



**Mwacho v Sunflag Textile & Knit Wear Mills Limited (Cause
1890 of 2015) [2022] KEELRC 4065 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4065 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1890 OF 2015**

M MBARŪ, J

JUNE 6, 2022

BETWEEN

ENOCK MWACHO CLAIMANT

AND

SUNFLAG TEXTILE & KNIT WEAR MILLS LIMITED RESPONDENT

JUDGMENT

1. The respondent issued the claimant with a letter of employment as a weaver job group 2 from August, 2007 at a wage of Ksh 14,586 per month. A letter of appointment was issued and dated May 4, 2009.
2. The claimant was a member of the Tailors and Textile Workers Union and acted as the shop steward in the company. There was a collective agreement (CBA) on terms and conditions of employment.
3. On January 29, 2014 the respondent terminated the claimant in his employment through summary dismissal on allegations that he had removed drums/jerry cans valued at Ksh 25,798.40 which had not been paid for and this amounted to gross misconduct.
4. The claim is that there was no justification to the summary dismissal and the claimant was not paid his terminal dues and claim the following;
 - a. Salary for January, 2014 ksh 14,586;
 - b. Leave pay for 3 years Ksh 43,758;
 - c. Notice pay for 2 months Ksh 29,172;
 - d. Gratuity/service pay Ksh 68,068;
 - e. Arrears of underpayment ksh 79,214.76;
 - f. Compensation and



- g. Costs.
5. The claimant testified that on January 25, 2014 while under instructions as a shop steward to sell empty used drums and jericans to the workers who were in need upon payment, he took names and money from all those who wanted the drums and made a list. He took out the drums from the store and placed them outside the store for other employees to choose the ones they wanted to buy. In line with company procedures, he took the money for deposit in the bank as required and came back and handed over the list of employees and the bank deposit slip as proof of payment to Mr Madivani who confirmed and issued a receipt and gate pass and which allowed the claimant to proceed with sorting out the drums.
 6. The claimant testified that Mr Madivani was with malice since he came out and said that the drums were more than what was paid for and he stopped the process and proceeded to summon the claimant to the office to record a statement. There was a wrong accusation of removing empty drums from the store. The claimant was just sorting them out for handing over to the buyers. The summary dismissal was not justified.
 7. The claimant called Pascal Omondi as his witness and who testified that on January 25, 2014 he was working with the claimant and other employees and was instructed to sort out empty drums that were to be sold to employees. After sorting them, the remainder of the drums were to be returned to the store. Workers would first give money and a deposit in the bank and upon the respondent issuing a receipt, a gate pass would be issued but on this date, while he was still sorting out the drums, Mr Madivani asked the claimant to give him the list of those who had paid before issuing the drums. Before finalisation of the process, Mr Madivani came to the store and started quarrelling them stating that some drums had not been paid for and that they were stealing the excess drums yet the process of issuance had not completed. Together with the claimant and Ne Mwcho, Mwaniki Metho and Okumu they were all summoned to the office and recorded statements.
 8. Mr Omondi testified that together with the claimant they were called to the office and suspended and issued with notice with copies to the union and then issued with letters terminating employment. Termination of employment was due to the claimant participating in union activities as a shop steward and he never stole the drums as alleged by the respondent.
 9. In response, the respondent's case is that the claimant was employed on May 1, 2009 and issued with letter of appointment and his last wage is Ksh 11,086 and a house allowance of Ksh 3,500 per month.
 10. Before the claimant was dismissed he had been issued with warning for absenting himself from work on January 12, 2010 and a second warning on May 11, 2010 to improve on his output and a third warning on May 24, 2012 for absenting himself from work without permission and a 4th warning on August 29, 2013 for poor work performance.
 11. The claimant was dismissed for gross misconduct when he was caught removing company property from the respondent's premises. The claimant had previously been cautioned on his conduct and when he was caught removing over 398 empty drums from the premises contrary to the 260 empty drums which had been paid for, the accountant noted and a physical count was done which revealed the claimant found to have in excess of 138 empty drums which had not been paid for.
 12. This incident was reported to the respondent on January 25, 2014 and upon investigations the claimant was found to have acted in gross misconduct, he was suspended and invited to a hearing on January 27, 2014 in the presence of the human resource and shop steward and was found to have acted contrary to company policy. The claimant had planned, coordinated and carried out unlawful acts to remove empty drums from its premises with ill intents and this justified summary dismissal.



13. The claimant was paid his terminal dues in cheque No 012604 on March 5, 2014 but he declined to collect the same.
14. The respondent called Chris Mukung' the human resource manager who testified that before the claimant was dismissed from his employment he had been issued with several warning notices for absenting himself from work and poor work performance and on January 25, 2014 he was caught by the company accountant unlawfully removing over 398 empty drums from the premises instead of 260 empty drums which had been requested and paid for. upon doing a physical count, the respondent discovered that there was excess of 138 empty drums. Upon the mater being reported, an investigation was conducted and the claimant found culpable. He was suspended and then invited to a hearing but failed to give satisfactory reasons for his conduct and was then issued with notice of summary dismissal for gross misconduct.
15. Three other employee were dismissed over the same conduct being John Mwaniki, Pascal Omondi and Leonard Katamu. These others were not shop stewards like the claimant and he cannot justify his conduct as being victimised for union activities. The other employee were happy with the sanction issued and were paid their terminal dues.
16. Mukung' also testified that the claimant was not underpaid as alleged. Wages were paid in accordance with the contract and then the union applied the CBA terms. A weaver fell under job group 2 and the claimant was entitled to Ksh 10,211 in the year 2012 and in 2013 the wage was reviewed to ksh 10,517. The claimant was paid his terminal dues but he failed to collect the cheque.
17. At the close of the hearing, the parties filed written submissions which have been analysed and the issues which emerge for determination are whether there was unlawful and unfair termination of employment and whether the reliefs sought should issue.
18. In a letter dated January 29, 2014 the respondent terminated the employment of the claimant through summary dismissal on the grounds that he unlawfully removed empty drums valued at ksh 25,798.40 and which he knew were not requested for or paid for.
19. In the notice, the respondent offered to pay the claimant salary for day worked in January, 2014; accrued leave days and less loans advanced to him.
20. An employer is allowed to issue summary dismissal on an employee who fails to do his work properly or who commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property pursuant to section 44(4) of the Employment Act, 2007. The only safeguard to the employee is to be allowed a hearing to defend his employment pursuant to section 41(2) of the Act that;
 - (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
21. The calamity testified that the respondent had a procedure for selling empty drum to its employees. on January 25, 2014 he was found soughing out the drums and directed to return them to the store for a physical count.



22. The respondent on the other hand through Mr Mukung’ testified that the accountant noted that the claimant in sorting out the empty drums had removed more container than what had been paid for. there was an investigation and an excess of 138 drum was found which had not been paid for.
23. The claimant was suspended and then called for a hearing in the presence of the human resource officer and a shop steward.
24. The shop floor is the best forum to source evidence. the claimant was taken through the due process and his conduct found wanting with regard to removal of paid for empty containers and removing excess which had not been paid for. he was given a hearing and his conduct justified summary dismissal. The sanction of summary dismissal cannot be faulted by the court.
25. On the claims made, notice pay and compensation are remedies not available in a case where summary dismissal is justified.
26. In the notice terminating employment, the respondent noted the claimant would be paid for days worked up and until January 27, 2014.
27. Leave days accrued were all tabulated and accounted for. the claimant cannot justify a claim over and above such account.
28. Gratuity/service pay is regulated under the applicable CBA. Such is not due in a case of summary dismissal. The record of the claimant during the entire phase of his employment does not place him in good standing. He had been issued with several warning over his conduct and such entire record must be put into account pursuant to the provisions of section 45(5)(b) and (e) of the [Employment Act](#), 2007 that;
 - (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - ...
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) ...
 - (d) ... and
 - (e) the existence of any pervious warning letters issued to the employee.
29. Ultimately, the terminal dues payable to an employee who has enjoyed a facility or a loan from the employer are paid less such a facility.
30. pursuant to section 17 and 19 of the [Employment Act](#), 2007 the employer is authorised to make a deduction of any amount that the employee owes at the end of employment pursuant to a salary advance or loan during the pendency of such employment. such loan due by virtue of employment and secured through a salary is a lawful deduction at source by the employer.
31. In [Javan Were Mbango v H. Young & Co. \(E.A\)](#) [2012] eKLR the court held that;

Employees who out of their own free will join employees sacco do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the sacco for their welfare and for the collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, there are owed all their



savings without taking into consideration the collective agreement under their sacco and or cooperative society. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of the termination of his relationship with the principal.

32. Accordingly, the claims made are found without merit and are hereby dismissed. The claimant is at liberty to collect his terminal due from the respondent upon giving at least 14 days' notice in advance. The respondent is entitled to costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 6TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

