



Kenya Union of Commercial Food and Allied Workers v Sameer Agricultural and Livestock Kenya Ltd (Cause E020 of 2020) [2023] KEELRC 1021 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1021 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E020 OF 2020**

HS WASILWA, J

MAY 4, 2023

BETWEEN

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

AND

SAMEER AGRICULTURAL AND LIVESTOCK KENYA LTD RESPONDENT

JUDGMENT

1. The claimant, a registered trade Union within the laws of Kenya, sued the Respondent by a Memorandum of claim dated March 3, 2020, alleging that one of its members, Benson Odoyo Achieng (herein after referred to as the ‘grievant’) was unfairly terminated without notice for disciplinary hearing. The claimant prayed for the Court to find in its favour and; -
 1. Declare the Respondent’s actions unprocedural, unfair and unlawful.
 2. The Respondent be ordered to reinstate the grievant back to Employment unconditionally.
 3. In the alternative to prayer 1 and 2 above, the court makes the following Orders;-
 - a. One-month salary in lieu of notice of Kshs 30,000.
 - b. Salary for August, 2018 of Kshs. 30,000.
 - c. 15 days worked in September, 2018 of Kshs 17,308.
 - d. 7 months’ pro-rata leave of Kshs 12,250.
 4. Certificate of service.
 5. Cost of the suit to the claimant.
 6. Any other order that the Honourable Court deems fit to address the cause of Justice.



Claimant's case.

2. The claimant states that the grievant was employed by the Respondent on January 30, 2018 as a boiler operator on a 3-year contract, earning a gross salary of Kshs 30,000. Upon employment, he was deployed to Salгаа plant.
3. The claimant states that the parties to this suit do not have any recognition agreement, neither have they negotiated any Collective Bargaining agreement but the grievant is an active member of the Union, having joined it on March 20, 2018.
4. The circumstances that led to the grievant's termination is that on September 14, 2018 at about 0900hrs, the grievant was confronted and attached by one Mr Amod, the Salгаа plant production manager for exiting the building through the milk reception area while on a work related emergency call. The grievant reported the issue to Sachangwan Police base who issued him with OB number 04/14/9/2018.
5. About a week later on September 20, 2018, the grievant was suspended from duty on allegation that he was the one that instigated the confrontation with Mr Amod. He was then invited for a show cause hearing on September 24, 2018 at 10.00 am.
6. It is stated that on the day when the show cause hearing was scheduled, the grievant was given his termination letter.
7. On December 2, 2018, the Claimant through its Nakuru Office, wrote to the Respondent seeking to address the issue of the termination and since no response was received, they escalated the issue to the labour office on December 21, 2018
8. Mr G O Abuto was appointed as the conciliator in the matter. The conciliator then invited both parties for a meeting on April 25, 2019 and further directed the parties to forward their proposal. Since no resolution was arrived at, the Conciliator issued a certificate of unresolved dispute on April 30, 2019.
9. The claimant contends that the termination of the grievant was unfair because the grievant was not given time to respond to the offenses raised against him instead he was directed to respond on the same day of the hearing and then terminated on the same day.
10. During hearing the grievant testified as CW-1 and adopted his witness statement of March 3, 2020 which in summary stated that the circumstances that led to his termination is that on September 14, 2018 he got a work related emergency call and while exiting the building he used the milk reception area instead of the main gate. He was stopped by Mr Amod and directed to use the main entrance. He explained to Mr. Amod his situation and requested to use the Milk reception area, however instead of allowing him, he began hauling insults and physically confronted him, forcing him to defend himself. He then reported the issue to the police station who issued him with OB number 04/14/9/2018. He was later on dismissed on that ground. He urged this Court to allow the claim as prayed.
11. Upon cross examination he testified that clause 8 of the Employment contract expected him to comply with all policies. He stated that the Milk reception area door was an emergency door and on that particular time, he was having a work related emergency in relation to a stem that had stopped working, which could have caused the milk to spoil and therefore he needed to rescue the situation urgently.
12. He testified further that contrary to the allegation by the Respondent, he was the one that was hit by Mr Amod. That he reported the issue to the Human Resource office and the police station where he recorded a statement.



13. On further cross examination, he testified that he did not participate in the hearing because the Respondent forced him to write a resignation letter. On whether he cleared from the Respondent, he answered in the negative and stated that he was not allowed past the gate of the Respondent and therefore was unable to clear from them.
14. On re-examination he stated that he was suspended then invited for hearing but was not given a show cause letter. He added that he received his termination letter via email on the day of the show cause disciplinary hearing when he was still within the Respondent's premises.

Respondent's case

15. The Respondent filed a defence on June 9, 2022 and admitted to employing the grievant as particularized in the claim but denied the Locus standi of the claimant to bring this suit on behalf of the grievant as per section 54 of the [Labour Relations Act](#) and urged this Court to dismiss the suit with costs.
16. Contrary to the allegation by the claimant, the Respondent stated that the grievant is the one that attacked Mr Amod on September 14, 2018 and not the other way round. He added that the grievant refused to follow lawful instructions given to him and instead became agitated and assaulted his supervisor, Mr Amod.
17. It is averred that the confrontation caused Mr Amod serious Injuries that necessitated his immediate medical attention. The issue was reported to Sachangwan Police post where the Mr. Amod was issued with OB.
18. The Respondent stated that the grievant's actions was callous, hostile and untenable as it threatened the safe working environment of other working employees, which was in breach of his terms of employment and Employment laws.
19. It is contended that the grievant was guilty of gross misconduct, an issue that earned him suspension from employment. He was then invited for disciplinary hearing where he submitted his response but refused to participate in the hearing before the disciplinary committee. Due to his uncooperative behaviour and unwillingness to participate, the committee resolved to terminate his services in accordance with Clause 11 of the Employment Contract.
20. The Respondent admitted to not participating in the conciliation proceedings because the Claimant was the one representing the grievant when there was no relationship between it and the claimant, neither where they aware that the grievant was a member of the Union.
21. The Respondent maintained that it complied with all laws in terminating the services of the Grievant and urged this Court to dismiss this suit with costs to the Respondent.
22. During hearing, Paul Maina, the Respondent's legal officer testified as RW-1 and adopted his witness statement of May 31, 2022. He testified that the grievant was not allowed to pass through the Milk reception area because it was prohibited by company policies to avoid instances of petty theft. He stated further that he is testifying because Mr Amod left the Respondent's employment.
23. On cross examination, he testified that the Milk Reception area is a no go zone. He admitted that it is an emergency exit but that the same was not contemplated to be used to pass through. He admitted that the grievant was not sued on any case of assault. He also stated that he was not aware of any proceedings with the police.



Claimant's Submissions.

24. The claimant submitted on three issues; whether the disciplinary hearing process was procedurally fair, whether the dismissal was justified and whether the claimant is entitled to the reliefs sought.
25. On the first issue, it was submitted that the grievant was invited to a show cause disciplinary hearing and instead of being given audience, he was forced to resign from service and issued with termination letter on the same day contrary to the dictates of section 41 of the *Employment Act*. It was argued that the Respondent acted without undue regard to the principles of Fair Administrative Action. In this they relied on the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, where the Court held that:-

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

26. They also relied on the case of *Christian Samba Obath v Fossil Fuels Limited* [2016] eKLR, where it was held that;

“The procedure was faulty. The letter to show cause as seen above, issued complete with a date for the disciplinary hearing. There was no room for the Respondent to consider the explanation given by the Claimant in answer to the letter to show cause. The Claimant was prejudged. The hearing which took place was not objective, but a rerun of the show-cause process. The Claimant was asked to repeat his explanation and a decision promptly made. Notice to show cause is a procedure that must be taken seriously and looked at by the Employer independently of the process of disciplinary hearing. The need for proceeding with the disciplinary hearing must be weighed carefully and objectively, in light of the response made to the letter to show cause. These processes are not mere formalities, one following the other; there must be some justification in rejecting reply given to the letter to show cause. The setting down the matter for hearing, even before the Employee has shown cause, raises doubt on the seriousness of the Employer in considering what the Employee has said, in showing cause. In this case, the Court finds procedure was faulty and unfair”

27. On that basis, they submitted that the Respondent's actions did not adhere to the dictates of section 41 of the *Employment Act*.
28. On whether the termination was justified, it was submitted that the termination was arrived at because the disciplinary hearing collapsed. It was argued that since the disciplinary hearing proceedings collapsed, the grievant was termination unheard, which actions are in violation of the *Employment Act*. It was further argued that even if the termination was done in accordance with Section 44 (4) of the *Employment Act* on Gross misconduct, the employee ought to be subjected to disciplinary hearing.
29. It was submitted that, the Respondent being the custodian of all employees' records, ought to have justified the termination of the grievant as per Sections 10, 43 and 74 of the *Employment Act*.



Accordingly, that since no justification for termination was demonstrated the termination and the process was unfair.

30. On remedies sought, the claimant urged the court to allow the claim for maximum compensation relying on the case of *Paul Mumo Kitavi V ACME Containers Limited* [2019] eKLR. Additionally, that the termination was not justified in the circumstances and thus the claim is due and urged for it to be allowed as prayed.

Respondent's Submissions.

31. The Respondent submitted on three issues; whether the grievant's contract of service was unlawfully terminated, whether the claimant is entitled to the reliefs sought and who is entitled to the costs of this suit.
32. On the first issue, it was submitted that the claimant in the statement alleged that the termination was unfair because he was asked to give a written statement on the day of the disciplinary hearing but on hearing, the position was changed that the grievant was forced to resign. It was argued that the allegation that the grievant was forced to resign was an afterthought and therefore should be disregarded by this Court.
33. On the reason for termination, it was submitted that the grievant was terminated due to gross misconduct that occurred on September 14, 2018 where the grievant failed to follow lawful directions from his supervisor, Mr Amod and instead, confronted, hit and injured his supervisor. That he was suspended and in the letter, the Respondent gave detailed reasons for the suspension. That he was later invited for disciplinary hearing on September 24, 2018 but he refused to defend himself in the disciplinary hearing. It was submitted that the grievant admitted during hearing to accessing the milk reception area, a prohibited area as per the company policy despite being requested by Mr. Amod, the production manager to use the main entrance.
34. The Respondent contends that the suspension letter gave the details of the offense levelled against the grievant and the same formed the basis for the disciplinary hearing held on 24th September, 2018, therefore that the grievant was informed of the charges raised against him and given adequate time to respond in line with section 41 of the *Employment Act*. Further that the disciplinary committee meeting was held as scheduled but that the grievant refused to make his defence on the mere fact that the Committee requested for a written response.
35. The Respondent maintained that the reasons for termination were for insubordination, disobedience and imprudence. On insubordination and disobedience, it was submitted that the failure by the grievant to use the correct gate instead of the Milk Reception Area, even after receiving direction from the production manager, amounts to insubordination and ground for termination. In this they relied on the case of *Konig V Kanjee Naranjee Properties Limited* [1968] EA 233 where the Court held that;

“a master is entitled to dismiss his servant summarily for willful disobedience of his masters lawful and justifiable orders, which is his duty to obey.”
36. They also relied on the case of *Simon P W Karimi V Kenya Commercial Bank Limited and another* [2005] eklr where the Court found the termination of an employee, who had willfully refused to take orders of his employer, justified.



37. To further buttress their argument, the Respondent cited the case of *Korich v Fairview Hotel Limited* (Cause 594 of 2018) [2023] KEELRC 499 (KLR) where the Court relied on the case of *Dede Esi Amanor Wilks v Action Aid International* [2014] eKLR, where the Court held that;

“Employers generally, are entitled to have harmonious working relationships in their Organizations, and can do so by weeding out trouble makers, eccentrics and disruptive Employees from their Organizations. Employers can tolerate mild eccentricities or idiosyncrasies, but cannot reasonably be expected to tolerate downright impossible or unmanageable Employees.”

38. Similarly, that since the grievant disobeyed the Respondent’ Policy in accessing a prohibited area and further confronted his manager, the termination is justified on those circumstances and as provided for under section 44(4)(e) of the *Employment Act*.

39. On the refusal by the grievant to continue with the disciplinary hearing, the Respondent submitted that the failure to defend himself is attributed to the grievant and the Respondent cannot be faulted. In this they relied on the case of *Banking Insurance & Finance Union(Kenya) V Barclays Bank of Kenya Ltd* [2014] eKLR where the Court held that

“the employer cannot be faulted when an employee invited to a disciplinary hearing fails to attend without any justifiable cause.”

40. On the locus for the claimant to act on behalf of the grievant, it was submitted that there is no recognition agreement or CBA between the Respondent and the claimant, neither did the grievant inform the Respondent that he has joined a trade Union. He argued that without any recognition Agreement or CBA, the claimant lacked locus to represent the grievant as provided for under Section 54 of the *Labour Relations Act*. To support this argument, they relied on the case of *Communication workers Union V Safaricom Limited* [2014] eKLR where the Court held that;

“The question here with regard to locus standi is that the Claimant union has no recognition with the Respondent and even where such recognition is lacking; there is no CBA between the parties to regulate terms and conditions of work. Without recognition by an employer, a trade union, even where registered as such, becomes a by-stander waiting by the road side for instructions. Similar to a lawyer, though having a first class honours lacks a certificate of practice as an advocate of the High Court of Kenya. Such a lawyer though well versed in law and well suited to give legal advice to various citizens, lacks the capacity to stand in Court as an advocate representing a client.”

41. They also cited the case of *Kenya Union of Employees of Voluntary and Charitable Organizations(KUEVACO) V Board of Governors and Maina Wanjigi Secondary School*[2015] eKLR where the Court stated as follows;-

“Without Recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organization, such a trade union without Recognition cannot file a trade dispute within the meaning of the *Labour Relations Act*. The starting point would be to apply the provisions of sections 54(3) and (6) for such a union to have the locus standi in dealing with trade disputes, Recognition agreements or any negotiations for and on behalf of members and their employers.”



42. On the reliefs sought, it was submitted that the claimant has not proved the case herein to warrant any relief being granted. Nevertheless, that the grievant was terminated for gross misconduct and thus not entitled to prayer one. On the claim for reinstatement, the Respondent submitted that the grievant has already been replaced and the prayer is not tenable.
43. On the claim for compensation under section 49 of the *Employment Act*, it was submitted that this prayer was merely introduced at submission stage and none was prayed for in the statement of claim as is required under the rules, therefore the same is not tenable and should be disregarded by this Court. To support this argument, they relied on the Court of Appeal case of *Independent Electoral and Boundaries Commission and Another V Stephen Mutinda Mule & 3 others* [2014] eKLR where the Court relied on the case of Adetoun Oladeji (NIG) LTD vs Nigeria Breweries PLC SC 91/2002, where Judge Pius Aderemi J.S.C. expressed himself ;
- “...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
44. On that basis, the Respondent urged the Court to ignore the prayer for compensation under section 49 of the *Employment Act*, for lacking merit and for the reason that the same was introduced at submissions stage.
45. On cost of this suit, it was submitted that cost follow event as provided for under section 27(1) of the *Civil Procedure Act* and since the claimant has not proved its case to the required standard, they should be compelled to pay costs of this Suit to the Respondent.
46. In conclusion, the Respondent urged this Court to consider the totality of its submissions and dismiss the suit herein with costs.
47. I have examined all evidence and submissions of the parties herein.
48. The respondents averred that the claimant lacks locus to bring the claim against the respondent on behalf of the grievant as they have no recognition agreement with the claimant.
49. In answer to this submission, I wish to refer to Article 41 of the *constitution* which grants anybody a right to join and participate in the affairs of a trade union.
50. This right is not limited to any recognition agreement between a union and an employer. The assertion by the respondent that the claimant lacks locus due to no recognition between them is not tenable as the grievant has a right to join a union and be represented by that union recognition notwithstanding.
51. Having resolved the issue of locus, I note that this issue was referred for conciliation by the claimant.
52. A conciliator was appointed to concile the parties. The parties were invited to a meeting by the conciliator but the respondent declined to attend.
53. The conciliator couldn't resolve the matter and so referred the matter to court.
54. The respondents have averred that the grievant was infact the one in the wrong and that he assaulted his supervisor and failed to follow lawful instructions.



55. The respondent even aver that they reported the matter to police but they produced no evidence to prove this point.
56. The respondents also aver that they invited the grievant for a disciplinary hearing but that he refused to participate in the committee hearing.
57. The grievant on his part indicated that he was invited to a disciplinary hearing.
58. He indicated he reported the assault by his supervisor to the police vide OB No 05/14/9/2018. He then received a letter suspending his services from September 14, 2018 and also instructing him to attend a show cause hearing on September 24, 2018.
59. He avers that when he attended the hearing, he was forced to write a statement which he declined and was then served with a termination letter on the same day.
60. It is not clear from the evidence before me what transpired during the hearing. The minutes of the disciplinary hearing have not been presented before me.
61. The respondents had an opportunity to attend a conciliation meeting which they also failed to attend and present evidence to clarify what happened and even allegations if so made against the grievant.
62. In the absence of any clarity concerning the matter I find the grievant has established his case as against the respondent.
63. The respondents aver that they paid the grievant money prayed for but there is no evidence before court on the same.
64. In the circumstances of the case, I find for the claimant and I award the grievant as prayed as follows:-
 1. 1 Month salary in lieu of notice = 30,000/=
 2. Salary for August 2018 = kshs 30,000/=
 3. 15 days worked in September 2018 – Kshs 15,000/=
 4. Prorata leave of 7 months = 12,250/=
 5. 8 months salary as compensation for the unlawful termination = 30,000 x 8 = 240,000/=TOTAL = 316,225/=
6. Issuance of a Certificate of Service
7. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF APRIL, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jaoko for Claimant - present

Achieng for Masese for Respondent – present

Court Assistant – Fred

