



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 28 OF 2020**

**KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS .....CLAIMANT**

**VERSUS**

**BUTALI SUGAR MILLS LTD.....RESPONDENT**

**JUDGMENT**

1. The Kenya Union of Sugar Plantation & Allied Workers (the Union) sued Butali Sugar Mills Ltd (the Respondent) alleging that the summary dismissal of: Nebert Posta Salamba, Simon Mwando, Eileen Luvisia Yicha, Mercy Adhiambo Lumbugu, Jackline Chemutai Ndiema, Geoffrey Mutali and Vincent Mukhwana (the Grievants) was unfair.
2. The Respondent filed a Response on 11 June 2020 and the Cause was heard on 17 May 2021, 7 November 2021, and 21 February 2022.
3. Simon Mwando, Eileen Luvisia and Vincent Mukhwana testified on behalf of the Grievants while the Respondent called its Finance Manager.
4. The Union filed its submissions on 16 February 2022 and the Respondent on 29 March 2022.
5. The Court has considered the pleadings, evidence, and submissions.

**Abandoned claims**

6. The Union dropped the claims on behalf of Nebert Posta Salamba and Mercy Adhiambo and the Court marks the claims as withdrawn.
7. Jackline Chemutai Ndiema and Geoffrey Mutali were dismissed on different dates and the Court deconsolidated their claims from the suit herein.
8. The Court will therefore not consider their cases in this judgment.

**Unfair termination of employment**

**Procedural fairness**

9. The Respondent issued show-cause notices to the Grievants on 22 December 2017, 3 March 2018 and 29 March 2018 respectively.
10. The show-cause notices spelt out the allegations the Grievants were expected to confront and called upon them to respond in writing. The notices were copied to the Union.
11. The Grievants responded and were thereafter invited to attend physical disciplinary hearings which they attended.
12. Section 35(1) of the Employment Act, 2007 contemplates written notice of termination of employment while section 41 of the Act requires the employer to grant an opportunity to the employee to make representations before taking the decision to terminate.
13. The Court is satisfied that the Respondent complied with the statutory elements of procedural fairness.

**Substantive fairness**

14. Pursuant to sections 43 and 45 of the Employment Act, 2007, the Respondent was expected to not only prove but prove a valid and fair the reasons for dismissing the Grievants.

#### **Simon Mwando**

15. The reasons for the dismissal of this Grievant was that he was caught with a colleague attempting to sneak out of the Respondent's factory scrap metal(s).

16. The investigations by the Respondent established that the Grievant was in the company of a colleague who was driving a tractor assigned to the Grievant out of the factory with the scrap metal.

17. At the time, the Grievant was supposed to have been driving the tractor but he had left the task to the colleague.

18. The Grievant admitted in his written response that they were caught with the scrap metals but denied knowledge of how the metal came into the tractor.

19. Since the Grievant knew of the operations and procedures involving the tractor and he allowed a colleague to drive the tractor with him as a passenger, he must have been complicit in the attempt to steal the scrap metal.

20. The Court finds that the Respondent had valid and fair reasons to dismiss him.

#### **Eileen Luvisia**

21. This Grievant was employed as a dispatch clerk.

22. The Respondent's witness testified that on 4 March 2018 she was suspected of entering a wrong weight to cane brought in by a tractor when the weights had already been entered in respect of other cane brought by another tractor.

23. In the written response, the Grievant admitted the allegation but explained it away that she had gone for a call of nature and when she returned, she found that a colleague had already taken the weights but not entered the weight into the system and that another tractor was already on the weighbridge.

24. During the disciplinary hearing, this Grievant admitted that she had entered the wrong weights and that both herself and the colleague had left their workstations at the same time.

25. With the admission by the Grievant, the Court cannot fault the Respondent's decision to dismiss her. The Court is comforted in the conclusion because the Conciliator also made a similar finding.

#### **Vincent Mukhwana**

26. The allegation against this Grievant, a fuel pump attendant was altering daily fuel issuance sheets on 24 March 2018/25 March 2018.

27. In his response, the Grievant had stated that there was no fuel issued on 24 March 2018, and when he realised on 25 March 2018 that the fuel sheet had the previous days date, he requested the supervisor to have it changed and that it was the Transport Manager who changed the sheet and countersigned it.

28. On why there was a fuel discrepancy between the fuel sheet and the metre reading, the Grievant explained that it had errors from time to time which are reset by the Transport Manager (he admitted he did not report the errors).

29. The Grievant had previous disciplinary cases involving alteration of fuel pump readings. He had served for over 6-years as a pump attendant. He knew the procedures well and it was his responsibility to enter the opening and closing pump metre readings.

30. He did not demonstrate that he reported any fault with the fuel pumps before the allegations of altering the readings.

31. The Court is satisfied that the Respondent proved valid and fair reasons to dismiss this Grievant.

32. Compensation and pay in lieu of notice are thus not available to the Grievants as remedies.

#### **Breach of contract**

33. The Union contended that the Grievants had accrued leave by the time of separation and that the same should have been commuted for the years served.

34. Section 28(4) of the Employment Act, 2007 circumscribes how much leave can be carried forward. The Union did not lead any evidence to show that the Grievants carried forward the leave with the approval of the Respondent or that they applied for leave and were denied.

35. The Court declines to grant this head of the claim.

**Conclusion and Orders**

36. The Court finds no merit in the Cause, and it is dismissed.

37. Due to the social partnership between the parties, the Court makes no order on costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 20TH DAY OF APRIL 2022.**

**RADIDO STEPHEN, MCIARB**

Judge

Appearances

**FOR UNION MR. LINCOLN, INDUSTRIAL RELATIONS OFFICER**

**FOR RESPONDENT MR. MBEKA INSTRUCTED BY L.G. MENEZES & CO. ADVOCATES**

**COURT ASSISTANT CHRISPO AURA**