



**Kenya Building Construction Timber and Furniture Industries Employees Union v Victory Construction Ltd (Cause 1648 of 2015) [2023] KEELRC 1580 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1580 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 1648 OF 2015**  
**BOM MANANI, J**  
**JUNE 22, 2023**

**BETWEEN**  
**KENYA BUILDING CONSTRUCTION TIMBER AND FURNITURE**  
**INDUSTRIES EMPLOYEES UNION ..... CLAIMANT**  
**AND**  
**VICTORY CONSTRUCTION LTD ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The facts giving rise to this dispute are not complicated. The Grievant avers that he was an employee of the Respondent earning a salary of Ksh. 10,000.00 until his contract of service was terminated on 5<sup>th</sup> July 2013. According to the Grievant, the Respondent's decision to terminate the employment contract between the parties was without valid reason and in disregard of due process.
2. On the other hand, whilst the Respondent admits existence of the employment relation between the parties, it contends that the contract was terminated after the Grievant absconded from duty. According to the Respondent, following the Grievant's failure to report on duty, a decision was taken to summarily dismiss him from employment.
3. The Grievant had been hired by the Respondent to guard the Respondent's yard where road construction machinery was stored. It does appear that the Grievant was guarding the site together with another employee of the Respondent. Whilst the Grievant was charged with guarding the facility at night, his colleague was entrusted with the day shift.
4. On 22<sup>nd</sup> June 2013, a battery from one of the machinery was stolen. The Grievant's position is that the theft occurred during the day shift when his colleague was on duty. Consequently, the Grievant denies responsibility for the loss. On the other hand, the Respondent's case is that the loss happened when the Grievant was on duty. As such, he bears responsibility for the theft.



5. It is the Grievant's case that following this incident, the Respondent terminated his contract of service. The Grievant asserts that he was not given a chance to defend himself on the charge leveled against him by the Respondent. Further, the Grievant contends that there was really no reason to terminate his contract on account of the theft incident since it happened when he was not on duty.
6. On the other hand the Respondent maintains that the Grievant is responsible for the loss of the battery. The Respondent posits that when the Grievant was confronted about the matter, he left his place of work and did not report back. That following the Grievant's absence from duty, the Respondent summarily terminated his contract of service.

### **Issues for Determination**

7. The parties testified orally in court. From their pleadings, evidence and submissions, the following issues fall for determination:-
  - a. Whether the Claimant has locus standi to prosecute this action on behalf of the Grievant.
  - b. Whether the Grievant's employment contract with the Respondent was lawfully terminated.
  - c. Whether the parties are entitled to the reliefs that they seek through their respective pleading.

### **Analysis Whether the Claimant has locus standi to prosecute this action on behalf of the Grievant**

8. The Respondent has objected to the Claimant's participation in the action. The Claimant argues that the Grievant is its member and that the Claimant filed this suit as a Trade Union representing the Grievant.
9. According to the Claimant, it is yet to enter into a recognition agreement with the Respondent. However, the Claimant argues that it has recruited several employees of the Respondent to be its members. Therefore, it is entitled to represent these members notwithstanding that the parties have yet to finalize the recognition process.
10. On the other hand, the Respondent contends that recognition is a prerequisite for the Claimant to represent its members. Since the parties have no recognition agreement, it is the Respondent's position that the Claimant had no locus standi to file this action on behalf of the Grievant. In any event, the Respondent contends that the Claimant has not furnished the court with proof that the Grievant was actually its member.
11. The question whether a Trade Union ought to have a recognition agreement with an employer before venturing to represent its members who are employees of such employer has in my view now been settled. To begin with, section 54 of the [Labour Relations Act](#) which deals with recognition agreements is clear that these agreements are only a prerequisite for the employer and a Trade Union to enter into the process of collective bargaining. They are not a requirement for other purposes such as representing employees who are members of the Trade Union in court.
12. Second, section 22 of the [Employment and Labour Relations Court Act](#) appears to recognize the right of a Trade Union to represent its members in court proceedings. There is no indication from this provision of statute that this right is conditional upon the Trade Union having a recognition agreement with the employer of the affected employees.
13. Although there was uncertainty on this matter with Judges in the Employment and Labour Relations Court pronouncing themselves differently on the subject, the Court of Appeal has since brought



the matter to rest. This was through the decision of *Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR.

14. The Claimant has produced in evidence check off forms signed by the Grievant authorizing the Respondent to deduct union dues from his salary for the benefit of the Claimant. Further and contrary to the submissions by counsel for the Respondent, the Grievant testified that in the course of his employment to the Respondent, he used to make payments of union dues to the Claimant. In my view, this is sufficient evidence of the Grievant's membership to the Claimant. Consequently, the answer to the first question is that the Claimant has locus standi to prosecute this action on behalf of the Grievant.

#### **Whether the Grievant's employment contract with the Respondent was lawfully terminated**

15. The Respondent maintains that it had a lawful reason to terminate the Grievant's contract of service. According to the Respondent the fact of loss of its battery whilst the Grievant was on duty is evidence that he was either an accomplice to the theft or the theft occurred because of his negligence. Either way, this conduct constitutes gross misconduct. That being the case, the Respondent contends that it was entitled to summarily dismiss the Grievant from employment.
16. The Respondent asserts that the Grievant absconded from duty. As such, the only option that remained open to the Respondent was to terminate the Grievant's contract.
17. The law on termination of employment contracts is encapsulated in sections 41, 43, 44 and 45 of the *Employment Act*. In order to lawfully relieve an employee of his employment, the employer must have valid reason for the decision. Besides, termination of the contract must be in accordance with due process. Under sections 43 and 45 of the *Employment Act*, the employer bears the burden of proving the validity of the termination.
18. Section 41(2) of the *Employment Act* obligated the employer to accord employees accused of gross misconduct the opportunity to be heard before their employment contracts are terminated. It provides as follows:-

“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.”
19. From the foregoing, it is clear to me that the Respondent had a duty to convene a disciplinary session for the Grievant before terminating his contract of service. The fact that the Grievant had allegedly absconded from duty did not negate this duty.
20. An employer must make every effort to trace the whereabouts of an employee accused of absconding from duty with a view to subjecting him to the disciplinary process. It is only when the employer can demonstrate that he has made unsuccessful attempts at getting the employee that he may be permitted to sidestep the disciplinary hearing session (see *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR).
21. There is no evidence that the Respondent made any efforts to ascertain the whereabouts of the Grievant in order to subject him to a disciplinary process if indeed it is true that the Grievant had absconded from duty. Contrary to the submissions by counsel for the Respondent that the Grievant was invited



to show cause but absconded from duty, there is no evidence on record that the Grievant was indeed issued with a notice to show cause.

22. Even if it were to be assumed that the Respondent had valid reason to terminate the Grievant's employment, it is evident that it failed to ensure due process in processing the release of the Grievant. Consequently, the decision to terminate the Grievant's employment was procedurally flawed. It is so declared.

### **Whether the parties are entitled to the reliefs that they seek through their respective pleading**

23. The Claimant has prayed for a number of monetary reliefs. These include pay in lieu of notice, pay for accrued leave, service pay and compensation for unfair termination.
24. Whilst the Grievant pleaded accrued leave, he did not provide evidence on the matter either through his written witness statement or orally in court. The only time this matter featured in the trial is at the stage of cross examination of the defense witness when he was asked whether the Grievant was entitled to annual leave. In response, the witness confirmed that the Grievant was indeed entitled to annual leave and that he had been compensated for his accrued leave days.
25. It is true that the obligation to prove a disputed term of a contract of service which the law requires to have been reduced into writing but which the employer failed to put into writing lies with the employer. However, this presupposes that the employee has placed preliminary material on the contested issue before the court. The Grievant had a duty to lay a basis for his claim by raising the matter not just in his pleadings but also through his testimony in court. Only then can it be said that the Grievant had presented preliminary evidence which the employer would be required to rebut if the claim is contested. In the absence of such preliminary evidence, the claim for accrued leave pay has not been established. It is therefore dismissed.
26. The Grievant was purportedly summarily dismissed for gross misconduct following the loss of the Respondent's battery and alleged absconding of duty. As has been indicated in the preceding parts of this judgment, the Respondent's decision to summarily dismiss the Grievant from employment was procedurally flawed. Consequently, the Grievant is entitled to have received notice under section 35 of the *Employment Act* before his contract was terminated. Absent this notice, the Grievant was entitled to be paid salary in lieu of notice under section 36 of the *Employment Act*. Accordingly, I award the Grievant Ksh. 10,000.00 being one month's salary in lieu of notice to terminate his contract of employment.
27. At the time that he was relieved of his contract of service, the Grievant had been in the Respondent's employment for slightly over seven (7) years. There was no evidence that during the currency of his contract, the Grievant had been enrolled to any provident scheme. He is therefore entitled to service pay under section 35(5) of the *Employment Act*. A departing employee's service pay is ordinarily computed at the rate of the employee's salary for fifteen (15) days for every year worked (see *Ruth Pamela Adhiambo v Maseno University* [2017] eKLR). For the Grievant, this works out to Ksh. 5000 x 7 = Ksh. 35,000.00.
28. I award the Grievant compensation for unfair termination that is equivalent to his gross salary for nine (9) months that is to say, Ksh. 90,000.00. In making this award, I have considered the length of service by the Grievant to the Respondent. I have also considered that the Grievant committed no act that can genuinely be said to have contributed to the decision to terminate his contract of service.
29. The Grievant shall also be paid interest on the amounts awarded at court rates from the date of this decision.



30. The award is subject to the applicable statutory deductions.
31. As the proceedings were prima facie not commenced or continued through representation by a lawyer within the meaning of the Advocates Act but by a Trade Union as sectioned under the Labour Relations Act and the Employment and Labour Relations Court Act, I am unable to grant the Grievant costs in terms of the Advocates Act. Accordingly, the Grievant is to only recover the actual disbursements incurred in prosecuting this Claim.
32. The Respondent is ordered to issue the Grievant with a Certificate of Service.

Summary of the Findings and Award

- a. The Claimant has the requisite locus standi to sue on behalf of the Grievant.
- b. The Respondent's termination of the Grievant's contract of employment is declared unlawful.
- c. The Grievant is awarded salary in lieu of notice to the terminate contract of service assessed at Ksh. 10,000.00.
- d. The Grievant is awarded service pay of Ksh. 35,000.00.
- e. The Grievant is granted compensation for unfair termination of Ksh. 90,000.00.
- f. The Grievant is awarded interest on the amounts awarded at court rates from the date of this decision.
- g. The Grievant is allowed to recover only the actual disbursements incurred in mounting this claim. Otherwise, there is no order as to costs as contemplated under the Advocates Act and the Advocates (Remuneration) Order that issued pursuant thereto.
- h. The award is subject to the applicable statutory deductions.
- i. The Respondent is ordered to issue the Grievant with a Certificate of Service.

**DATED, SIGNED AND DELIVERED ON THE 22<sup>ND</sup> DAY OF JUNE, 2023**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12<sup>th</sup> July, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

**B. O. M MANANI**

