



**Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v United Millers Limited (Cause 42 of 2017) [2023] KEELRC 1365 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1365 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 42 OF 2017  
S RADIDO, J  
MARCH 23, 2023**

**BETWEEN**  
**BAKERY CONFECTIONERY FOOD MANUFACTURING & ALLIED  
WORKERS UNION (K) ..... CLAIMANT**  
**AND**  
**UNITED MILLERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Bakery Confectionery Food Manufacturing & Allied Workers Union (the Union) sued United Millers Ltd (the Respondent) on 15 February 2017, and the Issue in Dispute was stated as:

Wrongful and/or unlawful summary dismissal of thirty (30) employees of the company namely

1. Benard K Yengo
2. Hamis Nyongesa
3. Joel Ngetich
4. Fredrick K Lagat
5. Joseph K Kirui
6. Steve Otieno
7. Julius K Kirui
8. Lambert Odekeyo
9. Christopher Tanui



10. Simon Kipkoross
11. Daniel Gikonyo
12. Charles Ayoo
13. Benson Onguru
14. Steven Amollo
15. Vitalis Ouma
16. Francis Otieno
17. David Apiyo
18. Naftali Adera
19. Victor Ruvanga
20. John Njuguna
21. Peter Njihia
22. Evans A. Khisa
23. Philip Soek
24. Salim K. Limo
25. Clement M. Maina
26. Leonard K. Tonui
27. John Kimani M
28. Nobert Maina
29. George Karanja
30. Joseph Cheruiyot

2. The Respondent filed a Response on 25 May 2017, and the Cause was heard on 8 July 2019, 17 February 2020, and 14 December 2021.
3. The Union called two witnesses while the Respondent called its Human Resources Officer.
4. The Union filed its submissions on 1 March 2022. The Respondent had filed its submissions on 1 February 2022.
5. The Court has considered the pleadings, evidence and submissions.

### **Unfair termination of employment**

#### **Valid and fair reasons for dismissal(s)**

6. The reason that the Respondent gave for dismissing the Grievants on 30 June 2014 was that they had deserted work with effect from 10 March 2014.



7. In terms of sections 43 and 45 of the *Employment Act*, 2007, that was the reason the Respondent was expected to prove as valid and fair.
8. To discharge the burden, the Respondent called its Human Resources Manager. The witness joined the Respondent in 2018, and his evidence was based on records kept by the Respondent.
9. The gravamen of his evidence was that the Grievants had gone on an illegal strike and that the Respondent approached the Court on 12 March 2014 and secured orders restraining the Grievants from continuing with the illegal strike.
10. The Union denied that the Grievants had gone on an illegal strike.
11. Confronted with the different narrations, the Court in the strike case directed the County Labour officer to visit the Respondent's factory and report back to Court.
12. The County Labour Officer was called to testify in this Cause. He testified that when he visited the Respondent's factory on 14 March 2014, he was refused entry and that he established that the Grievants had been ready to resume work (the Court had issued an order on 12 March 2014 directing the Grievants not to take part in a strike), but the Respondent had locked them out.
13. The Labour Officer was acting under a Court order, and his impartiality was not questioned in cross-examination.
14. With the evidence that the Grievants were ready and willing to resume work by 14 March 2014, the Court finds that dismissing the Grievants on 30 June 2014 on the ground of desertion was not valid or fair.

### **Procedural fairness**

15. Section 35(1) of the *Employment Act*, 2007 requires an employer to give written notice of termination (unless it is a case of summary dismissal), while section 41 of the *Act* contemplates the employer allowing the employee to be heard before termination of employment.
16. The Grievants were drivers.
17. On or around 10 March 2014, the Grievants reportedly went on strike. The Respondent gave them an ultimatum to return to work on 11 March 2014 or face disciplinary action.
18. According to the Respondent, the Grievants did not purportedly comply with the ultimatum.
19. At the same time, the Respondent instructed the Grievants to surrender all company property in their possession by 1.00 pm.
20. On 12 March 2014, the Respondent secured court orders that restrained the members of the Union from taking part in the strike or any form of industrial action.
21. The Respondent issued a notice to the Grievants on the same day to contact the human resource office to get notifications on disciplinary action ahead of hearings on 14 March 2014. The notice set out the names of the Grievants and the charges.
22. On 13 March 2014, the Union and the Respondent met to consult on the situation. A request was made to the Union to invite a representative of the Grievants to attend.
23. When the parties appeared in Court on 14 March 2014, they were directed to meet and attempt to settle the industrial stalemate.



24. Although two representatives of the Grievants attended the meeting, officials of the Union did not participate, and the meeting was rescheduled to 17 March 2014.
25. On the same day, the Union wrote to the Respondent expressing regret that although the Grievants had been reporting to resume work, the Respondent had locked them out.
26. On 18 March 2014, the Respondent informed the Union that it had employed replacement drivers to maintain the business operations.
27. The parties met for conciliation under the Ministry of Labour but could not agree, and the Conciliator issued a Memorandum of Disagreement on 25 April 2014.
28. The Respondent sent letters to the Grievants on 30 June 2014 through registered post notifying them of summary dismissal(s).
29. In its submissions, the Respondent contended that despite a Court order and the fact that the Grievants were issued with show-cause notices, they defiantly refused to attend the disciplinary hearing(s) on 14 March 2014. It was also asserted that the Union declined to facilitate a resolution.
30. The Respondent, therefore, urged that it could not be accused of not following a fair procedure.
31. The Union, on its part, urged that the Grievants were not afforded an opportunity to show-cause before dismissals on the ground of desertion of duty.
32. The Union pointed out that a show-cause produced in Court was sent to an employee who was not a Grievant in this Cause.
33. Desertion occurs when an employee has formed an intention not to return to work.
34. The Respondent did not lead any evidence as to when it came to the view that the Grievants had deserted.
35. It is at that time that it should have issued show-causes notices. The notices sent on 11 March 2014 were sent before that intention could be ascribed to the Grievants as the parties were still before the Court and were attempting negotiations.
36. The Court finds that the Respondent did not comply with the requirements of procedural fairness before dismissing the Grievants.

### **Counterclaim**

37. The Respondent submitted that it incurred losses of Kshs 8,066,000/- and Kshs 23,336,531/- and that any awards made in favour of the Grievants be offset against the losses.
38. The Respondent did not expressly plead a Counterclaim as known in law. It also did not strictly prove the loss as expected of special damages, and the Court will discount the claim and submissions on the Counterclaim.

### **Appropriate remedies**

39. The Union sought two substantive orders, a declaration that the dismissals of the Grievants were unlawful and payment of terminal benefits.
40. In an attempt to resolve the dispute, the parties met under the leadership of the Federation of Kenya Employers on 3 March 2015.



41. The agreement was in the following terms:
- (1) After discussions it was agreed that the Management would recover losses on crates and tools from the employees' benefits.
  - (2) That though according to the Management, the actions of the workers could have justified summary dismissal with loss of benefits, they proposed to pay 50% of the benefits due in compensation of production loss.
  - (3) The Union stated that they would consult their members as this was a good gesture from the Management towards resolving the dispute.
42. In her report dated 15 September 2016, the Conciliator agreed with the compromise reached by the parties save for the recovery of crates and tools lost.
43. The Court will adopt the compromise reached by the parties and recommended by the Conciliator.

### **Conclusion and Orders**

44. The Court finds and declares that the dismissal of the Grievants was unfair and awards them:
- (i) Terminal benefits in terms of appendix 20 to the Response.
45. Due to the social partnership between the parties, each party bears its costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23<sup>RD</sup> DAY OF MARCH 2022.**

**Radido Stephen, MCI Arb**

**Judge**

### **Appearances**

For Union, Mr Amalemba instructed by Amalemba & Co. Advocates

For Respondent Mr Ouma, Federation of Kenya Employers

Court Assistant Chrispo Aura

