



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Plantation & Agricultural Workers Union v Delmonte Kenya Limited  
(Cause E020 of 2022) [2023] KEELRC 284 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 284 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E020 OF 2022  
ON MAKAU, J  
FEBRUARY 2, 2023**

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

**JUDGMENT**

1. The claimant is a trade union and brings this suit on behalf of its member John Munyua Ngugi (hereinafter referred to as 'the grievant'). The grievant was employed by the respondent on 27<sup>th</sup> October, 2001 as a Lead man in the Agriculture department and worked until 3<sup>rd</sup> April 2019 when he was dismissed. The claimant alleges that the dismissal was unfair and unlawful and seeks the following reliefs:-
  1. An order directing the Respondent to:-
    - a. To unconditionally reinstate the grievant herein;
    - b. To pay the grievant in respect of all the leave days due to him at the time of reinstatement.
    - c. To pay the grievant leave and travelling allowance.
  2. Should prayer 1 above fail, an order directing, the respondent to:-
    - 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 leave 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 cost of the cause;
  - h. Interest on (a), (b), (c), (e), (f) (g) and (h) above;
  - i. Any other relief this Honourable court deems fit to grant.
2. The respondent filed defence on 2<sup>nd</sup> August, 2022 denying the alleged unfair dismissal and avers that the grievant was arrested by the police for soliciting and receiving a bribe of Kshs 240,000.00 together with another employee in order to aid in securing a tender for supply of porridge in the respondent company. It is the respondent's case that the conduct by the grievant was a valid ground for terminating his employment, and that he was accorded a disciplinary hearing before the dismissal. It is further defence case that the suit is time barred by dint of Section 90 of the Employment Act and it should be struck out with costs.

### **Evidence**

3. The grievant testified as CW1 and basically adopted his written statement dated 28<sup>th</sup> March 2022 and a bundle of documents in the list also dated 28<sup>th</sup> March, 2022 as his evidence. In brief the statement reiterates that the grievant was employed by the respondent from 27<sup>th</sup> October 2001 as Lead man on permanent terms. His monthly salary at the time of exit was Kshs 49,356.16. He was also shop steward and secretary of the union.
4. On 29<sup>th</sup> March 2019, he was arrested by the police on allegation that he was involved in solicitation of money to allegedly secure a tender award within the respondent company. Upon checking the OB 6/20/3/2019 he found that the complainant was Mr. Henry Kamau Mwaniki, his friend who had advanced him a loan of Kshs 212,000.00. The matter was resolved amicably at the police by executing an agreement on how the debt was to be paid by instalments.
5. The statement went on to say that after securing his liberty at 4pm the grievant passed through the HR office to drop a letter and on arrival at the office, his seniors unduly influenced him to write a statement. He was again served with a show cause letter on 27<sup>th</sup> March 2019 and he responded the same day vehemently disputing the allegation in the show cause letter. He also recanted the said statement by an affidavit sworn on 27<sup>th</sup> March, 2019.
6. On 28<sup>th</sup> March 2019, he was served with a letter inviting him to a disciplinary hearing on 29<sup>th</sup> March 2019. He attended the hearing but on 3<sup>rd</sup> April 2019 he was dismissed for alleged gross misconduct. He served the respondent for 18 years before the dismissal. His appeal was dismissed.
7. He contended that his request for the complainant to be brought to the disciplinary hearing was declined. He is now selling roast maize in streets of Thika town and he prays for the relief sought to be granted.
8. On cross-examination, he reiterated that he was arrested following a complaint by Henry Kamau Mwaniki who had loaned him some money and he was released after signing an agreement admitting the debt of Kshs 212,000.00. After the arrest, he went to the respondent's office and recorded a statement. Thereafter he was served with show cause letter and he responded. He was then summoned



- to a disciplinary hearing to answer a charge of receiving money as inducement to aid in getting a tender. He attended the hearing with a representative.
9. After the hearing he received a dismissal letter indicating the reason for the dismissal. He appealed but the appeal was dismissed by the Managing Director. After the dismissal he was paid Kshs 14,000.00 as his final dues.
  10. On re-examination, he maintained that the Kshs 212,000.00 was a debt as indicated in the agreement. He contended that he was tired and under pressure when he signed the agreement. He further contended that the statement at the HR's office was not voluntary and he swore an affidavit thereafter to recant the contents therein. Finally he contended that he was not paid his lawful terminal dues.
  11. Ms.Martha Adongo Atudo, respondent's Senior Department Head Industrial Relations testified as RW1. He stated that the grievant was dismissed for the reason that he was arrested by the police on allegation of soliciting and receiving money to secure a tender for supply of porridge to the respondent company.
  12. She stated that the police called the company about the arrest and she went to the station. The claimant was then released upon signing an undertaking to pay back Kshs 212,000.00. she contended that the grievant violated Section 44 of the *Employment Act*, the CBA and Company Code of Conduct and Business Ethics Policy. She stated that another employee, Mr.Michael Kinuthia was also named in the agreement to repay the money. Another employee, Mr.Anthony Ndavu was also mentioned in the scandal and all the three employees were subjected to disciplinary process.
  13. RW1 admitted that the grievant was not paid his terminal dues namely leave and salary after the dismissal contending that he never went to do clearance as indicated in the dismissal letter. She prayed for the suit to be dismissed with costs because the reason for the dismissal was valid and the procedure followed was fair.
  14. On cross-examination she stated that the grievant was a general field worker and later he was promoted to a Lead man (Head of a group of staff). She reiterated that the grievant was dismissed for soliciting money to secure a tender which is a criminal offence. She admitted that the grievant was not convicted in connection with a bribe.
  15. She further admitted that the agreement signed by the grievant and Mr.Michael Kinuthia did not mention that the money involved was for tender. She maintained that the respondent company does not allow corruption by staff. However admitted that the grievant was not involved in tendering process. She contended that the reason for the dismissal has been substantiated as the claimant had recorded a statement admitting that he received the money.

### Submissions

16. It was submitted for the claimant that the reason for the dismissal was not valid and the procedure followed was not fair. It was argued that the grievant worked for 18 years diligently and without receiving any warning letter. It was further submitted that the right of the grievant under Article 50 of the *Constitution* were blatantly disregarded during the internal hearing which was merely a means to an end and not aimed at realizing the elements of natural justice. Consequently, it was submitted that the dismissal of the grievant was unjustifiable and as such he is entitled to the reliefs sought.
17. Several judicial authorities were cited including *Kenfreight (EA) Ltd v Benson K.Nguti* (2016) eKLR and *Raymond Chepkirwa Mrisha v Civion Limited* (2014) eKLR where the court agreed that termination of employment without valid reasons and without following fair procedure is unfair.



18. However it was submitted for the respondent that the reason for dismissing the grievant was valid. It was argued that he was arrested following a complaint by one Henry Kamau Mwaniki at Ngati police station on allegation that he had solicited and received a bribe of Kshs 212,000.00 to help in awarding of a tender for supply of porridge to the company. It was further observed that the claimant signed an agreement undertaking to repay the money to the complainant and thereafter wrote a statement at the respondent's office confirming that the purpose of receiving the money from Henry Kamau Mwaniki was purpose of securing tender for supply of porridge. That in the statement the claimant acknowledged that they had Kshs 10,000.00 to a deputy chief to arrange for the employees to boycott the porridge from the contracted supplier then so as to sabotage his chance of renewal of the existing tender which had an automotive renewal clause.
19. It was submitted that the grievant recanted the statement 7 days thereafter on the day he was served with a show cause letter. Further during the disciplinary hearing, Michael Kinuthia Kariuki who had been arrested with the grievant and also signed agreement to repay the said money, confirmed that he and the grievant were involved in the fraudulent solicitation and receipt of money to secure porridge tender at respondent's company.
20. As regards the procedure followed, it was submitted that the procedure provided under Section 21 of the *Employment Act* was followed. The grievant was served with show cause letter and thereafter he attended a disciplinary hearing in company of shop stewards of his choice. His defence was considered before dismissal was decided. He appealed and the appeal was considered by the Managing Director but it was dismissed.
21. On the basis of the foregoing submissions, it was urged that the claimant is not entitled to the reliefs sought and as such the suit should be dismissed with costs. For emphasis reliance was placed on the case of *Kennedy Maina Mirera v Barclays Bank of Kenya Ltd* (2018) eKLR where the court dismissed the suit because the reasons for dismissal were valid and the procedure followed was fair.

### **Analysis and Determination**

22. The issues for determination are:-
  - a. Whether the reason for termination was valid and fair.
  - b. Whether the procedure followed was fair.
  - c. Whether the reliefs sought are merited.

### **Reason**

23. The reason for dismissal is captured in the dismissal letter dated 3<sup>rd</sup> April 2019 in the following excerpt:-

“Reference is made to the incidence of 20<sup>th</sup> March 2019 and investigations pertaining to a complaint on solicitation and payment to secure provision of porridge and tea tender for a third party in Del Monte Kenya Limited.

During the investigations it was established that you were involved in a fraudulent act of receiving money from the complainants against *Employment Act* Section 44, parties Collective Bargaining Agreement and the Company Code of Conduct and Business Ethics Policy...”

24. The claimant denies the above misconduct but the court finds that there is evidence to substantiate the allegation. First the grievant was arrested on a complaint lodged in the police station by Henry Kamau



Mwaniki from whom the grievant Solicited and received money as an inducement to secure a tender for supply of porridge to the respondent company. In order to settle the matter the grievant signed an agreement with the complainant undertaking to repay the said Kshs 212,000.00.

25. In this court's view, the arrest and proceedings at the Ngati police station where the grievant was at the centre, was sufficient to arouse reasonable suspicion on the part of the respondent that the grievant had committed the fraud complained of. The circumstances were enough for any reasonable employer to genuinely conclude that the employee was involved in fraudulent conduct of corruption using the company's name.
26. The said conduct was a valid and fair reason for separation because the grievant was engaging in conduct that violated basic ethics leave alone the *Employment Act* and the respondent's Code of Conduct and Business Ethics Policy. Such conduct of employees soliciting and receiving bribes from third parties and going to an extent of engineering a scheme for an industrial action in order to manipulate tendering processes is incompatible with work ethics universally and any employee engaging in such conduct has obviously substantially breached his own contract. In such circumstances the employer is justified in summarily dismissing the employee as it happened in this case.

### **Procedure**

27. Section 41 of the *Employment Act* provides;-

- “(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.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

28. In this case the court is satisfied that section 41 above was complied with. The claimant was served with show cause letter and he responded. He was accorded hearing before a committee where he attended in the company of shop stewards. He defended himself and his defence was considered before the dismissal. He appealed and the same was considered by the Managing Director but he dismissed it. In the circumstances of the case I find that the claimant was dismissed after a fair procedure.

### **Reliefs**

29. In view of the finding that the reason for dismissal was valid and fair procedure was followed the prayer for reinstatement and damages for unfair termination is declined. For the same reason he is denied salary in lieu of notice. The claims for house allowance, leave, and leave travelling allowance, until reinstatement date have no legal basis and are declined.
30. The claim for gratuity under the CBA must also fail because the grievant was dismissed for gross misconduct. Clause 8 (h) of the CBA provides that service gratuity is paid when an employee retires or terminated for reasons other than for gross misconduct.



31. In the end I find that the claimant has not proved that the grievant was unfairly and wrongfully dismissed by the respondent and proceed to dismiss the suit with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

