant's claim for pay in lieu of notice is merited and the grievant is awarded two months' salary in lieu of dismissal notice.

Gratuity

76. As correctly submitted by the Claimant, unionisable employees of the Respondent are entitled to payment of gratuity in accordance with Clause 32 of the Collective Bargaining Agreement between the Claimant and the Respondent. To this end, I find that the grievant is entitled to payment of gratuity at the rate of 25 days for every completed year of service.
77. In conclusion, Judgment is entered for the Claimant as against the Respondent as follows: -
 - a. Two months' salary in lieu of notice at Kshs. 65,296/-
 - b. Payment of gratuity
 - c. Payment of any other terminal dues accrued at dismissal.
 - d. Costs of the suit and interest until payment in full.
78. It is so ordered.

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

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Aveza present for the Claimant

Ms. Namusubo h/b for Ms. Omollo for the Respondent



Christine Omollo- C/A

