



**Kenya County Government Workers Union v Mavoko Water and Sewerage Company  
(Cause E005 of 2022) [2023] KEELRC 2176 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2176 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
CAUSE E005 OF 2022  
MA ONYANGO, J  
SEPTEMBER 21, 2023**

**BETWEEN  
KENYA COUNTY GOVERNMENT WORKERS UNION ..... APPLICANT  
AND  
MAVOKO WATER AND SEWERAGE COMPANY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a trade union registered under the [Labour Relations Act](#) to represent employees working in county Governments.
2. The Respondent is a limited liability company incorporated under the laws of Kenya with the mandate of provision of water and sewerage services in Mavoko, Athi River and Machakos.
3. The suit herein is filed by the Claimant on behalf of one Cynthia Kavengi, its member hereinafter referred to as, the Grievant.
4. It is the claimant's case that the Grievant's employment was unfairly terminated by the Respondent by letter dated 16<sup>th</sup> July, 2020.
5. The claimant reported a dispute to the Minister for Labour and a conciliator was appointed. After hearing the parties the conciliator prepared his report dated 16<sup>th</sup> June 2021 in which he found the termination unfair and recommended the reinstatement of the Grievant.
6. The Claimant accepted the findings and recommendation of the conciliator but the Respondent rejected the same hence necessitating the filing of the instant suit.
7. In its Statement of Claim dated 21<sup>st</sup> April, 2022 the Claimant prays for the following remedies on behalf of the Grievant:
  - a. Unlawful, unfair and illegal termination of Ms. Cynthia Kavengi;



- b. Compensation for Unlawful & Unfair Termination; and
  - c. Terminal dues.
  - d. Reinstatement into the service without loss of benefits.
8. The Respondent filed a Statement of Defence to the claim dated 10<sup>th</sup> May, 2022 in which it denied all the averments in the Statement of Claim and averred that the termination of the employment of the Grievant was justified both substantively and procedurally. The Respondent prayed that the claim be dismissed with costs.
9. At the hearing the Claimant called the grievant who testified as CW1 while the Respondent called Daniel Muendo David Muthuko the Grievant's supervisor RW1 and Elizabeth Muikali Ngao Ndeti RW2, the Human Resource and Administrator Officer of the Respondent.
10. After hearing the parties filed written submissions.

### **Claimant's case**

11. The grievant, Cynthia Kavangi Simon testified that she started working for the Respondent in 2017 on contract. She was confirmed in September, 2018 as permanent and pensionable.
12. She testified that on 14<sup>th</sup> April, 2020 while on annual leave she met RW1 who was her immediate supervisor outside the gate of her residence and it appeared to her as if he was waiting for her.
13. The grievant testified that RW1 was always unfair to her. He used to confront her and abuse her. He would call her late in the night but she never answered his calls. That RW1 wrote to her messages on WhatsApp and asked her when they could meet.
14. She testified that she reported to the Human Resource Officer (RW2) and Technical Manager Mr. Njenga but no action was taken by Human Resource Officer even after she reported twice. The reports were verbal. In her view no action was taken because RW1 was favouring RW2 because they were related. That on the contrary when RW1 reported to RW2 she took action.
15. The grievant testified that she lived in Kitengela while her work place was Athi River, 30 minutes drive away. She testified that RW 1 stayed in the same neighborhood as her but she did not know his residence. She stated that on 14<sup>th</sup> April 2020 when she met RW1 outside her gate he started abusing her but she did not say anything. That he then started beating her. That she did not fight back but protected herself by holding both his hands.
16. She reported the incident to Kitengela Police Station under OB No. 27//4/4/2020. She did not report the incident to the work place because she was on leave and did not consider the incident work related
17. The Grievant testified that after reporting to the police she recorded a statement. About 40 minutes later RW1 also went to the same police station to report. The police did not take any action.
18. The Grievant testified that RW1 reported the incident to RW2 that she was called by RW2 to collect a show cause letter dated 15<sup>th</sup> May, 2020. According to the show cause letter she was accused of assaulting RW1.
19. She Responded to the show cause letter on 19<sup>th</sup> May, 2020. In her response she stated that it was RW1 who assaulted her.
20. She was thereafter by letter dated 22<sup>nd</sup> May, 2020 summoned for a disciplinary meeting to be held on 28<sup>th</sup> May, 2020 which she attended. She was thereafter issued with a letter of termination of



employment dated 16<sup>th</sup> July, 2020. The Letter was signed by the Managing Director. The reason for termination was assault of RW1.

21. The Grievant testified that she attended a disciplinary hearing on 28<sup>th</sup> May 2020 and not 3<sup>rd</sup> June 2020 referred to in the letter of termination.

### **Respondent's case**

22. RW1 Daniel Mwendu testified that he was employed by the Respondent as a supervisor and that he was the supervisor of the Grievant Cynthia who worked as a water operator. He testified that on 14<sup>th</sup> April, 2020 he was on leave during Covid period. That he was on his way to buy milk for his baby when he heard a voice behind him saying "You reported me to management. I will beat you"
23. RW1 testified that when he looked back he saw the Grievant. When he realised that the Grievant was going after him he took out his phone and started to record her. She then started beating and kicking him. He fell and injured himself and at the same time dropped the phone and the screen got cracked. When people started gathering the Grievant went away.
24. RW1 testified that he had fallen on a piece of scrap metal which injured him. That his bottles of milk also fell into a pool of water.
25. RW1 testified that he called the Human Resource Officer and the Managing Director both of whom advise him to report the incident to the police. He also called a union official to go and witness what was happening but the union official refused.
26. He testified that when he reached the police station he found 2 police officers who wanted to put him in custody. He refused and cried out loudly. A senior officer who heard him told the policemen to leave him alone and called both himself and the Grievant separately and interviewed them. RW 1 showed the Senior officer what he had recorded on his phone. They all went to the scene of the incident and an eye witness narrated what had happened.
27. He testified that he also notified management and was directed to write a statement which is filed at page 46 of the Respondents bundle as document No. 12 in the Respondent's List of Documents.
28. RW1 testified that he was never charged for assaulting the Grievant. He further testified that he was not aware that the Grievant had reported him to management for sexual harassment.
29. RW1 testified that the Respondent has regulations and fighting among staff is not allowed whether at work or not.
30. Under cross examination the RW1 testified that the incident occurred when both himself and the Grievant were on leave. He further testified that he was summoned and attended only one disciplinary hearing. On 28<sup>th</sup> May, 2020 and not 3<sup>rd</sup> June, 2020 as stated in the Grievants letter of termination.
31. RW1 further testified that he is not aware of a complaint of sexual harassment against him made by the Grievant in 2019. He further testified that the Human Resource Officer, RW2 is not related to him.
32. RW2 Elizabeth Mwikali Ngao Ndeti testified that she is a Human Resource and Administration Officer of the Respondent.
33. RW2 testified that the Collective Bargaining Agreement (CBA) provides for grounds of gross misconduct at clause 27(2).



34. She testified that the Respondent followed procedure of dismissal as per CBA and Human Resource Policy Manual. That the disciplinary committee meeting was held on 3<sup>rd</sup> June, 2020 and both the union and management were represented.
35. That the Grievant was accompanied by a Mr. Mathew Ndivo as a witness. She testified that the role of the disciplinary committee was to come up with findings and recommendations to the CEO. That the finding, was that the Grievant committed gross misconduct. She further testified that the consequence of gross misconduct was termination. That the disciplinary committee recommended that the grievant's employment be terminated.
36. Under cross examination RW2 testified that no report of sexual harassment by RW1 was made to her by the Grievant. She testified that the allegation of sexual assault was made by the Grievant in the response to show cause letter and not as a complaint. That this is the reason why she did not write to RW1 to respond to the complaint. That she asked RW1 about the complaint during the disciplinary hearing.
37. She testified that the disciplinary hearing was held on 3<sup>rd</sup> June, 2020 even though the letter summoning the Grievant stated that the meeting would be held on 28<sup>th</sup> May, 2020. She testified that the Grievant's employment was terminated for assaulting her supervisor.
38. She testified that there were two (2) secretaries at the disciplinary meeting, one for the union and one for management.

### **Analysis and Determination**

39. I have considered the pleadings, evidence adduced in court and the written submissions filed by the parties. The issues for determination are whether the termination of the Grievants employment was unfair and if she is entitled to the remedies sought.
40. Fair termination is provided for in section 45 (2) of the [Employment Act](#) as follows:-
  - (2) A termination of employment by an employer is unfair 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 procedure.
41. It is the submission of the claimant that the Grievant was assaulted by RW1 and reported to the police station. That RW1 has not proved that he was assaulted by the Grievant as he did not produce the OB report number or a P3 form to prove the same. That RW1 also did not produce any treatment notes. The Claimant further submitted that the reason for termination cited in the Grievant's letter of termination being use of abusive words and assault of her supervisor outside work station was never stated in the show cause letter, hearing notice or dismissal letter. Further that there was no witness who recorded statements before the disciplinary committee or in court. That the Grievant maintained that she never assaulted RW1. It is further the claimant's submissions that the minutes of the disciplinary



hearing were not properly signed as they were not signed by the chairman. The claimant relies on the decision in the case of National Bank of Kenya V Anthony Njue John [2019] eKLR where the court stated:

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer. ”

42. The letter of show cause issued to the claimant is reproduced below:

Athi River, Mavoko Road  
Off Nairobi - Namanga Highway  
Opp. Athi river Railway Station  
Box 582-00201 Athi River  
Mobile: 07191488866  
Wireless: 020 2106291  
Email: info@mav-water.org  
Date: 15/5/2020  
Our Ref: MAV/PERS/S-003(10)

Cynthia K. Simon,

Dear Madam

Re: Show Cause

It was reported that you physically assaulted your immediate supervisor Mr. David Mathuku while at Kitengela on work related issues on 14<sup>th</sup> April 2020 at around 9:30 am. It was also that you used abusive words and unprofessional language.

further investigations were done and found you had earlier made remarks planning to physically assault him.

This is violation of company policies and act of misconduct. Therefore, you are given seven (7) days to respond in writing as to why disciplinary action cannot be taken against you.

signed

Yours faithfully,

Elizabeth M N Nndeti

Hr & Admin Officer

For, Managing Director

Cc -managing Director-



- Finance Manager
- Technical Manager
- Branch Secretary KCGWU- Frank Nzau

43. The letter of termination of Employment is also reproduced below:

Athi River, Mavoko Road  
Off Nairobi - Namanga Highway  
Opp. Athi river Railway Station  
Box 582-00201 Athi River  
Mobile: 07191488866  
Wireless: 020 2106291  
Email: info@mav-water.org  
Date: 16/7/2020  
Our Ref: MAV/PERS/S-003(13)

Cynthia Kavengi Simon,

Dear Madam

Re: Termination Of Employment

Following the disciplinary committee hearing meeting held on 3<sup>rd</sup> June 2020 the view of the matters refers.

It was ascertained that, you assaulted your supervisor Mr. Daniel Muendo outside work station on issues related to work. You further picked his mobile phone on realizing you were recorded and threw it down damaging the mobile screen due to the impact.

Fighting in public places amounts to criminal offence hence jeopardizing corporate image. Take note that, the nature of offence you committed constitutes to Gross Misconduct as per the provisions in CBA 27:3 the course of punishment constitutes to termination of employment. Therefore, this kind of behavior cannot be tolerated in Mavoko water & Sewerage company ltd.

Lastly, decision has been made to serve you with Termination Lettter which will take place with immediately i.e Fromo 17/07/2020.

Yours sincerely

Signed

Michael Y Mang'eli

Managing Director

44. At the disciplinary hearing, the committee made the following findings - Min 2:03/06/2020It was ascertained that Cynthia was the one who assaulted Muendo.the committee was shown the video clip Cynthia approaching Muendo quarrellingMuendo mobile screen was damaged due to the impact of falling down.Cynthia never reported any assault by Muendo to the officeOffice was not furnished with any statement on the case by police as promisedUnion met with the two parties but according to



Muendo's sentiment: the forgiveness was not made to stop management decision on the case according to laid down procedures. Cynthia sentiments:- was that they forgave each other and there was no need for the hearing

45. The committee recommended as follows:

The committee recommended that Managing Director decide on the action to take as per the laid down procedures above in the CBA & HR policy Manual

46. From the foregoing it is evident that the show cause letter stated that grounds for disciplinary action and the letter of termination stated the grounds for termination. It is further evident from the minutes of the disciplinary hearing that the committee which constituted of representatives of both the claimant union and the Respondent was unanimous that it was the Grievant who assaulted RW1 his supervisor.

47. The minutes of the disciplinary hearing are signed by all members of the committee comprising both members from the claimant and members from the Respondent. The fact that the minutes were not signed by the chairman therefore does not invalidate the same.

48. In any event the claimant did not object to the production of the said minutes or to the findings and recommendation thereof.

49. I find that the argument by the claimant that the minutes are not properly signed is not valid.

50. From the evidence on record it is clear that the Respondent complied with sections 41 and 45 of the Employment Act in the disciplinary process. Further that there were valid grounds for termination of the Grievants employment which were proved both at the disciplinary hearing and in court. I therefore find the termination of the Grievants employment to have been fair both procedurally and substantively

### **Remedies**

51. The Claimant prayed for a declaration that the termination of the Grievant's employment was unfair. As I have found above, the termination was fair. The prayer is thus not warranted.

52. The Claimant further prayed for reinstatement or compensation in the sum of Kshs.3,325,245 in the alternative. Having found the termination fair, the claimant is not entitled to the prayers.

53. The Claimant is not entitled to damages for loss and suffering unlawful and unfair termination as the same was not proved.

54. For the foregoing reasons the entire claim has not been proved and is dismissed. Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023**

**MAUREEN ONYANGO**

**JUDGE**

