



**Kenya Union of Sugar Plantation and Allied Workers v Butali Sugar Mills Limited  
(Cause 41 of 2021) [2022] KEELRC 1552 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1552 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 41 OF 2021**

**JW KELI, J  
JULY 28, 2022**

**BETWEEN**

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

**AND**

**BUTALI SUGAR MILLS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant a registered trade union to represent workers in the sugar sector filed a memorandum of claim dated May 26, 2021 received in court on even date on behalf of its member Geoffrey Mutali against the Respondent seeking the following prayers:-
  - (a) The termination of Geoffrey Mutali be revoked and he be reinstated back to his substantive employment without loss of benefits.
  - (b) Where reinstatement is not practical the aggrieved person be compensated/paid as follows; Two months' notice as per the C.B.A between parties i.e kshs.22,035x2 =Kshs.44,070 18 days per every year worked hence  $(18/26 \times \text{kshs.22,035})7 = \text{Kshs.106,785}$  12 months maximum compensation for job loss i.e 12 months xKshs.22,035= Kshs.264,420/-.  
Grand total of Kshs.415,275/-.
  - (c) Issue the grievant with a certificate of service.
  - (d) Costs for the suit
  - (e) 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 Masoso 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 Geoffrey Mutali dated 26<sup>th</sup> January 2022 received in court on the January 26, 2022.
4. The respondent entered appearance and filed statement of 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 1<sup>st</sup> respondent's witness statement of Daniel Kiyondi and 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 with one witness of fact Geoffrey Mutali who testified on oath and adopted his filed witness statement as his evidence in chief and was cross-examined by Counsel for the respondent.
6. The defence case was heard on the April 27, 2022 with the respondent calling one witness of fact Daniel Kiyondi 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 Avesa Isagi are dated May 10, 2022 and received in court on the May 18, 2022. The Respondent's written submissions drawn by L.G Menezes & Company Advocates dated May 11, 2022 were received in court on the May 18, 2022.

#### **Claimant's case in summary**

8. The claimant's case is that the grievant, Geoffrey Mutali who was employed by the respondent in the year 2011 as Field Assistant was dismissed from service unfairly. The claimant states that the respondent terminated the grievant's service without any warning. On the November 5, 2018 he was issued with a show cause letter by the Human Resource Manager, Mr. Masese, with allegations that the grievant, between October 18, 2018 and October 19, 2018 colluded with other three people namely, Reuben Munanya, Benson Manyonge and Caroline Seme to defraud a farmer in Lugari the proceeds of his cane by producing two permits with different names (one with the farmer's name and other with the slip of Benson Manyonge's name) and lifting two tractors of the farmer's cane with the slip of Benson Manyonge and sharing the proceeds of the cane with the alleged accomplices. The grievant responded to the show cause letter stating that it was the brother to the farmer, who is the care taker to the farm, who requested for a permit to harvest cane, however, he did not have identification card which is a requirement hence he could not process the permit without the identity card and then the caretaker said he could use Benson Manyonge's identity card to secure the permit which he did.
9. The Grievant stated he was invited to the disciplinary hearing on the December 18, 2018 which he attended in company of the union chairman, treasurer and the section shop steward.
10. The Grievant says he followed all permit issuance procedures as required and said sugarcane was released by the caretaker of the farmer and the farmer did not complain on the same.
11. That he did not steal any sugar cane as portrayed by the Human Resource during the disciplinary hearing and that he expected police investigations to follow and that did not happen.
12. That he and the union representatives were sent out before the committee arrived at the decision. That he was served with a summary dismissal letter alleging he flawed the procedures of issuing permit.

#### **Respondent's case in summary**

13. The respondent's put the claimant to strict proof of its claim, states that the grievant was employed on fixed contract vide employment letter dated January 9, 2012 as field assistant which contracts were



renewed until September 16, 2014 when the grievant was confirmed as a regular employee. That vide internal memo dated November 3, 2018 the grievant was reported to have colluded with others between 18<sup>th</sup> and October 19, 2018 in defrauding a farmer Daniel Hesbon Mumasaba of Identity Card No. 5280173 two trailers of his harvested mill cane about 16.250 tonnes.

14. The Grievant was issued with a show cause letter dated November 5, 2018 which he replied to vide handwritten letter dated November 7, 2018 and was invited to attend a disciplinary hearing for December 18, 2018 vide letter dated December 13, 2018. The Grievant attended the hearing accompanied by the union branch chairman, treasurer and shop steward.
15. The Disciplinary Committee concluded the procedure for permitting was not followed and the grievant colluded with the farm manager and the caretaker to defraud the farmer hence this was an abuse of office and an offence against the company's code of conduct and it was unanimously resolved that that the grievant be summarily dismissed. The grievant was issued with a summary dismissal letter dated 20<sup>th</sup> December, 2018 informing him that his grave omission amounted to gross misconduct and was contrary to provisions of sections 44(4)(c) (e) and (g) of the *Employment Act*. Consequently the respondent's case is that the Grievant was lawfully and procedurally dismissed from service hence no cause of action against it.

## Determination

### Issues for determination

16. The claimant submit that from the pleadings and evidential documents the issues arising for determination before the court pertaining to the aggrieved person in question as follows:-
  - a. Was the disciplinary procedure just and fair?
  - b. Was the process of fair hearing adhered to?
  - c. Is the claimant entitled to the prayers sought in the memorandum of claim?
17. 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; and
  - b. Whether the claimant is entitled to reliefs sought.
18. 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 the termination of the employment of the grievant was lawful and fair
    - Substantive fairness
    - Procedural fairness
  - b. Whether the Claimant is entitled to the reliefs sought.



## The relevant law

19. Procedural fairness before summary dismissal of employee is effected is provided under the *Employment Act* under Section 41(2) which reads:-

“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 sub-section (1) make.” This is the law against which the court will test the process applied by Respondent before summary dismissal of the grievant.

20. At this point the court makes it clear that compliance with the provisions of section 41(2) of the *Employment Act* is mandatory before effecting summary dismissal of an employee the provisions of Section 44 of the Act notwithstanding.

21. 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.”

22. Section 44 (4) of the *Employment Act* provides for justifiable and lawful grounds for dismissal from employment.

23. 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.

24. Section 46 of the *Employment Act* provides for reasons that do not constitute fair reasons for dismissal.

25. 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.”

## A. Whether the termination of the employment of the grievant was lawful and fair.

### Substantive fairness

26. 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)



27. The Respondent had the burden to prove the validity of the reasons it relied on to terminate the services of the grievant. The respondent produced show cause letter dated 5<sup>th</sup> November 2018 (produced as the exhibit on page 50 of the Respondent's bundle) of allegations of colluding with three others namely, Reuben Munanya, Benson Manyonge and Carolyine Seme to defraud a farmer in Lugari of the proceeds of his cane by producing permits with different names (one in the farmer's name and another in the name of Benson Manyonge ) and lifting two tractors of the farm with the slip of Benson Manyonge and went ahead and shared the proceeds with his accomplice.
28. The Grievant responded to the letter vide his of 7<sup>th</sup> November 2018 and denied the accusation (produced as the exhibit on page 51 of the Respondent's bundle). In the hand written response he stated that he was requested by the brother to the farmer one - Reuben Munanga who is the caretaker of the farm to process for him the permits so that he can harvest the cane. That the said caretaker requested he writes the permit in the name of Benson Manyonge since he did not have his National Identity Card. He denied sharing proceeds with the accomplices stating his work ended on issuance of permits.
29. The respondent invited the Grievant to disciplinary hearing vide letter dated December 13, 2018( produced as the exhibit on page 52 of the respondent's bundle) which hearing was scheduled to be held on the December 18, 2018at 2.30pm at the Human Resource Office. Same reasons under the show cause letter were stated.
30. Several staff and the union branch were also invited to attend the hearing (invitations produced as the exhibits on page 53-56 of the respondent's bundle).
31. The Grievant and the union branch representatives signed the charge sheet which repeated the contents in the show cause letter and the invitation letter ( produced as the exhibit on page 57 of the Respondent's bundle).
32. The Grievant was heard and the minutes are produced (produced as the exhibit on page 59-62) of the Respondent's bundle. The hearing committee it is recorded, that procedure of permitting was not followed and the grievant colluded with the farm manager and caretaker to defraud the farmer hence this was office abuse and against the company code of conduct and painted the company's image in bad light. The Committee resolved that the grievant be separated.
33. The respondent produced the summary dismissal letter dated December 20, 2018which gave the reasons found by the committee at the hearing as the reasons for termination.
- 34 The claimant agrees to the reasons given and said that the grievant followed the procedures and cane was released to care taker of the farmer but at no time did the farmer complain.
34. At cross- examination the grievant admitted he got the summary dismissal letter and understood its content. He does not dispute the show cause letter, his response and the hearing. His only issue was that he and the union representatives were asked to step out during the final decision making.
35. 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)I.R.L.R 91 where the judge stated as follows:-  

‘ 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.’



36. The valid reasons are ones which employer reasonably believed to exist under section 43 of the *Employment Act* and related to the reason for the termination of employment.
37. 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 that the reasons were captured in the 1<sup>st</sup> show cause letter and the dismissal letter being failure to follow the procedure for permitting in collusion with the farm manager and caretaker to defraud a farmer and the conduct being a gross misconduct and therefore contrary to section 44 sub-section 4(c)(e)(g) of The *Employment Act*.
38. The court finds and determines that any reasonable employer would have dismissed the grievant from employment based on the reasons proved by the Respondent. The court upholds the decision of Lord Denning (supra).
39. The court further finds that the conduct of the grievant led to breakdown of his relationship with the employer and that is another test. The Grievant admitted in his response that he flouted the permitting procedures albeit deliberately because the caretaker did not have his National Identity Card and he issued permit based on identification card of person not before him and not the owner of the farm. 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”.
40. The court finds and determines there were valid reasons related to compatibility of the employee and operational requirements of the employer. The court finds that grievant was dismissed from employment of the Respondent based on lawful and valid reasons.

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

41. It was not in dispute that the Claimant and Grievant were informed of the reasons the employer was contemplating her dismissal, and the reasons have been found to be valid. The grievant admitted to have been invited for hearing which he attended accompanied by the branch chairman, the branch treasurer and the shop floor steward. The minutes of the proceedings were produced by the Claimant (exhibits 6 ) and also by the Respondent. The court examined the minutes and found that the representations of the union officials, shop floor steward as well as the grievant are recorded.
42. The Claimant submits that though the union was invited to the hearing the management excluded them from the final decision. That they did not sign the minutes and the Human Resources Manager acted as the accuser at same time the judge hence lack of neutrality in the disciplinary process. That the process contravened provisions of article 47 of *the Constitution* on fair administration action and article 50 on fair hearing and section 41 and 43 of the *Employment Act*. That the Respondent’s witness did not attend the disciplinary process hence not able to confirm the minutes are a true reflection of what transpired.
43. The criteria of fair procedure in termination of employment is provided for under Section 41 of the *Employment Act*, which provision is consistent with the provisions of Article 47 and 50 of *the Constitution*, and a mandatory requirement and has 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.
44. The court finds the termination process of the grievant was consistent with clause 5 of the Collective Bargaining Agreement between the parties as the grievant was issued with show cause letter and heard in the accompany of the union representatives and shopfloor steward.
45. The court finds that the management having heard the union representatives, the shopfloor steward and the grievant, the management was within its statutory rights to exclude them from its final decision making. That the action of excluding the parties to make the final decision is consistent with the provision in section 41(2) of the *Employment Act*. The employer was only required to hear and consider the grievant, the union representatives and the shop steward representations. The court is convinced the grievant and the claimant's representatives were heard and their representations considered as the accusation on sharing proceeds of the offence based on the audio clip which the union representatives questioned was dropped in the final decision. The failure to sign minutes of the disciplinary hearing by the union representatives does not invalidate the process which they admitted to have participated in.
46. The court finds and determines that there was procedural fairness as provided for under section 41 (2) of the *Employment Act* in the process of summary dismissal of the grievant from employment by the Respondent.

**Whether the claimant is entitled to prayers sought.**

47. 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.
48. The respondent produced a copy of the certificate of service of the grievant dated December 20, 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
49. 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.\*\* \_\_\_**

50. The court enters judgment and determines that the dismissal from employment of the grievant by the respondent was lawful and fair.
51. The claim dated May 26, 2021 is unmerited and is hereby dismissed.
52. The respondent to issue the claimant with the certificate of service for the grievant under section 51 of the *Employment Act* within 14 days of this judgment.
53. No order as to costs.
54. It is so ordered.



**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> 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

