



Kenya Union of Sugar Plantation And Allied Workers v West Kenya Sugar Company Limited (Cause 15 of 2021) [2022] KEELRC 1222 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEELRC 1222 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 15 OF 2021**

**JW KELI, J
APRIL 28, 2022**

BETWEEN
**KENYA UNION OF SUGAR PLANTATION AND ALLIED
WORKERS CLAIMANT**
AND
WEST KENYA SUGAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. By Memorandum of Claim dated January 9, 2020 the claimant on behalf of the Grievant (Bramwel Wanambisi) sought the following reliefs:-
 - a. A declaration that the decision and action of the respondent in terminating the employment of the grievant Mr. Bramwel W. Wanambisi was wrongful, Unprocedural and unfair.
 - b. An order for the respondent to issue the grievant with certificate of service.
 - c. An order for the grievant to be compensated as follows: -
 - i. Maximum 12 months compensation for loss of job at cross pay of monthly cross pay of kshs.34,809.30x12
= Kshs.417,711.60
 - ii. Three months payment in lieu of notice as per C.B.A Clause 9c; Kshs. 34,809.30.x3months = Kshs. 104,427.90/-
 - iii. 48 days annual leave balance from year 2014 as per C.B.A clause 16; (24,032x12)x8hrsx48 days = Kshs.44,366.75

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- iv. 15 days service pay for each year worked;
 $(24,032 \times 12) \times 8 \text{hrs} \times 15 \text{days} \times 3 \text{ years} = \text{Kshs.} 152,510.80$
2496
 - v. Compensation for psychological damages and injured feelings kshs.1,000,000/-.
2. The claimant, filed together with the claim a bundle of documents.
 3. The respondent entered appearance and filed Response to the claim dated August 28, 2021 through the law firm of O&M Law LLP Advocates. The respondent in addition to the statement of response filed respondent's list of witnesses, respondent's witness statement of Duncan Abwao dated November 10, 2021, respondent's list of documents dated November 10, 2021 together with the bundle of documents.

The Hearing

4. The court heard the parties on the December 9, 2021 when the Grievant gave sworn testimony adopted his statement as evidence in chief and was cross examined, produced claimant's documents and closed the case. On same day the respondent's witness (Duncan Obwao, DW) also gave sworn testimony adopted his statements as evidence in chief, produced respondent's documents and was cross examined and the respondent's closed its case.
5. The court gave directions on filing of submissions. The claimant's written submissions are dated January 10, 2022 filed in court on the January 13, 2022 by its representative Jeremiah Ingalia Akhonya. The respondents written submissions are dated February 11, 2022 and filed in court by O& M Law LLP Advocates represented by Mr. Andiwo on the February 17, 2022.

Undisputed Facts.

6. The Grievant was employed by the respondent on August 10, 2003 as a feed table operator. An incident leading to the dismissal happened on the March 24, 2016 leading to damage of HD Knives . The Grievant was on duty on March 24, 2016 from 2.00 pm to 10.00pm. The parties agreed on the disciplinary meeting process. The Grievant received a show cause letter and responded. The supervisor Mr. Charles Narusesi was also issued with a show cause letter and responded. The Grievant was invited to hearing and attended the same accompanied by Union representatives and minutes were done. The summary dismissal letter dated April 9, 2016 was issued to Grievant after the hearing.
7. Disputed facts.
The dispute facts concern the cause of damage of the HD Knives and whether the grievant was responsible in the observations in the minutes, the validity of the minutes some members having not signed, and validity of the reasons for dismissal, and procedural fairness.

Determination

Issues for determination

8. The claimant does not identify issues for determination in its submissions but addressed validity of reasons for dismissal and procedural fairness. The respondent in its submissions identifies the following as issued for determination:-
 - a. Whether the Grievant was summarily dismissed for justified reasons.



- b. Whether the respondent adopted a lawful procedure before dismissing the grievant and
 - c. Whether the grievant is entitled to prayers sought.
9. Upon consideration of the disputed facts and issues by the parties the court is of the considered opinion that the issues placed before the court for determination of the case are as follows:-
- a. Whether the respondent dismissed the grievant from employment for valid and justifiable reasons.
 - b. Whether termination of employment of the grievant was fair
 - c. Whether the grievant is entitled to reliefs sought.
 - a. Whether the Respondent dismissed the Grievant from employment for valid and justifiable reasons.
10. Section 43 (2) of the *Employment Act*, 2007 provides the threshold for the validity of reasons as follows:-“ the reason or reasons for termination are matters that the employer at the time of termination of the contract generally believed to exist and much caused the employer to terminate the services of the employee”. This provision is to be read together with section 45 (2) (b) of the said Act which provides that the employer must prove that the reason for termination is a fair reason related to the employee’s verdict, capacity, or compatibility or based on the operational requirements of the employer.
11. The respondent in the dismissal letter dated April 9, 2016 addressed to the grievant states the reasons for the termination to be :- “ You failed to demonstrate and convince management that you were not informed to take care of the company, barricading the foundation. Your negligence caused serious damage to HD Knives resulting to a loss 3 hours of running time”. The Grievant told the court he did not receive the said instructions. That he was not the supervisor. The claimant told the court the feeder table is part of the system and it takes cane to cane carrier then to HP Knives then to shredder then to the runner. He told the court a bar coupling is a metal on the run side and it was not in the cane yard. The Respondent said that the Bar coupling was found at the entry of the HD Knives at 10.00pm. The grievant said he had handed over and clocked out at 10.00 pm. That he usually left at 9.21 to 9.50 pm. That his shift is 2.00pm to 10.00 pm. That the mill operates past 10.00pm. That he reported o work the next day but did not work. That there was no damage at the feed table. The grievant told the court that he was told that the Bar coupling was found on March 24, 2016but did not see it. He told the court that Charles Nabusasi was his supervisor was dismissed from employment for same reasons. He said he takes 5 to 10 minutes to change clothing before clocking out.
12. The respondent witness told the court that the bar coupling originated from the cane yard and made way through the feed table upto the HD Knives. The grievant’s shift ends at 10.00pm and the bar compuling was found on March 24, 2016at 10.00 pm resulting to damage of HD knives causing stoppage of 3 hours of milling. The show cause was issued to several people working on the conveyor belt. During cross examination DW told the court he had no record that the grievant failed in his operation of levelling feed table, DW said he had no evidence that the bar coupling was found at 10.00 pm and had no shift record, there was no statement of the person who stopped the operation from 10.00pm for 3 hours due to the bar coupling, the bar coupling originated from the cane yard but the grievant was not supervisor attendant of the cane yard. The Supervisor is recorded under the minutes of disciplinary hearing to have said the incident happened after the shift of the grievant had ended and that he had already left. The supervisor pointed at probability that incident was caused by the shovel. DW agreed with the supervisor position that the bar coupling can only be moved by the shovel not the feed table operator. The shovel is a heavy plant machinery operated mechanically and able to move a



- load of more than 4 tones and movable like a tractor. DW told the court he did not record a statement from the shovel operator.
13. Paragraph 6 of the observation in the investigation report states that Biometric data shows the incident happened when the outgoing employees had clocked out. DW told the court the committee faulted the investigation on the conclusions and that there were gaps in the investigation report. DW confirmed in the response by the supervisor he had stated having warned the shovel operator not to push the cane towards the compiling. DW told the court it is not possible for anything to reach the HD Knives without passing through the feed table. That the Bar Coupling was a foreign object that the feed table operator ought to have seen. That the clocking system is a security system for access and one can clock out later for overtime or for a reliever who has not arrived or a reliever can arrive earlier. That at the hearing they considered other factors and it was not just the evidence of the supervisor only. .
 14. The respondent invited the court to rely on the court of Appeal decision in *Judicial Service Commission v Gladys Boss Shollei and another* (2014) where the court held as follows:- ‘ there is a band of reasonableness with which one employer may reasonably take one view. Another quite reasonably take a different view... if it(the dismissal) was quite reasonable to dismiss him , then the dismissal must be upheld as fair even though some employers may not dismiss him.’.. ‘if no reasonable employer would have dismissed him , then the dismissal was unfair. But if a reasonable employer might have dismissed him then the dismissal was fair.’” The Court of Appeal decision is binding on this court and the criteria is applicable in the instant case.
 15. The court having considered the evidence by both party notes that other staff including the supervisor were charged with the incident . The Supervisor exonerated the grievant from the incident. The investigation report indicated the incident happened when the grievant had clocked out, no statement was produced by the person who found the bar coupling and stopped the milling for the alleged 3 hours. It was established the bar coupling is a heavy load that would have been lifted by the shovel as per statement of the supervisor but no statement was recorded by the shovel operator. The grievant said in the morning when he reported the machine was working.
 16. The show cause letter dated March 26, 2016states:-

“ all yard supervisor and charge hands had been informed that the tell bar compiling were put on the foundation as barricade and cane around the foundation must be pinched by the bell loader instead of the shovel. this command was not observed resulting in the damage caused to the had knives. you are required to show cause why disciplinary action should not be taken against you for failure to obey lawful instructions and commands issued by your employer or his representative.”
 17. In the letter of termination, it is indicated “ you failed to demonstrate that you were not informed to take care of the compiling barricading the foundation. Your negligence caused serious damage to HD knives resulting to loss of 3 hours of running time”.
 18. Having considered the evidence by the parties the court finds that the grievant was not a bell loader or shovel operator but a feed table operator, the investigation report indicated the grievant had clocked out by 10.00 pm, his supervisor exonerated him, there was no evidence before the court to prove the grievant was negligent and had caused the alleged incident leading to damage of the HD knives. Consequently the court finds that the reasons for termination were not valid or justified. The court is persuaded by decision in *Jaffar Moahmed v Ready Consultancy Co Ltd* 9 2015) eKLR where court held at paragraph 15 that in ‘addition the fact that the respondent dismissed several mechanics means that there was no evidence to identity the alleged thief.....’



19. In this case the fact that other persons operating the mill that night were dismissed including the supervisor it is the finding of the court that there was no identification of the culprit. The reasons for termination of employment must be based on objective test and to add the reasonable test but not speculation by the employer as happened in the instant case. A reasonable employer would not have dismissed the grievant. I find and determine the reason given for the termination of the employment of the grievant are not valid or justifiable.
- b. Whether the termination of the employment of grievant was fair?
20. Section 45 (1) of the *Employment Act* provides that no employer shall terminate the employment of an employee unfairly. Section 45 (2) of the same Act provides:-
- a. That the reason for the termination is valid. The court found the reason given for the termination of the employment of the grievant to have been in valid and unjustified. Further under Section 45 (b) the reason for the termination is a fair reason if related to employees conduct, capability or based on the operational requirements of the employer. This was not the case in the instant case.
21. Section 45 (5) of the same Act provides for the criteria of deciding whether it was just and equitable for the employer to terminate the employment of an employee, and the court is to consider:- The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision.
22. It was not in dispute the grievant was issued with a show cause letter and there was a hearing and the grievant was accompanied by 3 representatives Yusto Luchivya, Gordon Uganda & Bereli Mukonyole and minutes were produced though not signed by all the attendees.
23. The Grievant said that he was issued with letter of invitation on March 20, 2016 to appear next day hence this was not sufficient time to prepare and be given all relevant documents. At the hearing the Claimant did not tell the court of any documents not given to him. It is true procedural fairness requires the charged to be afforded sufficient time to prepare for defence. The court agrees one day notice is not adequate time. The court nevertheless finds, save for the short time there was substantive procedural compliance with the statutory procedure under Section 41 of the *Employment Act*, 2007. The failure to sign minutes by all attendees does not render the minutes invalid.
24. The court upholds the criteria set out by Justice Radido in decision cited by the respondent in *Antony Mkala Chitavi v Malindi Water & Sewerage company ltd* (2013) eKLR on procedural fairness as follows:-“ The ingredients of procedural fairness as I understand it is within Kenyan situation is that the employer should inform the employee as to what changes the employer is contemplating using to dismiss the employee. This gives a non committant statutory right to be informed to the employees. Secondly it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and be heard and to present a defence/ state his case in person writing or through a representative if possible..”.
25. This court finds that procedural fairness is not sufficient. The reasons for the termination must be valid and justified.
26. The other criteria is under section 45(5)(b) of the *Employment Act* being the consideration of the conduct and capability of the employee upto the date of termination. There was no adverse information produced against previous conduct of the grievant. There were no previous warning letters to the grievant produced under criteria under Section 45 (5) (b) . The court having found the reasons given for the termination to have been invalid and unjustified it is the finding and



determination of the court, applying criteria under Section 45 (5) of the Employment Act, that the termination of the employment of the grievant was not fair.

27. Whether the Claimant is entitled to relief sought
- a. The court having found the reasons for the termination of the Claimant not valid and unjustified declares the action of the Respondent in terminating the employment of the grievant Mr. Bramwel W. Wanambisi wrongful and unfair.
 - b. The Respondent to issue certificate of service under Section 51 of the Employment Act, 2007.

Compensation payment

28. On compensation pay, the grievant prays for maximum 12 months compensation for loss of job at gross pay monthly pay of kshs.34,809/-The grievant produced his payslip of March 2016 indicating gross salary @ Ksh. 34,809.30. The court applies the last payslip in tabulation of compensation. Section 49 of the Employment Act provides the criteria for determination of the compensation for wrongful termination in the instant case. The court is to consider section 49 4 (b) “ The circumstances in which the termination took place including the extent if any, to which the employee caused or contributed to the termination, 49 (4) (e), the employees length of service and reasonable expectation of the employee as to the length of time for which the employment with that employer might have continued but for the termination, opportunities available to the employee for servicing comparable or suitable employment with another employer, conduct of the employee which to any extent caused or contributed to the termination, any other compensation.
29. Applying the above outlined criteria, the grievant was at no fault, no evidence of previous warning related to his performance, the grievant had served the Respondent from August 31, 2003 to April 9, 2016 without any adverse record. This is approximately 15 years of service. That is a long length of service that ought to be appreciated. The grievant was not paid any terminal benefits. The court is persuaded by the decision of justice Nduma cited by Claimant Bungoma ELRC Cause No 23 of 2017 Charles Samson Namusasi v West Kenya sugar company Ltd, where the Claimant who was the former supervisor of the grievant and dismissed on similar circumstances was awarded maximum award of 12 months. The court is persuaded that the grievant deserves the maximum compensation at 12 months last salary of kshs. 34,809.30 and is awarded compensation as prayed thus kshs. 34,809.30x2 = 417,711.60.

Notice payment

30. Notice pay in lieu of Notice as per C.B.A Clause 9 c. The Clause provides “if an employee has been in the employment of the Company for a continuous period of 10 (ten) years or nine the period of notice shall be three (3) months or three (3) month pay in view of notice by either party wishing to terminate the employment contract”. The grievant served for approximately 12 years hence falls within clause 9 (C) of the CBA.

The court determines the Respondent to pay the grievant 3 months notice pay @ Kshs.345.809.30x3= Kshs.104,427.90.

Accrued unpaid annual leave

31. On the claim for 48 days annual leave balance from year 2014 as per CBA Clause 16, the grievant in his statement filed in court on November 12, 2021 stated that the Respondent never paid his 48 days accrued annual leave. The Respondent had the burden to prove evidence to the contrary. The Respondent did not address the issue in its pleadings. The submissions that the Respondent



demonstrated grievant took all leave days is misleading. Section 74 (1) (f) of the Employment Act required employer to keep record of an employee's annual leave entitlement, days taken and days due specified in section 28. The grievant consequently is awarded payment for 48 days of leave in lieu thereof pleaded @ Kshs. 44,366.75.

Service pay claim

32. Service pay claim – the same is not justified and is not available to the grievant pursuant to provisions of Section 35 (6) of the Employment Act the grievant having been under the NSSF scheme and provident fund as per deductions under his March 2016 payslip.

Claim for compensation for psychological damage and injured feelings Kshs.1,000,000/-.

33. The court finds not statutory basis for such a claim the grievant having been compensated for the wrongful termination of employment. The claim is dismissed.

34. Conclusion and Disposition

The court having found the termination of employment of the Grievant by the respondent was wrongful and unfair and in final determination of the claim grants the following orders:-

- a. A declaration that the termination of the Grievant from employment by the respondent was wrongful and unfair.
- b. The respondent to issue the Grievant certificate of service under section 51 of the Employment Act.
- c. Compensation pay is ordered equivalent of 12 months salary pay
@Kshs. 34.809.30x12 = Kshs.417,711.60.
The Grievant is awarded Kshs.417,711.60/- as compensation.
- d. Three months payment in lieu, of Notice as per Clause 9 (c)
@Kshs.34.809.30x3.Total Notice pay awarded Kshs.104,427.90.
- e. 48 days accrued annual leave computed as follows:- Kshs.24.032x12x48 days = total Kshs.44,366.75
(sums under c, d, e,) subject to statutory deductions).

35. No order as to costs.

36. In the event the total awarded amount (c,d,e)is not paid within 30 days from date of judgment, Interest at court rates to apply from date judgment until payment in full.

DATED , SIGNED AND DELIVERED AT BUNGOMA THIS 28 TH DAY OF APRIL, 2022

J. W KELI,

JUDGE.

In the presence of

Court Assistant : Brenda Wesonga

Claimant:-

Respondent:-

