Kenya Union of Commercial Food and Allied Workers v Chandarana Supermarket Limited (Cause 1455 of 2017) [2023] KEELRC 2094 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 2094 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1455 OF 2017

K OCHARO, J

MAY 31, 2023

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... CLAIMANT

AND

CHANDARANA SUPERMARKET LIMITED ..... RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated 19th July 2017, the Claimant Union instituted a Claim on behalf of its member, Antony Murangiri [the Grievant] against the Respondent, seeking the following reliefs:

    a. The Respondent to reinstate the grievant without loss of any benefits.

    b. Notice pay..... Ksh.43,122.76.

    c. Worked day..... Ksh.13,467.40.

    d. Annual leave..... Ksh.17,011.20

    e. Gratuity..... Ksh.80,803.55

    f. Full compensation..... Ksh.221,146.56

    g. Cost of the suit.

2. The Statement of Claim was filed together with the grievant's witness statement and documents that it intended to place reliance on as documentary evidence in support of the claim.

3. Upon being served with the summons to enter appearance, the Respondent entered appearance on 10th January 2017 and filed its Memorandum of reply on 30th January 2018.In the Response denied the claim and grievant's entitlement to the reliefs sought, were denied in toto.

4. Subsequent to the close of the pleadings, the matter was heard inter-partes on merit on 28th September 2022.

5. At the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents admitted as their documentary evidence.

The Claimant's case.

6. The Claimant avers that the grievant came into the employment of the Respondent on 2nd December 2010 as a shop attendant, at a monthly gross salary of Ksh.16, 397 The salary was inclusive of house allowance of Kshs. 2,397.

7. It is contended that the grievant rose through the ranks and promotions, consequently as at the time of holding the position of Product Manager at a monthly gross salary Ksh.21,561.28, inclusive of house allowance.

8. It was the Claimant's case that on the 19th April 2016, the grievant in the course of his employment worked up to the lunch hour, when he decided to proceed for a lunch break. Before exiting for the lunch, he went through security checks as per the Respondent's policy and practice. When he resumed duty at 2.00 p.m., he was into the change room by the Manager. Thereat he was asked whether he had any cloths in the room, he answered in the affirmative, and showed them [the manager and two supervisors] the polythene bag which had the same.

9. It is contended that when the grievant opened the polythene bag, after being told to do so by the Manager and the supervisors, six pieces of Dettol soap each weighing 90 grams were found therein. Consequently, he was asked by the Manager to give a written explanation by the following to the Respondent's Human Resource Manager. He obliged.

10. On the 20th April 2016, the Human Resource manager instructed him to be off duty for 7 days pending investigations. When he reported back to worm after the 7 days. He was served with a dismissal letter.

11. The grievant stated that he appeared before the Human Resource Manager and one Mr. Shikuku, who asked him to explain to them regarding how the soaps, got into his bag. Upon explaining himself, they gave him 7 days to investigate, and get back to them with the result thereof. He asserted that this was a task impossible as he wouldn't do any investigations while on suspension from duty.

12. He was not given a chance to appear before the Human Resource Manager and Mr. Shikuku accompanied by a colleague or a Union representative.

13. At the dismissal, he was given a cheque of KShs. 24,000 as his final dues.

14. The grievant asserted that the changing room was accessible to anybody. He knew not how the soaps got into his bag.

15. In his evidence under cross-examination, the grievant stated that he was employed by the Respondent as a shop attendant and his duties entailed working at its store.

16. He further contended that approximately 30 of the Respondent's employees would access the changing room. Throughout the day, the room was never locked.

17. He admitted that he was issued with a notice to show cause dated 19th April 2016 that required him to respond thereto by the following day, response which he gave. In the response, he admitted that some soaps were found in his bag. I

18. Contrary to the Human Resource Manager's report, he never mentioned that he was being set up by other workers, the two colleagues he mentioned were those who could support his case that he didn't get out with any soap.

19. He declined to pick the terminal dues that the Respondent was offering as in his estimation, the same was too inadequate.

The Respondent's case

20. The Respondent's case was presented by Ms Jane Mwangi who was its Human Resource Manager at the material time. She testified that grievant was employed as a shop attendant tasked with the responsibility of receiving goods in the Respondent's store which was located underground of its premises, placing in the shelves at the supermarket that was located upstairs.

21. It was her testimony that 8 pieces of Dettol soap were found in the grievant's bag that was in the dressing room. The room was situated outside the supermarket and could be accessed at any time. On the material day, shortly before lunch time, he had been seen get into the room. He was so spotted by a watchman, arousing interest to check his bag. This event led to the show cause letter dated 19th April 2016, being issued to him.

22. She told the Court that the Claimant was given seven days to look for evidence from the colleagues whom he had alleged were sabotaging him, but he brought forth none.

23. She further asserted that the grievant was taken through a disciplinary hearing, before his dismissal from employment.

24. When cross-examined, it was her testimony that prior to issuing the grievant with a notice to show cause letter, there were investigations. The investigations involved searching his bag.

25. She further testified that the watchman didn't allege that he had seen the grievant with the soaps into the dressing room, but that he saw him getting into the room yet he had not been checked by the security personnel. This attracted interest, leading to a search his bag.

26. She alleged that the grievant alleged that he was being sabotaged, prompting her to give him time to present evidence to support the allegation, but he failed to put forward any.

27. The witness admitted that the grievant was not accorded the right to accompaniment as required by the law.

28. As regards the failed conciliation process, the witness testified that she did attend two of the meetings that were set by the Conciliator but unfortunately didn't attend the third one as it escaped her minds.

The Claimant's submissions

29. It was submitted that the circumstances of the matter raised crucial questions which needed to be answered by the Respondent, but which were not. For instance, the dressing room was one that was being used by more than 30 people, how then did the management manage to identify the grievant's cloths, yet there were no lockers or labels that would aid the identification. The Respondent's premises had installed CCTVS, why weren't they used to resolve the puzzle? The dismissal letter indicated that the CCTV didn't" capture any suspicious behaviour of any other staff that day going out without search."

30. The totality of the material that was presented to Court by the Respondent clearly indicate that the Respondent's action against the grievant was anchored only on suspicion. The Respondent was not able to get statements from workers, as clearly brought out in the dismissal letter.

31. It was submitted that the disciplinary hearing was unfair and un-procedural as the grievant was not allowed to attend the meeting with a colleague or a union officer in accompaniment. Furthermore, the grievant was not given ample time to prepare for the said hearing. The Claimant relied on sections 41(1) and 44 (4) of the *Employment Act* 2007 in fortification of its submissions.

32. The Claimant submitted that the Respondent didn't not demonstrate that it had a valid and fair reason to dismiss the grievant from employment. A dismissal anchored on suspicion cannot be said to be one attracted by a valid and fair reason.

The Respondent's written submissions

33. The Respondent filed its written submissions on 12th January 2023 distilling three issues of determination thus;

    a. Whether the reasons for termination was fair and valid.

    b. Whether the due process was followed in the termination.

    c. Whether the Claimant is entitled to the reliefs sought.

34. The Respondent submitted that it behoves the employee alleging unfair termination to prove the same. In support of this point, reliance was placed on the holding in Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR, thus;

> " 16. However, section 47(5) puts a spin on this as follows –
>
> "For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."
>
> 17. The two sections may appear contradictory in terms, but this is not so taking into account the provisions of section 107 of the *Evidence Act*, which provides –
>
> "Whoever desires any court to give judgment as to any Legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
>
> 18. It is the court's considered view that sections 43(1) and 47(5) of the *Employment Act*, must be construed so as not to nullify the conventional and accepted law on the burden of proof.
>
> 19. Therefore, the Plaintiff must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the Claimant presents prima facie evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a

fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case on a balance of probabilities.

20. In the present case, the Claimant adduced evidence under oath to demonstrate that there was no valid reason to terminate his employment and that the employer did not follow a fair procedure. However, the records tendered by the Claimant himself, did not support that view because the impugned investigation report, contradicted the testimony by the claimant."

35. The material placed before this Court can only attract one conclusion, that the Claimant didn't establish that the dismissal of the grievant's from employment was unfair.

36. The grievant was issued with a show cause letter dated 19th April 2016, which clearly set out the allegations against the grievant. He was given an opportunity to respond to the same and indeed he did. A disciplinary hearing got slated for the 20th April 2016, but on this day, he made an allegation to the effect that all that was happening was an engineered sabotage by his colleagues, prompting the Respondent to give him seven days to bring forth evidence in support of the assertion. He didn't do so. It is incorrect for the Claimant to allege therefore that the seven [7] days were a suspension period.

37. That flowing from the investigations that it had carried out and the disciplinary hearing, the Respondent terminated the grievant's employment through its letter dated 27th April 2016, upon reasons that were put forth thereon.

38. By reason of the premises foregoing, it is clear that the Respondent adhered to, and demonstrated, that the law required of it as elaborated in the case of Bamburi Cement Limited v Farid Aboud Mohammed [2016] eKLR, thus; held:

> "Where a party makes a claim for unfair termination, the court must be satisfied of two things; the procedure employed in terminating the party's service and the reason or reasons assigned to the termination. The procedural requirement includes the termination notice under section 35 and the disciplinary hearing under section 41 of the Act. Where the employer does not issue the requisite notice under the law or in accordance with the terms of an employment contract, the employee is entitled to payment of salary in lieu of notice. On the other hand, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, or before summarily dismissing an employee, the employer is required to explain to the employee the reason for the intended action in the presence of another employee or a union official. Thereafter, the employer must hear the employee's representation before taking any disciplinary step. Termination is unfair under Section 45 of the Act if the employer fails to prove that the reason for the termination is valid, that the reason for the termination is fair in relation to the employee's conduct, capacity or compatibility, or based on the operational requirement of the employer, and that the employment is terminated in accordance with fair procedure."

39. On the reliefs sought the Respondent submitted that an order for reinstate cannot be availed to the grievant by operation of the law. True, section 49[3] of the *Employment Act* provides for reinstatement as one of the remedies if the termination is found to be unfair. However, section 12[3] [vii] of the Employment and Labour Relations Court, decrees that such a remedy cannot be available to the employee 3 years after the termination. It has been a period of more than 6 years since the termination the subject matter herein.

40. The Respondent submitted that, having been fairly dismissed, the grievant cannot be entitled to notice pay. His pay slip clearly shows that he was being compensated for unutilised leave days. The grievant was a member of NSSF, consequently by dint of the provisions of section 35[6], a relief under the head gratuity cannot be available to him.

41. The Respondent further submitted that the grievant is not entitled to the compensatory award of 12 months 'gross salary, as the dismissal was justified and in accordance with procedural fairness. To buttress this submissions reliance was placed on the case of United States International University v Eric Rading Outa [2016] eKLR.

Analysis and determination

42. From the pleadings, evidence on record as well as the submissions by the respective parties, the following issues present themselves for the determination thus:

    a. Whether the dismissal of the grievant was substantively and procedurally fair.

    b. Whether the Claimant is entitled to the reliefs sought.

    c. Who should shoulder the cost of the suit.

Whether the dismissal was substantively and procedurally fair.

43. Section 41 of *Employment Act* 2007, provides for the procedure to be followed by an employer before terminating an employee's employment or summarily dismissing an employee from employment. The procedure is mandatory, it embodies three components, the information/notification component-the employer must notify the employee of his or her intention to take action against him or her, and the grounds attracting the intention. Second, the hearing component-the employer must accord the employee an adequate opportunity to prepare and make a representation on the grounds. This Component also avails the employee the right to accompaniment, either by a colleague, where he or she is not a member of a trade unio or a union representative, where he or she is a member. Lastly the consideration component, the employer must consider the representations made by the employee and or the colleague or union representative as the case may be before making a decision.

44. In Hema Hospital v Wilson Makango Marwa [2015] eKLR, the Court of Appeal stated;

> " 20. As Radido ,J observed in Mary Mutundwa v Ayuda [2013] eKLR:
>
> The *Employment Act*, in a radical departure from the position which obtains under the common law and in Kenya prior to 2nd June 2008 has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever his /her termination is under contemplation by the employer if the ground for the termination relates to the employee's misconduct, poor performance or physical incapacity. The employee is by law even entitled to have a representative present".
>
> 21. This Court in CMC Aviation Limited v Mohammed Noor [2015] eKLR also reaffirmed that the dismissal of an employee in that case without according him an opportunity to be heard amounted to unfair termination."

45. There is no contest that following the alleged incident, the Respondent issued the grievant with a shoe cause show cause letter dated 19th April 2016 on which he was directed to submit his response by 20th April 2016, 4:00pm. The letter was clear about the issue that the grievant was supposed to address. He

complied and gave a written response on the same day. With this I am of a considered view that the first component which is notification was complied with.

46. The Respondent alleged that it conducted a disciplinary hearing on the 20th April 2016. I find considerable difficulty to be persuaded that on this day there was a disciplinary hearing or one that could fit the contemplation of section 41 of the *Employment Act*. The show cause letter set a deadline for the grievant's response for the 20th April 2016 at 4:00 pm, thus;

> " .....your written response is required by 20/04/2016 at 4:00 pm, if not received then a disciplinary action will be taken against you at the discretion of the management."

With this in my view, no disciplinary hearing would take place before the 4:00pm, of 20th April 2016. The Respondent's witness did not explain to court when this hearing date was fixed and how the grievant was invited to the thereto. There were no minutes availed to demonstrate that there was a disciplinary hearing.

47. I have carefully considered the handwritten document dated 20th April 2016, and conclude that the same cannot amount to minutes of a disciplinary hearing.

48. Assuming I am wrong to conclude that there was no disciplinary hearing on by reason of the foregoing premise, this Court could still be inclined to hold that if there were any disciplinary hearing, then the same was incomplete. The document mentioned above read in part;

> " .... Advised to give us more evidence.
>
> I have no doubt that this statement suggests that the hearing was adjourned to allow the grievant adduce more evidence in his defence."

49. However, further to this, there is no indication that the grievant did appear before any panel to adduce further evidence or state that he hadn't been able to get the evidence for that reason or the other. There is no evidence by the Respondent that a further hearing date was fixed after the 20th for this purpose. The decision to dismiss was therefore anchored on incomplete disciplinary proceedings.

50. The Respondent's witness admitted in her evidence under cross-examination admitted that the grievant was not accorded the right to accompaniment as stipulated under section 41 of the *Employment Act*.

51. There was no dispute that the grievant was a member of the Claimant union. Too, there was no dispute that the Collective Bargaining agreement that the Claimant placed before Court as evidence was the agreement obtaining and relevant at the material time. At clause 17, it provided for "the disciplinary procedure". I have carefully considered the stipulations therein and conclude that the procedure obtaining therein was not at all followed by the Respondent in dismissing the grievant from employment.

52. The clause provided inter alia for the composition of the disciplinary panel, that there must be written and signed minutes and that the employee affected should be given a two days' notice to appear before the panel.

53. Section 43 of the Act requires an employer in a dispute like the instant one, to prove the reason[s] for the termination, otherwise the termination will be deemed unfair by dint of the provisions of section 45. It is imperative to state however that it is not enough for the employer to prove the reason[s] but must further demonstrate that the reason[s] was fair and valid as required by the provision of section 45 (2) of the *Employment Act*.

54. The Respondent alleged that the separation between the grievant and it occurred when the latter was found in possession of six pieces of Dettol soap in his bag which amounted to theft. Though he admitted that indeed the pieces of soap were so found, he denied any knowledge as to how the same found their way into the changing room and the bag. He further denied having accessed the change room at any time before or during the lunch hour.

55. I have considered the summary dismissal letter, and more specifically the mention therein concerning the CCTV and what they captured on that day, thus;

> " ..... your are summarily dismissed for the following reasons;
>
> The soaps were found in your bag which was evident.The cameras did not show any suspicious behaviour of any employee that day; going out without search.The 'trap' is hearsay and no staff is willing to give a statement on this.

56. It was not alleged that the cameras captured the grievant going out without search or that he was seen getting into the change room at the time alleged or at any time after he had reported to work in the morning. The Respondent didn't explain to Court how it was possible for him to access the room without the cameras capturing the event. In light of the fact that this was a highly contested issue, it was imperative that the Respondent gives a satisfactory explanation.

57. The Respondent clearly concludes in the letter that the cameras didn't show any suspicious conduct of any employee [emphasis mine], this being so, how then could it reasonably adjudge the grievant guilty of the alleged misconduct?

58. It was common cause that the changing room was accessible to anyone. It was unrestricted. This fact could make it more imperative for the Respondent to tender sufficient evidence, that the grievant actually placed the pieces of soap in the bag. I hesitate not conclude that the Respondent didn't. The fact that the soaps were found in the grievant's paper bag, alone, without any other evidence linking him to the act of placing them therein, could in the circumstances of this matter not reasonably attract a conclusion that he was involved.

59. The Respondent's witness alleged that a watchman saw the grievant get into the changing room at around the lunch hour of the material day. The watchman is not name at any material point during the alleged disciplinary hearing, he gave no evidence in the presence of the grievant. He was not called to testify before this Court. In the circumstances of this matter, no evidence by any witness of the Respondent could be more vital than his. I cannot help but make an adverse conclusion that either the watchman never made the allegation or that had he been called to testify, he could have given evidence prejudicial to the Respondent's case.

60. It is my firm view that considering the totality of the circumstances of the matter, no reasonable employer would summarily dismiss an employee, that an item[s] had been found in his bag, without further linking him to the act of placing them there. In the premise, I conclude that the grievant was summarily dismissed without a fair and valid reason.

61. In the upshot the dismissal was both procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought.

a. Order of Reinstatement.

62. The Claimant urged this court to issue an order of reinstatement to work without loss of any benefit. Section 49 (3) (a) of the *Employment Act* provides for reinstatement as one of the remedies for the unfair

termination of the employee's employment. However, by dint of section 12 (3) (vii) of the *Employment and labour Relations court Act*, Court's power to grant the relief is to a certain extent limited. The order can only be given within three years of the date of disengagement. Apparently, it is now more than six years since the separation, thus the Claimant is statutorily barred from being availed the relief.

b. Notice pay

63. The Claimant urged the Court to award him Ksh.43,122.76 as salary in lieu of notice. Having noted as I have hereinabove that the termination of the claimant was both procedurally and substantively unfair and taking into consideration Clause 19 (b) of the Collective Bargaining Agreement on record that provides:

> " After the completion of the probationary period, services may be terminable by either party giving notice as follows
>
> a. Employees with1 to 5 years' service,1 months' notice or pay in lieu thereof.
>
> b. Employees with 5 years and above service, 2 months' notice or pay in lieu thereof."

64. The Claimant had worked for the Respondent for more than six years. He is thus awarded Ksh.43,122.76 as 2 months' salary in lieu of notice.

c. Salary for the Worked days

65. The employees are entitled to remuneration for the work done, withholding the employees' salary is against the fair labour practices. Section 20(2) of the Act enjoins the employer to prepare itemised records of payment made to the Employee including salary. The Respondent contends that the grievant was paid for the worked days without furnishing any proof in support thereof. In the premise, I am persuaded by the Claimant that the grievant was not paid and hereby award Ksh.13,467.40 under the head.

d. Annual leave.

66. The Claimant sought annual leave of Ksh.17,011.20.I have considered Clause 8 of the parties Collective Bargaining Agreement and the same provides:

> " Where employment is terminated, after completion of the three or more consecutive months' service, the employee will be entitled to pro-rata leave with full pay for each completed month of service in such period. The employee shall receive pay in lieu of such leave."

67. The grievant was entitled to leave or compensation for unutilised leave days. The Respondent didn't tender any evidence to rebut the grievant's evidence that he did not utilise his leave days and that he is entitled to the relief. By reason of this premise, I award him the KShs. 17,011.20

Gratuity

68. The Claimant urged the Court to make an award of Ksh.80,803.55 as gratuity pay. Clause 26 of the Parties Collective Bargaining Agreement provides:

> " Upon termination of employment by either party, an employee shall be paid gratuity at the rate of 19 days for each completed year of service."

69. The grievant worked for the Respondent for a period of five years and five months at the time of his dismissal. I hereby award the Claimant gratuity as tabulated hereunder:

21,558 X19/30 X 5.5/2 Years = Ksh.59,285 as gratuity pay.

e. Compensation for the unfair termination.

70. The Claimant sought for a compensatory relief in favour of the grievant to an extent of 12 months' gross salary, for unfair dismissal. The authority to make this award flows from the provisions of section 49 of the Act. Circumstances of each case influence the making of the award. Having found that the grievant's dismissal was both procedurally and substantively unfair and the length of time he was under the Respondent's service, I conclude that he is entitled to 6 months' gross salary as compensation for the unfair dismissal, pursuant to the provisions of section 49[1][c] of the *Employment Act*, thus, Ksh.129,348.

71. In the upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

a. A declaration that the of the dismissal of the grievant was both procedurally and substantively unfair.

b. 2 months' salary in lieu of notice..... Ksh.43,122.76.

c. Salary for the worked days in April..... Ksh. 13,467.40.

d. Pay for unutilised leave days ..... Ksh. 17,011.20.

e. Gratuity..... Ksh.74,756.79.

f. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*..... Ksh.129,348.

g. Cost of the suit.

h. Interest at court rates on the awarded sums from the date of this judgment till full payment.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MAY, 2023.

OCHARO KEBIRA

JUDGE.

In the presence of:

Ms. Manene.....For the Claimant

Ms. Akonga.....For the Respondent