



**Mutsotso v Butali Sugar Mills Limited (Cause 98 of 2021)
[2022] KEELRC 1723 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1723 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 98 OF 2021**

**JW KELI, J
JULY 21, 2022**

BETWEEN

RODGERS SIMIYU MUTSOTSO CLAIMANT

AND

BUTALI SUGAR MILLS LIMITED RESPONDENT

JUDGMENT

1. The Claimant following summary dismissal from employment by the Respondent filed a claim against the Respondent dated 27th February 2017 seeking the following reliefs:-
 - a) A declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair.
 - b) the sum of Kshs. 260,784/- as set out in the claim.
 - c) Certificate of service.
 - d) Cost of this suit and interest on at Court rates from time of filing suit until payment in full.
 - e) Any other further and better relief the Honourable Court may deem just and fit to grant.
2. In addition to the claim, the Claimant filed list of issues, list of witnesses and Claimant's witness statement all dated 27th February 2017. The Claimant also filed his list of documents of even date together with the bundle of documents.
3. The Respondent entered appearance through the Federation of Kenya Employers and filed response dated 6th July, 2017 and received in Court on the 7th July 2017 together with bundle of documents. The Respondent further filed in Court its witness statements by Umberjet Yasena and Kevin Inzuga all dated 12th July 2018 and filed in Court on the 13th July 2018.



4. The Claimant on the 27th July 2017 filed in Court reply to the Respondent's statement of response dated 26th July 2017.
5. The Claimant's case was first heard in open Court on the 25th May 2019 by Lady Justice Maureen Onyango. Due to lapse of time this Court heard the case de novo on the 21st March 2022 with the Claimant being the only witness of fact in his case.
6. The Respondent's case was heard on the same day with the Respondent calling one UMBERJET YASENA (RW) as its only witness of fact.
7. After the hearing, parties filed written submissions. The Claimant's written submissions drawn by Kirwa Jonah of Mwakio Kirwa & Company Advocates are dated 20th April 2022. The Respondent's written submissions drawn by Federation of Kenya Employers are dated 27th April, 2022.

Claimant's case in summary

8. The Claimant's case as per witness statement adopted as his evidence in chief is that he was employed from 1st July 2013 as cane yard supervisor by the Respondent at monthly salary of Kshs. 17,000/- plus housing allowance for the sum of Kshs. 1332/-. That he served without any warnings till 13th October 2015 when his services were terminated unfairly on allegations that on 21st September 2015 at around 2am there was an incident where tractor KTCB 018 J was found wrecked down from the yard while connected to its trailer. That the particulars/investigation report of the allegations were not availed to him. The Claimant states that he was not afforded fair hearing before the termination of his services. The Claimant produced documents filed under his list of documents dated 27th February 2017.
9. During cross-examination the Claimant, on oath, admitted that he received the show cause letter and responded. That he received invitation for hearing and that he attended after which he got the summary dismissal letter. He told the Court he did not clear with the Respondent. He told the Court that he did not receive the investigation report and admitted he did not request for it from the management. The Claimant admitted he was at work on the 21st September 2021 at 2am as the supervisor of the cane yard. The Claimant told the Court there were 4 drivers on duty at that time. The Claimant on being asked what caused the tractor to fall, he told the Court he did not know, that he heard noise when upstairs at feed operating and on getting there he did not see a driver. He said the tractor was loaded with cane and he reported to security. When asked about the name of the security manager he told the Court he did not know. He added that he also called Wycliff Nyongesa shift engineer and informed the transport manager who was an Indian and could not recall the name. The Claimant told the Court Baraza was a shift engineer and Lucas a supervisor like him. That he was not unionized as he was in management.
10. During re-exam the Claimant told the court that he was not issued with investigation report and it was not at the hearing. He told the Court he did not clear as he was not called to clear.
11. The Claimant told the Court he was 46 years old and currently at home and closed his case.

Respondent's case

12. The Respondent's witness UMBERJET YASENA (RW) was a witness of fact and testified on oath. He adopted his witness statement dated 12th July 2018. He worked as security officer at the Respondent's company since 26th May 2015 and he knew the Claimant as his former colleague. He associated himself with the averments in statement of response paragraphs 2 to 10. He produced the appendixes 1-8 of the documents filed with the statement of response as the evidence of the Respondent. In summary the Respondent accused the Claimant of negligence in failing to do his job as supervisor leading



to loss of a tractor valued at Kshs. 5million which tractor had been parked at 5pm and ought to have been offloaded cane but that was not the case. The tractor was wrecked at 2am 10 hours which the Respondent upon investigations concluded must have been with a driver and believed that the Claimant as supervisor on duty knew the culprit and failed to disclose.

13. During cross-examination by Counsel for the Claimant, Mr. Kirwa Advocate, RW told the Court that the Claimant that he had worked for the Respondent for 7 years as head of security. RW told the Court that the employee record was kept by the Respondent who ought to produce it in Court. RW admitted that documents ought to be issued to the employee for fair hearing. RW told the Court he submitted the investigation report to the Human Resources. That according to Appendix 6 RW did not attend the disciplinary hearing the report is not indicated in the report. RW confirmed that the Claimant was not at work at 5pm and reported at 10pm. That at the time the tractor was parked there was a different supervisor and further there were hundreds of tractors which were parked and off loaded over time which process runs around the clock. RW could not recall if there was a line manager working with the Claimant on material day. RW told the Court he did not have a document to show that one of the roles of the Claimant was to assign tractors to drivers. RW admitted that under paragraph 5 he should have known who was the unauthorized person. RW told the Court he questioned the security personnel not before Court as witnesses. He also questioned other persons whose statements were not before the Court and further the said persons did not appear at the disciplinary hearing hence the Claimant did not have opportunity to question the witnesses. RW told the Court he did not have the inspection certificate of the tractor before travel and did not know the driver who parked the tractor at 5pm. RW told the Court John Paul was the transport manager and he did not know why his statement was not recorded. RW confirmed that the incident was not isolated as indicated at the disciplinary hearing by Lucas Amondi a colleague of the Claimant and further RW confirmed some tractors were faulty. RW could not confirm his dues were paid as per appendix 7. RW told the Court he could not confirm notice as indicated as he was not in Human Resources. RW confirmed he had not produced evidence of remittance of dues.
14. On re-examination RW stated that the Claimant did not ask for the investigation report, confirmed that leave days are provided for in the payslip. RW told the Court he did not attend the disciplinary hearing hence could not confirm if the investigation report had been tabled. RW said the Claimant confirmed he was the yard supervisor at material time of the incident. RW confirmed that if the incident had occurred before 10pm the Claimant would not have been held culpable as he was not on duty. It was the duty of the Claimant to identify the unauthorized driver as he was incharge. The cost of the damage was not challenged. That it was correct the parking area was risky hence the Claimant ought to have been alert during his shift due to the risk. RW said that the Claimant had not cleared.

Determination

Issues for determination

15. The Claimant identified the following as issues for determination under his written submissions:-
 - a. Whether the Claimant was unlawfully, unprocedurally, and unfairly terminated from the employment by the Respondent
 - b. Whether the Claimant is entitled to compensation for unlawful, unprocedural, and unfair termination from the employment as prayed for in the statement of claim.
 - c. What other remedies are available to the Claimant in the circumstances.
 - d. Whether the Claimant is entitled to certificate of service, and



- e. Who should pay the costs and interest of the suit
16. The Respondent in its written submissions addressed the following issues:-
- a. Procedural fairness
 - b. Substantive fairness
 - c. Whether the Claimant is entitled to the reliefs sought
17. The Court having considered the claim and issues addressed by the Claimant and the response and issues addressed under the Respondent's written submissions is of considered opinion that the issues for determination in this suit placed by the parties before the Court are as follows:-
- a) Whether the reasons for the termination of the employment of the Claimant by the Respondent were valid;
 - b) Whether the termination of employment of the Claimant by the Respondent was procedurally fair, and
 - c) Whether the Claimant is entitled to reliefs sought

The relevant law

18. 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.”
19. Section 44 (4) of the *Employment Act* provides for justifiable and lawful grounds for dismissal from employment, inter alia if:-
- “(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
 - (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,
 - (c) an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”
20. 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.



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

Whether the reasons for the termination of the employment of the Claimant by the Respondent were valid

22. 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.”

Thus the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.

23. The Claimant alleged that his dismissal was tainted with ill will for the reasons that he was not availed the investigation report relied on, that he had served the Respondent for 3 years without any allegations of theft or any warnings, that it was not his role to identify the responsible driver as that was the role of the security.

24. The Respondent in the summary dismissal letter addressed to the Claimant dated 13th October 2015 (Claimant’s document no. 5) gave the reasons for the termination as follows:-

“Reference is made to the show cause letter ..dated 22nd September 2015 and your response on the same. further you were invited to the disciplinary committee vide our letter .. dated 1st October 2015 and investigation done incriminated you as having not been in control of the happenings in the area of your command. In view of the above the committee noted that your defence was not convincing. In view of the foregoing there was laxity and negligence on your part which amounts to gross misconduct and which is contrary to section 44 subsection 4(c) and (e) of the Employment Act , 2007. The management had decided therefore that you be summarily dismissed with effect from the date of this letter. Kindly handover any company property in your possession to your immediate supervisor and all other departments so that your dues are remitted to you.”

25. From the summary dismissal letter it is apparent the reason for the summary dismissal is as captured in the letter as follows:-

“investigation done incriminated you as having not been in control of the happenings in the area of your command. In view of the above the committee noted that your defence was not convincing. In view of the foregoing there was laxity and negligence on your part which amounts to gross misconduct and which is contrary to section 44 subsection 4(c) and (e) of the Employment Act , 2007.”

26. The Respondent led evidence that the Claimant was responsible for the happenings at the cane yard as the supervisor and ought to have know which of the drivers on duty drove the tractor to wreck. The Respondent noted that the Claimant ought to have been alert as it was admitted the area they were parked was risky. That the incident happened at 2am when the Claimant was on duty. The



- Respondent produced the show cause letter dated 22nd September 2015, the Claimant 's response dated 21st September 2015 and the minutes of the disciplinary proceedings on the Claimant dated 2nd October 2015.
27. The disciplinary committee after hearing the Claimant and his two witnesses unanimously concluded that the Claimant was negligent and ought to be separated.
 28. The Claimant case is that there was no particulars of the incident issued to him (paragraph 5 of the statement), that no investigation report on the incident was issued to him to prepare for defence to the show cause letter, that he was terminated without any lawful reason or justification.
 29. The Claimant submits that the termination was malicious, ill willed, and calculated to form basis to unfairly terminate his services on grounds that:- the subject tractor was parked at 5pm and the Claimant reported to work at 10pm, the Claimant does not know how to operate a tractor and placing him to know who operated the tractor was wrong and malicious and the same was cited to form basis to unfairly terminate his services, that if the tractor was operated unlawfully it was the security to tell and not the Claimant , that to terminate the services of the employee on the basis of believe not supported by any form of evidence is unfair and unlawful, the Respondent's witness told the Court investigations were done but the same was not availed to the Claimant or the Court, the Respondent failed to avail mechanical fitness investigation of the subject despite admission that such incidences were extremely common and that the current case was not isolated to form reason for the termination, that both the Claimant and the Respondent admitted that the parking area was risky and the burden of ensuring that the parking was fit was on the Respondent and not the Claimant and the same cannot therefore form the basis to terminate the services of the Claimant .
 30. The Respondent submits that section 43 and 45 of the [Employment Act](#), 2007 requires that the reasons for termination of employment must be proved. Such reason for termination must be matters that the employer must genuinely believe to exist at the time of termination. Further the standard of proof is not one beyond reasonable doubt but rather on a balance of probability, that there was an incident involving a tractor around 2 a.m. when the Claimant was on duty as a supervisor was not in dispute, that the Claimant was on duty at the time of the accident was similarly not in doubt, that the point of departure between the Claimant 's account and the Respondent was that it was not open to the Claimant to remain clueless and helpless like everybody else at the accident scene without taking responsibility or at nay rate singling out who was the unauthorized driver who caused the accident that caused the substantial loss to the Respondent. That this formed a good and valid reason to make the Respondent contemplate initiating disciplinary process against the Claimant.
 31. The Respondent further submits that the Claimant's evidence during the disciplinary hearing tended to contradict his written statement. That the Claimant stated in his written statement that he heard some noise and when he went to check he found the tractor having broken into pieces, that during disciplinary hearing he stated that Mr.Sukla had complained of cane shortage at the feed table, he therefore rushed to the upper cane yard where he noticed the tractor had crashed and broken into pieces. That this showed considerable inconsistency and which the Claimant was not able to explain even during his testimony and therefore could only point towards culpability. That it also evident that Rodgers took over from previous supervisor and was supposed to ensure all was well and that the tractors must be properly parked. The Claimant also stated that the tractors were parked from the main store by the previous supervisors. the question is if he found it to be wrong parking what did he do? He did not inform the transport manager of the poor parking. He only informed him after the incident. That due to the negligence of the Claimant the company lost kshs. 5million as the tractor was written off. The Respondent submits that under section 44(4)(c)(e) of the [Employment Act](#) summary dismissal was allowed.



32. It is not for the Court to determine justifiable reasons for termination. The valid reasons are the ones which employer reasonably believed to exist under section 43 of the *Employment Act* and related to the reason for the termination of employment.
33. In the instant claim the facts of the incident indicate that the incident of the tractor happened at 2 a.m., that at 2 a.m. the Claimant was on duty as the cane yard supervisor, that the loaded tractor has been parked at 5pm and the Claimant reported at 10pm, that the Claimant was informed of the reason why employer was contemplating to terminate his services in the show cause letter being that, 'on 21st September 2015 at around 2am there was an incident whereby a tractor KTCB 018J was found wrecked down from the yard while it was still connected to its trailer during your shift. the incident happened under his watch and he did not provide explanation and report to that effect, that he feigned ignorance of the same . The damage to the tractor is extreme valued at kshs. 5 Million. This is grave omission on your part which amounts to gross misconduct and therefore contrary to section 44 subsection 4(c) of the *Employment Act*'.
34. The Claimant alleged he was not given the particulars of the accusations. The Court finds that the above show cause letter disclosed the particulars of the reason the disciplinary action was contemplated.
35. The Claimant responded to the show cause in the letter of 21st September 2015. The management was not satisfied with the response and invited him to disciplinary hearing vide letter of 1st October 2015 reiterating the same reasons. In the minutes produced before court the same reasons/ accusation are recorded. The Court then finds that the Claimant had full knowledge in all steps as to why the employer was contemplating his termination of service. It is true there is inconsistency on the response of the Claimant and his evidence before the committee being in response he heard noise and at the hearing he saw. The Claimant at the hearing admitted it was his responsibility to organize, supervise the employees under him and property under his custody. He admitted that when he took over the tractors were parked at the main store and he only informed the transports manager after the incident.
36. The Claimant submits that RW alluded to investigation report which he was not given hence the termination was unfair, that there was a witness who stated the parking was risky and some tractors faulty and further it was the security who should have investigated the unauthorized person who caused the incident.
37. The Court finds that the dismissal letter gave the reasons for the termination. It is apparent from the dismissal letter and the evidence of RW that the Respondent relied on an investigation on the incident that it states incriminated the Claimant. That investigation report or finding was not tabled at the disciplinary hearing as per the minutes produced in court by the Respondent nor was it produced in court. The court is in darkness on the alleged incriminating information leading to the summary dismissal of the Claimant. The court agrees with the Claimant that fair hearing entails providing the accused with the evidence being used against them before issuance of verdict. RW alluded to the report and did not produce it. Considering the evidence of the witnesses of the Claimant at the disciplinary hearing that the parking area was risky, that in the past some tractors moved on their own and some were faulty and the incident having occurred at night where visibility is an obvious challenge, the Court finds that the alluded investigation report was material.
38. Due to the failure by the Respondent to table the investigation findings or report referred in the dismissal letter before disciplinary hearing or this court, the court finds that the Respondent has not proved existence of valid reason for the summary dismissal of the Claimant from its employment as required under section 43 of the *Employment Act*.



Whether the procedure adopted in the termination was lawful

39. The Claimant submits that the disciplinary committee did not adhere to the provisions of section 41(1)(2) of the employment being that the employer must allow a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation and the hearing and relies on the decision in *Alphonse Machanga Mwachanya v Operation 680 Limited* (2013)eKLR where the Court summarized the procedure under section 41 of the *Employment Act*. The Court upholds the procedure as summarized in the decision.
40. The Claimant further relies on the decision of Court in *Judicial Service Commission V Gladys Boss Shollei & Another* (2014)eKLR where the Court explained what entails fair hearing under section 50(1) of *the Constitution* being encompass several aspects including; ‘the individual being informed of the case against him/her , being given opportunity to present his or her side of the story or challenge the case against him or her and having the benefit of public hearing before the Court or other independent and impartial body.’” The Court upholds the finding of the Court in the decision as far as fair hearing is concerned.
41. The Claimant submits that there seems to be a predetermined verdict to terminate the services of the Claimant . That RW admitted not to have participated in the disciplinary hearing despite being the alleged substantive investigating officer and ought to have availed himself together with all security officers present at material time of the incident. That the investigation report is the primary document of the alleged wrong doing was not availed to the Claimant or the Court hence the process be said to be fair. That representation is a key instrument and right that cannot be waived and it was waived by the Respondent as against the Claimant. That the right includes being supplied with documentary evidence before hand to prepare for the alleged disciplinary hearing under Article 41 and 50 of *the Constitution* as read together with sections 7,8,9, 10(5),41 and 45 of the *Employment Act*.
42. The Respondent submits that at the hearing the Claimant was accompanied by two fellow employees Mr. Barasa and Luke Amondi (Appendix 6-minutes). The Claimant was found to have neglected his duties and dismissed, the Claimant was afforded a fair chance to exonerate himself as required under section 35(4)(b) and 41 of the *Employment Act*.
43. Applying the criteria under Section 41, the Court found evidence the Claimant was issued with notice to show cause, he was invited to disciplinary hearing and informed of the reason, attended the disciplinary hearing with 2 colleagues as witnesses, the Claimant was in management hence not unionized, his evidence and representations of the witnesses was recorded in the minutes produced and attendance signed by all parties(appendix 6 of the Respondent’s bundle). The Court found that the alleged investigation report was material to the finding on the validity of the reasons and that it was not tabled at the disciplinary hearing or before the court. The Court finds there was good attempt with compliance with the steps under section 41 of the *employment Act* by the Respondent and only issue was stating in the summary dismissal letter it relied on investigations which it says incriminated the Claimant. The court finds that relying on the alleged investigations not disclosed at the disciplinary hearing in the summary dismissal of the Claimant fatally tainted the procedural process.
44. The Court determines that there was no procedural fairness in the summary dismissal of the Claimant from employment by the Respondent.



Whether the Claimant is entitled to reliefs sought

Claim for notice pay.

45. The Claimant submits that he is entitled to notice pay under section 35(1)(c) and 36 of the *employment act* in lieu of notice and this is not disputed by the Respondent .
46. The Respondent submits that the Claimant is not entitled to notice payment and compensation as the termination of employment was based on a valid reason and due process was followed.
47. The Court having found there no valid reason for the summary dismissal of the Claimant for employment, notice pay in lieu is awarded at one month's gross salary for total sum of Kshs. 19,778/- (pay slip of August 2015 applied. Page 18 of the Claimant's document)

Compensation for unfair summary dismissal

48. The Court determined there was wrongful and unfair termination due to lack of valid reasons and procedural fairness. Applying the provisions of section 49 of the *Employment Act*, the Claimant having been in service for short period being from 1st July 2013 to 13th October 2015 and being still unemployed at 46 years of age, the future prospects for getting similar or suitable job not certain and the conduct of employer in the termination process, the court finds that an award of compensation the equivalent of 6 months last salary is fair compensation to wit Kshs. 19788 x 6 total sum awarded as compensation being Kshs. 118,728/-

Service pay / gratuity

49. The claim was abandoned.

Claim for Leave days

50. The Claimant submits that he was entitled to 26 days of leave in 2015, that the Respondent did not produce evidence to rebut this statement and indicate that the Claimant went on leave thus the Claimant ought to be paid the leave dues tabulated in the claim. The Court notes that the Claimant noted he had balance of 16 leave days for 2015 and submits on 21 days.
51. The Respondent, the employer in response produced evidence of balance due days for leave of 11 days (appendix 7 (a)) payslip for October 2015 which reflects payment of the leave at ksh8,372/-. The Court finds that the tabulation of balance of 11 days for annual leave 2015 is not challenged in the reply to defence.
52. The Court finds and determines that the leave pay is for 11 days which is paid under the October 2015 payslip. The claim is disallowed.
Certificate of service
53. The certificate of service is a right under section 51 of the *Employment Act*. The Respondent annexed a copy of the certificate dated 13th October 2015. There is no evidence the certificate was issued to the Claimant upon the summary dismissal. The Respondent is ordered to issue the certificate of service to the Claimant within 7 days of Judgment.



Conclusion and final determination

54. The Court determines that the termination of the employment services of the Claimant by the Respondent was wrongful and unfair and issues judgment for the Claimant against the Respondent as follows: -
- a. Compensation for unfair termination of employment equivalent of six months at last month's gross salary (of Kshs. 19,788) to total sum of Kshs. 118,728/- awarded.
 - b. Notice pay of one month salary awarded for the sum of Kshs. 19,788/-
(above awards a and b subject to statutory deductions)
 - c. The Court orders the Respondent to issue the Claimant with original Certificate of service pursuant to Section 51 of the [Employment Act](#) within 7 days of this judgment through his Advocates.
 - d. Interest awarded at court rates from date of judgment until payment in full.
 - e. Costs follow the event. Respondent to bear costs of the suit.
55. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 21ST DAY OF JULY, 2022.

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant :- Absent

Respondent: Mr Dickens Ouma

