



**Kenya Union of Commercial Food and Allied Workers v KK Shah and Sons Limited
(Cause E004 of 2023) [2023] KEELRC 3185 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3185 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE E004 OF 2023
MA ONYANGO, J
NOVEMBER 30, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

KK SHAH AND SONS LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the [Labour Relations Act](#) to represent employees in the commercial and food sector.
2. The Respondent is a company carrying on the business of wholesale and distribution of goods within Trans-Nzoia and Uasin Gishu Counties.
3. The Claimant has jurisdiction to represent the employees of the Respondent in labour matters according to the membership clause of its constitution registered by the Registrar of Trade Unions.
4. The claim herein was instituted by the Claimant on behalf of the Grievants, who are members of the union vide a Statement of Claim dated 18th August 2022 seeking the following remedies:
 - a. An order that the Grievants be reinstated without loss of benefits. If reinstatement is untenable, the following prayers be granted:
 - b. Pay the Grievants as follows: -
 - Julius Mose Momanyi
 - i. 3 years severance pay..... 33,027
 - ii. July and August 2021 salary arrears..... 40,375



- iii. Saturday overtime (5pm to 6pm) for 3 years...41,472
 - iv. 16 days worked in September 2021.....11,744
 - v. 1 month notice in lieu..... 22,018
 - vi. 1year leave..... 15,413
- Total 164,049

Antony Wangila Juma

- i. 8 years severance pay88,073
 - ii. July and August 2021 salary arrears..... 40,375
 - iii. Saturday overtime (5pm to 6pm) 41,472
 - iv. 16 days worked in September 2021..... 11,744
 - v. 1 month notice in lieu..... 22,018
 - vi. 1 year leave..... 15,413
- Total 219,094

Geoffrey Onyango

- i. 13 years severance pay.....124,499
 - ii. July and August 2021 salary arrears.....40,375
 - iii. Saturday overtime (5pm to 6pm) for 3 years.....41,472
 - iv. 16 days worked in September,2021.....11,744
 - v. 1 month notice in lieu.....22,018
 - vi. I year leave.....15,413
- Total 255,471

- c. Certificate of service
 - d. Costs of the suit to the Claimant
 - e. Any other order the honourable court deem fit to address the cause of justice
5. In the Statement of Claim, the Claimant alleges that the 1st Grievant, Julius Mose Momanyi was employed by the Respondent on 15th November 2015 as a loader earning Kshs. 300 per day, and was later promoted to the position of store clerk on 15th May 2019 earning a gross salary of Kshs. 22,018 per month.
 6. The 2nd Grievant, Antony Wangila Juma is alleged to have been employed by the Respondent on 5th August 2013 as a general worker earning Kshs. 200 per day and was later confirmed on 5th February 2015 earning Kshs. 12,000 per month. That he was promoted to a stores clerk on 1st June 2018 and his salary was increased to Kshs. 22,018 per month.
 7. It is averred that the Mr. Geoffrey Onyango, the 3rd Grievant was employed by the Respondent on 5th August 2007 as a general worker earning Kshs. 280 per day and was confirmed on 2nd January 2011



- earning Kshs. 12,000 per month. It is averred that he was promoted to a stores clerk earning Kshs. 22,018 which he was earning as at the time of the termination of his employment.
8. According to the Claimant, on 18th September 2021 at around 9:30am while at their work station, the director of the Respondent, Mr. Ashok informed the 1st, 2nd and 3rd Grievants that the Respondent was going to do an audit/stock taking. That they should go home and report back on 20th September 2021.
 9. It is averred that when the three Grievants reported back to work on 20th September 2021, the Respondent verbally informed them that there had been a loss of Kshs. 148,500 and their employment was terminated with immediate effect.
 10. It is further averred that the Grievants reported the termination of their employment to the Claimant where they were members.
 11. The Claimant avers that it tried to resolve the dispute at the shop level but the Respondent was unresponsive. That the Claimant consequently reported a trade dispute to the Cabinet Secretary for Labour and Social Protection on 21st October 2021. The dispute was accepted and a conciliator was appointed. The parties were invited to a joint conciliation meeting.
 12. It is averred that the dispute was not be resolved during conciliation necessitating the filing of this suit.
 13. In response to the Statement of Claim, the Respondent filed a Statement of Defence dated 25th January 2023 on 17th February 2023.
 14. The Respondent averred that contrary to the averments in the Statement of Claim, an audit of its stores was carried out on 7th April 2021 when it was established that there were missing stocks to the tune of Kshs. 1,461,855 which the Grievants could not account for.
 15. It was the Respondent's position that the Grievants undertook to make good the lost stock. The 1st Grievant was to repay Kshs. 450,000 while the 2nd and 3rd Grievants were to pay Kshs. 365,500 each.
 16. It was further the Respondent's position that the three Grievants agreed to have part of their respective monthly salaries deducted to recover the value of the unaccounted-for stock that was lost in their custody.
 17. The Respondent further stated that in September 2021, a thorough physical stock audit was carried out which revealed more losses in the stores which the 3 Grievants were in charge of. That when the Grievants were called to account for the losses, they failed to do so.
 18. It is the Respondent's case that it was not in the best interest of the company to continue retaining the Grievants as their presence was injurious to the business.
 19. The Respondent denies that the Grievants were unfairly dismissed and maintains that dismissal letters were issued to them.
 20. According to the Respondent, the findings of the conciliation meeting held on 15th December 2021 were that the Grievants had breached their obligations under the contract of service and the termination of their employment was therefore justified.
 21. The Respondent contends that the Claimant has no locus to mount this claim as there exists no recognition agreement nor CBA between the Claimant and itself.
 22. The Respondent states that the Claimant's claim has no merit and should be dismissed with costs.



23. At the close of the Respondent's case, the parties filed written submissions. The Claimant filed its submissions on 5th September 2023 and those for the Respondent were filed on 26th September 2023.

Evidence

24. The Claimant called Geoffrey Onyango, the 3rd Grievant who testified as CW1 on his own behalf and on behalf of the 1st and 2nd Grievants.
25. CW1 adopted his witness statement and documents dated 6th July 2023 as his evidence in chief. He reiterated the contents of the statement of claim.
26. On being cross examined by Mr. Samba Counsel for the Respondent, CW1 stated that they were not issued with notices before their employment was terminated. He stated that the Respondent did not deduct union dues as evidenced by his pay slip but that they paid union dues directly. CW1 agreed that the conciliator in his report stated that the termination of the Grievants from employment was justified and that they were not entitled to terminal benefits.
27. The Respondent on its part called Ashok Shah, its Director who testified as RW1. He adopted his witness statement recorded on 24th January 2023 as well as the documents filed by the Respondent as his evidence in chief.
28. On cross examination, RW1 stated that he issued show cause letters to the Grievants but they refused to sign the letters. He stated that he gave the Grievants verbal notice to show cause. He stated that the Grievants were not taken through a disciplinary hearing before they were dismissed from employment. He testified that the delivery notice filed in court in the Respondent's documents confirmed the discrepancies between the stock in the computer and the stock that had been removed from the list.

Determination

29. Upon considering the pleadings herein, the evidence of the respective parties, the submissions and the authorities cited, I find that the issues for determination are: -
- i. Whether the Claimant has locus standi to represent the Grievants;
 - ii. Whether the Grievants were unlawfully and procedurally dismissed from employment;
 - iii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant has a locus standi to represent the Grievants

30. The Respondent has raised the issue that the Claimant has no locus to file the instant claim on behalf of the Grievants as there is no recognition agreement or CBA between itself and the Respondent.
31. It is trite that for a Claimant to bring a suit on behalf of the Grievants it has to prove that it has the mandate by way of a recognition agreement or check-off forms signed by its members or other evidence of membership.
32. In the instant case, the 1st Grievant in his testimony stated that they used to pay union dues directly to the Claimant. Section 52 of the [Labour Relations Act](#) permits an employee to make direct payment of union dues to the trade union. The Respondent's arguments that because there was no recognition agreement or collective bargaining agreement between the Claimant and the Respondent the Claimant had no locus is therefore misplaced.



33. The dispute herein was reported to the Minister by the Claimant union. The Respondent agreed to meet with the Claimant during conciliation and has produced a copy of the conciliation report in court, which it is relying on. During the conciliation process the issue whether or not the Grievants were members of the union was not raised by the Respondent.
34. The issue of locus is one that ought to have been raised as a preliminary point so that it is be dealt with as a preliminary issue before the substantive suit is fixed for hearing. The Respondent did not raise the issue at that point and allowed the suit to go to full hearing with full participation.
35. It is also important to note that this is a trade dispute commenced by filing a complaint to the Cabinet Secretary in charge of Labour as provided in section 62 of the *Labour Relations Act*. The dispute was accepted by the Cabinet Secretary who appointed a conciliator to deal with the issues in dispute as reported. The only issues for determination before this court are therefore those that were dealt with at conciliation. The Respondent ought to have raised the issue of proof of membership at that point so that the same could be dealt with in the report of the Conciliator, which it failed to do.
36. CW1 was asked in cross examination if he was a member of the Claimant and he responded that he paid his terminal dues directly to the Claimant. He reiterated the same during re-examination. It is my view that by acquiescing to deal with the Claimant before and during conciliation and by failing to raise the issue as a preliminary issue for determination before the hearing of the suit the Respondent is estopped from denying that the Grievants were members of the Claimant.

Whether the employment of the Grievants was unlawfully and unprocedurally terminated

37. For termination of employment to be fair the employer must comply with both section 41 of the *Employment Act* on due process and section 43 on proof of reasons for termination. RW1 testified at length about losses in stock in the stores that the Grievants were in charge of. He testified that the Grievants had agreed to make payments of losses that had arisen earlier in April 2021. That when a stock taking in September 2021 revealed more losses he decided to terminate the employment of the Grievants.
38. In his witness statement dated 24th January 2023 RW1 stated “On 20th September, 2021 a further and thorough physical stock audit revealed more losses but the Grievants were unable to account for the lost/stolen stock and were unwilling to commit themselves to pay for the losses. That is when it was decided to hand them letters of termination/dismissal.
39. The letter of termination of Antony Wangila Juma, CW1 who testified on behalf of all the Grievants is reproduced below:

Date: 20 September 2021.

To:

Anthony Wangila

ID No.25304202.

Dear Sir,

Re: Letter Of Termination.

You are hereby informed that your services as a Storekeeper has been terminated with effect from this date 20th September 2021.



You are dismissed due to misconduct and mishandling company goods entrusted to you as the storekeeper.

You have been warned severally verbally and you were given time to change but in vain.

The company is not liable for any final benefits and you owe the company

Kshs.749,714.00 (Seven hundred and forty nine thousand seven hundred and fourteen only).

This is a breach of company rules and regulations.

Yours Faithfully.

Signed

For & on Behalf of

KK Shah & Sons Ltd.

CC Trans Nzoia County labour officer.

40. The letter is dated the same day as RW1 stated the stock taking took place. No copy of the report of stock taking was produced in court. As admitted by RW1 during the hearing, the Grievants were not given an opportunity to defend themselves.
41. According to CW1, the Grievants reported to work on 18th September, 2021 and were told there was no more work for them. When they asked for letters of termination they were told to go and report wherever they wanted, whether to police or labour. According to CW1 the Grievants were never issued with letters of termination of employment.
42. It is evident that the Grievants were never subjected to any hearing before the termination of their employment. They were not issued with notices to show cause.
43. The letters of termination appear to have been prepared after the termination of the employment of the Grievants as they are dated 20th September 2021 yet the Grievants state their employment was terminated on 18th September, 2021 verbally.
44. The termination having been without a hearing was unfair under section 45(2) of the *Employment Act*. The manner in which the whole process was handled by the Respondent raise more questions than answers as the documents filed by the Respondent in support of the claim of loss are not in a format that disclose any loss of stock or how the Grievants were involved. Even the amount alleged to have been lost is not evident from the documents filed by the Respondent. To prove that there was loss and that the Grievants were responsible for the same, the Respondent ought to have filed a proper audit report. I find that the Respondent failed to prove that there was valid reason to terminate the employment of the Grievants.

Whether the Claimant is entitled to the remedies sought.

45. Having found that the employment of the Grievants was unfairly terminated, they are entitled to pay in lieu of notice. The Respondent did not deny that the Grievants were not paid salary for July and August as claimed and I award them the same. I also award the Grievants salary for days worked in September 2021. I further award them pay in lieu of one year leave as the Respondent did not deny the same or produce records to prove that the Grievants took their annual leave for the year.



46. The Prayers for overtime were however not proved and are declined. The prayer for severance pay is not payable as the Grievants were not declared redundant.

47. The Grievants are entitled to certificate of service in terms of section 51 of the [Employment Act](#).

48. In summary I award each of the Grievants the following:

Julius Mose Momanyi

- i. Salary for July and August 2021 Kshs. 40,375.00
 - ii. Salary for days worked in September 2021 Kshs. 11,744.00
 - iii. Pay in lieu of notice Kshs. 22,018.00
 - iv. Pay in lieu of 1 year leave Kshs 15,413.00
- Total 89,550

Anthony Wangila Juma

- i. Salary for July and August 2021 Kshs. 40,375.00
 - ii. Salary for days worked in September 2021 Kshs. 11,744.00
 - iii. Pay in lieu of notice Kshs. 22,018.00
 - iv. Pay in lieu of 1 year leave Kshs 15,413.00
- Total 89,550

Geoffrey Onyango

- i. Salary for July and August 2021 Kshs. 40,375.00
 - ii. Salary for days worked in September 2021 Kshs. 11,744.00
 - iii. Pay in lieu of notice Kshs. 22,018.00
 - iv. Pay in lieu of 1 year leave Kshs 15,413.00
- Total 89,550

49. The Respondent shall issue a certificate of service to each of the Grievants within 30 days.

50. The Respondent will pay the Claimant's costs which I assess at Kshs. 80,000 to cover reasonable disbursements and expenses of the suit. This is in view of the fact that the Claimant was not represented by an advocate and its costs can therefore not be taxed under the Advocates Remuneration Order.

51. Interests shall accrue from date of judgment.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 30TH DAY OF NOVEMBER, 2023.

M. ONYANGO

JUDGE

