



REPUBLIC OF KENYA



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**Kenya Plantation and Agricultural Workers Union v Uniliver Tea Kenya Limited
(Cause E009 of 2021) [2022] KEELRC 1321 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1321 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E009 OF 2021
ON MAKAU, J
JULY 27, 2022**

BETWEEN

**KENYA PLANTATION AND AGRICULTURAL WORKERS
UNION CLAIMANT**

AND

UNILIVER TEA KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant, a trade union, brings this suit on behalf of its member Ms. Peres Moraa (the grievant). The claimant alleges that the grievant was unfairly dismissed from employment by the respondent and seeks the following reliefs:
 - a) An order directing the respondent to:-
 - (i) Unconditional reinstatement of the grievant.
 - (ii) Payment for the entire period of dismissal
 - (iii) Payment for leave days due at the time of reinstatement
 - (iv) Payment of leave travelling allowance
 - b) In the alternative to the above, the respondent be directed to
 - (i) Pay grievant gratuity under the CBA.
 - (ii) Pay house grievant allowance from time dismissal till time of judgment.
 - (iii) Pay her 12 months' salary



- (iv) Pay salary in lieu of notice of termination
 - (v) Pay her in lieu of leave and leave travelling allowance for the period of dismissal
 - (vi) Pay her damages for unlawful and unfair dismissal
 - (vii) Pay her costs and interests.
2. The respondent filed defence on 9th November 2021 denying the alleged unfair dismissal and objecting to the reliefs sought. It avers that the dismissal was fair because the grievant committed gross misconduct and that she was accorded a fair hearing before the dismissal. Therefore it prayed for the suit to be dismissed with costs.
 3. The suit went to full hearing and both parties gave evidence. Thereafter they filed written submissions.

Summary of the evidence tendered

4. The grievant testified as CW1 and adopted his written statement dated 14/3/2022 as her evidence. She further produced a bundle of 10 documents as exhibits.
5. In brief her testimony was that she joined the respondent as a tea planter in September 2020 and worked until 2011 when he was confirmed. On 20th February 2020 she received a letter dated the same day telling her not to allow her son Kevin Moturi into her staff house at Jimji Estate because he was unwanted person there. However, she told the employer that the said person was not known her and that the correct name of her son was Kevin Gesose Omanga who has lived in Nyamira since 2019.
6. On 24/3/2020, the respondent's security went to her house and found her sister's son (nephew), called Amos with an unknown friend but her son was not present. On 25th March 2020, the employer served her with a letter to vacate the house within 24 hours and she complied.
7. On 28/3/2020 she was served with a show cause letter on allegation that her son by the name Kevin Moturi was found in her staff house on 24th March 2020 and she responded denying the said allegation. Thereafter she was invited to a disciplinary hearing, where she denied ever hosting the alleged Kevin Moturi her staff house. She further denied that the said person was her son.
8. On 1st April, 2020 she was dismissed by the respondent for the alleged which was said to amount to disobeying a lawful command. However, according to the grievant, the said reason for the dismissal was not valid and therefore the dismissal was unfair. She further contended that no warning letter had been given to her before the dismissal.
9. On cross examination, she admitted that she received a letter from the employer barring her from housing Kevin Moturi. However, she maintained that she never knew Kevin Moturi who was alleged to be her son.
10. She further reiterated that she was served with show cause letter dated 28th March 2020 and responded on 29th March 2020 denying that Kevin Moturi was her son. She maintained that her son was Kevin Gesore Omanga and he lives and works in Nyamira since 2019. She also denied that her son Kevin Gesore caused disturbance to people in the company residence.
11. She admitted that she was living with her current husband who also works in the same company. However, she denied that her son threatened the said husband with a matchet.
12. She explained that Amos Nyadiko her nephew and his friend were found in her house on the material day and they were taken to the Police Station. She denied knowledge of the name of her nephew's friend.



13. She stated that Nicodemus OmangaOtiso was the father of her son Kevin GisoraOmanga but she denied ever telling the disciplinary committee that he was living with his son in the company house.
14. In re-examination, she contended that she gave particulars of her family members to the employer and Kevin Moturi was not among them. She stated that her employment records indicate her children as Kevin GisoraOmanga, Victor Kaka Omganga, Brian OtisoOmanga and Gideon ObuyaOmanga. She maintained that her son Kevin GesoraOmanga since 2019 never stayed with her in the company house.
15. The respondent's Manager Mr. Jeremiah Koskei testified for the respondent as RW1. He also adopted his written statement dated 31/5/2022 as his evidence in chief and produced as exhibits, bundle of documents in the list dated 14/12/2021. He explained that the claimant was dismissed for breach of Covid-19 guidelines by inviting her son in her staff house. The son had previously caused disturbance at the estate as a result of which he was given persona non-grata notice (PNG) by the company dated 20th February 2022.
16. He further stated that the PNG was against Kevin Moturi a son to the grievant who run away after causing disturbance at the company estate. Rw1 then stated that the son returned and was hosted by the grievant on 25th March 2020 in the company house and security guards picked Kevin Moturi from the house and took him to the Police Station. The grievant was then evicted from the company house.
17. He further testified that the grievant was served with show cause letter on 28th March 2020 and she responded on 29th March 2020 in writing denying knowledge of Kevin Moturi. Thereafter she was invited to disciplinary hearing on 31st March 2020 and she insisted that her son was Kevin Gesora, and that he is not the one who caused disturbance in the estate. However, RW1 maintained that the grievant was not being truthful by her denial that Kevin Moturi was not her son. All in all RW1 concluded that the dismissal was justified and the procedure followed before dismissing the grievant was fair.
18. On cross examination, RW1 contended that the conduct by the grievant constituted gross misconduct. He admitted that the respondent maintains Biodata of its employees, spouses and children. He further admitted that the grievant's employment records shows that her son is called Kevin GisoreOmanga and not Kevin Moturi. He also admitted that there is no company rule which warrants dismissal of employee who hosts a PNG.
19. He admitted that a PNG could access the estate because there are areas which were not fenced. He admitted that the grievant served for 9 years, without any disciplinary issues. He further admitted that he never saw the PNG in the grievant's house on the material day. He also admitted that the grievant never admitted that the PNG was his son or that she hosted him on 24/5/2020.
20. RW1 denied knowledge whether Kevin GisoreOmanga went away from 2019 but he maintained that he caused disturbance in the estate in February 2019.
21. RW1 admitted that the dispute herein went for conciliation at the labour office and the conciliator made his recommendations. However, RW1 maintained that the dismissal of the claimant was fair.
22. On re-examination RW1 testified that the PNG Notice was an order by the grievant's supervisor. He further stated that the grievant had constant wrangles with her husband and the son. He contended that the family issues involved the son and she had been cautioned severally. He maintained that the son was found in the grievant's house on 24th March 2020 and he was arrested then taken to Police Station.



Submissions

23. The claimant submitted that the dismissal of the grievant was unfair because the reason for the dismissal was not valid. It contended that the respondent did not prove that her son was found in her house on 24th March 2020 during the disciplinary hearing and also herein. Therefore, it was submitted that the respondent has not discharged its burden of proof under Section 43 of the *Employment Act*. For emphasis it relied on the Court of Appeal decision in the case of *Kenfreight (EA) Ltd vs Benson K. Nguti* [2016] eKLR.
24. The claimant further submitted that the grievant was not accorded a fair hearing before the dismissal as required under Section 41 of the *Employment Act*. For emphasis it relied on several precedents including *Mary ChemwenoKiptui vs Kenya Pipeline Company Limited* [2014] eKLR where the court upheld the statutory requirement of substantive and procedural fairness before dismissing the employee for a cause.
25. For the reasons stated above, the claimant submitted that the reliefs sought by the memorandum of claim are merited.
26. On the other hand, the respondent submitted that the reasons for the dismissal was valid and fair. It urged that the grievant's son Kevin Moturi was given a PNG Notice on 20/2/2020 barring him any access and presence within the respondent's premises but the grievant defied that notice and hosted the son in her staff house on 24/3/2020.
27. Accordingly, the respondent contends that the grievant disobeyed a lawful command from his employer and under Section 44(4) (e) of the *Employment Act*, the summary dismissal was justified. For emphasis, it relied on *Dam v Maison de Luxe Limited, Isaacs*, ACJ [1924] 35 Comm. LR where the court held that mere disobedience to lawful orders is a breach of the contract of service.
28. As regards the procedure followed, the respondent submitted that the grievant was accorded a hearing before the dismissal and thereafter granted a right of appeal. Consequently, the respondent maintained that the threshold for procedural fairness was met in this case and therefore the reliefs sought are not merited.

Issues for Determination and Analysis

29. Having considered the pleadings, evidence and submissions herein, it is a fact that the grievant was employed by the respondent until 1st April 2020 when he was dismissed for gross misconduct. The issues for determination are:
 - (a) Whether the reason for the dismissal was valid and fair.
 - (b) Whether the procedure followed was fair.
 - (c) Whether the reliefs sought are merited.

Reason for dismissal

30. The dismissal letter dated 1st April 2020 cited the reason for the dismissal as follows:

“... in the disciplinary hearing held on 31st March 2020, the committee has concluded that you, Peres Moraa have breached the Unilever Housing Policy and Safety Health Policy. This breach constitutes gross misconduct and Unilever has taken the decision to



summarily dismiss you from employment with effect from 2nd April 2020, on account of gross misconduct upon normal clearance ...”

31. The specific breach was that on 24th March 2020 the grievant hosted her son Kevin Moturi who had been declared persona non-grata (PNP) within the respondent premises. The grievant was also accused of defiance to directive from the Managing Director on Visitor Management and Commuting in and out of the respondent’s sites. The directive was issued on 21st March 2020 and required that the Managing Director’s approval be sought before hosting a visitor within staff quarters and, further that the visitor to be subjected to screening at Central Hospital. The grievant was alleged to have defied the said guidelines and hosted his son Kevin Moturi who had travelled from Nairobi and failed to follow the visitor registration protocol.
32. Section 44(4) of the Act in deed provides as follows;

“ Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

 - (a)...
 - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.”
33. The grievant denied that Kevin Moturi was his son and denied further that she hosted him in her staff house on 24th March 2020. She also contended that her son’s name was Kevin GesoraOmanga and he lives and works in Nyamira since 2019. It was also submitted that RW1 has confirmed under oath that indeed her son was Kevin GesoraOmanga according to the employment records.
34. The burden of proof is on the respondent who alleges that the grievant hosted the alleged person by the name Kevin Moturi in her company house on the material day in defiance to a lawful command from her employer. Section 43 of the Act places upon the employer in any legal proceedings challenging termination of employment, the burden of proving the reasons for the termination of the contract of service. Section 45 of the Act then provides that termination is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason related to the employee’s conduct, capacity and compatibility or based on the employer’s operational requirement.
35. Courts have enforced the aforesaid provisions of the law. In *Mary Chemweno Kiptui v Kenya Pipeline company Limited* [2014] eKLR, Mbaru J held that:

“ Invariably, therefore, before an employer can exercise their right to terminate the contract of an employee, there must be a valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee.”



36. Again in the case of *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR, the Court of Appeal authoritative held that –

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

37. In this case the reasons given for dismissal of the grievant, as stated above was defiance to lawful command from his employer which allegedly amounted to gross misconduct under section 44(4)(e) of the *Employment Act*. According to the dismissal letter, the grievant hosted her son Kevin Moturi in her company house on 24th March 2020 contrary to a Notice served on her on 20th February 2020 declaring the said son Person non-grata in the company premises. It was alleged that the said person did not comply with the entry protocol and screening.

38. Considering the facts of the case as set out in testimonies of the witnesses above, it is clear that the respondent has failed to discharge its burden of proving the validity of the reason cited for the dismissing the grievant. The person or persons who allegedly found Kevin Moturi in the grievant’s house on 24th March 2020 did not give evidence to confirm that allegation. Further RW1 did not adduce evidence to confirm that the said Kevin Moturi was indeed found in the grievant’s house on 24th March 2020 and that he was hosted there by the grievant.

39. Besides, the grievant’s evidence that Kevin Moturi is not her son has also not been rebutted. Also, her evidence that her nephew Amos and his friend were who were arrested from her house on the material day were from the neighborhood Kapkatet was not rebutted. Finally, no evidence has been adduced to link the claimant to said Kevin Moturi and the alleged offence of hosting an unwanted person in her company house. Consequently, I find that the alleged reason for dismissal was not valid and by dint of section 43 of the *Employment Act* the dismissal was unfair within the meaning of section 45 of the Act.

Procedural fairness.

40. Section 45 of the employment, 2007, bars employers from terminating the employment of an employee unfairly. Section 45 (2) (c), provides that termination of employment is unfair if the employer fails to prove that the same was done in accordance with a fair procedure.

41. The legal threshold of procedural fairness is set under Section 41 of the *employment Act* which provides that:

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.



(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.”

42. In the case of *Anthony Mkala Chitavi V Malindi water and Sewerage Co. Limited* [2013] eKLR where the Court held that;

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

43. In the instant case, the Respondent argued that the claimant was subjected to fair disciplinary process in because she was issued with a notice to show cause, giving her time to respond before being invited to disciplinary hearing where she defended herself. The claimant submits that the procedure followed was not fair.

44. Having carefully considered the evidence tendered, statutory provisions and case law, the court is satisfied that the respondent has discharged its burden of proving that the dismissal was done in accordance with a fair procedure as required by the law. It is clear from the record that the claimant was given a fair opportunity to offer her defense both in writing and orally before a committee prior to the dismissal.

Remedies sought

45. Having found that the dismissal of the claimant was unfair because it was not grounded on a valid reason, I find and hold that the some of the reliefs sought are merited. However, I decline to grant the prayer for reinstatement under section 49 of the Act of the Employment Act because the claimant has not demonstrated any exceptional circumstances warranting the said relief. It is now trite that reinstatement ought to be withheld unless on very exceptional circumstances being shown by the employee.

46. The claimant is instead awarded salary in lieu of notice plus compensatory damages under section 49 (1) of the Act. Under clause 23 (c) of the CBA, an employee who has served for over 5 years like the grievant is entitled to two months’ notice before termination or salary in lieu of the notice. Therefore I grant her the same because the dismissal was unfair and unlawfully done.

47. Further, I award the claimant 8 months’ salary as compensation for the unfair dismissal considering that her long service and the fact that the alleged misconduct was not proved against her. I have also considered the manner in which she was forced out of the company house with 24 hours.

48. The claimant prays for service gratuity. Under clause 30 of the CBA an employee who serves for more than ten years before resignation or termination is entitled to payment of gratuity at the rate of 22



days' pay for each completed year of service. The grievant served the respondent continuously from September 2008 to March 2020 which is slightly over ten years. Therefore she is entitled to gratuity at the rate of 22 days' pay for every year of service.

49. The rest of the reliefs are unmerited because they relate to the period after the termination of the contract of service.
50. In conclusion I enter judgment for the claimant against the respondent in terms of the awards made above. The court is unable to compute the final award because the claimant did not plead the grievant's salary. Consequently, the respondent is directed to compute the amount payable based on the grievant's last salary and pay the same within 30 days of this judgment. Since the claimant drafted poor pleading I deny it costs the suit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27ST DAY OF JULY, 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this Judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

