



**Kenya Plantations and Agricultural Workers Union v Kakuzi Limited
(Cause 973 of 2015) [2023] KEELRC 2001 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2001 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 973 OF 2015
MA ONYANGO, J
JULY 31, 2023**

BETWEEN
**KENYA PLANTATIONS AND AGRICULTURAL WORKERS
UNION CLAIMANT**
AND
KAKUZI LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 29th May 2015, seeking the following prayers against the Respondent;
 - i. A declaration that the Respondent’s actions locking out and/or dismissing the Grievants are unlawful and wrongful
 - ii. An order compelling the Respondent to reinstate the Grievants unconditionally and without loss of benefits.
 - iii. Costs of this Cause
 - iv. Any other relief that this Honourable Court may deem fit and just to grant.
2. The Claimant amended the Memorandum of Claim on August 4, 2016 and a Further Amended Memorandum of Claim on November 13, 2019. In the Further Amended Memorandum of Claim the Claimant seeks orders that:
 - i. A declaration that the Respondent’s actions locking out and/or dismissing the Grievants are unlawful and wrongful.
 - ii. An order directing the Respondent to pay the Grievants their emoluments and other entitlement including unpaid leave for their period of dismissal.



- iii. An order directing the Respondent's to pay the Grievants as per the tabulation annexed to this further amended memorandum of claim dated November 12, 2019.
 - iv. Costs of this cause
 - v. Any other relief that this Honourable Court may deem fit and just to grant.
3. The Respondent filed a Memorandum of Defence dated June 6, 2019 which it amended and further amended on July 24, 2020. It denied all the averments made in the Further Amended Memorandum of Claim.

The Claimants' Case

4. The Claimant aver that it has a Recognition Agreement with the Respondent by virtue of which they have negotiated several Collective Bargaining Agreements (CBA) stipulating the terms and conditions of service for employees who are members of the Claimant.
5. It is contended that the parties embarked on the negotiation of the CBA for the period 2014-2015 on 14th November, and agreed on several clauses but hit a deadlock in respect of 27 clauses.
6. According to the Claimant, it filed Nairobi ELRC Cause No. 775 of 2015 on March 21, 2014 seeking orders in the nature of compelling the Respondents to conclude the CBA for the year 2014-2015 which suit was still pending for hearing before the Court at the time material to this suit. That when the said matter came up for mention on May 22, 2015 before the Principal Judge, the court directed the matter to be heard on September 21, 2015 and that in the intervening period, the parties do attempt conciliation to resolve the outstanding issues.
7. It is averred that on May 23, 2015 at around 6.40a.m, the Respondent's Divisional Manager, one Samir Wason called for a General Meeting of the employees at the Respondent's premises to address them on developments in the said court case. That at the meeting the said Samir Wason informed the employees that the court had scheduled the case for hearing on September 21, 2015 and that it had directed the parties to go for conciliation. That after being addressed, the employees left for their respective places of work but were called back by the Respondent's General Manager for Horticulture, Mr. Paul Mbugua who informed the employees that Cause No. 775 of 2014 had been withdrawn on the orders of the Honourable Court and that the court had directed the parties to resolve the matter out of court.
8. It was further averred that the said Mr. Mbugua informed the employees that those employed under fixed term contract should not expect to receive salary arrears.
9. It was contended that on May 25, 2015, all employees assembled on parade as usual to be allocated daily tasks and once again, Mr Mbugua addressed the workers on the position of Cause No. 775 of 2015 and repeated his previous sentiments sending workers into panic upon which they requested that they be addressed by the Respondent's Managing Director, but the said Managing Director refused to address them.
10. According to the Claimant on the May 26, 2015, a conciliation meeting was held at 4pm in the Respondent's premises where both parties were represented and it was during the meeting that the Respondent's representatives informed the Claimant that it had dismissed some employees.
11. It is further the Claimant's averment that the Respondent was non-committal on the request by the Claimant that it reverses its decision to dismiss the employees and despite being prevailed upon to the Labour Officer to negotiate a return to work formula.



12. The Claimant contended that the labour officer also made a finding that the Respondent had violated the provisions of the [Employment Act](#) as it had kept employees on fixed term contracts for successive years with some employees being employed under such contracts for up to 18 years.
13. It was the Claimant's contention that the employees reacted to misinformation and falsehoods propagated by the Respondent's manager and agent and that the Respondent should not have locked them out and/or dismissed them since it was the author of the problem.
14. The Claimant maintained that the Respondent set up the employees to withdraw labour with a premeditated motive of dismissing them because the Respondent. That the Respondent immediately thereafter issued about 300 employees with dismissal letters without affording them an opportunity to be heard.
15. It was further averred that 96 of the dismissed employees were serving under open ended contracts and did not participate in the events leading to the lock out and dismissal.
16. The Claimant stated that Respondent's actions are unconscionable, unlawful and without any colour of right as it is the Respondent that engineered the problem at its premises and cannot sanitize its actions by punishing employees who reacted to misleading information delivered to them by their employer whose instructions they dutifully and religiously followed.
17. The Claimant in furtherance of its case called Gideon Ochieng Oyawa, the Claimant's Area Secretary based in Murang'a County who testified as CW1. CW1 basically reiterated the contents of the further Amended Memorandum of Claim as summarised above.
18. On Cross examination, CW1 maintained that Mr Samir the Managing Director communicated to the employees the correct information on the status of the case and that it was Mr. Mbugua who misinformed the employees leading to the lock out. He stated that he did not attend the meeting where Mr Mbugua addressed the employees and that he had no evidence to show that the said Mbugua addressed the employees.
19. Josephat Ronje Ireri testified as CW2, and introduced himself as a shop steward at the Respondent company. He reiterated that he was a permanent employee of the Respondent but was dismissed from employment as a result of the strike. He denied ever being issued with a show cause letter or a warning letter.
20. CW2 gave a chronology of the events of May 25, 2015. He stated that Mr. Mbugua called for a meeting and informed the workers that ELRC Cause No. 775 of 2014 had been dismissed and that fixed term workers would not be paid arrears of salary arising from the CBA.
21. On Cross examination, CW2 maintained that employees on permanent terms did not go on strike. That it was only employees on fixed term contract who were disgruntled by the remarks of Mr. Mbugua.
22. CW3, Beatrice Ngalyuka Musyoka introduced herself as a shop steward at the company. She adopted her witness statement as her evidence in chief and maintained that she was not called for a disciplinary hearing and neither was she issued with a show cause letter.

The Respondent's Case

23. The Respondent on its part denied the allegation that it unlawfully and wrongfully locked out and dismissed its employees.



24. The Respondent further denied the allegations that Mr. Mbugua addressed the employees on May 25, 2015. It was the Respondent's averment that Mr. Mbugua was at Horticulture West Division and that he could not have been in two different places at the same time, making speeches at both horticulture East and West Divisions.
25. It was the Respondent's case that the unionisable employees in the pack house who were under Mr Mbugua reported to work and carried out their duties on the said date. That the employees at the horticultural section failed and/or refused to work and engaged in an illegal and unprotected strike at 7 am despite having been issued with job cards.
26. It was averred that there had been leaflets circulating in which the employees had indicated that they intended to go on strike and thus it was evident that the strike was pre-planned by the employees and had nothing to do with Mr. Mbugua as alleged by the Claimant.
27. The Respondent averred that the Grievants did not abide by the requirements of Section 76 of the Labour Relations Act by failing to issue the required 14 days written strike notice. That the Claimant failed to exhaust the grievance procedure under the Recognition Agreement and the Labour Relations Act in terms of meeting and conciliation proceedings to discuss the alleged grievances.
28. It was contended that the employees' action of engaging in a strike particularly during the avocado harvesting season, was a malicious and well calculated measure meant to inflict major losses to the Respondent's business.
29. The Respondent called Andrew Kiragu Kuruga who testified as RW1. He informed the court that he was the Respondent's Internal Audit Manager until June 2022 when he retired. It was his testimony that the Grievants were summarily dismissed from employment as they went on illegal strike. That they did not issue notice of the strike.
30. Upon cross examination by counsel Ingati for the Claimant, RW1 maintained that the Respondent's management had followed the laid down procedures in terminating the Grievants. Although he stated that the Grievants were issued with notice to show cause letters, he conceded that the said notices which formed the bundle of the Respondent's documents were not signed. He also stated that the Grievants did not attend the disciplinary hearing. RW1 admitted that the 14 employees that were in the pack house when the strike began were also terminated from employment even though they had not participated in the strike.
31. Charles Ario Oguna testified as RW2. He informed the Court that he was the Respondent's Security Officer. He stated that on May 25, 2015 he was driving a Motor Vehicle pick up Reg No. KBW 145Z at the Respondent's premises, workshop area, when employees who were on strike vandalised the said vehicle. He stated that he was not aware whether a strike notice had been issued. It was his testimony that one Rogers Oundu and himself were tasked to serve the Grievants with the show cause letters which they did. He stated that during the strike, employees on permanent terms continued to work.
32. During cross-examination, RW2 stated that he hand delivered the show cause letters to employees of Horticulture West individually. However, he conceded that the Grievants were not on strike on 27th and 28th May 2015.

Determination

33. From the pleadings, the evidence of the parties as well as the submissions on record the issues that fall for this Court's determination are;
 - i. Whether the termination of the Grievants was substantively and procedurally fair,



- ii. Whether the orders sought by the Claimant on behalf of the Grievants are warranted
34. It is common ground that there was a suit on the CBA pending for determination in court at the time material to this suit and that it is that pending suit that triggered the circumstances that led to the instant suit.
35. Both parties also agree that the Respondent's representatives prepared a brief on what transpired in court on May 22, 2015. The same position was relayed to the workers at a meeting with the Claimant's Area Secretary on May 23, 2015.
36. The Claimant however avers that the information relayed by the Respondent's Manager for Horticulture Mr. Paul Mbugua was to the effect that Cause No. 775 of 2014, the CBA case, had been withdrawn and the parties directed to go for conciliation. That Mr. Mbugua further informed the workers that the employees on fixed term contract who were the majority at about 67% of the workers, would not benefit from payment of CBA arrears. It was the Claimant's position that the fixed term contract employees were not paid arrears from the previous CBA for the period 2012-2013, a claim that the Respondent did not deny. That the averments by the Respondent's Manager alarmed the fixed term contract workers causing them to demand a meeting with the Respondent's Managing Director which demand was not granted hence their refusal to report to their work stations.
37. CW1, the Claimant's Area Secretary testified that when the workers refused to go to their work station the Respondent opted to send letters to the head office of the union in Nakuru which is far away, instead of contacting him at Makuyu which was nearby.
38. He testified that he arrived at the Respondents office at 11.15 am but they declined to engage him to settle the dispute. That after trying and failing to engage the Respondent's Managers he contacted the Labour Officer at Murang'a County Labour Office. That the Labour Officer was not available immediately and promised to go to the Respondent's main office the following day to resolve the dispute.
39. CW1 testified that the employees were dispersed by the police using teargas. That the following morning, on May 26, 2015 when the employees reported for work they found that the police had blocked all entry points.
40. CW1 testified that the meeting chaired by the Labour Officer took place at the Respondent's main office on 26th May 2015 at about 4pm. That the Respondent informed CW1 and the Labour Officer that they had already dismissed the more than 300 employees. That the request of the County Labour Officer to the Respondent to rescind the decision was rejected.
41. It was the testimony of CW1 that there were no disciplinary hearings and that the employees never received the dismissal letters. That the show cause letters were never received by the employees as there was no signature to confirm receipt by the employees. That the dismissal letters were forwarded to the Labour Office on May 26, 2015.
42. The Claimant pointed out that both the show cause and dismissal letters are dated May 26, 2015 which is proof that there was no disciplinary hearing.
43. Under cross examination CW1 stated that he arrived at the Respondent's offices at 11.15 am on May 25, 2015 after receiving an email that the workers were on strike but the Respondent declined to engage him.



44. He stated that the workers were addressed by Mr. Samir who gave the correct position. That since Mr. Mbugua was senior to Mr. Samir, the workers considered his position to be the company's final position.
45. CW2 and CW3 who were both shop stewards reiterated that Mr. Mbugua informed the workers on 23rd and again on May 25, 2015 that the court case on CBA had been dismissed and fixed term contract workers would not be paid arrears.
46. CW3 testified that the workers did not go on strike. That they sat down and demanded to be addressed on what Mr. Mbugua had stated. That instead of addressing them the Respondent called the police who dispersed them.
47. Both CW2 and CW3 denied receiving show cause letters or invitations to attend disciplinary hearing notices.
48. The Respondent maintained that the strike was illegal and that it issued show cause letters to the employees before they were dismissed. That some of the dismissed employees filed appeals and were heard and the dismissals were either upheld or reversed.
49. Section 44(4) of the *Employment Act* sets out grounds of gross misconduct which entitle an employer to summarily dismiss an employee. Section 41 however provides that before dismissing such an employee the employer must give the employee a hearing. Section 41 specifically requires an employer to hear an employee in the presence of either a fellow employee or a union representative of his choice. The section is reproduced below:

Section 41

1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 2. 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.
50. In the instant case the strike is alleged to have occurred on 25th May 2015. The notice to show cause which was also the disciplinary hearing notice is dated May 26, 2015. A copy of one of the letters is reproduced below: -

May 26, 2015

Mr. John N. Ndungu

Horticulture – West

PR 604481

C/O Kakuzi Ltd

Re: Notice to Show Cause & Disciplinary Hearing Notice

You are hereby invited to submit in writing to the Company any reasons you wish to on;



Why you failed to comply with the management instructions to return to work given to you on the May 25, 2015 at 08:00 hours and the subsequent instruction at 10:00 hours. You absented yourself from work without any lawful cause and you failed to heed management's instructions to carry out your duties.

You are suspended on full pay pending a disciplinary hearing.

This written submission should be produced at the disciplinary hearing as to why disciplinary action should not be taken against you. The details of the hearing are attached to this letter.

Faithfully

Signed

Paul Mbugua

Assistant General Manager

51. The Respondent further issued another notification to attend hearing on the same date as below:

Kakuzi Ltd

May 26, 2015

Mr. John N Ndungu

PR 604481

Horticulture West

Notification to attend a disciplinary enquiry

This document serves to inform you that a formal complaint was lodged by Kakuzi Management in that on 25th May 2015 you engaged and participated in unprotected industrial action;

And

You failed to respond to management instructions on May 25, 2015 to return to normal work.

Please note that a disciplinary hearing will be held on May 26, 2015 at 0800 hours at Horticulture West Office

1. You are requested to prepare for the case timeously
2. You are advised that you have the right to representation by a friend or colleague or employee organization office bearer, who is a full time employee of the company.

Management.....signed date: 25/5/2015

Acknowledgement of receipt

Employee: date:

Take note that the proceedings will continue in your absence, should you fail to appear at the proceedings, without proper reason and without contact having been made with management

52. The letter of summary dismissal is also dated May 26, 2015. The same is reproduced below:

May 26, 2015

To: Mr. John N Ndungu

Pay roll No.: 604481



RE: Summary Dismissal

Reference is made to the disciplinary hearing held at H/WESS on Tuesday May 26, 2015 for which you did/did not attend.

After carefully reviewing your case, the Company has come to the conclusion that your explanations are unsatisfactory and has decided to summary dismiss you from employment with effect from Wednesday May 27, 2015 on the account of gross misconduct as envisaged in Section 44(4) of the Employment Act 2007, the Labour Relations Act 2007 and section 8 of the Collective Bargaining Agreement.

Upon normal clearance of your terminal benefits, if any, you will be paid the following:

1. Wages earned up to the last working day
2. Pro-rata leave earned but not utilised
3. Overtime worked but not paid.
4. You will also be issued with a Certificate of Service.
5. Please note that the above payments are subject to statutory deductions and any monies that you may owe the company.
6. You are required to vacate the Company house within seven (7) days in compliance with Clause 17 of the current collective Bargaining Agreement.

Yours faithfully

For: Kakuzi Limited

Signed

chairman disciplinary meeting

CC KPAWU

53. From the foregoing it is evident that the Respondent did not comply with the provisions of the Employment Act. The strike is alleged to have occurred on 25th and May 26, 2015. The letters state that the employees failed to return to work at 800 hours and 1000 hours on May 25, 2015. The notification to attend a disciplinary enquiry dated 26th May 2015 are on the face thereof signed on May 25, 2015. The employees were required to attend the hearing at 800 hours on the same day that the letter is dated meaning that they were required to attend the disciplinary meeting before they received the notification.
54. The letters of dismissal state that the explanation of the employees was not satisfactory yet it is clear that the employees did not have the opportunity to respond to the show cause letters or to attend the disciplinary hearing at 800 am on the very date of the letter. The provisions of the Act are not cosmetic and are not intended to be superficially applied.
55. It has further been stated by the Claimant that the Respondent called in the police as soon as the employees staged a sit in demanding to be addressed by the Respondent's Managing Director and the police dispersed the employees. It is therefore doubtful whether there was a strike and not a lockout.
56. It is obvious that the whole situation was stage-managed to send the employees home to ensure that there was no opportunity to resolve the situation.



57. It is a matter of common knowledge that whenever there is an alleged strike parties meet to discuss the issues giving rise to the same and negotiate a return to work formula. The parties' recognition agreement sets out a procedure to be followed in the event of disagreement. The Respondent ignored all these.
58. In the instant case it is alleged that the Respondent refused to engage CW1 who arrived at the scene at 11.15 am. They also refused to heed the advise of the Labour officer called in by the Claimant to assist the parties reach an amicable resolution.
59. The Respondent's witness RW1 and 2 admitted on cross examination that the dismissals were indiscriminate and included employees who were never involved in the alleged strike.
60. It is evident from just the contents and sequence of the letters alleged to have been issued to the employees by the Respondent that the Respondent did not serve the Grievants with the letters to show cause and or the hearing notices. Even had they been served there was no time for the Grievants to prepare for a disciplinary hearing or to contact their union for representation.
61. Further, there is no evidence that all the workers who were summarily dismissed took part in the alleged unprotected strike. From the reasons given for absence on 25th and May 26, 2015 in the Appeal Forms at pages 39 to 106 of the Claimant's bundle dated 10th June 2019, it is evident that had the Grievants been given a hearing a good number would have given valid reasons for not being at work on the date they were alleged to have engaged in an unprotected strike.
62. The evidence on record shows that the fixed term contract employees wanted to be addressed by the Managing Director as they had received conflicting information about the position of the CBA case that was pending in court. They were particularly concerned as they had not been paid arrears when the immediate past CBA was implemented. They thus had a genuine concern which the Respondent ought to have addressed.
63. It is further evident that the employees were dispersed by police on May 25, 2015 and were therefore unable to report to work on May 26, 2015 when they have been alleged to have been on strike as they were denied entry by the police. The evidence on record is that they were denied entry on that day.
64. The Respondent has submitted that the Claimant did not issue 7 days' notice as required under Clause 10 of the parties CBA. That there was a leaflet circulated over the weekend of the impending strike which in their opinion was premeditated. The Respondent however have not shown what action they took to engage either the Claimant or the fixed term contract employees whose issues the alleged leaflet referred to.
65. The allegation that the Claimant did not take any action when informed about the workers refusal to report to their stations of duty is not borne by the evidence of the said Respondent to the effect that the Claimant's Area Secretary responded to the Respondent's letter and went to their offices and a meeting was held with him at 12 noon.
66. The Respondents have further not given valid reason for termination of the employment of the Grievants who were undergoing training at the Pack House at the material time.
67. From the totality of the evidence on record it is my finding that the termination of the services of the 99 Grievants did not comply with fair procedure and neither did the Respondent have valid reason to terminate the services of the Grievants. The Respondent did not comply with either the provisions of the [Employment Act](#) or the recognition agreement on resolution of disputes between the parties. I therefore declare the dismissal of the Grievants unfair.



68. The Claimants tabulated the remedies due to each of the Grievants. The same is attached as an addendum to the Further Amended Memorandum of Claim. According to the tabulation the Grievants seek the following:
- a. Salary for 26 days
 - b. Notice
 - c. Gratuity
 - d. Leave
 - e. Arrears
 - f. Rest days
 - g. Compensation
69. Having found that the termination of the employment of the Grievants was unfair, they are entitled to all the items claimed in the tabulation. The Respondent states that the employees were paid for days worked, leave, and rest days. That the payments were made on the date of dismissal. I have not seen a tabulation of what the Respondent paid to the Grievants except for Veronica Wanza Munywoki, who was paid kshs. 424 on account of prorated leave only, and Joel Kyengo Kagori who was paid kshs. 6970 on account of prorated leave and leave traveling allowance.
70. The Respondent did not comment on the heads of claim except CBA arrears for which it relies on the decision of Patrick Ouma Owinyo v Paper Converters Limited [2015] eKLR wherein the court adopted the decision in Kenya Chemical & Allied Workers Union v E A Industries (Unilever(K) Limited in Cause 41 of 2001 and Kenya Engineering Workers Union v Heavy Engineering Works Ltd Cause No. 100 of 2010 where the decision of Cockar J as follows:
- “...the CBA becomes effective after it is registered by the Court and applies only to those employees who are in employment after the CBA has been registered. Those who left employment before the registration of the CBA are not entitled to any arrears as it is a principle of the law of contract that a person can only be bound by an agreement if he/she is privy to the contract.”
71. Section 59 of the *Labour Relations Act* which was enacted in 2007 after the said decisions is in my view clear on the subject and provides that the CBA is binding on both employers and employees who were in employment on the commencement date of the CBA even where they have since left employment. The position stated in the cases relied upon by the Respondent is no longer tenable as the Act is explicit on the issue. I therefore find the Grievants are entitled to arrears of CBA for the duration of the CBA that they were in employment.
72. It is the Respondent’s position that the Grievants are not entitled to notice, gratuity and compensation because their termination was valid.
73. Having found the termination of the Grievants unfair, they are entitled to the same.
74. I accordingly award the Grievants the following:
- a. Salary for 26 days
- I award each of the Grievants salary for days worked up to May 27, 2015 being the effective date of termination according to the letters of dismissal. I award as per tabulation of the Claimant.



b. Notice

Having found the dismissal of the Grievants unfair, I award each one of them pay in lieu of notice according to their respective length of service as per CBA Clause 13. The same is awarded as per tabulation of the Claimant.

c. Gratuity

The employees are awarded gratuity as per clause 9.7 of the CBA depending on number of years of service as per tabulation of the Claimant.

d. Leave

Each employee is entitled to pay in lieu of any leave earned but not taken.

e. Arrears

The Grievants are entitled to the arrears as already stated above.

f. Rest days

The Grievants are entitled to any rest days worked and not paid.

g. Compensation

Having found the dismissal of the Grievants unfair they are entitled to compensation.

- i. The Grievants who were engaged in the pack house and were not among the fixed term employees who staged a sit in are each awarded 12 months' salary as compensation since the termination of their services was unwarranted at all. Both RW1 and RW2 testified that permanent employees were not involved in the alleged strike. On the material day they were undergoing training at the Pack House.
- ii. Grievants who had served for up to 6 years are awarded 6 months' salary as compensation.
- iii. Grievants who had served for more than 6 years up to 10 years are awarded 10 months' salary as compensation
- iv. Grievants who had served for more than 10 years are awarded 12 months' salary as compensation.

75. In awarding the compensation I have taken into account the length of service of the Grievants and all relevant circumstances including those set out at section 49(4) of the *Employment Act*.

76. The Respondent shall pay the Claimant's costs for this suit.

77. Interest shall accrue from date of judgment.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY, 2023.

M. ONYANGO

JUDGE

