



**Mulanda v Butali Sugar Mills Limited (Cause 38 of 2021)
[2022] KEELRC 92 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 92 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 38 OF 2021
JW KELI, J
MAY 19, 2022
(FORMERLY KISUMU ELR CAUSE NO. 83 OF 2021)**

BETWEEN

KENNEDY DICKSON MULANDA CLAIMANT

AND

BUTALI SUGAR MILLS LIMITED RESPONDENT

JUDGMENT

Issue

Unlawful and unfair termination of employment

1. The Claimant through his advocates M/s Mwakio, Kirwa & Company Advocates filed a claim against the Responded upon summary dismissal from employment dated February 27, 2017 seeking the following reliefs:-
 - a. A declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstances the Claimant is entitled to compensation as prayed for herein above,
 - b. The sum of Kshs. 313,749/- as set out in the claim
 - c. Cost of this suit and interest on at court rates from time of filing suit until payment in full
 - d. A certificate of service as per section 51 of the [Employment Act](#)
 - e. Any other further and better relief the Honourable Court may deem just and fit to grant.



2. In addition the Claimant filed list of issues, list of witness, Claimant's witness statement all dated February 27, 2017. The Claimant in addition filed his list of documents of even date together the bundle of documents.
3. The Respondent entered appearance through the Federation of Kenya Employers and filed response dated July 6, 2017 received in court on the July 7, 2017 together with bundle of documents.
4. The Claimant on the July 27, 2017 filed in court reply dated 26th July 2017 to the Respondent's statement of response.
5. The Claimant's case was heard in open court on the 19th February 2018 by Justice Nderi Nduma. The Claimant gave sworn evidence. He adopted his statement dated February 27, 2017 as his evidence in chief and was cross-examined by Counsel for the Respondent.
6. The Respondent's case was heard on the April 9, 2018 by Justice Nduma Nderi. The Respondent called witness of fact Martin Arutu Emonjoing who gave sworn evidence and was cross-examined by counsel for the Claimant.
7. The court relies on the record of the proceedings to write this judgment. The parties did not write written submissions despite taking directions on the same.

Claimant's Case in Summary

8. The Claimant told the court he was employed on January 21, 2012 as auto mechanic and was accused of attempted theft leading to his dismissal on the January 4, 2016. Prior to dismissal he had been subjected to disciplinary proceedings. He produced his documents as filed as his evidence.
9. During cross-examination the Claimant told the court he called security Mr. Kurgat at 4.00 a.m. in the morning to warn him that he had left parts in a tractor as stated in his statement. That he alerted security to take the part and return to the workshop as per his statement. That he reported at 2.00p.m. shift. Haron drove the tractor. He returned the item to the workshop. That he was tired. It was an oversight. He forgot the clutch was in the tractor.

Defence Case

10. The Respondent witness Martin Arutu Emonjong (RW) on oath was a witness of fact. He worked as security officer at the Respondent's company since 26th May 2015 and he knew the Claimant as his former colleague. The Claimant was dismissed. The Claimant was given special duties in one of the units. After finishing the job a PTO clutch was found in the unit he was working in. The driver, Harun Muchika, of the truck reported that the clutch had been found. A guard called Reuben Kurgat reported the matter to him. He questioned the guard. Appendix S was the statement of Mr. Kurgat which he asked him to record, appendix B is statement of Aron which he recorded. Appendix 7 was his statement after investigations. He recommended the employee to face disciplinary proceedings. He had no problem with the Claimant who was his friend. Mr. Kurgat and Mr. Muchika were no longer in employment of the Respondent. They delivered the show cause letter to the Claimant. Disciplinary hearing was held. The Human resources unit dealt with the matter after the investigations. He was not aware of the charge the Claimant faced. (It is recorded that the Claimant's counsel objected to the production of the statements of Reuben Kurgat and Muchika because they were not witness hence no opportunity to cross-examine them.) The said statements were not produced.
11. During cross-examination by Counsel for the Claimant, Sutel Advocate , RW told the court that the Claimant was charged with attempted stealing. That he interviewed him. The Claimant called one



of the guards for safekeeping of the item. The item never left the premises. It was reported by the Claimant. He did not have police background. He was employed as security guard from school.

12. On re-examination RW stated that the guard told him he had been asked by the Claimant to pick the clutch and keep it for him and not to report to any one.
13. The Respondent was granted leave to call makers of the statements and that was allowed. On the January 19, 2022 when the parties appeared before the Court, the counsel for the Respondent proceeded to close the Respondent's case.
14. Undisputed facts
It was undisputed fact that the Claimant was issued with notice to show case, responded and was called and taken through disciplinary proceedings before issuance of summary dismissal. The facts of the incident of the clutch are not in dispute.
15. Disputed facts
Date of employment and period of service
Validity of reason of the dismissal and fairness of the termination procedure.
Reliefs sought

Determination

Issues for determination

16. The Claimant filed list of issues for determination in document dated February 27, 2017 which the court summarizes to be:-
 - a. Whether the Claimant was an employee of the Respondent
 - b. Whether the termination of employment of the claimant by the Respondent was lawful and fair
 - c. Whether the claimant is entitled to reliefs sought including award of certificate of service
 - d. Costs and interest of the suit.
17. The Respondent did file issues for determination in the suit.
18. The court having considered the case by the Claimant and the response evidence is of considered opinion that the issues for determination in this suit placed by the parties before the court are as follows:-
 - a. The period of employment of the Claimant by the Respondent
 - b. Whether the termination of employment of the Claimant by the Respondent was lawful and fair
 - c. Whether the claimant is entitled to reliefs sought
 - d. Who bear costs of the suit.

a. The period of employment of the Claimant by the Respondent

19. The Claimant told the court he was employed on January 21, 2012 as auto workshop mechanic and continued working upto January 4, 2016. The Claimant produced his letter of appointment (pages 14 and 15 of claimant's bundle). At page 14 the letter is signed by the Claimant on the 12th July 2011 and



for the Respondent July 13, 2011. At page 15 the letter with clause 8 to 12 is signed by the Claimant on the September 3, 2014. The letter is signed for the Respondent.

20. The Respondent produced the letter of appointment (Appendix 1). At page 1 of the letter addressed to Kenneth Dickson Mulanda(Claimant) dated July 1, 2014. The court took note that the page 2 of the letter is similar to contents of the letter produced by the Claimant(page 15 of the Claimant's bundle).
21. The court notes that the contents of the letter at page 14 of the Claimant's bundle are not consistent with letter at page 15 of the Claimant's bundle as follows:- the Claimant accepted letter at page 14 on July 12, 2011 and at page 15 on September 3, 2014. If the contract was commencing on 1st July and ending June 30, 2012 then it is not reasonable that it was accepted on 3rd September 2014. The Claimant told the court he was employed by the Respondent on 21st January 2012 another inconsistency. The court finds the clause on termination at page 14 is also repeated at page 15. the court draws conclusion that the document at page 14 is different from document at page 15(of the Claimant 's bundle of documents). The court finds that the letter of appointment produced by the Respondent (appendix 1) resembles the documents at page 15 of the Claimant's bundle. The court then finds that the employment letter produced by the Respondent (appendix 1) is a valid letter of employment of the Claimant.
22. The Court noted that the Respondent produced certificate of service(Appendix 12) of the Claimant dated January 6, 2016 indicating he worked from January 21, 2012 to January 4, 2016 The court notes that the Claimant had told the court in examination in chief he was employed by the Respondent on the January 21, 2012.
23. The court determines that the Claimant was employed from 21st January 2012 as per certificate of service by the employer who is the custodian of records of employment under section 74 of the [Employment Act](#).

b. Whether the termination of employment of the Claimant by the Respondent was lawful and fair

24. It is a 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 43,45 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.
25. 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".
26. 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.
27. Applying the foregoing requirements of the law the Court then considers whether there were valid and justified reasons for summary dismissal of the Claimant. The Show Cause letter dated 8th December issued to the Claimant (appendix 3) states:
- ‘ it has been reported that on the 5th December 2015 at around 5.15am a P.T.O clutch set was found hidden underneath the driver’s seat of tractor KTCB 466G which you were assigned to repair the previous day. The same was intended to be sneaked out out of the BSML premises. This is a grave omission on your part which amount to gross misconduct and therefore contrary to section 44 subsection 4(g) of the *Employment Act* 2007 . in the mean time show cause why disciplinary action cannot be taken against you. You are required to respond within the next 48 hours failure to which the management will arrive at appropriate disciplinary cation against you”.
28. The Claimant did not dispute receipt of the show cause letter which he proceeded to respond to vide his letter dated 8th December 2015. In the Response the Claimant’s statement is consistent with the evidence of facts of RW (appendix 7) but stated he never intended to sneak the item out of the company premises.(Appendix 4 of the Respondent’s documents)
29. The Respondent produced letter of invitation of the Claimant to disciplinary hearing dated December 9, 2015(Appendix 8). The invitation repeats the same issue in the letter to show cause.
30. The Respondent produced the minutes of the meeting(appendix which records the presentations of the Claimant and his witnesses(2 union representatives.) The Claimant admitted to leaving the Clutch in the tractor, calling the Security officer Kurgat because they were close and he had his contact, the Claimant said he did not call the workshop manager as it was the security guard who was on site. The disciplinary committee doubted his explanation and concluded that the Claimant had intention of sneaking out the clutch from the employers premises. They also concluded that the Claimant was negligent for leaving the clutch in the tractor. The committee concluded no previous adverse reports against the Claimant and he could be given warning with strong reprimand. The committee also noted the offense calls for summary dismissal and left issue with the management. The parties present signed attendance list including the Claimant and the union representatives. (Appendix 10)
31. The Respondent’s management decided to issue summary dismissal letter dated 4th January 2016 stating the Claimant’s defence was not convincing and citing section 44(4)(c) and (g) of the *Employment Act* which address negligence of employee and suspicion of having committed a crime respectively.
32. The valid reasons for termination of employment are the ones which employer reasonably believed to exist under section 43 of the *Employment Act* and related to the reason for the termination of



employment. The court of Appeal in *Clement Karuri v 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”.

33. The court is persuaded and guided accordingly by the above decision in making its determination by the foregoing court of Appeal decision.
34. The court finds the reasons for dismissal were on suspicion of attempted theft, also admitted by the Claimant at the hearing, by finding of intention to sneak out the clutch the Claimant had left underneath the seat of a tractor he was repairing only to call his guard friend Kurgat later to pick and keep item for him and not the driver of the said tractor or the workshop manager.
35. The court upholds the decision of the court of Appeal in *Clement Karuri case (supra)* and finds the Claimant’s action gave rise to a breakdown of trust in the employment relationship . The reasons for the terminations are found to have been valid and justified.
36. Whether the procedure adopted in the termination was lawful.
Applying the criteria under Section 41, the court found evidence the Claimant was issued with notice to show cause, he was invited to disciplinary hearing and informed of the reason, attended the disciplinary hearing with 2 union representatives, his evidence and representations of the union representatives was recorded in the minutes produced and attendance signed by all parties. The Court finds there was full compliance with the provision of section 41 of the *Employment Act* by the Respondent before issuance of the summary dismissal letter.
37. The court determines that there was procedural fairness in dismissal of the Claimant from employment by the Respondent.
38. Whether the Claimant is entitled to reliefs sought
 - a. Compensation for unfair termination :- The court found there was valid and justified reasons to terminate the employment of the grievant. The court also find the termination procedure was fair. The Claim for compensation is dismissed.
 - b. Claim for notice pay. On finding the termination was fair the remedy is not available.
 - c. Leave days- the Respondent produced record of terminal benefits for 3 employees (appendix 11). It is indicated nil days for leave for the Claimant. The Claimant told of private leave in 2013. That Is unknown type of leave under the law. The claim is dismissed.
 - d. On the claim for public holidays worked the Claimant did not plead but stated under reliefs sought it was a claim for 4 years. The court established he only worked from January 21, 2012 to 4th June 2016. The Respondent stated in its response to the claim that the Claimant did not work on public holidays. In reply to the response the Claimant did not rebut the allegation. The court did not find prove of the claim. The claim is dismissed,
 - e. On severance pay- the Respondent stated it was paying NSSF as per payslip (page 17 of the Claimant’s bundle). The court finds having been on NSSF the claim for severance pay is denied pursuant to the provisions of section 35(6) of the *Employment Act*.
 - f. Certificate of service under section 51 of the *Employment Act*



The Respondent annexed a copy of the certificate dated 6th January 2016. There is no evidence it was issued to the Claimant upon the summary dismissal. The Respondent is ordered to issue the certificate of service to the Claimant within 7 days of Judgment.

Conclusion and Final Determination

39. The Court determines that the termination of the employment services of the Claimant by the Respondent was lawful and fair. The claim is dismissed save for the claim for certificate of service.
40. The Court orders the Respondent to issue the Claimant with original Certificate of service pursuant to Section 51 of the *Employment Act* for the period worked from January 21, 2012 to January 4, 2016 within 7 days of this judgment through his Advocates..
41. No order as to costs.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 19TH MAY 2022

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant:- Kirwa

Respondent: Bruce Odeny holding brief for Ouma.

