



**Kenya Union of Sugar Plantation and Allied Worker v West Kenya Sugar Company Limited (Cause 17 of 2021) [2022] KEELRC 59 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 59 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 17 OF 2021  
JW KELI, J  
APRIL 28, 2022  
(FORMERLY KISUMU ELR CAUSE NO. E025 OF 2021)**

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

**JUDGMENT**

**Issue**

**Unlawful and unfair termination of employment**

1. The Claimant is a trade union registered under the laws of Kenya to represent workers in sugar plantation and related industries. The Claimant filed this suit against the Respondent on behalf of its former employee Ambrose Wawire Efukhu ( the grievant) seeking the following reliefs:-
  - (i) Maximum 12 months compensation for loss of job at monthly gross pay of kshs.43,032.25x12 = Kshs.516,387.00.
  - (ii) Three months payment in lieu of notice as per C.B.A Clause 9c; Kshs.43,032.25x3 = Kshs.129,096.75
  - (iii) 36 days annual leave balance for the year 2015 as per C.B.A Clause 16; 8 days balance of 2014 28 days balance for 2015  
 $(30,061 \times 12) \times 8 \text{hrs} \times 36 \text{days} = \text{Kshs.}41,623$   
2496



- (iv) Salary arrears arising from underpayment while on acting in the position of an Electrician;  
January 2015 -31<sup>st</sup> April 2015 – (27,579-21847)x4months =Kshs.22,928.00  
1<sup>st</sup> May 2015 – January 2016 – (30,061-24,032)x9months =Kshs.54,261.00  
Total underpayment Kshs.77,189.00  
Grand Total Kshs. 764,295.75

2. In addition the Claimant filed a bundle of documents together with the Memorandum of Claim and a witness statement by the Grievant dated 5<sup>th</sup> November 2011.
3. The Respondent filed response dated 28<sup>th</sup> August 2021 received in court on the 15<sup>th</sup> November 2021. In addition the Respondent filed Respondent's witness statements dated 10<sup>th</sup> November 2021, Respondent's list of documents dated 10<sup>th</sup> November 2021 and annexed bundle of documents.

### **The Claimant's Case**

4. The Claimant was heard on 9<sup>th</sup> December 2021 and called one witness of fact, the Grievant, Ambross Wawire Efukho, who gave sworn testimony and adopted his witness statement dated 15<sup>th</sup> November 2021 as his evidence in chief and was cross -examined by counsel for Respondent. His case in summary being that he was unfairly dismissed from work and had been underpaid for lack of promotion following his GTTII certificate and working as electrician as per the CBA.

### **The defence Case**

5. The Defence was heard on the same day. The defence called one witness Duncan Abwao who gave sworn testimony he adopted his statement dated 10<sup>th</sup> November 2021 as evidence in chief and was cross examined by the Claimant's Representative. The defence in summary is that it complied with procedural fairness before dismissing the Grievant for reason of removing an electrical cable around 100 meters from the company premises which was an unauthorized act. That the Grievant failed to clear with the Respondent hence final dues have not paid. The defence denies the claim for underpayment .
6. The Parties filed written submissions. The Claimant's written submissions are dated 13<sup>th</sup> January 2022 and drawn by Jeremiah Ingalia Akhonya, the Claimant's representative and received in court on the 13<sup>th</sup> January 2022. The Respondent's written submissions are dated 11<sup>th</sup> February 2022 drawn by O &M LLP Advocates represented by Mr. Andiwo Advocate and were received in court on the 17<sup>th</sup> February 2022.

### **Undisputed facts**

7. It was undisputed that:- the Grievant was employed by the Respondent as an It was undisputed that:- the Grievant was employed by the Respondent as an Electrician Helper ( UG4) vide letter of employment dated 14<sup>th</sup> July 2006, effective 1<sup>st</sup> July, 2006. It was not also in dispute the grievant was issued with a letter dated 13<sup>th</sup> January 2015 titled 'formalization of transfer'' in the position of Electrician with effect 6<sup>th</sup> December 2014 with his other terms and conditions of employment remaining the same. It was not disputed that the grievant was issued with a show cause letter dated 8<sup>th</sup> January 2016 and responded to the same, that he attended disciplinary hearing on 14<sup>th</sup> January 2021 and a letter of dismissal dated 8<sup>th</sup> February 2016 was issued to Grievant afterwards.



## Determination

### Issues for determination

8. The Claimant in submissions addressed the following issues under its submissions.
  - (a) Claim for underpayment
  - (b) Procedural fairness
  - (c) Lack of valid reason for dismissal
9. The Respondent in its submissions identified the following issues for determination
  - (a) Whether the Grievant was summarily dismissed for justifiable reasons.
  - (b) Whether the Respondent adopted a lawful procedure before dismissing the grievant
  - (c) Whether the Grievant is entitled to prayers sought.
10. The court having considered the foregoing issues addressed by the parties if of the considered opinion that the issues placed by the parties for conclusive determination of the dispute are as follows:-
  - a. Whether the termination of Grievant from employment by the Respondent was lawful and unfair.
  - b. Whether the Grievant is entitled to reliefs sought.
  - a. Whether the termination of Grievant from employment by the Respondent was lawful and unfair.
11. It is considered position of the court that for termination of employment to be said to be lawful and fair it must comply with the requirements of Section 43 and 41 of the *Employment Act*. Section 43 of the Act requires proof of reason for termination. Section 43(2) guides the court on the prove of reasons by providing as follows, “43(2) the reasons 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 termination is unfair if the reasons did not exist. Section 45 further expounds on the reasons by providing 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 and capability or (ii) based on the operational requirements of the employer
  - c. That the employment in termination is in accordance with fair procedure”.
12. The criteria of fair procedure is provided under Section 41 of the *Employment Act* and the court finds that three ingredients are to be met namely:-
  - a. The employer, before the termination explains to the employee in a language they understand, the reason the employer is considering termination. The court considers issuance of a letter to show cause giving reasonable time and in a language the employee understands sufficient compliance with condition.
  - b. Secondly the employee is entitled to have another employee or a shop floor union representative of his choice during this explanation. The court considers that this right must be reflected in



the letter of invitation to the disciplinary hearing and in the minutes of the proceedings of the hearing.

- c. Thirdly the employee and his representative must be afforded opportunity to be heard and the employer must consider their representation on the grounds in its finding. The court considers the minutes of the hearing meeting reflecting the hearing of the representatives and consideration of their representation to meet this condition.
13. Applying the forgoing the court then considers whether there were valid and justified reasons for summary dismissal of the grievant. The Show Cause letter issued to the grievant is dated 8<sup>th</sup> January 2016 which states as follows:-
- “ report has been received from Misikhu transloading station security team that at about 8.37 am on January 7<sup>th</sup> 2010 you have been found taking an electric cable over the security fence and handing it over to an identified person without authority . this illegal Act amounts to theft contrary to section 44 (g) of the *Employment Act*, 2007. You are required to show why disciplinary action should not be taken against you including termination of employment for engaging in theft of company electric cable and removing company property without authority. Your response should reach the Human Resource office within 48 hours form the date of receipt of this letter ...”. The Grievant is indicated to have received the letter on 9<sup>th</sup> January 2015 and signed.
14. The grievant response letter to the show cause is dated 9<sup>th</sup> January 2016 and states as follows:-
- “ at around 8.30 am 7<sup>th</sup> January 2016 Thursday while working inside the cane yard, I met a security officer . As an electrician I had a cable and pliers. The cable to be used on lights that had failed. And Pliers is part of my tools that I should have as an electrician . but the security officer insisted that the cable was not in use”.
15. During the hearing the Grievant confirmed that he did not respond to the allegation of having been found taking electric fence and handing over to an unidentified person. He further stated that by the time of buying airtime he had been stopped by the Security Officer. The Respondent produced the minutes of the hearing. The representations of the grievant are recorded, submissions of security project manager and the Grievant was cross- examined by committee members and it is recorded he gave contradictory statements .
16. The committee reached conclusion that acts committed by the Grievant amounted to outright theft. The minutes are signed by 4 persons who appear to be from the Respondent.
17. The Claimant submits there was no prove the cable was lost and the Respondent relied on evidence of Mugoya the Security person only.
18. The Respondent submits that the Grievant steered off the issue under the show cause letter. The court finds this position was confirmed during cross- examination.
19. The Respondent states that the Grievant had opportunity to cross-examine the security officer and gave 3 different and contradictory accounts on the issue accused of. The Respondent submits the dismissal was justified and to buttress its case relies on the decision of the court in *Judicial Service Commission -vs Gladys Boss Sholei & Another* (2014) eKLR where the Appellate court stated in part: “ a court should therefore not lightly interfere with the sanction composed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it would have imposed the sanction . Imposed by the employer but whether in the circumstances of the case the sanction was reasonable”..



20. The Respondent further relies on the decision of the court of Appeal in *Clement Karuri -vs- Kenya Ports Authority* ( 2018) eKLR held that :- “ whether an employer is justified in dismissing an employee on grounds of dishonesty is a question that requires an assessment of the content of the alleged misconduct. More specifically the test is whether the employee is dishonesty gave rise to a breakdown in the employment relationship. The test could say, for example, that just cause for dismissal exists where the dishonesty violates essential condition of the employment contract, breaches the faith interests to the work relationship or is fundamentally or directly inconsistent with the employees obligations this or her”.
21. The court persuaded and guided accordingly in making its determination by the foregoing court of Appeal decision.
22. The Claimant, to buttress its case that there was no justified reason, relies on the decision in *Jaffar Mohammed -vs Ready Consultancy Co. Ltd* 2015 eKLR and quotes part of the decision, ‘he did not however, prove that indeed there was a lost flange. He relied on mere verbal report from the workshop Manager without evidence that any flange was lost while in custody of the Claimant”.
23. The court notes that, during his submissions under the minutes the grievant admitted he had custody of the cable and stated that due to emergency call he received he left the workshop to go purchase airtime. He admitted he did not obtain permission. During the hearing grievant said that by the time of being stopped by security he had not completed the work and that by the time of buying airtime he had already been stopped by security.
24. From the foregoing the court deducts that the Claimant failed to respond to the issue of the theft of cable in the show cause letter in his response, the evidence of the Mr Mugoya, the security was consistent with evidence of grievant in court that by the time he was stopped by security he had not completed the works, perhaps because he had done away with the cable and that he bought the air time after the stopping by security.
25. The court finds the reasons under show cause letter and dismissal letter were justified and existed with the employer.
26. The court upholds the decision of the court of Appeal in *Clement Karuri* case ( supra) and finds the Grievant’s act of dishonesty gave rise to a breakdown in the employment relationship . The reasons for the terminations are found to have been valid and justified

#### **Whether the procedure adopted in the termination was lawful**

27. Applying the criteria under Section 41, the Claimant told the court he was not accompanied by shop floor Union representative. The court finds this to be true from the minutes. The Grievant told the court he was just told to go to disciplinary hearing and was not prepared. Grievant told the court he was called to Human Resources Office at 2.00 pm and the hearing session begun at 4.00 pm of same day. That he told them to call the Engineer and Supervisor and they refused. The court faults the Respondent for non-compliance with the statutory requirement that the employee shall be accompanied by employee of choice or shopfloor Union representative. Whereas the court agrees short notice is sufficient in disciplinary cases the right to be accompanied by employee of choice or shop floor union representative cannot be waived by the employer. To this extend the procedural test was not met.
28. The court determines that the right to fair procedure was not met. Thus the termination was not fair.



## Whether the Grievant is entitled to reliefs sought

29. Compensation for unfair termination :- The court found there was valid and justified reasons to terminate the employment of the grievant. This court also find the termination procedure was unfair. In determining this issue the court is persuaded by decision of Justice Mbaru in Jacob Juma Makokha -vs Redar Security ( k) Limited 2018 eKLR where having found the Claimant was indeed guilty for gross misconduct like in the instant case stated , “ To award the Claimant under Section 49 of the [Employment Act](#) 2007 with compensation would be to reward gross misconduct. Such would not be in interests of Justice and good order. As a remedy of unfair termination must put into account provisions of sections 45 (5) (5) (b) of the Act in that the conduct and capability of the employee upto the date of termination becomes material”. The Court upholds the above decision and determines no compensation is accorded in this case for wrongful termination under section 49.
30. Notice pay -Despite the above finding Notice pay is awarded where termination of employment is not procedural based on 3 months balance as per clause 9c CBA is awarded.
31. On claim for underpayment the grievant submits that holds a GTT II certificate from 6<sup>th</sup> December 2014 and worked as electrician hence the letter of formalization of transfer referring to him as Electrician. That electrician helper ( his initial position) earned different salary hence he was discriminated against and prayed to be paid underpaid salary as per the CBA .
32. The Respondent submits there is no prove the Grievant was promoted to GTTII hence no basis of underpayment. The court having considered the Respondent’s letter dated 13<sup>th</sup> January 2015 finds that it amounts to promotion. The letter states “ This is to formalize your transfer from West Kenya Sugar Company Headquarters Kakamega to Misikhu region in the position f Electrician with effect from 6<sup>th</sup> December 2014. Your other terms and conditions of employment remain unchanged. By copy of this letter the finance controller is hereby requested to pay relocation allowance of Kshs.5,000/-.” The court’s interpretation of contents of the letter is that this is a promotion to position of electrician effective December 6<sup>th</sup> 2014.
33. The Grievant had been employed as Electrician helper in (UG4) in 2006. Electrician holding certificate “according to Claimant is under “UG8’).earning basic salary of Kshs. 30,061.00. In the Respondent’s witness statement paragraph 3 DW states he was aware that on December 7th 2014 he was transferred to Misikhu region in the position of an Electrician vide a letter dated 13<sup>th</sup> January 2014. This ties with the finding of the court the said formalization of transfer was a promotion .
34. The court finds and determines the Claimant was under paid as prayed.
35. Annual leave claim- The Grievant claim accrued annual leave of 36 days in arrears- The same is granted for there no being record by Respondent that the Grievant took leave. It is the obligation of employer under Section 74 (f) to keep record of the employee’s annual leave entitlement, days taken and days due specified under Section 28. The Respondent did not produce the Grievant’s record on leave entitlement. The court awards payment for the claim for 36 days accrued annual leave as prayed.

## Conclusion and disposition

36. The court determines that there were valid reasons for dismissal but the procedure was not fair and having found compensation is not awardable, the Claimant is awarded other reliefs as follows:-
  - (a) Certificate of service to issue pursuant to Section 51 of the [Employment Act](#).



- (b) Notice pay is awarded equivalent of Three months salary payment in lieu ((@ Ksh.43,032.25x3= ) amounting to the sum of Kshs.129,096/-.
- (c) The Grievant is awarded 36 days accrued annual leave  
30061x12 8hrsx36days) for the total sum of Kshs41,623/2496
- (d) Salary arrears arising from underpayment while on acting in the position of an Electrician from 1<sup>st</sup> May 2015 to January 2016 calculated as follows:-  
Kshs.30,061-24,032x9months =Kshs.54,26/-.  
January 2015 -31<sup>st</sup> April 2015  
27579-21847x4 months = Kshs.22,982  
Total underpayment awarded to the Grievant for the sum of Kshs.77,189/-.

37. The above amounts (b,c,d) are payable subject to statutory deductions of PAYE.
38. No order as to costs.
39. Interest at court rates effective date of judgement to date of payment in full if awarded monies are not paid in full within 30 days of this judgement .

**DATED, SIGNED & DELIVERED AT BUNGOMA THIS 28<sup>TH</sup> DAY OF APRIL, 2022**

**J. W. KELI,**

**JUDGE.**

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant:-

Respondent:

