



**Kenya Plantation & Agricultural Workers Union v Delmonte Kenya Limited
(Cause E019 of 2022) [2023] KEELRC 310 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E019 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 which has a signed recognition agreement and concluded Collective Bargaining Agreements (CBAs) with the respondent company. The claimant brings this suit alleging that its member, Mr Daniel Wambua Nguu (hereinafter referred to as ‘the grievant’) was unlawfully dismissed from employment by the respondent on April 1, 2019 after serving for 26 years. His monthly salary was Kshs 29,222.94. It is the claimant’s case that the summary dismissal of the grievant was unfair and unlawful because the reason was not valid and also he was not accorded a fair hearing. The suit seeks the following reliefs:-
 1. An order directing the respondent to:-
 - a. To unconditionally reinstate the grievant herein;
 - b. To pay the grievant for the entire period within which he was dismissed.
 - c. To pay the grievant in respect of all the leave days due to him at the time of reinstatement.
 - d. 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 house allowance from the time of dismissal until the time of judgment.
 - c. Pay the grievant monthly salary for a period of twelve (12) months.
 - d. Pay the grievant *in lieu* of leave for the period dismissed.
 - e. Pay the grievant leave travelling allowance for the period of dismissal;
 - f. Pay the grievant *in lieu* of notice of termination;
 - g. Pay the grievant damages for unlawful, illegal and unfair dismissal;
 - h. Pay the grievant the cost of the cause;
 - i. Interest on (a), (b), (c), (e), (f) and (g) above;
 - j. Any other relief this honourable court deems fit to grant.
2. The respondent denies that the dismissal of the grievant was unfair and avers that the same was justified by a valid reason and that a fair procedure was followed. It avers that on March 14, 2019 the grievant attended work while drunk, disorderly and unable to perform his duties properly and he was taken to the security office due to his unruly behavior where he also disrupted operations before being escorted to the company dispensary for a breathrizer test. The results showed that his alcohol level was 2.30mg/L which was above the acceptable 0.35mg/L.
 3. As a result the grievant was served with a show cause letter and he admitted in response that he had taken intoxicating substance the previous night and sought forgiveness. He was however invited to a disciplinary hearing which culminated in his dismissal. He appealed but the appeal was dismissed. It is the respondent's case that the grievant's dismissal was lawful because he violated section 44 of the [Employment Act](#), the CBA and the company's code of conduct and business ethics policy. Therefore the respondent prays for the suit to be dismissed with costs.

Evidence

4. The claimant's witness was the grievant himself who testified as CW1. He stated that he was employed by the respondent on February 5, 1994 as a general worker in the irrigation section and as at April 2019, his salary was Kshs 29,222.94. On March 14, 2019 he was not feeling well and he took some medicine but became drowsy and at 6.30am went to seek an off from his supervisor. His reporting time was 7.00am. On reaching the factory gate, his condition was mistaken for drunkenness and he was placed under custody by the security guards. His request to see his supervisor was rejected.
5. On March 15, 2019 he resumed work but he was served with a show cause letter and he responded. Thereafter he was summoned to a disciplinary hearing and he attended and continued with his work until end of the month. On April 1, 2019 he was served with a summary dismissal letter. He served the company for 25 years. He said that is now old and has no strength to work anymore.
6. On cross-examination, he maintained that on March 14, 2019 he was unwell and he went to seek for an off. He contended that his purposes of going to the factory that day was not to work but seek an off duty and indeed he never worked that day. He stated that a guard by the name Omondi arrested him and locked him in a holding cell and later the head of security took him to the company dispensary for medical examination then he went to his house to rest.
7. He admitted that he was invited for hearing and he attended with a representative to defend himself. Thereafter he continued with work until he was given a dismissal letter. He appealed against the



- dismissal but the managing director dismissed it. He contended that he was not paid his terminal dues but admitted that he never did clearance.
8. In re-examination he reiterated that he went to seek off duty before his reporting time but he found other employees present. He stated that the security guard pushed him into a holding cell and when he resisted the guard forcefully pulled him into the cell while other employees were protesting.
 9. The respondent called its senior head industrial relations Ms Martha Adongo Atudo who testified as RW1. She stated that the claimant attended work while drunk, disorderly and unable to perform his duties properly. He then had altercation with his supervisor and security guards. She stated that the grievant was at the factory on March 14, 2019 to work because he was dressed with full PPE uniform but he could not perform his duties.
 10. She further stated that the grievant was served with show cause letter on March 15, 2019 and he respondent *vide* letter dated March 19, 2019 and also attended a hearing on March 27, 2019 with a team of shop stewards. At the hearing he admitted that on March 13, 2019 he attended a function and took drinks which led to his behavior on March 14, 2019.
 11. RW1 maintained that the dismissal of the grievant was fair because all the charges levelled against the grievant were explained to him and he was given an opportunity to defend himself. He was also given a right of appeal but his appeal was unsuccessful. She reiterated that the reason for the dismissal was justifiable and sufficient because his conduct violated section 44 of the [Employment Act](#), CBA and code of conduct and business ethics.
 12. On cross examination, RW1 contended that the factory operates 24 hours under three shifts of 8 hours each. She stated that the grievant's shift was running from 6am to 2pm. She stated that there is a procedure for reporting when an employee is sick but nothing bars one from going physically to the office to seek permission.
 13. She admitted that the company guards are not allowed to attack anyone unless they are confronted. She denied existence of any holding cell in the company. She maintained that on March 14, 2019, the claimant indeed attended work but after the confrontation he never returned but went to hospital. However he was awarded 8 hours in the attendance register. She stated that clause c(ii) of the CBA provided for dismissal for reporting to work drunk. She contended that the grievant was a perpetual absentee and he had been absent for 3 days prior to the said incidence.
 14. On the re-examination RW1 contended that the grievant checked -in for work on March 14, 2019 but he never did any work. She contended that if the grievant was going to seek for an off duty, he should not have clocked in.

Submissions

15. It was submitted for the claimant that the reason for the dismissal of the grievant was not valid and as such the respondent has not discharged his burden of proving the reason for the dismissal as required under section 43 and 45 of the [Employment Act](#). It was submitted that the alleged misconduct happened at 6.30am before the reporting time for the grievant which was 7.00am. It was contended that the grievant never presented himself for work on the material date but he went there honestly to seek an off duty but the security guards mishandled him and even arrested him. The said arrest was said to be an affront to the grievant's right to fair labour practices under article 41(1) of the [Constitution](#).
16. It was submitted that the respondent has miserably failed to prove that the reasons for dismissing the grievant were just and fair, namely attending work under the influence of an intoxicant and disobeying



- instructions from his supervisors. It was argued that the alleged intoxication has not been proved and the alleged altercation with his supervisors have also not been proved.
17. Reliance was placed on the case of *John Rioba Maugo v Rilely Falcon Security Services Ltd* (2016)eKLR and *Kenfreight (EA) Limited v Benson K Nguti* (2016) eKLR to emphasis that the employer must prove that termination of employment was grounded on valid and fair reason and that a fair procedure was followed or else it is unfair within the meaning of section 45 of the *Employment Act*.
 18. In this case the court was urged to find that the dismissal was unfair and grant the reliefs sought.
 19. It was submitted for the respondent that the reasons for the dismissal herein were valid because on the material date, he reported to work at 6.30am while drunk and had an altercation with security guards. He was then taken to a dispensary for alcohol test which turned to be 2.30mg/L as opposed to the permitted 0.35mg/L level.
 20. Reliance was placed on a statement recorded by Mr Felix Omondi, the security guard who had altercation with the grievant on the material date. The statement was produced as exhibit D.5 and it explains how the security guard was called by the grievant's supervisor Mr Mark Ojwang for assistance when the grievant reported to work drunk and disorderly.
 21. Another statement (exhibit D.8) by Mr Simon Wachira Mwangi, who escorted the grievant to take alcohol test was also relied upon in the respondents submissions. The statement indicates that the grievant had reported to work on the material day in full official uniform but was drunk, uncontrollable and very noisy. The statement also confirmed that alcohol level test was done on the grievant and he was found to have 2.30mg/L level of alcohol.
 22. Reliance was also placed on the statement (exhibit D.6 and 4) by fellow employee Mr Simon Kuria and grievant's brother Mr Michael J Musyoki respectively which also confirmed that the grievant was found to have 2.30mg/L level of alcohol on the material date. On the basis of the foregoing statements the court was urged to find that the reason for the dismissal of the grievant was valid and justifiable under section 44 (4) (b) of the *Employment Act* and clause II (c) (ii) of the CBA.
 23. It was further submitted that the procedure followed before the dismissal of the grievant was fair and in line with section 41(1) of the Act. First an investigation was done and the grievant was served with a show cause letter dated March 15, 2019 explaining the reason for intended termination. He responded to the letter and then he was invited to a disciplinary hearing. After the hearing his defence was considered but was found wanting and therefore he was dismissed by letter dated April 1, 2019. He appealed and the managing director, considered the same but dismissed it. Consequently, the court was urged to find that the respondent adhered to the procedural requirements outlines in the *Employment Act* before dismissing the grievant.
 24. On the basis of the above submissions the court was further urged to dismiss the suit with costs because the reliefs sought are not merited. Reliance was placed on the case of *Kennedy Maina Mirera v Barclays Bank of Kenya Ltd* (2018) eKLR where the court dismissed the suit after finding that there was valid reason for the separation and fair procedure was followed.

Determination

25. The issues that arise for determination are:-
 - a. Whether the reasons for termination were valid and fair.
 - b. Whether fair procedure was followed.



- c. Whether the reliefs sought are merited.

Reason

26. The dismissal letter dated April 1, 2019 states:-

“Sub: dismissal from service

On March 14, 2019, you were found by your supervisor intoxicated, unable to perform your duties properly and disrupted operation in security offices in anglo french. A subsequent breathrizer test carried out on you for alcohol recorded levels above acceptable limits...”

27. The above excerpt from the dismissal letter reveals two offences:-

- a. Being intoxicated and unable to perform work
- b. Disrupting operations in the security office.

28. There is admission by the grievant that on the night of March 13, 2019 he attended a function where he took substances which affected him and when he took medicine in the morning of March 14, 2019, he became drowsy. The respondent has produced as evidence herein statements recorded by fellow employees during internal investigations that show that the grievant was drunk and disorderly on the morning of March 14, 2019. The statements also show that the grievant was taken to a dispensary and he tested higher alcohol levels than the permitted level. The grievant has also admitted that he was taken to dispensary and alcohol test was done on him.

29. The grievant alleged that he was not attending work on the material but rather going to seek for an off duty because he was feeling drowsy. He further alleged that the time he arrived at the gate was 30 minutes before reporting time and therefore he was not doing any work.

30. RW1 alleged that the grievant’s shift started at 6.00am and therefore he was already on duty but he was unable to perform his duties. He stated during cross-examination that the first shift was from 6am to 2pm, the second run from 2pm to 10pm and the last shift from 10pm to 6am. The respondent did not produce any documentary evidence to prove the time for the said three shifts.

31. However, I must observe that he who alleges must prove. The claimant is the one who alleges that on the material date he was not attending work but office to seek for an off duty. He also alleges that he was to report at 7am. Having carefully considered the evidence, I find that he has not discharged the burden of proving the above allegations.

32. I am of the view that the weight of evidence is against the claimant. He admitted that he was drowsy on the material day when he went to the work place. He was in full PPE gear ready for work and he clocked-in. He admitted also that he was involved in altercation with security guards and he was arrested and locked in a holding cell. He admitted that he was escorted to the dispensary for an alcohol test after which he never worked but went home.

33. He was never treated at the company dispensary for any illness on the said day and he never sought treatment elsewhere. He was therefore unable to perform his duties due to intoxications as established by the alcohol test done that day. He was noisy and uncontrollable until he was restrained by the security.

34. As regards the disruption of operation at the security office, there is evidence that he was mistreated and mishandled by the security guards. The resistance he made to the arrest was supported by other staff including the shop stewards who did not like the manner in which the guards were handling the



grievant. Consequently, I find that the second reason for the termination was not valid and fair to warrant dismissal.

Procedure

35. 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.”

36. In this case there is evidence to show that the grievant was served with a show cause letter and he responded. Thereafter he was invited to a disciplinary hearing and he attended with representatives. His representations were considered before the dismissal was decided. The decision was communicated in writing and a right of appeal was given to the grievant. The appeal was considered and decision was communicated in writing. The foregoing facts support the finding that the dismissal was done in accordance with a fair procedure.

Reliefs

37. In view of the finding that there is evidence to prove that the grievant attended work while drunk and unable to perform his duties, and that a fair procedure was followed before his summary dismissal, I decline to declare the said dismissal wrongful and unfair. Accordingly, the prayer for reinstatement, compensation for unfair dismissal and salary in lieu of notice must fail.

38. The claims for pay, house leave, and leave travelling allowance, for the period after dismissal have no legal basis and are declined.

39. 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.

40. 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 15th 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.

ONESMUS N. MAKAU

JUDGE

