



Kenya Engineering Workers Union v Farm Engineering Industries Limited (Employment and Labour Relations Cause E003 of 2022) [2023] KEELRC 924 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 924 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E003 OF 2022**

**CN BAARI, J
APRIL 20, 2023**

**BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
FARM ENGINEERING INDUSTRIES LIMITED RESPONDENT**

JUDGMENT

1. The Claimant's Memorandum of Claim is dated January 14, 2022, and filed on January 25, 2022. The Claimant seeks that the Court finds the grievant's dismissal unprocedural and awards him terminal dues, two months' salary in lieu of termination notice and 12 months salary for unfair termination,
2. The Respondent entered appearance on March 25, 2022, and thereafter filed a statement of defence on May 25, 2022.
3. The Claimant's case was heard on November 1, 2022. The Claimant presented a Mr Paul Odhiambo Ogollah, the grievant herein, to testify in support of its case. The grievant adopted his witness statement and produced documents filed as exhibits in support of the Claimant's case.
4. The Respondent's case was heard on December 6, 2022. A Mr James Mathew Odhiambo testified in support of the Respondent's case, and adopted his witness statement and produced exhibits filed by the Respondent.
5. Both parties filed submissions.

The Claimant's Case

6. The Claimant's case is that the grievant herein was employed by the Respondent on January 19, 2002 as a Welder on a monthly salary of Kshs 35,561.00 inclusive of house allowance.



7. The Claimant states that on May 25, 2021, the grievant was issued with a letter accusing him of misconduct while on duty, and corruption for attempting to obtain confidential information for personal use.
8. The Claimant further states that the grievant was suspended from duty vide the same letter from May 24, 2021, to May 30, 2021, and asked to appear before the disciplinary committee on May 31, 2021.
9. It is the Claimant's case that on May 31, 2021, the grievant appeared before the disciplinary committee at 10:30 am in the accompany of the Claimant Union Representative, but before the meeting started, the Managing Director of the Respondent demanded that the disciplinary meeting be chaired by a Mr Joash Okonjo, an outsourced agent who is not party to the Recognition Agreement signed between the parties herein.
10. The Claimant states that it declined the demand by the Managing Director, resulting in the cancellation of the disciplinary hearing.
11. It is the Claimant's case that upon cancellation of the hearing, the grievant was issued two letters; one being a notice to show cause and the second one, an extension of his suspension both dated May 31, 2021.
12. It is the Claimant's case that upon receiving the response to the show cause letter from the grievant, the Respondent issued another show cause letter and an invitation letter for the 2nd disciplinary hearing scheduled for June 14, 2021.
13. The Claimant further states that during the disciplinary hearing a Ms Velma who was a key witness in the hearing, denied ever informing the management that she was approached by the grievant to provide him with the register of the outsourced or contracted employees.
14. The Claimant states that the Respondent issued the grievant with a letter of summary dismissal dated June 22, 2021, which letter was based on the disciplinary hearing of June 14, 2021.
15. The Claimant states that the dismissal of the grievant herein, was a witch hunt based on the Union activities, and was intended to get rid of the Union representation in the company and to allow the outsourcing agent to take over with none unionized Employees.

The Respondent's Case

16. The Respondent's case is that Paul Odhiambo Ogolla, the grievant herein, was employed by the Respondent as a Welder sometimes in 2002 until May, 2021, when he was suspended to pave way for investigations on account of gross misconduct, and thereafter, dismissed.
17. It is the Respondent's case that Prior to his dismissal, the grievant was suspected in collusion with other employees, to have maliciously and unlawfully accessed private employee data records, and that upon internal investigations, he was found to have demanded that the receptionist through threats, allows him access the Respondent's confidential records, and which led to the disciplinary process against him.
18. The Respondent states that the grievant was afforded a fair hearing during the disciplinary meeting held on June 14, 2021, during which he was ably represented by a representative of the Union, and the disciplinary committee found him culpable of gross misconduct and effectively terminated his employment.
19. The Respondent further states that the information that was leaked related to the employees of the Respondent, specifically the details found in a workers' register, and which the grievant had no authority to access.



20. The Respondent prays that the Court dismisses the Claimant's case with costs.

The Claimant's Submissions

21. It is the Claimant's submission that the Service Manager's statement filed in this matter, has no merit in the face of the law as the same is not factual.
22. It is the Claimant's submission that for reason that the purported key witness (the receptionist) denied being approached by the grievant, the matter herein, should be dismissed with costs.
23. It is the Claimant's further submission that the letter of dismissal clearly confirmed that all allegations and accusations of misconduct were framed to undermine the Mandatory Provisions of Section 34(1) of *Labour Relations Act* 2007, on election of officials of a trade Union.
24. The Claimant further submits that the actions of the Respondent of dismissing the grievant's employment on grounds of Union activities/affiliation, is a violation of Article 36 of the *Constitution* of Kenya on Freedom of Association.
25. It is the Claimant's submission that the action of the Respondent of forcing Ms Velma, a Receptionist, to lie against the grievant herein prompted her to tender her resignation from employment immediately contrary to Article 47 of the *Constitution* of Kenya on Fair Administrative Action.
26. The Claimant prays that the Court be pleased to consider the prayers sought in the Claimant's memorandum of claim and allow the claim.

The Respondent's Submissions

27. The Respondent submits that during the hearing of this suit, the employee confirmed that he was informed of the accusations of gross misconduct levelled against him and afforded an opportunity to respond to the allegations as well as disciplinary hearing during which he was well represented.
28. The Respondent submits that the grievant did not refute accessing the private employee date record, but only claimed that since they were in the custody of the security guards and the reception, he deemed it fit to access, even though his job description did not involve dealing with such records.
29. The Respondent further submits that the grievant failed to give a plausible explanation for his motive to access the said records, confirming the Respondent's apprehension that the employee had an ulterior motive that was detrimental to the Respondent's business.
30. The Respondent submits that under clause 23 of the parties' collective bargaining agreement, gratuity is only payable to an employee who has retired from employment or an employee who is affected by normal termination. The Respondent had reliance in Justice Nambuye's holding in *Stephen B Nguthi v Del Monte (K) Ltd [2007] eKLR*.
31. The Respondent further submits that it deducted and remitted the NSSF payments on account of the grievant and pursuant to Section 35(6) of the Act, and the circumstances of the case herein, it is exempt from the payment of service pay or gratuity.
32. The Respondent finally submits that the grievant was dismissed within the law having adhered to all the steps necessary in such circumstances.



Analysis and Determination

33. I have carefully considered the pleadings herein, the witnesses' oral testimonies, and the parties' submissions. The issues that arise for determination are:
- i. Whether the grievant was unfairly terminated
 - ii. Whether the Claimant deserves the remedies sought
 - iii. Who bears the costs of the suit?

Whether the grievant was unfairly terminated

34. The Claimant's case is that their member- the grievant, worked for the Respondent for 18 years without any case of misconduct, and that at no time was he issued a warning letter in his 18 years of service.
35. The grievant was in May, 2021, issued three letters in quick succession, one being a warning on ground of gross misconduct and which also suspended him from service; the second a notice to show cause why he should not be dismissed for gross misconduct, and yet another inviting him to a disciplinary hearing.
36. The grievant was subsequently summarily dismissed from service for allegedly accessing the Respondent's staff details without authority.
37. The role of the Court is firstly, to establish whether the grievant's dismissal was within the law, and secondly, whether he is deserving of the remedies sought
38. A dismissal/termination is unfair or wrongful, where the employer fails to adhere to the provisions of Sections 41, 43, 45 and 47(5) of the Employment Act, 2007, on procedure and the existence of valid reasons for termination.
39. On the question of procedure, it is not disputed that the grievant was issued with a show cause letter, an invitation for a hearing before a disciplinary committee, and that the invite informed him to attend the hearing accompanied by a representative of his choice.
40. The grievant confirmed that he attended the hearing accompanied by a representative from the Claimant's union, and his only dissatisfaction with the disciplinary process, is the attendance by one Mr Joash Okonjo, who he termed an outsourced employee. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR* the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
41. Further, in *Hosea Akunga Ombwori v Bidco Oil Refineries Limited (2017) eKLR*, the Court expounded on the provisions of Section 41 of the Employment Act as follows:-

' To satisfy the requirements of Section 41 of the Employment Act, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.

The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms'.



42. In my view, and contrary to the Claimant's assertion, the Respondent adhered to the tenets of fair process in arriving at their decision to dismiss the grievant. The process was handled as envisaged under Section 41 of the *Employment Act*.
43. To this end, I find the grievant's dismissal procedurally fair.
44. The next limb in establishing the fairness or lack thereof of the grievant's dismissal, is whether the Respondent met the requirements of Sections 43, 44 and 46 of the *Employment Act*, on prove of valid, fair and justified reasons for the dismissal.
45. The Respondent begun by issuing the grievant with a suspension letter dated May 24, 2021. In the letter, the reasons given for the suspension were attempts to corrupt an employee named Velma, who was the Respondent's receptionist, and seeking to possess the Respondent's Company confidential information for his own personal ulterior motive, contrary to the rules on confidentiality and against his contract of service.
46. The grievant was subsequently issued a show cause letter and thereafter, a letter of summary dismissal dated June 22, 2021. The dismissal letter indicated that the disciplinary committee had confirmed that the grievant had attempted to obtain the Company's confidential information with respect to employee files at the behest of an undisclosed third party, and that he attempted to corrupt another employee, to be allowed access to the information.
47. Validity, fairness and justice, are yardsticks that an employer must be alive to when dealing with termination, as a reason for termination can be valid yet unfair. Further, a penalty that is too severe and which does not match the transgression, even though valid, may not pass the fairness test.
48. In determining whether reasons for dismissal/termination are fair, the employer is required to show that he believed at the time of termination/dismissal that the employee was guilty, that he has reasonable grounds to sustain the believe, and finally, that he carried out investigations on the matter. 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.'
49. I would then pause the question whether a reasonable employer would have dismissed the grievant herein, based on the grounds put forward for the summary dismissal.
50. For starters, the grievant is said to have colluded with one James Oloo Ochieng, and who from the investigation report before court, was the one the grievant sent to try and obtain the information from the receptionist and is actually said to have threatened the receptionist with consequences if she does not provide the information.
51. The only action taken against the said James Oloo Ochieng, was a warning letter issued on May 21, 2021, which is the same period the grievant was taken through disciplinary action. This in my view, is a clear case of double standards and outright discrimination.
52. The grievant told this Court that the Respondent had learnt that he had been elected as an official of the Claimant's union and hence the Respondent's action against him. This position is convincing considering the speed at which the grievant's disciplinary action was handled, and the penalty passed.



53. It is my considered view, that the penalty meted against the grievant was too severe compared with the charge against him, and especially based on the fact that his co-accused, was only issued with a warning letter.
54. I conclude by holding that a reasonable employer, would not dismiss the grievant based on the grounds for which the Respondent herein did.
55. The dismissal is substantively unfair, and I so hold.

Whether the grievant is entitled to the reliefs sought.

56. The grievant seeks orders for award of terminal benefits, two months' salary in lieu of notice and 12 months salary for unfair termination.

Two Month's Notice Pay

57. The grievant did not prove that he was entitled to a two months' pay in lieu of termination notice. The CBA between the parties herein was not placed before Court to prove that the grievant was entitled to a two months' notice pay, and neither did he produce his letter of appointment.
58. The terms of service are therefore unknown to the Court. In the premise, the one month statutory notice pay, is hereby awarded.

Compensation for unfair termination

59. The Court has found the grievant's termination unfair. This finding entitles the grievant to compensation in accordance with Section 49(4) and 50 of the [Employment Act](#), 2007.
60. The investigation conducted by the Respondent indicated that the grievant attempted to obtain information on the Respondent's employees unprocedurally. Although the grievant was a union official, I believe that there are structured ways for obtaining this information from an employer, as opposed to the means the grievant decided to employ. The grievant cannot thus be said to have been without fault.
61. I therefore find that for reason that the grievant contributed to his own dismissal, a seven (7) months' salary, would be sufficient compensation for the unfair termination, and is hereby awarded.

Terminal Benefits.

62. The grievant sought to be paid terminal benefits in form of service pay. The Respondent submitted that the grievant was a member of the NSSF and to which it remitted both employee and employer contributions on behalf of the grievant.
63. For reason that neither the CBA nor the grievant's letter of appointment was produced in evidence, the Court is unable to establish whether the grievant was entitled to either service pay or a gratuity in addition to the NSSF contribution.
64. To this end, I hold that this claim was not proved, and it fails and is dismissed.
65. In whole, I make the following orders in favour of the Claimant and against the Respondent: -
 - i. That the grievant was unfairly dismissed.
 - ii. Payment of One-month salary in lieu of dismissal notice at Kshs 35, 561/-
 - iii. 7 months' salary as compensation for unfair termination at Kshs 248,927/=



iv. Costs of the suit and interest thereon until payment in full.

Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
20TH DAY OF APRIL, 2023.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Haraka present for the Claimant

Ms. Thuku h/b for Mr. Gitonga for the Respondent

Ms. Christine Omolo- C/A

