Kenya Plantation and Agricultural Workers Union v Eastern Produce (K) Limited (Employment and Labour Relations Cause 22 of 2019) [2022] KEELRC 1302 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1302 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

EMPLOYMENT AND LABOUR RELATIONS CAUSE 22 OF 2019

ON MAKAU, J

JULY 21, 2022

BETWEEN

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION ..... CLAIMANT

AND

EASTERN PRODUCE (K) LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant Union instituted this suit *vide* a Memorandum of claim dated 18th February, 2019 challenging dismissal of its member, Mr. Jeremiah Musa Lisero ("the Grievant") by the respondent. The suit seeks the following reliefs;

    a) A declaration that the grievant's dismissal was unfair and unlawful.

    b) Maximum compensation by way of damages for wrongful and or unfair dismissal.

    c) Special loss amounting to Kshs 704,162.57.

    d) Costs of this suit.

    e) Interest in (b), (c) and (d) above.

2. The Respondent entered appearance on the 12th June, 2019 and filed a Response to the Claim on 10th July, 2019 denying the alleged unfair termination. It averred that the grievant had grossly misconducted himself by vandalizing and deliberately damaging the MTH machine placed under his care leaving only 3 out of 11 machines functioning. It further averred that the grievant breached section 30(c) & (e) of the CBA by failing to perform his duties and execute instructions given to him by his superiors.

3. Besides, the respondent averred that based on the above misconduct, the grievant was subjected to a fair disciplinary hearing, and he was found culpable. Accordingly the respondent's case is that the terminations was fair and the claimant is not entitled to the reliefs sought.

4. The suit was heard on the 15th March, 2022 when both parties gave evidence and thereafter filed submissions.

Evidence.

5. The claimant called the grievant, as its witness and he testified as CW-1. He adopted his written statement dated 18/2/2019 and produced the 8 document in the list filed. In summary, the grievant avers that he was employed by the Respondent on the 18th May, 1998 in the plucking section of Kibabet Tea Estate which employment was made permanent in the year 2002. In 2005 he was redeployed to work at Kibabet workshop for maintaining machines such as streamers and plucking machine among others.

6. In 2010 the grievant was again transferred to Kapsumbeiwa Estate as Puncture-man in the Factory's workshop where he worked diligently till 2016 when he was promoted and appointed as Grade III artisan in MTH plucking in the said factory. His basic salary was also reviewed to Kshs. 16,617.93. per month.

7. On 18th October, 2017 he was served with suspension letter accusing him of vandalizing machines, misuse of service fuel, swapping of MTH machine, removal of pruning machines gear without any authority and for absenteeism. The letter did not require him to respond but the Manager, Mr. Martim told him to hand over to Mr. Hilary Too.

8. On 3rd November, 2017, he invited to a disciplinary hearing but he sought adjournment to secure attendance of his witnesses. The hearing proceeded on 6th November, 2017 when he attended with his witness Mr. Alex Shagala but they were not allowed to give their evidence. The chairperson Mr. Ernest Nyamberi just told that he was guilty based on the evidence by the witnesses and asked him to give his mitigations. Despite his denial of the allegations his employment was terminated by the letter of 6th November, 2017 and he was not issued with a Certificate of Service.

9. He testified that although he was an Artisan Grade III he was never trained to perform the work he was assigned, nor did the machines have a manual for him to follow. He avers that he was never given a specific job description. On consumption of fuel, he maintained that the machines consumed at least 2 litres of fuel every 2 day because they were old, dirty and worn out. He denied there being any new machines.

10. On cross examination by Onyango Advocate, the witness testified that he had worked as Artisan grade III for over 10 years and was in charge of maintaining the machines. He stated that 8 out of 11 machines under his custody were working and the three were under maintenance, which issue he had raised and even filed a report with the Respondent.

11. He contended that although the suspension letter provided for payment of his full pay, the same was not paid and the payslips produced were not acknowledged by him. He admitted that he also never signed the other pay slips on page 40 of his bundle of documents.

12. On further cross examination, he admitted that the suspension letter notified him of the charges against him and his rights to request for any documents for purposes of his defense and to call a witness during hearing. He admitted that the hearing proceeded on 6th November, 2017 when he attended with Mr. Alex Shagala as his representative. He signed the findings and not the proceedings. He appealed but he

never raised the ground that he was given a chance to defend himself but he prayed for a fresh hearing. He further admitted that he was notified that the appeal was unsuccessful by a letter.

13. The Respondent's Divisional manager, Joseph Maritim, testified as RW-1 and averred that the grievant was reporting to him. He testified that the work of an artisan is to maintain machines and recommend for new spare parts to be bought by the management then proceed to fit the new spare parts. He stated that machines are critical in high seasons such as the month of October. He affirmed that the grievant was very competent and experienced and had worked for the Respondent for close to 15 years.

14. Rw-1 testified that in October, 2017 he was notified by the supervisor that most machines at the farm were faulty. He went there and confirmed that only 3 out of 11 were working. Some of the machines were only 4 months old and as per the company policy, the machines are replaced after every 3 years. Upon calling the claimant over the matter, he stated that the machines had a hard-start and he failed to fix the problem.

15. Rw-1 then called another artisan from a sister Estate who found that some spare parts in the machines were faulty and new ones were bought and the machines were repaired. He contended that there was sign of tampering with the machines by the grievant because he was the only one with the known-how to that in the farm.

16. Due to the seriousness of the matter, the grievant was suspended with full pay and the charges against him were set out in the suspension letter. Thereafter the grievant attended disciplinary hearing where he was heard and even cross examined the Respondent's witnesses. In the end the grievant was dismissed and he was paid his terminal dues. He denied that the grievant is entitled to notice pay and gratuity contending that he was summarily dismissed.

17. On cross examination by Ateko Advocate, the witness testified that the grievant had knowledge in the machine repairs and maintenance, having worked for 21 years for them and was even training his colleagues. The swapping of parts of some machine and vandalizing was discovered by the artisan from sister company that came to repair some of the machines. He maintained that the machines were about 4 months old but he did not have any evidence in support.

18. On the reliefs sought, he testified that all employees are entitled to leave and the grievant had taken his leave days.

Submissions.

19. The claimant submitted that the reasons for termination was not justified by the Respondent since the said machines were not vandalized but damaged as a result of normal wear and tear of machines due to their old age. It was further denied that the grievant improperly performed his work on 21st October, 2017, yet he was also alleged to have been absent from work.

20. As regards the alleged failure to obey his superiors' orders, it was argued that on the 18th October, 2017 he obeyed instructed by his Divisional manager to hand over his duties to his colleagues. On the alleged failure to carry out reasonable instruction, it was argued that the charge was not justified as the Respondent failed to give particulars of the offense.

21. On the other hand, it was argued that proper procedure was not followed as provided for under section 41 of the *Employment Act*. In support of his case, he cited the case of *Pius Machafu Isindu v Lavington security Guards Limited* [2017] eKLR and argued that he was not issued with a Notice to show cause before being called for the disciplinary hearing.

22. The grievant took issue with the disciplinary hearing and argued that he, together with his representative, was not given an opportunity to be heard or to cross examine the Respondent's witnesses. He further argued that the grievant was only asked to mitigate because he was guilty and as such the process was for sanitizing an already pre-determined decision. For emphasis the claimant relied on the case of *Geoffrey Gikonyo Mathu v Intex Construction Company Limited* [2007] eKLR where again the Court affirmed the right to be heard before dismissal from employment.

23. Consequently, the claimant submitted that the entire disciplinary process was a sham and the termination was unfair in the circumstances, he then urged this court to allow the claim as prayed

24. The Respondent on the other hand submitted that there were sufficient reasons, as captured in the Suspension letter, which justified the impugned termination. It was argued that these reasons amount to gross misconduct as per section 44(4) of the *Employment Act* which warrants summary dismissal of an employee. It was further argued that the grievant's action were also in violation of clause 30(c) and (e) of the CBA and therefore the termination was fair under section 45 (2) of the *Employment Act*.

25. According to the Respondent, the Suspension letter and the invitation to a disciplinary hearing letter of 1st November, 2017, indicated all the offenses that were subject of the disciplinary hearing, and the grievants right to have representative accompany him to the hearing, but there was no need for a Notice to show cause.

26. It was submitted that the reason for termination were all established during disciplinary hearing which action were tantamount to gross misconduct and a recipe for summary dismissal as provided for under section 44(4) of the *Employment Act* and Clause 30 of the CBA. It was argued that the reason for termination as stated under section 43(2) are those matters that the employer genuinely belief to exists and therefore the court ought to test the reasonableness of the actions of the employer on a case to case basis.

27. Reliance was then placed on the case of *Judicial Service Commission v Gladys Boss Shollei and another* [2014] eklr where the Court upheld the test of reasonableness in determining whether the dismissal of an employee was unfair. The court noted that if no reasonable employer would have dismissed him, then the dismissal was unfair.

28. On procedural fairness, the Respondent relied on the case of *Anthony Mkala Chitavi v Malindi Water and Sewarage Company limited* [2013] eKLR where the Court held that the statute law entitles an employee the twin rights of being informed of the reason for termination, and the right to be heard on the same before the termination is decided.

29. In line with above the case law above, the Respondent submitted that the grievant was afforded an opportunity to explain himself in presence of a representative of his choice and that no questions were raised during hearing on the procedure.

30. On the reliefs sought, the Respondent submitted that the claimant has failed to prove his case as required under section 47(5) of the *Employment Act* and therefore he is not deserving of the Reliefs sought in the claim.

Issues for analysis and determination

31. I have carefully considered the pleadings, evidence and the submissions presented by both parties and the issues that commend themselves for determination are as follows;

    a) Whether the dismissal of the grievant was grounded on valid and fair reasons.

b) Whether a fair procedure was followed.

c) Whether the claimant is entitled to the reliefs sought.

Procedural fairness.

32. Section 41 (1) of the *Employment Act* provides for the minimum procedural requirement before dismissing an employee, thus:-

> "(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."

33. The above provision only requires that before terminating the contract of service of an employee on ground of misconduct, poor performance or physical incapacity, the employer must first explain the reason to the employee in a language he understands, and in the presence of a fellow employee or union official of his choice. The claimant alleges that no show cause notice was served and therefore the procedure followed was not fair.

34. My view is that, service of a Notice to Show Cause is not mandatory unless it is provided under the contract of service, collective agreement or the employer's HR Policy and Procedures Manual. In this case no evidence was adduced to show that the Notice to show cause was mandatory. What matters is whether the claimant was informed of the reason for the intended termination, and he is availed an opportunity to defend himself. In the instant case, the grievant was served with a suspension letter date 23rd October, 2017 which enumerated 6 offenses therein, and the same were read again to him during the disciplinary hearing.

35. Courts have unanimously enforced the right to procedural fairness and emphasized that the employer has no option. Where there is no prove that section 41 was not followed, the termination is declared unfair. In the case of *Geoffrey Gikonyo Mathu v Intex Construction Company Limited* [2017] eKLR where the Court of Appeal held that:

> " But even if the reason advanced by the respondent had been valid, the dismissal herein would stand impugned for want of a hearing in line with section 41 (2) of the *Employment Act* set out herein above. We note that the appellant was merely asked to provide a written account of the events of the material date to his supervisor Munene, who in turn served him with a letter informing him of the decision to dismiss him summarily. Would the foregoing action amount to a hearing? We think not as the said approach ought to be in addition to and not in substitution to a hearing as envisaged in section 41 of the *Employment Act*.....accordingly, we find and hold that the appellant was not given a fair hearing which would have attached the stamp of legality to the termination of the appellant's employment for cause."

36. Again in the case of *Anthony Mkala Chitavi v Malindi Water and Sewarage Company 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."

37. The grievant was invited for disciplinary hearing by the letter of 1st November, 2017, which hearing took place on the 6th November, 2017 as per the minute produced before this Court. In the said minutes, the charges were indeed read to the grievant who allegedly pleaded not guilty. Four witnesses, namely, Mark Lukoye, Michael Cheruiyot, Hillary Too and Felix Kemboi then testified before the panel but there was no single question posed to them by the grievant. After the testimonies of these witness the disciplinary committee found the grievant guilty and he was asked only to mitigate. The complainant was also allowed adduce any aggravating evidence and he produced a warning letter previously issued to the grievant.

38. The claimant contended that the grievant was not given an opportunity to defend himself and going by the minutes produced before this Court, I agree with him that having been called to the disciplinary hearing, the Respondent at the very least ought to have allowed him cross examine the witnesses arraigned against him and also afford him an opportunity to give his side of the story. Mere invitation and appearing at a disciplinary hearing is not sufficient prove of procedural fairness. The employee must be given an opportunity to explain himself.

39. I seek the support from the case of Gilbert *Mariera Makori v Equity Bank Limited* [2016] eKLR where the court observed as follows;

> " Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union. After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decisions whether or not to dismiss or terminate the services of the employee."

40. In light of the foregoing, I am of the considered view that without affording the grievant a chance to air his representations during the disciplinary hearing meant that the dismissal was not done in accordance with a fair procedure as required by to section 45(2)(c) of the *Employment Act*.

Reasons for the dismissal

41. Section 43 of the *Employment Act* provide for substantive fairness as follows-

> " 43. Proof of reason for termination
>
> (1) In any claim arising out of termination of a 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.
>
> (2) The reason 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."

42. In the present case, reason given for termination is captured in the letter of termination dated 6th November, 2017 in the following terms:

> " Dismissal of Service Letter
>
> ...Your service with the company has been summarily dismissed following the outcome of a disciplinary enquiry held on 6th October,2017 for breach of the following company rule and/or standard:
>
> 1. Vandalization/deliberate damage of the (self-propelled/TM23, TM24, TM26 and TM28) placed under your care.
>
> 2. Section 30 subsection (c) and (e) of the current CBA.
>
> a. You neglected to perform your duty on 12th October 2017. Despite being informed by the Divisional Manager that you should fit the Ochia Skids engines onto the DTH (self-propelled machines) you did not do this and by 16th October 2017 the machine was still not ready for use, forcing the Divisional Manager to ask for assistance from another GCW artisan.
>
> You carelessly and improperly performed your work on 21st October 2017 by removing a pruning machine gear head and replacing it with one from an unspecified strimmer.
>
> Further to the above, on 18th October 2017, you failed to attend to the machines that had broken down forcing the Manager to get an artisan from Kibabet estate to repair the machines.
>
> b. Refusal/failure to carry out reasonable instructions – You knowingly failed/refused to obey lawful and proper command from the Divisional Manager who is the person placed in authority by the Company."

43. I have carefully considered the reason tendered and from the onset I would say that the first allegation of vandalizing MTH machines and replacing the pruning machine gear with that of a strimmer and

has not been established. No evidence was tabled before this Court by Rw-1 to support that allegation. The evidence by RW-1 is hearsay because it is based on information received from other persons who did not testify before this court.

44. Further, the alleged vandalism of the machines by the grievant was an unfounded opinion by Rw-1 because he confirmed under oath that the artisan from the sister Estate said that the machines had faulty parts and new ones where purchased and fitted. The said evidence corroborates the claimant's evidence that the damage on the machines was due to normal wear and tear and his request for new parts was ignored.

45. As regards the alleged replacement of the pruning machine gear with a strimmer, I wish to further observe that, Rw-1 was also not right to suggest that the grievant was the only person with the know-how to replace pruning machine gear with a strimmer because Mr. Hillary Too was also an Artisan to whom he handed over before going on suspension. Another observation is that although Mr. Hillary Too alleged before the disciplinary committee that he saw the grievant replace the said gear with a strimmer, that allegation was not verified by the artisan from the sister Estate who repaired the faulty machines.

46. Last allegation was failure to follow instruction given on 12th October 2017 by the Divisional Manager and the particulars were that he failed to repair Ochia skids engines on the DTH (self-propelled machines) after being instructed to do so by the said Manager until 16th October 2017 when assistance was sought from a sister Estate. This allegation was also not established because the grievant's evidence that the spare parts he had requested for had not been provided was not rebutted. In fact the said evidence was corroborated by the Rw-1 when he testified that the Artisan from the sister Estate said the parts were faulty and new parts were bought and fitted onto the machines to make them work.

47. As a consequence of the foregoing observation, I find and hold that the reasons cited for the dismissal of the claimant have not been proved by the employer on a balance of probability as required under section 43 and 45 of the *Employment Act*. In all fairness, and in view of the observations made above, I am of a considered opinion that the no reasonable employer, would have dismissed the grievant in the circumstances of this case.

48. I gather support from on the case of *Judicial Service Commission v Gladys Boss Shollei and another* [2014] eKLR where the Court of Appeal held that; -

> " From my own analysis of the record before us, I would very much doubt that there are many employers who, faced with conduct such as displayed by the 1st respondent, would have retained her in her position. I am not saying there would be none, only that such an employer would be a rarity indeed. As to the action of dismissing the 1st respondent, I find and hold that it was an eminently reasonable action to take by an employer. It probably would have been the only reasonable and responsible cause of action left open to the employer. The dismissal therefore passes with ease the test propounded by Lord Denning in the same British Leyland case (ibid.);
>
> "Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair."

Reliefs sought.

49. Having found that the respondent has failed to prove that the reasons for dismissing the claimant were valid and that a fair procedure was followed, I make declaration that the termination was unfair and unlawful as prayed.

50. In view of the foregoing, the claimant is entitled damages under section 49 of the *Employment Act* including salary in lieu of notice and compensation for unfair termination. Under clause 29(d) of the CBA he is entitled to 2 months' salary in lieu of Notice because of his long service.

51. I further award the claimant 12 months' salary as compensation for the unfair termination considering that the grievant served the respondent for over 19 years. I have also considered that the respondent did not prove any misconduct against the grievant, and the unfair manner in which he was thrown out of his job unheard.

52. The claim for pro-rat leave, 23 days worked in October, 2017 and Bus fare is decline. The claims fails because it lacks particulars and also because the Respondent has produced a pay slip for October, 2017 indicating that the grievant was paid his salary for October, 2017, annual leave and Bus Fare. The payment was done through the bank and the claimant has not produced grievant's bank statement to rebut the alleged payment.

53. As regards the claim for gratuity pay, the CBA under clause 30, provided for payment of Gratuity at the rate of 21 days for employee who had served for more than 10 years. The grievant worked for over 19 years since May 1998 and therefore he is entitled to gratuity at that rate.

Conclusion.

54. Judgement is entered for the claimant as against the Respondent for payment of;

    a) Two months' salary in lieu of notice of Kshs. 31,235.86

    b) 12 months' salary as compensation for the unfair termination of Kshs 187,415.16.

    c) Gratuity pay for 20 years worked at the rate of 21 days per year. 21/26 x 15,617.93 x 20= 252,289.64.

    d) The claimant will have costs and interest at court rate from the date hereof.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST 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