



Kenya Union of Sugar Plantation And Allied Workers(KUSPAW) v Butali Sugar Mills Limited (Cause 13 of 2021) [2022] KEELRC 3785 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 3785 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 13 OF 2021**

JW KELI, J

JULY 28, 2022

(FORMERLY KISUMU E040 OF 2021)

BETWEEN

**KENYA UNION OF SUGAR PLANTATION AND ALLIED
WORKERS(KUSPAW) CLAIMANT**

AND

BUTALI SUGAR MILLS LIMITED RESPONDENT

JUDGMENT

1. The claimant a registered trade union in the sugar sector filed a memorandum of claim dated May 26, 2021 received in court on even date on behalf of its member Jackline Chemutai Ndiema against the respondent seeking the following prayers:-
 - i. The summary dismissal of Jackline Chemutai Ndiema be revoked and she be reinstated back to her substantive employment without loss of benefits.
 - ii. Where reinstatement is not practical the aggrieved person be compensated/paid as follows:- One months notice as per the CBA between parties =Kshs 19,290/-12 months maximum compensation for job loss ie 12months X Kshs 19,290/- = Kshs 231,480.Grand total of Kshs 250,770/-.
 - iii. Issue the grievant with a certificate of service
 - iv. Costs for the suit
 - v. Any other relief the court deems fit.



2. In addition to the claim, on even date the claimant filed supporting affidavit sworn by Felix Idamangéyo, the Branch Secretary, the Recognition Agreement, the Collective Bargaining Agreement and correspondence on the termination of employment.
3. The claimant filed the witness statement of Jackline Chemutai Ndiema dated January 26, 2022 received in court on the January 26, 2022.
4. The respondent entered appearance and filed defence /reply dated June 17, 2021 to the claim and received in court on the June 29, 2021 and in the same bundle filed respondent's list of witnesses, the 1st respondent's witness statement of Daniel Kiyondi and the respondent's list of documents (No 1-24) and annexed the bundle documents.
5. The claimant's case was heard on the March 30, 2022 and on April 27, 2022 with one witness of fact Jackline Chemutai Ndiema testifying on oath. The grievant adopted her filed witness statement as their evidence in chief and was cross-examined by counsel for the respondent Mr Kundu.
6. The defence case was heard on the April 27, 2022 with the respondent calling one witness of fact, Daniel Kioni Nyarunda, who testified on oath and adopted his witness statement as his evidence in chief and was cross-examined by the claimant's representative, Mr Avesa.
7. The parties filed written submissions. The claimant's written submissions drawn by Lincoln Aveza Isagi are dated May 10, 2022 and received in court on the May 18, 2022. The respondent's written submissions drawn by LG Menezes & Company Advocates dated May 6, 2022 were received in court on the May 16, 2022.

Claimant's case in summary

8. The claimant vide the two witness statements states that the grievant was employed by the respondent in January 2015 as Lubricator at basic salary of grade 5 of the CBA of Kshs 19,290/.
9. That she was dismissed from the service unfairly on January 15, 2018 on allegations under show cause letter dated January 15, 2015 where she was accused of lying her mother had died, was accorded compassionate leave and granted Kshs 30,000 of benevolent when she knew the claims were not true.
10. That she was issued with a further another show cause letter dated January 18, 2018 requiring her to produce death notification. She responded to the first show cause letter *vide* letter dated January 17, 2018 where she stated clearly her biological mother had passed away and she deserved to be given benevolent fund and compassionate leave under the benevolent constitution and the collective bargaining agreement.
11. That she continued to work and later on October 24, 2018, ten months later she was invited for disciplinary hearing meeting on the October 24, 2018 which she attended accompanied by Union Branch Chairman and the Treasury and her section shop steward.
12. She states that since the chair of the meeting, Mr Masese, was the author of the show cause letter and doubted the death of her maternal mother he did not give time to explain herself at the meeting. That she was ready to be subjected to DNA test to prove her maternal relationship which the chairman of the disciplinary committee objected to.
13. That during the 10 months she was working before being invited to the Disciplinary Committee the benevolent fund was deducting her the said Kshs 30,000/- without her consent even before she was heard.



14. That on the October 25, 2018 she was issued with a summary dismissal letter by the human resources manager, Mr Masese.
15. The Claimant alleges that Mr Masese breached Clause 5 of the CBA on disciplinary procedure. That the union representatives were sent out during decision making.
16. That the minutes were signed by the management alone meaning there was a predetermined position. That this exposed the grievant to financial difficulties.

Respondent's case in summary

17. The respondent denies the grievant was employed to grade 5, states she was employed as lubricator on December 31, 2014 with effect from January 1, 2015 at starting gross salary of Kshs 15,261/- with basic salary of Kshs 13270/- and housing allowance of Kshs 1991/-.
18. The respondent agrees to having issued two show cause letters and the response received. The respondent says that it conducted investigations in the matter *vide* letter dated January 23, 2018 , internal memo dated January 23, 2018 and letter dated October 17, 2018 to the National Registration Bureau to establish the true position before inviting the grievant to disciplinary hearing before summary dismissal.
19. The respondent then denies the allegation by grievant that she adopted Selina's name as her biological mother had separated with the father before she obtained her National Identification Card.
20. The respondent denies existence of a cause of action against it by the claimant.

Determination

Issues for determination

21. The claimant in its written submissions identified the following issues for determination:-
 - a. Was the disciplinary procedure just and fair?
 - b. Was the reason for terminating the aggrieved person the role of management or the role of the benevolent fund officials.
 - c. Does the allegations used to summarily dismiss her pertain to her job as lubricant?
 - d. Why was the aggrieved person double punished?.
 - e. Were the procedure provided for in the parties CBA used exhaustively in disciplining the aggrieved person?.
 - f. Is the claimant entitled to the prayers sought in the memorandum of claim?.
22. The respondent on the other hand *vide* their written submissions identified the following issues for determination:-
 - a. Whether the termination of the employment of the claimant was wrongful , unfair and unlawful in the circumstances
 - b. Whether the claimant is entitled to reliefs sought.



23. The court upon considering the claim, evidence by the parties and the reliefs sought finds that this is a claim for unfair summary dismissal. It is the considered opinion of the court the issues to be determined in the dispute are as follows:-
- a. Whether there were valid reasons for termination of the employment of the grievant by the respondent
 - b. Whether there was procedural fairness in the termination of the employment of the grievant
 - c. Whether the claimant is entitled to the reliefs sought.

The relevant

24. Section 43 of the *Employment Act* addresses proof of termination as follows:-
- “(a) in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the services of the employee.”
25. Section 44 (4) of the *Employment Act* provides for justifiable and lawful grounds for dismissal from employment, inter alia if:-
- (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
 - (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,
 - (c) an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”
26. Section 45 (2) of the *Employment Act* provides that a termination of employment by an employer is unfair if the employer fails to prove:-
- a. The reason for the termination is a fair reason:-
 - i. Related to the employees conduct, capacity or compatibility or
 - ii. Based on the operational requirements of the employer.
27. Section 46 of the *Employment Act* provides for reasons that do not constitute fair reasons for dismissal.
28. Section 47(5) of the *Employment Act* provides for burden of proof in claims for wrongful dismissal as follows:
- “(5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of Employment or wrongful dismissal has occurred shall rest on the employee, while the burden



of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”

Whether there were valid reasons for termination of the employment of the grievant by the Respondent

29. The burden to prove that the reason or reasons for termination was valid rests on the employer under section 43 of the *Employment Act*(supra)
30. The respondent had the burden to prove the validity of the reasons it relied on to terminate the services of the grievant.
31. In the show cause letter (exhibit 2 by claimant)addressed to the grievant, she was informed that on the December 14, 2017 she had claimed to have lost her biological mother where the benevolent fund issued her with Kshs 30,000/. for funeral services as per the *Constitution*. That further she made same claim to the employer and was granted compassionate leave as stipulated under paragraph 19 of the CBA to condole the loss, that all the claims were investigated by the benevolent fund and it was found her mother was alive and well. The letter informed her that this was gross misconduct and asked to show cause why disciplinary action should not be taken against her.
32. The grievant *vide* letter dated January 17, 2018 responded to the show cause letter. In the letter she denied the allegation and stated that the person who had passed on was her biological mother and she was ready to prove the person who had passed on was her biological mother. That she was entitled to the funds and the leave (claimant’s exhibit 5)
33. The respondent on receipt of the response issued to the grievant another show cause letter dated January 18, 2018 and required the grievant to produce the death notification/certificate and burial permit so they can dispense the issue.
34. The respondent’s witness (RW) during cross- examination the produced the response by Registrar of persons to their request of October 17, 2018 to know the grievant’s parents indicating the biological mother was alive (respondent’s exhibit 9 at page 43). RW said they could not do DNA due to lapse of time and were only concerned with the person declared in their official records.
35. The respondent in their dismissal letter of the grievant from employment relied on same reasons under the show cause letter. (exhibit 5)
36. The claimant submits that she asked for DNA and the chair of the disciplinary committee refused. In her response she said she had prove that she had lost her biological mother. In the 2nd show cause she was asked to provide burial permit and death certificate or notification. She did not.
37. The claimant submits that the grievant having been surcharged the dismissal amounted to double punishment and questioned the interest of the management in the matter which was not related to her duties.
38. The claimant submits that law cited in the dismissal letter section 44(h) of the *Employment Act* does not exist hence the court should not entertain employers who dismiss workers on non-existent laws.
39. The respondent submits that the test to apply in determining the validity of the reasons by the employer is an objective test of what a reasonable employer would have done as described by Lord Denning in *British Leyland UK Limited v Swift* (1981)IRLR 91

‘ The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him , then the dismissal was unfair , but if the reasonable



employer might reasonably have dismissed him, the dismissal was fair...if it was reasonable to dismiss him, then the dismissal must be upheld as fair even though some employers may not have dismissed him.” The court upholds the test.

40. The valid reasons are ones which the employer reasonably believed to exist under section 43 of the [Employment Act](#) and related to the reason for the termination of employment.
41. The court having considered the submissions by the parties and the evidence presented by the respondent finds prove of valid reason of termination of the employment of the grievant. The court find reasons were captured in the 1st show cause letter and the dismissal letter being giving false information of her mother being dead and obtaining money by false pretense.
42. The court finds that the benevolent fund though managed differently is related to the employment of the grievant as she also got compassionate leave based on the same false information. The summary dismissal letter does not cite section 44(h) but 44(f) and (g) which are related to commission of offences. The court finds that the citation of facts not in the dismissal letter to be a mistake of the advocate.
43. The court applying the test by Lord Denning (supra) finds and determines that any reasonable employer would have dismissed the grievant from employment based on the reasons proved by the respondent.
44. The conduct of the grievant led to breakdown of her relationship with the employer and that is another test. 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’s 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”.
45. The court finds and determines there were valid reasons related to compatibility of the employee and loss of trust by employer to dismiss the grievant from employment of the Respondent.

Whether there was procedural fairness in the termination of the employment of the grievant

46. It was not in dispute that the claimant was informed of the reasons the employer was contemplating her dismissal, the reasons have been found to be valid. The grievant admitted to have been invited for hearing which she attended accompanied by the branch chairman, the branch treasurer and shop floor steward. The minutes of the proceedings were produced by the claimant (exhibits 6 and 7). The court examined the minutes and found the representations of the union officials, shop floor steward as well as the grievant are recorded.
47. The respondent submits that the process was not in accord with the process stipulated in clause 5 of the Collective Agreement. The claimant states that the process took over nine months after the show cause. RW on cross examination said that the investigation took long.
48. The claimant further submits that though the union was invited to the hearing the management excluded them from the final decision. That the grievant was willing to undergo DNA test.
49. The criteria of fair procedure is provided under section 41 of the [Employment Act](#) and is mandatory with three ingredients which 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.
 - b. Secondly the employee is entitled to have another employee or a shop floor union representative of his choice during this explanation.
 - 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.
50. The court finds that clause 5 of the Collective Bargaining Agreement between the parties does not define the period for disciplinary proceedings for an employee who is at work. The respondent justified the delay due to investigations taking long. There is no prejudice suffered by the grievant as she was at work. The court finds that the management having heard the union representative, the shop steward and the grievant the management was within its statutory rights to exclude them from its final decision making. That is consistent with the provision in section 41(2) of the *Employment Act*. The employer is only required to hear and consider their representations.
54. The claimant has placed before the court two authorities. The relevant one being *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR in which the court faulted the disciplinary process for failure to take its investigations full circle. The court finds in this case the investigations was complete. The insistence on DNA was an afterthought as it was not raised in the response to the show cause and further the respondent relied on official government record in finding the grievant lied about the death of her biological mother.
54. The court finds and determines that there was procedural fairness as provided for under 41 (2) of the *Employment Act* in the process of summary dismissal of the grievant from employment.

Whether the Claimant is entitled to prayers sought.

54. The claimant sought for reinstatement of the grievant back to employment and in the alternative notice pay and compensation. The claimant also prays for the grievant’s certificate of service and costs of the suit.
54. The respondent produced a copy of the certificate of service of the grievant dated November 2, 2018. There is no evidence that it was issued to the grievant. A certificate of service is a statutory right of the employee under section 51 of the *Employment Act* notwithstanding the circumstances of the termination of employment. The claimant to be issued with the certificate.
54. The court having found the summary dismissal of the grievant by the respondent was lawful and fair, all other prayers are disallowed.

Conclusion and disposition.

54. The court enters judgment and determines that the dismissal from employment of the grievant by the respondent was lawful and fair.
55. The claim dated May 26, 2021 is dismissed.
56. The respondent to issue the claimant with the certificate of service for the grievant within 14 days of this judgment.
57. No order as to costs.
58. It is so ordered.



DATED, SIGNED AND DELIVERED THIS 28TH DAY OF JULY 2022 IN OPEN COURT AT BUNGOMA.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:-

Court Assistant: Brenda Wesonga

For Claimant: Avesa

For Respondent : Oduor

