



**Kenya Plantation & Agricultural Workers Union v Flamingo Horticulture
– Kingfisher Farm (Employment and Labour Relations Cause
E023 of 2022) [2023] KEELRC 1651 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1651 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E023 OF 2022**

HS WASILWA, J

JULY 5, 2023

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT

AND

FLAMINGO HORTICULTURE – KINGFISHER FARM RESPONDENT

JUDGMENT

1. The claimant Union sued the respondent by a Memorandum of claim dated 6th June, 2022, claiming that two of its members; Judith Nekesa Juma and Margaret Muthoni Kiarie (herein after referred as the grievants) were unfairly terminated from employment. They prayed for the following reliefs;
 1. An Order directing the Respondent; -
 - a. To unconditionally reinstate the grievants herein;
 - b. To pay the grievants for the entire period within which they were dismissed.
 - c. To pay the grievants in respect of all the leave days due to them at the time of reinstatement.
 - d. To pay the grievants leave and travelling allowance.
 2. Should prayer 1 above fail, an order directing, the respondent to:
 - a. Pay the grievants gratuity for the years they had served with the Respondent at the rates provided for in the CBA;
 - b. Pay the grievants for days worked and not paid up to the time of their unjustifiable dismissal.



- c. Pay the grievants house allowance from the time of dismissal until the time of judgment.
- d. Pay the grievants monthly salary for a period of twelve (12) months as compensation for unfair termination.
- e. Pay the grievants 8 months prorated leave;
- f. Pay the grievants leave travelling allowance for the period of dismissal;
- g. Pay the grievants in lieu of notice of termination;
- h. Pay the grievants any overtime and/or bonus owed if any.
- i. Pay the grievant damages for unlawful, illegal and unfair dismissal;
- j. Pay the grievant the cost of the cause;
- k. Interest on (a), (b),(c),(d),(e),(f),(g),(h), (i) and (j) above;
- l. Any other relief this Honourable Court deems fit to grant.

Claimant's case.

2. The claimant states that the Respondent herein employed Judith Nekesa Juma in November, 2018, while Margaret Muthoni Kiarie was employed in November, 2017. They were both employed as general Labourers and deployed to harvesting department.
3. It is alleged that, during their cause of employment, on 18th May, 2019, the grievants used abusive, threatening and insulting language to their supervisors and on 22nd May, 2019 they absented themselves from their proper place of work from 7 am to 10 am without any justifiable reason. Further that the grievants behaved themselves in a manner that is disrespectful and insulting to a person in authority.
4. As a result of this, the Respondent issued the grievants with notices to show cause dated 7th June, 2019 with instructions to respond before close of Business on 11th June, 2019. Having the deadline in mind, the grievants responded to the letter on 10th June, 2019 denying the allegation raised in the show cause letter.
5. The disciplinary hearing took place on 12th June, 2019, where the grievants were found culpable of the offenses raised against them and they were dismissed by the letters of 25th June, 2019 for gross misconduct.
6. Upon the termination, the claimant escalated the issue to the ministry of labour, where a conciliator was appointed by the letter dated 29th October, 2019. After several meetings, the parties could not agree and the conciliator issued a certificate of disagreement, leading to the filling of this suit.
7. The claimant states that the grievants were not given a chance to be heard before the termination, therefore that the termination was unfair.
8. Both grievants testified in support of their case with Judith Nekesa Juma, testifying as CW-1 and adopted her witness statement of 6.6.2022. she denied abusing anyone on 18th May, 2019. She stated that she was off duty on 17th May, 2019. It is her case that on 18th May, 2019 she reported to work a bit late because her vehicle was involved in an accident. That Margaret and Jane were ahead of her and she ran to catch up with them. while running she was holding secateurs ready for work which her colleagues advised her to hold it properly because it would hurt someone. She maintained that she



never abused any one and was surprised when she met with her supervisor one Jeremiah at the Green house who informed her that she was fired.

9. Upon cross examination, she testified that she was off duty on 17th May, 2019 and on reporting to work on 18th May, 2019 she was bit late and from the changing area she ran to catch up with Margaret and Jane and on the way she passed by Mr. Sang who was the gender Representative. She stated that it was Jane that said the secateurs could harm someone in the private part and she agreed with her.
10. On further cross examination, she admitted that it was during the welfare meeting where the issue of using dirty language arose and her name together with Margaret was mentioned. The next day she was directed by her supervisor to record statements and the foreman informed them later that they were fired. On the reason of her absenteeism from work from 7 am to 11 am, she stated that on 22.5.2019 she was harvesting and needed to talk to the welfare representative, therefore she stepped out to look for the welfare representative, though she did not seek for permission. She admitted receiving notice to show cause and being invited to disciplinary hearing, accompanied by a colleague of choice one Moses William Baraza. Later on she was terminated. She admitted receiving her June salary. She added that she said the secateurs will pierce someone on a bad place not a private place.
11. Margaret Muthoni Kiarie, testified as CW-2 and adopted her witness statement of 6.6.2022. She testified that on the material day she was on shift at water point, when Judith came running with a secateurs and she commented that the tool could hurt her. That on 22nd May, 2019, she reported to work as usual when she was told to write a statement. They were later on sacked. She maintained that they never abused anyone and therefore did not know why they were fired.
12. On cross examination, the witness testified that she never threatened to cut someone. She admitted that when they were told to record statement they told the supervisor the foolscap was small but that they complied with the disciplinary process till appeal but she was dismissed.

Respondent's case

13. The Respondent entered appearance on the 30th November, 2022 and filed a defence to claim on the 17th January, 2023 denying the allegations raised in the claim and maintaining that the termination was done fairly.
14. The Respondent stated that Judith Nekesa Juma was employed on permanent basis with effect from 16th November, 2018 as a general worker in Job Group A band 1 earning a gross salary of Kshs. 10,435 made up of basic salary of Kshs 7935 and House allowance of 2500.
15. Margaret Muthoni Kiarie on the other hand was employed by the Respondent on permanent basis with effect from 16th May, 2018 as a general labourer, earning basic salary of Kshs 7593 and house allowance of 2500, all adding up to Kshs 10, 093.
16. The employment contract for the grievants gave either party a leeway to terminate the contract by giving one-month notice or one month's pay in lieu of notice.
17. The circumstances leading to the grievants termination is that on 22nd May, 2019, they engaged in a squabble at work alongside other staff and on other occasion, they absconded themselves from duty without permission, causing the Respondent to issue them with offense sheet, which they responded to. Investigations were carried out and recommendation were made for disciplinary action to be taken against them. Consequently, the Respondent issued them with notices to show cause and called them separately for disciplinary hearing that was conducted on 12th June, 2019.



18. After deliberations, the Respondent's disciplinary committee, resolved to terminate their services and issued them with termination letters dated 25th June, 2019. They both appealed the decision of the disciplinary committee on 26th June, 2019. In response, the Respondent convened appellate panel and considered the appeal on 18th July, 2019 which eventually upheld the decision of the disciplinary committee.
19. The matter was taken to the ministry of labour for determination but the parties did not agree.
20. The Respondent maintained that it had every reason to discipline the grievants and that it subjected them to the disciplinary hearing which was properly conducted as such the termination was fair and the claim herein is without basis.
21. The Respondent stated that it paid the grievants their salary till 24th June, 2019, together with one way leave travelling allowance. That there was no outstanding leave by either grievant, therefore that nothing is owing to the grievants.
22. The Respondent also denied the pecuniary jurisdiction of this Court.
23. During hearing, the Respondent called 4 witnesses in support of their case. The first witness was Peter Ngigi who testified as RW-1 and adopted his witness statement of 5.4.2023 and added that there was a meeting convened on the issue relating to use of abusive language by the grievants and other colleagues. On 22.5.2019, the grievants absented themselves from work without permission. On cross examination, he testified that he was not present when the grievants used abusive language such as "mama kanisa" meaning pretending to be good. He maintained that the grievant left work without permission.
24. Millicent Adhiambo, testified as RW-2 and adopted her witness statement dated 1.4.2023 and stated that on 18th May, 2019 while she was removing blind shots, Judith, Margaret and Jane were at the water point drinking water when she heard Judith saying in Kiswahili 'we will ensure we beat the oldest ladies(long serving in company) then insert Secateurs inside their private parts'. The use of such language was reported and a meeting was convened by the welfare to verify the said used of abusive words and the employees unanimously admitted to hearing the said grievants using abusive words.
25. On cross examination, she testified that she together with Rina and Sarah were the oldest serving ladies at the company and therefore the words were directed on them. She also stated that she has been labeled 'Mama kanisa' and the said grievants referred her by that name on the material day.
26. Rina Aswan Ocholla testified as RW-3 and adopted her witness statement of 1.4.2023 and corroborated the testimony by Millicent Adhiambo and stated that on 18th May, 2019 as she was walking to the green house behind Gender representative, one Ms. Sarah, they met Jane Wamalwa, Margaret Muthoni and Judith Nekesa near the water point chatting when Judith Nekesa said "Nitapiga mmama mpaka niingize makasa huko mbele-private part". Then the three ladies laughed and then Jane Wamalwa added that 'ata mimi nitapiga mmama na niingize kwa mtaro'. She added that the language was used occasionally by the grievants at workplace and even in of Elizabeth the acting supervisor who never took any action on them.
27. The fourth and last witness was Tabitha Ndunge who testified as RW-4 and adopted her witness statement of 22.2.2023 and produced the Respondent's list of documents dated 16.1.2023.
28. On cross examination, she testified that she has has been the Human Resource manager for more than 10 years. she told this Court that when the issue of abusive language arose, she advised the security department to investigate and record statement from the complaints and the suspected people. Once



that was done, the grievants were summoned for disciplinary hearing. She admitted that the grievants did not mention names when hauling the insults but used the term 'old women' and two ladies at their workforce being Millicent and Rina had served the Respondent for several years and where the oldest. She testified that she paid the grievant their dues on termination that included salary for the month of June, 2019.

Claimant's Submissions.

29. The claimant submitted on two issues; whether the grievants' termination was unfair, unlawful and unjustifiable and whether the grievants are entitled to the reliefs sought in the claimant's memorandum of claim.
30. On the first issue, it was submitted that the grievants in this case were terminated on allegations of using insulting, threatening and abusive language, for absenting themselves from work and for occasionally behaving in a manner that was disrespectful to persons place in authority over them. The reasons for termination, according to the claimant, were not supported with any evidence, both during the disciplinary hearing and in this case. Further that the grievants defence was never considered before they were fired. It was argued that the Grievants were not allowed to face their accuser during disciplinary hearing and that they were not given an opportunity to cross examine them. Therefore, that the Respondent terminated the grievants from employment on unsubstantiated claims which is in violation of the provisions of sections 41, 43 and 45 of the *Employment Act*. In support their argument they relied on the decision by Makau J in *Cherokewa Mrisha V Civicon Limited* [2014] eklr.
31. The claimant also relied on the case of *Loice Otieno V Kenya Commercial Bank Limited* [2013] eklr where the Court held that;-

“an employer who resorts to summary dismissal/instant dismissal will be required to demonstrate that the summary dismissal meets the requirements of sections 43 and 45 by proving the reasons for termination and that the reasons are valid and fair, where an employee challenges the summary dismissal.”

32. It was submitted that the reason for absenteeism was not justified because the grievants explained their whereabouts and stated that they were out of the place of work for a few hours looking for their welfare supervisors, before writing the statement that they had been ordered to write.
33. On whether the grievants are entitled to the reliefs sought, the claimant relied on the case of *Kenfreight (EA) Limited V Benson K Nguti* [2016] eklr where the Court held that;-

“A termination of employment by an employer is unfair in terms of section 45, if the employer fails to prove;

- “(a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason -
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedures.”

Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reason or if the reason itself or the procedure of termination are themselves not fair. Specifically, it will be unfair if it relates to;



- i. a female employee's pregnancy,
 - ii. the going on leave of an employee,
 - iii. an employee's membership of a trade union,
 - iv. the participation of an employee in the activities of a trade union,
 - v. the employee's seeking office in a trade union, or his refusal to join or withdraw from a trade union,
 - vi. an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability,
 - vii. an employee's initiation of a complaint or legal proceedings against the employer unless done irresponsibly, or
 - viii. an employee's participation in a lawful strike.”
34. Similarly, that the Respondent failed to prove the reason for termination before the disciplinary committee and before this Court as is required under the Section 107 of the *Evidence Act*. In this they relied on the decision by this Court in *Everyline Mamami V One Acre Fund* [2014] eklr where the Court stated that;

“The respondents contention is that the claimant often abused junior staff and harassed them and this behavior falls under S. 44 (4) (d) of *Employment Act* which states:-

“using abusive or insulting language, or behaving in a manner insulting to his employer or to a person placed in authority over him by his employer.”

The question then is whether the claimant did commit this offence...There is no proof that the claimant abused any staff or used insulting language. The reasons for which the claimant was therefore dismissed in the termination letter do not fall under S. 44(4) of *Employment Act* and do not amount to acts of gross misconduct warranting summarily dismissal. Given that the claimant didn't commit acts of gross misconduct, was her termination lawful? Termination would have been lawful if due process had been followed.”

35. In conclusion, it was submitted that the termination fell short of the requirements under the law as such the grievants should be fully compensated as required by law.

Respondent's Submissions.

36. The Respondent submitted from the onset that the Union does not have any locus to present this suit on behalf of the grievants because there is no evidence produced to affirm the grievants are members of the Union. Without such locus, the Respondent urged this Court to dismiss this suit in its entirety. In this they relied on the case of *Kenya Union of Commercial and Food allied Workers V Martin Njeru Mwea* [2020] eklr.
37. On whether the grievant were terminated unfairly, it was submitted that the burden of proof for the parties is provided for under section 47(5) of the *Employment Act* which must be discharged by the claimant but have failed in this case.



38. On reason for termination, the Respondent submitted that Judith Nekesa Wamalwa was terminated for using abusive language to their employees on 18th May, 2019, For absenting herself from work from 0700 hrs. to 1000 hrs. without permission and for refusing to obey lawful orders from her superior.
39. On hauling abusive words on her colleagues, the Respondent submitted that Rina Aswa adopted her statement that stated categorically that she heard Judith saying the said words. Also that the said Judith told the panel that “The mouth can say things it was not meant to say” intimating guilty on her part. Further that even if the said words were not directed at anyone then the said words were inappropriate at work place.
40. On the absenteeism, it was submitted that the said grievant left her work station without permission, a fact which she admitted in the disciplinary hearing as captured in the minutes. Ascertaining the reasons for her dismissal was justified.
41. With regard to Maragaret Muthoni, the Respondent submitted that the reason for dismissal were similar with the 1st Grievants and argued that the grievant herein also used abusive words on one Isabella when she stated that “Why does she not apply Carolight to bleach her skin to look beautiful”. Also that she was absent from her place of work without permission, a fact which she admitted and apologized in the disciplinary hearing. This was confirmed by RW-1 Peter Ngigi who testified that the allegation of using abusive language was raised in the staff meeting of 21st May, 2019 and the other employees mentioned her name and that of Judith in the said meeting. Therefore, that the reason for her dismissal was justified.
42. On procedure it was submitted that the Respondent accorded the employees ample time to defend themselves in a disciplinary process which was done in accordance with provisions of section 42 of the [Employment Act](#). It was argued that the grievants herein were advised to record statements with regard to incidents of 18th May, 2019 but since no proper explanation was given, the Respondent carried out its investigations, issued the grievants with notices to show cause, and invited them to disciplinary hearing and the invitation categorically stated that the employees to be accompanied by a representative or employee of their choice. The disciplinary took place on 12th June, 2019 and at the end of the meeting, the grievants signed the minutes in indication of their attendance. No reasonable explanation was given leading to the termination of the grievants which was also communicated by the letters of 25th June, 2019. The grievants appealed the decision of the disciplinary committee and the Appellant disciplinary committee heard the appeal on the 18th July, 2019. Later on the parties were subjected to mediation which collapsed and a certificate of disagreement issued.
43. The Respondent submitted that its evidence from the elaborated procedure above that they accorded the grievants various avenues to be heard and thus satisfied the requirement of procedural fairness.
44. On the reliefs sought, the Respondent submitted with regards to Reinstatement that the same has been caught up with time and therefore is no longer a viable option as a relief that can be awarded by this Court. In this they relied on the case of Sotik Highlands Tea Estates Limited V Kenya Plantations and Agricultural Workers Union [2017] eklr. It was argued, in any event, that the grievants misconducted themselves, creating a hostile work environment and thus are not deserving of reinstatement. Consequently, that the prayer seeking for payment of dues for the period of dismissal should be disallowed.
45. On the prayer for leave and travelling allowance pay, it was submitted that no particulars were given for these prayers, therefore that claim under this head should be dismissed.



46. On Gratuity pay, it was submitted that the employment contract between the grievants and the Respondent does not provide for gratuity pay, neither does the CBA provide for the same, thus the claim under this head is untenable.
47. On days worked and not paid, it was submitted that no particulars were supplied for consideration by this Court. It was argued that days worked are categorized under special damages that must be particularly pleaded and particularly proved.
48. On House allowance pay till judgement, it was submitted that House allowance is a pay given to employees while in employment and cannot be awarded to employees after termination for years not worked. Thus they urged this Court to dismiss this claim.
49. On 12 months' compensation for unfair termination, it was submitted that the grievants were dismissed for gross misconduct and subjected to disciplinary hearing and therefore that the termination was justified and the grievants are not deserving of any compensation. Additionally, that compensation should be limited to notice period as was held in *Ol Pajeta Ranch Limited V David Wanjau Muhoro* [2017] eklr.
50. The Respondent also submitted that the grievants had worked for about 8 months and no proof was tabled before this Court to suggest that the grievants were denied leave to warrant payment of the pro-rated leave. The Respondent urged this Court to decline the claim herein.
51. On payment in lieu of notice, it was submitted that since the grievants were dismissed under section 44 (1) of the *Employment Act*, Notice pay is not payable.
52. On overtime and Bonus pay, it was submitted that the claimant has not pleaded or led any evidence to show the amount of overtime sought and for what period. Without such evidence, the Respondent prayed for the claim to be disallowed.
53. On damages for unfair dismissal, the Respondent submitted that section 49 of the *Employment Act* provides for remedies that can be awarded to aggrieved party in employment claims which does not include damages. In any case that the claimant has already prayed for 12 months' salary compensation. In support of the fact that general damages is not awarded for wrongful termination, the Respondent relied on the case of *George Onyango Akuti V G4S Security Services Kenya Limited* [2013] eklr.
54. On costs and interests, the Respondent submitted that the claimant has failed to discharge its burden under section 47 of the *Employment Act* and therefore is not deserving of costs of this suit and interest sought.
55. I have examined all evidence and submissions of the parties herein. The issues for this court's determination are as follows;
 1. Whether this court has jurisdiction to deal with this matter.
 2. Whether there were valid reasons for the claimant's grievants to be terminated from employment.
 3. Whether due process was followed.

Issue No. 1. Jurisdiction

56. The respondent argued that the lower court has no pecuniary jurisdiction to handle this matter given the salary earned by the grievants.



57. It is imperative for this court to refer to the gazette notice issued by the Hon. Chief Justice conferring jurisdiction to the lower court dated 10th June, 2018. The gazette notice stated as follows;

“Appointment of magistrates’ courts to hear matters relating to employment and labour relations

In Exercise of the powers conferred by section 29 (3) and (4) (b) of the [Employment and Labour Relations Court Act](#), 2011, and in consultation with the Principal Judge of the Court, the Chief Justice appoints all Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction:

1. Disputes arising from contracts of employment (excluding trade disputes under the [Labour Relations Act](#), 2007) where employees gross monthly pay does not exceed KSh. 80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.
2. Matters relating to the following specific areas—
 - (i) offences under the [Work Injury Benefits Act](#), 2007
 - (ii) offences under the [Employment Act](#), 2007
 - (iii) offences under the [Labour Institutions Act](#), 2007
 - (iv) offences under [Occupational Safety and Health Act](#), 2007; and (v) offences under the [Labour Relations Act](#), 2007. The conferment under Gazette Notice No. 9243 is revoked. Dated the 10th June, 2018”.

58. It is clear that the pecuniary jurisdiction granted to magistrate was where an employee’s salary was not above 80,000/=.

59. It is however true that the magistrate’s jurisdiction fell outside the perview of trade disputes which are matters which are filed by or against Trade Unions under the [Labour Relations Act](#) like the instance case.

60. The claim herein was filed by the Kenya planation & Agricultural Workers Union and therefore the matter relates to labour relations from which the lower courts lack jurisdiction.

Issue No. 2: Reason

61. The grievants herein were apparently dismissed from employment for 2 reasons;

1. Using abusive languages against fellow employees
2. Absenteeism

62. It is alleged that the claimants were given notice on these acts and subjected to a hearing. The claimants admitted they were served with a hearing and also heard but insist that they never committed the offences alleged.

63. The respondents called several witnesses who attested to the alleged abuses by the claimant. The claimants also admitted that they left their work station as alleged.

64. In view of this fact, I find that there were valid reasons to warrant dismissal of the claimants.



Issue No. 3: Due Process

65. The claimants admitted that they were subjected to a disciplinary hearing but stated that the same was flawed in that they were not allowed to face their accusers during the disciplinary hearing and also cross examine them.
66. In cross examination however they admitted that the accusers attended the disciplinary hearing.
67. It is therefore my finding that the dismissal of the grievants was fair and justified and the claim for compensation for unfair dismissal cannot stand. I however find that the grievants are entitled to their terminal dues which I award as follows:-
1. Prorata leave for 6 months =
Judith Nekesa Juma – $\frac{1}{2} \times 10,435 = 5,246.50$
Margaret Muthoni Kiarie – $\frac{1}{2} \times 10,093 = 5,046.50$
 2. Service pay equivalent to 15 days for each years worked being;
Judith Nekesa Juma – $\frac{1}{2} \times 10,435 \times 1$
= 5,217.50/=
Margaret Muthoni Kiarie = $\frac{1}{2} \times 10,093 \times 2$
= 10,093/=
Total For Each
Judith Nekesa Juma – 10,464/=
Margaret Muthoni Kiarie = 20,186/=
 3. The respondents will pay costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 5TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Saya for Claimant – present

Mbeche holding brief for Bonyo Respondents - present

Court Assistant – Fred

