



**Langat v Uniliver Tea Kenya Limited (Cause E004 of 2021)
[2022] KEELRC 1238 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1238 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E004 OF 2021
ON MAKAU, J
JULY 21, 2022**

BETWEEN

JOHNSTONE LANGAT CLAIMANT

AND

UNILIVER TEA KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant brought this suit against the Respondent on the 12th June, 2021 seeking for the following reliefs;
 - a) A declaration that the termination of the claimant’s contract of employment based on health status is unconstitutional, unfair and unlawful
 - b) An order that the claimant be reinstated as an employee of the Respondent and in the alternative the claimant be paid Kshs 15,000,000 for unfair dismissal, terminal benefits for long services and general damages.
 - c) Issuance of service letter.
 - d) Costs of the claim and interest.
2. The Respondent filed a response to the Claim on 29th July, 2021, admitting that it dismissed the claimants but denying that the dismissal was unlawful. On the contrary, it averred that that the dismissal was done lawfully because the claimant breached Covid-19 safety protocols put in place by the Respondent and the Government of Kenya. It is the respondent’s case that the claimant visited another employee during the time when he was instructed by his supervisor to self-isolate, after having been identified as a contact person of an individual who had tested positive for Corona Virus. It is averred the claimant had also been issued with a warning letter for another misconduct just months before the above breach. The Respondent maintained that the termination was justified and fair



because the claimant was accorded prior hearing. The respondent further denied that the claimant was discriminated against and prayed for the suit to be dismissed with costs.

3. The case was heard on 9th March, 2022 and 10th May 2022 when both parties gave evidence and thereafter filed written submissions.

Summary of evidence

4. The claimant, Johnstone Langat, testified as CW-1 and adopted his witness statement dated 11th June, 2021. He told the court how he was employed by the Respondent in March 1997 as a field assistant and worked diligently rising through the ranks to become a Field manager. He worked for the Respondent for a total of 24 years.
5. He testified that, on 3rd of November, 2020, he received text and verbal instructions to go into isolation at home and await for collection of sample on allegation that he was a primary contact with a person who had tested positive for Covid-19. He identified the person as the Service Manager Mr. Chumba who he met in the office. He contended that there was no policy guideline at the time.
6. He testified that on the 3rd November, 2020, he was informed by the Respondent's manager that he was a primary contact of one of the Respondent's employees who had tested positive for Covid-19 Virus and directed to self-isolate for 14 days but this information was not given to other employees within the Respondent's employ. On 10th November, 2020 his samples were taken and the result purportedly turned positive though he never saw the said results.
7. Contact tracing was then done and it was discovered that he had visited another employee (Awa Kipkoech) on the 9th November, 2020 and attended a virtual meeting together contrary to the directive given by the line manager. However, he contended that as at the date of the said visit, he had not tested positive.
8. On 11th December, 2020 he received a Notice to show Cause for alleged violation of the Respondent's non-existent code of Business principles and occupational health and safety policy which states that the Respondent's employees and visitors must work and behave safely.
9. In his defence to the said allegations, he responded that he received several calls from his colleagues who wanted him to approve SAGE transactions that were pending to enable them move on but he had connectivity issues. As a result he called his colleague Awa Kipkoech well in advance to set up a site in her home where he could work from. The request was granted and he observed covid-19 measures, such as wearing a face mask and had a hand sanitizer which he used from time to time.
10. Despite the above explanation, he was dismissed and his appeal was not considered. In his view, he was discriminated by being dismissed for health status contrary to the provision of Article 27 of *the constitution*. He prayed for the claim to be allowed as prayed.
11. Upon cross examination by Muchela Advocate, the claimant admitted that on 3rd November, 2020, he received a text message from his line manager Ms. Margaret Langat requiring him work from home and restrict movement till further advice. He maintained that there was no policy on Covid-19 but just basic guidelines which he had understood.
12. He further admitted that he visited his colleague, Awa Kipkoech on 9th November, 2020 but maintained that as at that time, he had not received his test results or communication from the Respondent that he could leave the self-isolation. He reiterated that he visited the colleague because he had connectivity challenges and needed to sort out work related issue. He maintained that he observed



- covid-19 protocols as Awa sat meters away from him and they both wore masks. He confirmed, however, that he never disclosed to Mrs. Awa that he was on isolation.
13. On further cross examination, he admitted that he was called to a disciplinary hearing and where charges read and admitted the same. He further admitted that in March 2020 he had another disciplinary issue and he was issued with a warning letter.
 14. On re-examination, he testified that he has never received his result save for a call from a person who introduced himself as a doctor telling him that his results were positive. He maintains that he went to Awa's house because of the pressure from workers who needed approval of transaction on SAGE to enable them proceed.
 15. The Respondent's witness, Margaret Langat testified as RW-1 and adopted her witness statement dated 18th November, 2021 as her evidence. She also produced as exhibits, respondent's bundle of documents dated 19th November, 2021 and supplementary bundle dated 14th January, 2022.
 16. In summary the witness testified that the Respondent's core business is in Tea production and to achieve this mandate it must ensure it retains a healthy, fit and sizeable workforce that can harvest tea considering the perishable nature of Tea. She stated that any change in this demographic of the employees would have an overreaching effects on the tea harvesting that could even lead to running down of the company. It is on this basis that the Respondent, upon the emergence of Covid-19 pandemic, set rules and regulation in line with the measures given by the Government of Kenya including social distance, sanitizing, wearing of face mask and isolation in case of any suspicion of infection.
 17. Rw-1 further testified that on the 3rd November, 2020, the claimant was discovered to have been a primary contact of another employee who had tested positive for the virus. As a result, she informed him of the said fact via phone call followed by text message and advised him to self-isolate for 10 days awaiting further communication from the Respondent and testing. His samples were then taken and on 10th November, 2020 they tested positive for the virus. Upon contact tracing being done, it was discovered that the claimant had, in defiance of the directive by herself as his line manager, visited another employee named, Awa Kipkoech, who was also in isolation.
 18. As a result of the above the claimant was served with a Notice to show cause and he responded admitting that he breached covid-19 protocols by visiting another employee. She contended that the protocols were issued by the government and the respondent company. She dismissed as invalid, the explanation by the claimant that he visited the other employee in search of network connectivity to approve the Sage transactions. She contended that the claimant should have sought permission to be excused from the task or be provided with alternative.
 19. RW-1 further testified that the claimant was subjected to disciplinary hearing, and he admitted to the charges. As a result, he was dismissed for the reason that he breached Covid-19 protocols issued by the Government of Kenya and the company. Rw-1 denied the allegation of discrimination by the claimant and averred that the claimant had been earlier been warned for negligence. She contended that the claimant was accorded a fair hearing and therefore the procedure followed before the dismissal was fair.
 20. On cross examination by the Langat Advocate, the witness testified that the claimant was dismissed for breach of Covid-19 protocols. She stated that the claimant was a primary contact of Byegon Chumba who had tested positive for the virus and as such was to be in isolation till his samples were taken and tested. She stated that the protocols were those issued by the National Government and the Respondent adopted them for use on the 27th March, 2020.



21. She testified that the claimant was provided with a laptop that he could work from home. She contended that the claimant never reported that he had connectivity challenge and that he ought to have reported the network problem to the management before breaching Covid-19 protocols.
22. Rw-1 confirmed that the Ms. Awa Chelangat wrote a statement admitting that she prepared a place for the claimant to work from outside her house and at the time, he was wearing a face mask. However, Rw-1 maintained that the claimant still breached the rules by leaving his isolation place without approval by a Medical Health Officer.
23. On further cross examination, Rw-1 admitted that the guidelines required that people to wear mask and keep a distance of at least 2 meters apart. She also admitted that she never served the claimant with company letter requiring him to isolate and she has also not filed covid-19 results for the claimant.
24. On re-examination, Rw-1 maintain that the claimant breached protocol by leaving his isolation place and visiting another employee of the company. She contended that the breach was serious and warranted summary dismissal because the Guidelines were there to protect all people from death. She contended that the claimant was a manager and as such he was obliged to protect other staff.

Submissions by the Parties.

25. The claimant submitted that the reason for termination was on allegation of breach of Covid -19 protocols yet there was no such protocols published by the Respondent. He further contended that no such Covid -19 protocol had found its way to the Respondent's Code on Occupational Health and Safety policy. Consequently in his view, it was not possible to breach a non-existent rule.
26. It was also submitted that no evidence was tabled before the disciplinary hearing of the alleged positive result of both Mr. Byegon Chumba and the claimant. These result were not even shown to the claimant and as such the genuineness of the results cannot be verified. It was argued that the claimant had observed all the national protocol such as wearing a mask, maintaining social distance and sanitizing regularly. It was argued that if indeed the claimant had contracted the said virus he ought to have been taken to isolation centers as directed by the Government. Therefore it was opined that the allegation of contracting Covid-19 remains a myth.
27. It was again submitted that the visit to the claimant's colleague was necessary for the reason that during isolation the claimant continued working from home until on that one occasion when he experienced connectivity challenges and went to a colleague's place. He observed maintained that he all the protocols to avoid infecting his colleagues if he was indeed exposed to the Virus.
28. He argued that the termination was unfair because it was done at a time when he was alleged to have contracted the Covid-19 and as such it was virus contrary to provision of Article 27 of *the Constitution* which abhors discrimination based on, gender and health among others.
29. Finally it was submitted for the claimant that the termination was done without fair reason and or following due procedure and therefore it was unfair under section 45(2) of the *Employment Act*.
30. The Respondent submitted that the claimant was dismissed for a just cause. He argued that although the said protocols were not incorporated on the respondent's code of conduct, the same were communicated directly to the claimant through his line manager. It was argued that the defiance amounted to breach of lawful direction given to the Respondent's employees sometimes in September, 2020, which is a good cause for termination.
31. It was further argued that the claimant admitted the said charges during the disciplinary hearing and as such the reason for the dismissal was valid. In support of this argument the Respondent relied on the



case of *Timothy Gakere Gachaga & 2 others V Kenya Marine Contractors and another* [2017] eKLR where the Court held that; -

“The Court is satisfied the Claimants were dismissed for a clear act of gross misconduct. They defied a reasonable and lawful command of their Employer. They were guilty of an employment offence under Section 44 [4] of the *Employment Act* 2007. The 1st Respondent had valid reason to summarily dismiss the Claimants.”

32. On the other hand, it was submitted that due process was followed because the Claimant was served with a show cause letter dated 11th December, 2020 and he responded. Thereafter he was invited to a disciplinary hearing that took place on the 15th December, 2020, where he admitted the charges against him. Therefore the respondent holds the view that the termination was done through a fair procedure. For emphasis reliance was placed on the case of *Benard Ndungu Mbugua V Nairobi Water and sewerage Company Limited* [2019] eKLR where the Court held that;

“At the hearing the claimant admitted abandoning his colleagues in the forest. He also admitted reporting to work late. From the foregoing, there was valid reason for the dismissal of the claimant and he was subjected to a fair procedure. I therefore find that the termination was valid.”

33. Finally, it was submitted that since the dismissal of the claimant satisfied both procedural and substantive fairness, the claim ought to be dismissed with costs.

Analysis and determination.

34. Having considered the pleadings, evidence adduced and the rival submissions by parties it is a fact that the claimant was employed by the respondent until on 8th April 2021 when he was dismissed for misconduct. The issues for determination are as follows; -

- a.) Whether the dismissal was procedurally fair.
- b.) Whether the dismissal was substantively fair.
- c.) Whether the claimant was discriminated against.
- d.) Whether the reliefs sought are merited.

Procedural fairness.

35. 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.

36. 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.”

37. In the case of *Walter Ogal Anuro –v- Teachers Service Commission* [2013] eKLR the Court held that:

“ For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

38. Again 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.”

39. In the instant case, the Respondent argued that the claimant was subjected to fair disciplinary process in because he was issued with a notice to show cause, giving him time to respond before being invited to disciplinary hearing where he defended himself. The claimant in his submissions alleged the procedure was tainted with procedural impropriety, but failed to elaborate on how the said procedure was unfair.

40. According to the minutes of disciplinary meeting held on 15th December, 2020, it is evident that proper procedure was followed in the meeting because, he accepted to proceed with the hearing without any objection. He even admitted the charge and apologized for not consulting with his line manager before visiting the home of another employee.

41. Having carefully considered the foregoing evidence, 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 his defense both in writing and orally before a committee and he admitted the charges.

Substantive fairness.

42. 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.



43. 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.”

44. Similarly, in this case the reasons given for dismissal of the claimant were mainly breach of covid-19 protocols. The said breach allegedly amounted to gross misconduct under section 44(4)(e) of the *Employment Act*. Section 44(4) of the Act 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.”

45. The dismissal letter dated 8th April 2021 stated partly as follows:

“... It was alleged that on 3rd November,2020, you (Johnstone Langat) being primary contact to an employee who had tested positive for Covid-19 was directed by your Line Manager, Margaret Langat, to self-isolate in your house until your tests results for Covid-19 were out. This was in line with the requirements of the Ministry of Health as well as Company Guidelines. On 10th November, 2020, your results were received by the Hospital and confirmed that you had tested positive for Covid-19. While doing contact tracing, it was discovered that you (Johnstone Langat), had on 9th November, 2020, visited another employee, Awa Kipkoech, in her house, where you attended a virtual meeting together contrary to the instructions given by your line manager and company guidelines.

...

Based on the evidence presented by all the parties to the hearing committee during the disciplinary hearing held on 15th December,2020, the committee has concluded that you, Johnstone Langat have breached the Unilever Code of Business Principles, and section 44(4) (e) of the *Employment Act* 2007. This breach constitutes to gross misconduct and Unilever



has taken the decision to summarily dismiss you from employment with immediate effect on account of gross misconduct.”

46. The Respondent’s case is that the claimant was given simple instructions vide a phone call followed by text messages, to work from home with immediate effect and wait for medical samples to be taken from him. A follow up text message required him to restrict movement while in isolation till further advice. It was further argued that the claimant breached this protocol and visited one of the Respondent’s management staff contrary to direction given.
47. The claimant admitted to receiving this message and in his defence, he alleged that he needed to approve the SAGE transaction and since he was experiencing connectivity issue, he requested his colleague Ms Awa Kipkoech to set a place at her home, which was nearby as he always did whenever he experienced poor connectivity. He maintained that throughout their interaction he maintained Covid-19 protocol by wearing a mask, carrying a portable hand sanitizer and conducted the meeting outside the colleague’s house to ensure they had social distanced from each other. These averments were confirmed by Ms. Awa Kipkoech in her statement which was alluded to by RW-1 during cross examination.
48. From the set of facts states above, it’s true that the claimant left his house to attend to work related matter at his colleague’s home. The question that begs for answer is whether he breached or defied lawful command from his employer or his supervisor. The answer lies in the documents communicating the command.
49. The first text message was sent to the claimant and Awa Kipkoech on 3rd November 2020 at 4.41 PM and it stated as follows:
- “ Good afternoon. You are advised to work from home with immediate effect. Medical will come for Covid samples tomorrow.”
50. Again at 5.19 PM the same day, the second text message was sent to the same recipients and it stated as follows:
- “ Also restrict movement while in isolation until further advised.”
51. Earlier on 17th September,2020, the respondent hand written to all staff an email attaching a document on the Status of Covid-19 and the Company’s Existing Preventive Measures. The document provided that employee must among other things:
- “ 1. ...
9. Self-isolate and monitor your health for 10 days or as advised by MOH if:You have come into contact with anyone who has tested positive for COVID-19 or live with someone exhibiting symptoms suggestive of COVID-19.You have travelled outside operating counties.”
52. Having considered the above document, I am satisfied that the respondent had put in place guidelines and preventive measures on COVID-19 and communicated to all its staff including the claimant as early as 17th September, 2020. The guidelines required in mandatory terms that an employee must self-isolate and monitor his health for 10 days if he comes into contact with anyone who has tested positive for COVID-19 or lives with a person exhibits covid-19 symptoms.



53. In this case, the text messages above shows that the claimant was advised to work from home and restrict movement while in the isolation until further notice. The reason was that he was a primary contact of a fellow employee Mr. Byegon Chumba who had tested positive for Covid-19.
54. Cambridge Dictionary defines self-isolation as “the practice of not leaving your house and staying away from other people when you have, or may have, an infectious disease, so that you do not infect anyone else”.
55. Macmillan dictionary defines self-isolation as “the practice of voluntarily staying at home and away from other people in case you infect them”.
56. Collins dictionary then defines self-isolate as “to quarantine oneself if one has or suspects one has a contagious disease”.
57. Wikipedia describes quarantine as “a restriction on the movement of people, animals and goods which is intended to prevent the spread of disease or pests. It is often used in connection to disease and illness, preventing the movement of those who may have been exposed to a communicable disease, yet do not have a confirmed medical diagnosis.”
58. Having considered the above definitions and the instructions given to the claimant on 3rd November, 2020 by his line manager, I would say that the instructions were on all-fours with the guidelines by the company in the document emailed to all the staff on 17th September,2020. The guidelines where that if an employee came into contact with a person who has tested positive for Covid-19, he had to self-isolate and monitor his health for 10 days or as advised by the MOH. This meant that the employee was supposed to quarantine himself in his home and not to move out of his home until his Covid-19 status was verified by medical test.
59. The claimant is not in denial that he was informed by his line manager Ms Margaret Langat to work from home with immediate effect and restrict his movement while in isolation. He is not in denial that he was a primary contact to his colleague Byegon Chumba who tested positive for Covid-19. Finally, he has admitted that he breached the said instructions from his line manager and visited his colleague Awa Kipkoech on 9th November,2020 at her home to do work related task which he could not perform from his house due to poor network connectivity.
60. During his disciplinary hearing, he admitted the breach and apologized for not consulting with his line manager before visiting Ms Awa’s home on 9th November,2020. He justified his action by contending that there was urgency in the task he was required to do and he was the only person authorized to do it in his department. He also maintained that he and his colleague observed the Covid-19 preventive measures during his visit. However, the employer was not satisfied with the explanation and dismissed him.
61. The employer was entitled to dismiss the claimant for defying the lawful instructions given to him by his line manager and the Guidelines emailed to all staff on 17th September, 2020 which directed every employee to self-isolate for 10days if he comes into contact with a person who has tested positive for Covid-19. I have already pointed above that section 44(4)(e) of the [Employment Act](#) entitles an employer to dismiss an employee who 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.
62. In this case the claimant deliberately breached the command from both his line manager and the employer. Although he acted in good faith and for the interest of the employer’s business, and even



wore mask during the visit, the command required him to remain at home and restrict movement but he defied.

63. The said guidelines by the employer were meant for preventing spreading of a deadly disease which was very contagious and threatening the overall business of the company which is labour intensive. Consequently, I find and hold that the reason for the summary dismissal of the claimant was valid and fair.

Was the claimant discriminated?

64. The claimant alleged that he was discriminated based on health status and was dismissed contrary to provision of Article 27 of *the Constitution*. However, according to the pleadings and evidence the claimant was dismissed for breach of Covid-19 protocols and not for testing positive for Covid-19. No evidence was tabled before this Court to establish the alleged discrimination and I therefore I find and hold that the claimant was not discriminated through the dismissal for insubordination and breach of Covid-19 guidelines.

Remedies sought.

65. Having found that the dismissal of the claimant was for a valid reason and that a fair procedure was followed, I decline to make declaration that the termination of the claimant's contract of employment unconstitutional, unfair and unlawful as prayed. On the contrary, I make a finding that the termination was fair and lawful.
66. For the same reason, I decline to grant the prayer for reinstatement and compensatory damages under section 49 of the Act of the *Employment Act*. He will therefore have to contend with the pension which I noted as a benefit granted in the dismissal letter.
67. The claimant will however be issued with certificate of service as required under section 51 of the *Act*.
68. In conclusion and save for the order for issuance of certificate of service, the suit is dismissed for lack of merits. Considering that the claimant lost his job after contracting Covid-19 while on duty, I will not condemn him to pay costs of the suit.

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

7

