



Bakery Confectionery Food Manufacturing & Allied Workers v Big Bite Bakers & Confectioners Limited (Cause 9 of 2022) [2023] KEELRC 343 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 343 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE 9 OF 2022
NJ ABUODHA, J
FEBRUARY 3, 2023
FORMERLY ELDORET ELRC CAUSE 174/2018**

BETWEEN

**BAKERY CONFECTIONERY FOOD MANUFACTURING & ALLIED
WORKERS CLAIMANT**

AND

BIG BITE BAKERS & CONFECTIONERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant, a registered Trade union under the *Labour Relations Act, 2007* has brought this claim on behalf of eight of its members namely; Ambrose Sichangi, Joseph Omolo, Joseph Wekesa, Duncan Opara, Sammy Barasa, Simon Wafula, Kevin Musungu and Andrew Simiyu herein after referred to 'grievants', against the Respondent, a limited liability company and the former employer of the Grievants herein.
2. According to the Memorandum of Claim dated April 18, 2018 and filed in court on April 23, 2018, the claimant prays for judgment against the respondent under the following terms;
 - i. A declaration that the 8 grievants herein were wrongfully and unlawfully summarily dismissed from duty
 - ii. An order for payment of the grievants terminal dues and entitlements as particularized in the Memorandum of claim
 - iii. Certificate of service
 - iv. Costs of the suit
 - v. Interest at courts rate from the date of filing suit until payment in full.



3. The Respondent filed a Memorandum of Response dated August 10, 2018, and filed in court on August 13, 2018. The Respondent wholly denied the Claimant's claim and maintained that for the employees who were dismissed, they were valid reason for their dismissal within the meaning of section 45 of the *Employment Act* and the others who absconded duty, did so on their own volition.
4. On the September 29, 2022, hearing proceeded in the absence of the Respondent where four grievants testified in furtherance of their case.
5. Ambrose Wekesa Sichangi, the 1st grievant testified as CW1 and adopted his witness statement as his evidence in chief. He also relied on his documents filed in court in support of the claim. In summary, from his witness statement CW1 stated that he reported to work on June 3, 2016 and was informed that a piece of cloth had been found on bread and that he was responsible as the supervisor and that's when he was issued with a termination letter by a Mr Jumaan.
6. CW2 was Kevin Musungu who adopted his witness statement recorded on October 1, 2018 as his evidence in chief and relied on his documents on record. It was his evidence that he reported to work on August 9, 2014 and at around 3pm, he was confronted by his supervisor to report to the office where he was verbally accused of failing to obey lawful instructions to carry crates. He stated that he was instructed to execute a warning letter and upon refusal to do so, he was issued with a termination letter.
7. Duncan Opata testified as CW3. He stated that he reported to work on 18th August 2016 at around 2.05 pm where he reported 5 minutes late. He stated that he was asked to go back home and to never report back. It was his testimony that he was never issued with a show cause letter and was subsequently terminated from employment.
8. CW4 was Simon Wafula Nyongesa who adopted his witness statement recorded on October 1, 2018 as his evidence in chief and relied on his documents filed in court. He averred that he reported to work on May 21, 2016, at 2.04 pm by about 4 minutes late and was informed by the supervisor to go back home and wait for his summary dismissal letter to be typed. He stated that he was summarily dismissed vide a letter dated May 21, 2016 and that no show cause letter was issued to him setting out the allegations against him to enable him to respond and explain himself.
9. As regards the other grievants; Joseph Omolo, Joseph Wekesa, Sammy Barasa and Andrew Simiyu, an authority to give evidence was given to the grievants who testified in court.
10. With that evidence the claimant closed its case and the court directed the it to file written submissions.

Submissions

11. The claimant filed written submissions on November 16, 2022 and identified the issues for determination as;
 - i. Whether there was a valid reason to effect terminating of the grievants services
 - ii. Whether the grievants services were terminated based on fair procedure
 - iii. Whether the grievants are entitled to the remedies/relief sought.
12. As regards whether there was a valid reason to terminate the grievants services, the claimant submitted that under Section 45 of the *Employment Act*, the issue of the validity of the reasons for termination is a factual issue which has to be proved by adducing evidence in court.



13. It was further submitted that under Section 43 and 45 of the Employment Act, once an employee demonstrates that the reasons for termination is invalid, Section 47(5) of the Employment Act shifts the burden of proof to the employer to justify the reasons for termination.
14. It was thus submitted that looking at the circumstances in which the grievants were terminated from employment, the respondent failed to prove the reasons for termination and as such no valid reasons have been demonstrated to justify the termination of the grievants from employment.
15. On the second issue which was whether the grievants termination was based on a fair procedure, it was submitted that section 41 of the employment Act sets out the minimum statutory procedures to be adopted in cases where an employee faces allegations of misconduct. The claimant stated that although the respondent pleaded that the grievants were engaged in acts of misconduct, no show cause letters had been produced as evidence to demonstrate that the grievants were informed of the reasons for termination so that they could respond in writing in accordance with section 41(1) of the Employment Act.
16. It was thus submitted that the circumstances under which the grievants were terminated on the same day as the alleged acts of misconduct speaks of victimization of the grievants as the respondent was keen to terminate the grievants services without recourse to the procedure and the law.
17. Lastly on the issue of what reliefs to the grievants, the claimant submitted that this court should find that the grievants services were unlawfully and wrongfully summarily dismissed from duty and as such grant an order for payment of their terminal dues being claim for notice pay, underpayment of wages, overtime pay, service pay, leave pay and compensation for unlawful termination.

Determination

18. I have considered the pleadings, the grievants oral testimony and the submissions filed in the matter and I have found that the main issues for my determination are;
 - i. Whether the grievants were termination from employment.
 - ii. Whether the said termination unfair
 - iii. Whether the Claimant is entitled to the reliefs sought.

Whether the grievants were terminated from employment

19. In addressing this issue, it is important that this court analyses the evidence so as to establish whether the grievants were terminated from employment lawfully and whether some of them deserted work on their own volition. On one hand, the claimant avers that all the 8 grievants were unlawfully terminated from employment while on the other hand, the respondent from its statement of response has admitted that as regards Ambrose Sichangi , Samson Barasa and Simon Wafula , they were lawfully dismissed from work; and that the other grievants namely; Joseph Omolo, Joseph Wekesa, Duncan Opata, Kevin Musungu, Andrew Simiyu absconded duty and that the respondent cannot be blamed for those employees who absconded from duty.
20. The Court will first deal with the three grievants namely Ambrose Sichangi, Samson Barasa and Simon Wafula whom it is not in dispute that they were terminated from employment in a bid to establish whether their termination was unfair.



21. It is trite law that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but must also ensure that the laid down procedure has been followed.
22. As regards Ambrose Sichangi, it was averred that he was dismissed from work after a piece of cloth was found stuck on a bread. Samson Barasa is said to have been dismissed for his failure to adhere to the company's health and safety regulations while Simon Barasa is said to have been dismissed from work for his carelessness in the performance of his duties.
23. Indeed, looking at the said reasons as advanced by the respondent the Court finds them to be valid reasons for termination. However, the problem in employment related disputes is establishing that the dismissal was substantively and procedurally fair. In as much as the reasons provided for dismissal of the three grievants were valid, the court has to look into the issue holistically to establish whether there was compliance to procedural fairness.
24. Section 41 of the *Employment Act* provides as follows in regard to procedures for termination:
- “(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.”
25. In the case of *David Gichana Omuya v Mombasa Maize Millers Ltd* [2014] eKLR observed;
- “The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness.”
26. I have analysed the instant case and it is my finding that the respondent has not been demonstrated that there was compliance with procedural fairness. Infact, from the documents filed in court in its defence, it is evident that the said grievants were dismissed on the same day they were alleged to have engaged in the acts of misconduct. I therefore find that the termination of the three grievants namely Ambrose Sichangi, Samson Barasa and Simon Wafula did not meet the statutory threshold and as such I hold that their termination was procedurally unfair.
27. The next issue I need to address is with regards to the other five grievants who were alleged to have absconded duty. Section 44(4)(a) of the *Employment Act* provides for desertion as:-
44. Without leave or other lawful cause, an employee absents himself from the
(4) place appointed for the performance of his work;
(a)
28. The respondent in its response to the claim averred that the said employees deserted or absconded their duties. It is now trite law that where an employer alleges that the employee absconded from work, the onus is on the employer to demonstrate by way of evidence that indeed it tried communicating with the employee to find out why they had absconded duty, and what efforts the employer undertook to see if the employee could come back to work. In a nutshell, it is not enough to just say, an employee absconded duty.



29. This court in the case of in *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR
- “An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
30. Having found that no concrete evidence has been placed before me to support the assertion that the aforesaid grievants absconded work, I find that they were terminated from employment by the respondent.
31. Lastly, on the issue as to whether the claimant is entitled to the remedies it is seeking, the court finds that the termination of the grievants in this case was unfair and as such the claimant’s have established that the grievants are entitled to the remedies as computed in the claimant’s memorandum of claim except for service pay, leave allowance, underpayment and overtime.
32. The claimant is a Union and represented the grievants. Meaning there was a Recognition Agreement between the claimant and the respondent and a CBA. Further, even in the absence of such, it is inconceivable that the claimants were underpaid, never went on leave for the period they worked and declared redundant without the claimant union raising a finger. No evidence or allegation was made by the claimant union that such intervention was attempted and the result thereof. For this reason, these heads of claim are rejected.
33. On compensation for unfair termination the Court has reviewed and considered the level, years of service and the fact that the grievants never presented before the Court any special skills they held to perform the duties they claimed to be performing and thinks that an award of five months’ salary would adequately compensate them for unfair termination.
34. In the end, I enter judgment for claimant against the respondent as hereunder;
- a. A declaration is hereby made that the 8 grievants herein were wrongfully and unlawfully summarily dismissed from duty
 - b. The respondent to pay each grievant the sum of money as computed specifically in the memorandum of claim filed in court on April 23, 2018 except as clarified under paragraph 31 above.
 - c. The respondent to pay the claimant’s costs of the suit.
35. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF FEBRUARY, 2023

ABUODHA NELSON JORUM

JUDGE ELRC

