



**Mburu v Butali Sugar Mills Limited (Employment and Labour Relations Claim 20 of 2023) [2023] KEELRC 2192 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2192 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CLAIM 20 OF 2023**

**JW KELI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**PETER KIMANI MBURU ..... CLAIMANT**

**AND**

**BUTALI SUGAR MILLS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant upon the termination of his employment by the respondent *vide* memorandum of claim dated February 1, 2023 and filed in court on the February 2, 2023 seeking the following reliefs against the respondent: -
  - a. That the summary dismissal of the claimant from employment amounted to an unfair termination. .
  - b. That the claimant be compensated for the unfair termination of employment at the monthly salary of Kshs 253,172 for 12 months.
  - c. Issuance of certificate of service
  - d. Costs of the suit and interest.
2. The Claimant in addition on even date filed his verifying affidavit to the claim sworn on the February 1, 2023, list of witnesses, his witness statement, his list of documents of even date and the bundle of documents.
3. The claim was opposed by the respondent who entered appearance through the law firm of LG Menezes and company advocates and on the March 6, 2023 filed statement of response to the claim, respondent's witness statement by Daniel Kiyondi dated March 3, 2023 and the respondent's list of documents together with the bundle of documents.



## Hearing

### The Claimant's case

4. The claimant's case was heard on the July 10, 2023 where he testified on oath (CW), adopted his written witness statement dated February 1, 2023 as his evidence in chief, and produced his documents as exhibits C-1 to 7. The claimant was cross-examined by counsel for the respondent, Mr Fundi.

### The respondent's case

5. The Respondent's case was heard on even date of July 10, 2023 where its witness Daniel Kiyondi (DW) testified on oath as the respondent's witness of fact and adopted his written witness statement dated March 3, 2023 as defence evidence in chief, and produced defence documents as exhibits D-1-32 as per list of documents dated March 7, 2023. DW was cross-examined by counsel for the Claimant, Mr Kundu. The defence case was marked as closed same day.

### Claimant's Case In Summary

6. The claimant was a former employee of the respondent designated as Fleet and logistics Manager in charge of the transport department since January 23, 2021. That vide letter dated July 15, 2021 he was suspended from duty on grounds that he had been involved in theft of Tractor Reg No KTCB 458H belonging to the respondent. That he was served with a show cause letter to comment on the disappearance of Tractor Reg No KTCB 606G said to have gone missing since April 2021. That he responded to the show cause letter and thereafter the respondent invited him to disciplinary hearing on the allegations. That vide letter of termination dated August 22, 2022 he was dismissed for gross misconduct for reason of negligence that led to the loss of Tractor Reg No KTCB 606G. The claimant stated that the respondent did not place value in his response to show cause thus rendering the termination of his employment unfair. That his appeal against the termination received deaf ear hence the suit. The claimant produced exhibits 1-7 in support of the foregoing.

### The Respondent's case

7. The respondent's Case that the claimant was its former employee as Fleet and Logistics Manager on fixed term contracts from January 23, 2021 to August 22, 2023 when his employment was terminated fairly, lawfully and procedurally. That the claimant was terminated for breach of his contract obligations and for gross dereliction of duty and blatant disregard of company policy and instructions by failing to carry out his duties diligently and competently resulting to the loss of the respondent's tractors KTCB 458H and KTCB 606G, failing in his duties to ascertain the status of KTCB 458H and KTCB 606G in good time or at all and failing to inform his superiors of the fact of the tractor missing and carried out his duties in a careless and negligent manner resulting to the loss of KTCB 606G. The respondent stated the disciplinary process leading to the removal was procedural and fair, the claimant was paid his terminal dues and issued with certificate of service hence the claim had no basis.

### Written submissions

8. The court gave directions for filing of written submissions after the hearing. The parties complied. The claimant's written submissions were drawn by KN Wesutsa & Company Advocates and dated July 17, 2023. The respondent's written submissions were drawn by LG Menezes & Co. Advocates and dated July 13, 2023.



## Determination

### Issues for determination.

9. The Claimant addressed the validity of the reasons of the termination.
10. The Respondent in their written submissions identified the following issues for Determination:-
  - a. Whether the termination of employment of the claimant was wrongful, unfair and unlawful in the circumstances
  - b. Whether the claimant is entitled to reliefs sought.
11. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the issue to be addressed in the determination of the dispute were as follows:-
  - a. Whether the termination of employment of the claimant by the respondent as lawful and fair
  - b. Whether the claimant was entitled to reliefs sought

### **Issue 1. Whether the termination of employment of the Claimant by the respondent was lawful and fair**

12. The court in determination of the issue was guided by the provisions of section 45 of the [Employment Act](#) which states:- ‘Unfair termination 45(1) No employer shall terminate the employment of an employee unfairly. (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.’”

### **Substantive fairness- validity of the reason**

#### **Claimant’s evidence**

13. The pleadings are as summarised above. The claimant produced the show cause dated August 5, 2022(c- exhibit 3), his response (c- exhibit 4) and invitation to the disciplinary hearing (c-exhibit 5). The show cause letter , invitation to disciplinary hearing and the termination were consistent save for that the claimant was terminated on issue of the lost Motor Vehicle Registration No KTCB 606G.
14. On the validity of the reasons for the termination of the employment, the claimant submits that the termination was unfair as the Motor Vehicle Registration No KTCB 606G alleged to be unaccounted since April 2021 was not missing in the period and continued to be fuelled as per evidence by Felix OtieNo That the tractor Motor Vehicle Registration No KTCB 606G was fuelled by different drivers and attendants and the insurance stickers were handled by other 2 officers.
15. During cross examination the claimant confirmed he was engaged as fleet and logistics manager, confirmed there was issue of two lost tractors KTCB 458H and KTCB 606G in his show cause, confirmed he was suspended to pave way for investigations which were done and report produced at page 21 of the respondent’s bundle of documents in court, confirmed he got a show cause, he responded, he attended the disciplinary hearing with a representative and the termination decision was communicated. He confirmed receipt of certificate of service. The claimant admitted he did not issue



demand notice for the suit. He did not agree with the statement of Peter Sikolia to the police. There was no re-exam.

### **Respondent's evidence**

16. The burden of proof of the validity of the reason for termination of employment is with the employer under section 43 of the *Employment Act* to wit:- '(43)(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.'
17. The letter of termination of the claimant's services was dated August 22, 2022 (C- exhibit 6) referred to the show cause letter dated August 5, 2022 and the disciplinary hearing of August 17, 2022 and stated that the committee noted that there was lapse on the claimant's side in that he did not realise that Unit KTCB 606G had not been accounted for since April 2021 even after coming up with the Master fleet register. That despite having received the 2022 insurance certificate for the unit, he did not report it was missing with full knowledge of the insurance sticker which remained in the precinct of his department. The show letter stated that was high level of negligence of responsibilities as head of fleet and logistics and gross misconduct.
18. The respondent called Daniel Kiyondi (DW). During cross examination DW confirmed they had security measures to safeguard the premises including a fence wall. Had security personnel who patrol and recently installed CCTV. There were procedures for the tractors to leave the premises and that included driver's gate pass issued by the Transport department. The gate pass is surrendered at exit. There is a policy for the tractor to be assigned to a particular driver. The transport department assigned tractor units to other departments. The drivers are allocated work by the department through the transport manager. DW confirmed the claimant was separated for the reason of loss of two tractors as per his statement. Agreed that the letter of termination referred to loss of one tractor. DW confirmed the loss of Tractor KTCB 458H was subject of criminal court proceedings at Butali. DW confirmed movement of tractor vide CCTV captured the tractor KTCB 458H.
19. DW stated the unit KTCB 606G had been allocated to civil works department, that he could not recall the driver and that the actual date of its disappearance was unknown. No record of the gate passes and no employee from department of civil works department testified.
20. DW confirmed that one of the accusation against the claimant was that KTCB 606G was being fueled around same time it vanished. DW confirmed that the claimant was in charge and authorized the fueling. That there was a record of the actual persons who fueled but had since separated hence was not possible to question them. DW confirmed Felix Otieno separated in the same circumstances. Felix was Assistant Fleet Manager to the claimant and also got a show cause with respect to KTCB 606G. Felix had served longer. DW confirmed that Felix stated that by January 2022 tractor KTCB 606G was physically available. In re-exam DW told the court the claimant was accused person in Butali criminal case with respect to KTCB 458H, all tractors fell under the claimant who allocated then for specific jobs in the departments, that after KTCB 458H was stolen they did audit and discovered KTCB 606G went out of the tracking system in April 2021 and was being fueled but not being allocated duties to go the field. The claimant allocated drivers to specific units and was 100% responsible. DW confirmed the foregoing as the reasons for the termination of the employment of the claimant and produced the minutes of the disciplinary proceedings (D-Exhibit 16).



## Written Submissions

### Claimant's submissions

21. The claimant submits that in view of the representations by the Felix Otieno (pages 63 to 69 of the respondent's bundle) it was apparent Tractor KTCB 606G had not vanished from the premises of the respondent's company. That at paragraphs 4,5 and 6 of page 64 of the bundle the said Felix Otieno was assertive that the tractor had been accounted for in November 2021 and January 2022 by the field supervisor as being physically within the premises of the respondent and a report was generated to that effect. That if the tractor unit was available in January 2022 and being fueled and none of the fueling staff was questioned then claimant could not be accused of the missing unit.

### Respondent's submissions

22. The respondent submits that the role of the court is establish whether the decision to dismiss the employee falls within the band of reasonable responses which a reasonable employer might have adopted in the circumstances and submits that the test was described by Lord Denning in *British Ryland UK Limited v Swift*(1981)IRLR 91 'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair.... if it was quite reasonable to dismiss him then the dismissal must be upheld as fair even though some employers may not have dismissed him.'
23. The respondent submits that the role of the court is limited to making a wider inquiry as to whether the test was met by the employer and not substitute its decision with that of the employer. That any other reasonable employer would have made the decision made by the respondent herein under the circumstances taking into account the claimant acted negligently towards discharging his duties which resulted to the termination of the contract. The respondent submitted that it complied with procedural fairness under section 41 of the *Employment Act* before the termination of the claimant's services and to buttress this submission relied on the decision in *Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Ltd* [2015] eKLR.

### Decision on substantive fairness

24. The burden of proof of the validity of reasons for termination lies with the employer under section 43 of the *Employment Act* which reads:- '43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.'
25. In the instant case the termination of employment letter dated August 22, 2022 (C-exhibit-6) disclosed the reason for the termination to be negligence as follows:- ' ... you were invited for a disciplinary committee hearing at the BSML conference room on August 17, 2022 whereby the committee noted that there was a lapse on your side in that you did not realize that unit KTCB 606 G had not been accounted for since April 2021 even after coming up with a master fleet register. Further despite having received the 2022 insurance certificates for the same , you did not report it as missing with full knowledge of the unit insurance sticker which remained in the precincts of your department. This is high level of negligence of responsibilities on your part as the head of fleet and logistics. This is a



grave omission on your part which amounts to gross misconduct and therefore contrary to section 44 subsection 4(c)&(g) of the *Employment Act*.”

26. The termination letter cited provision of the *Employment Act* being :- ‘Section 44 (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly; (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.’ Under these provisions the employee conduct is deemed as gross misconduct inviting summary dismissal upon compliance with procedural fairness under section 41(2) of the *Employment Act*.
27. During the hearing, the Claimant admitted he was issued with show cause letter dated August 5, 2022 (C- Exhibit 3) and confirmed having responded to the same, admitted he was invited to the disciplinary hearing and attended with a representative and received the letter of termination. DW, Daniel Kiyondi, was the head of finance of the respondent. DW confirmed that the reason for the termination was negligence of the claimant for failure to account for MV KTCB 606G since April 2021.
28. DW agreed that Felix Otieno was also dismissed for same issue as the claimant. That Felix Otieno had indicated in the response to his show cause (at page 63-64 of respondent's documents) that the fleet supervisor had done a check in November 2021 and confirmed KTCB 606 G was physically present. The court noted (at page 71 of the respondent's documents )the said Felix Otieno at his disciplinary hearing informed the disciplinary committee that the master sheet was done by the Transport Manager who was the Claimant. Felix Otieno at the disciplinary hearing refuted that he prepared the report/fleet master sheet. This means that the evidence relied on by the claimant in his submissions was denied by the author at the disciplinary hearing. At page 73 Felix Otieno stated:- ‘ I refute the charges and would say the tractor KTCB 606G was in the yard even when the audit was being done and the transport manager is a witness to this.’(emphasis mine) Felix shifted the master fleet report to the transport manager. The court then finds the entire submissions relied on the response to show cause by Felix Otieno who did about-turn at the disciplinary hearing and stated it was the claimant who prepared the master fleet sheet indicating the tractor KTCB 606G was available at the premises. The court then finds on balance of probabilities that the respondent had valid reason to find that the claimant as the fleet and logistics manager was negligent in his duties as stated in the termination of employment letter (C-Exhibit 6).
29. The court finds existence of valid and justified reasons meeting the threshold under section 43 of the *Employment Act* being that:- ‘ The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee’’. The court finds that the claimant was negligent in his duties and the termination decision by the respondent met the reasonable test as held by Lord Denning in *British Ryeland UK Limited v Swift*(1981)IRLR 91 to be ‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view...”

### **Procedural fairness**

30. Procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*. The procedural fairness



for gross misconduct is as defined under section 41(2) of the Employment Act to wit:- ‘41(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.’”

31. It was not disputed there were disciplinary proceedings before the termination of employment of the claimant. The respondent produced the show cause letter, response by the claimant, investigation report, invitation to the disciplinary hearing, the minutes of the disciplinary hearing, the termination of employment, certificate of service and the last pay slip on payment of final dues.
32. The Claimant faults the termination process for reason of his appeal having received what he called ‘deaf ear’’. The claimant produced C-exhibit 7 as the appeal. The document was an email addressed to Mr. Sanjay as ‘ Hidden Truth on Tractor Loss’’. The court noted that the said email was a forward to the advocate. At the hearing the claimant stated he did appeal directed to the managing director and there was no response. The claimant did not submit on other aspects of the procedural fairness.

### Response

33. The Respondent submits that it complied with the legal process under section 41 of the Employment Act and relied on the decision in Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Limited (2015)e KLR on procedural fairness. The facts were not disputed save on the issue of appeal.

### Decision on procedural fairness

34. The court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR observed on procedural fairness :-‘13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.’”(emphasis given)
35. Section 41 of the employment Act provides for the procedure for fair termination as follows:- ‘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.’”
36. The claimant did not challenge the procedural fairness save to state his appeal to the managing director vide email did not elicit response. The court finds that said email titled ‘ Hidden Truth of Tractor Loss’ was not a formal appeal. Further there was no evidence before the court that the email was received by the respondent and this is especially so being a forward to the advocate. The court is persuaded and upholds decision in Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Limited (2015)e KLR to find the respondent complied with the procedural fairness law where the court stated as follows:- ‘25. From the record, the Claimant was issued with a show cause memo on 7th February, 2011 to which he responded on February 9, 2011 on which date he also made a written statement to the Investigating Officer. 26. By letter dated June 9, 2011, the Claimant was invited to appear before the Respondent’s Corporate Disciplinary Committee on June 23, 2011. His right to be accompanied by a union representative was highlighted. In his testimony before the Court, the Claimant confirmed



having appeared before the Disciplinary Committee in the company of a union official. There was no evidence of the Claimant taking issue with either the composition of the Disciplinary Committee or the manner in which the disciplinary proceedings were conducted.”

37. In the upshot the court holds there was procedural fairness in the termination process of the claimant’s employment contract.

**Issue 3-Whether the claimant is entitled to reliefs sought.**

38. The court holds the termination was lawful and fair. The claimant admitted at the hearing he was issued with certificate of service(D-exhibit 19 at page 50 of the respondent’s documents). The termination of employment letter indicated that on clearance his final dues would be processed. There was evidence the claimant was paid his salary for the month of termination August 2022 with terminal dues. The claimant was also on pension. The court diallows all reliefs sought.

**Conclusion and disposition**

39. The court holds the termination was lawful and fair and the claimant was paid his terminal dues and issued with certificate of service. The court is guided by the Court of Appeal in allowing the appeal in its decision in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR where it observed in allowing the appeal observed:- ‘Where, as here, an employer has reasonable cause to take disciplinary action against an employee and does so with scrupulous adherence to due process and fair, equitable treatment of the employee; and even imposes a normal termination with pay in lieu of notice when it could easily have summarily dismissed the employee reasonably suspected of attempted theft with ample evidence thereof availed, it cannot be right that orders such as issued in the instant case be given”
40. The court holds that the entire claim had no merit. The claim dated February 1, 2023 is dismissed with costs to the respondent.
41. Right of appeal in 30 days.
42. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21<sup>ST</sup> SEPTEMBER 2023.**

**JEMIMAH KELL,**

**JUDGE.**

**In The Presence of:-**

Court Assistant : Lucy Macheso

For Claimant : Ikhumba

For Respondent:- Otieno-Njoga

