



Kenya Plantation & Agricultural Workers Union v Kipkebe Limited (Cause E008 of 2021) [2022] KEELRC 1372 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1372 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E008 OF 2021
ON MAKAU, J
JULY 14, 2022**

**BETWEEN
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT
AND
KIPKEBE LIMITED RESPONDENT**

JUDGMENT

1. The claimant is a registered Trade Union registered under the *Labour Relations Act* and brings this suit on behalf of its member Mr Stanley Aranda hereinafter referred to as “grievant”. The respondent is a limited liability company and the former employer of the grievant. By a memorandum of claim dated September 15, 2021 the claimant alleges that the grievant was unfairly, unlawfully and or illegally dismissed from employment by the respondent and prays for the following reliefs: -
 - 1) An order directing the respondent to: -
 - a) To unconditionally reinstate the grievant herein;
 - b) To pay the grievant for the entire period within which he was dismissed.
 - c) To pay the grievant in respect of all the leave days due to him at the time of reinstatement.
 - d) To pay the grievant leave and travelling allowance.
 - 2) Should prayer 1 above fail, an order directing, the respondent to: -
 - a) Pay the grievant gratuity for the years he has served with the respondent at the rates provided for in the CBA;
 - b) Pay the grievant house allowance from the time of dismissal until the time of judgement.



- c) Pay the grievant monthly salary for a period of twelve (12) months.
 - d) Pay the grievant in lieu of leave for the period dismissed.
 - e) Pay the grievant leave travelling allowance for the period of dismissal;
 - f) Pay the grievant in lieu of notice of termination;
 - g) Pay the grievant damages for unlawful, illegal and unfair dismissal;
 - h) Pay the grievant the cost of the cause;
 - i) Interest on (a), (b), (c), (d), (e), (f) and (g) above;
 - j) Any other relief this Honourable Court deems fit to grant.
2. The respondent filed a memorandum of response dated November 23, 2021 denying the alleged unfair termination of the grievant's employment and averred that the termination was fair because the grievant grossly misconducted himself by reporting to work while drunk and unable to work and when he was told to go home to sober up he refused and used abusive words to his Supervisor. It was further stated that he was accorded a fair hearing before the termination. Therefore, the respondent denied that the claimant is entitled to the reliefs sought and prayed for the suit to be dismissed with costs.
 3. On the May 17, 2022, parties attended court for hearing but instead agreed to adopt their respective statements and documents as evidence then proceed to file submissions.

Summary of Evidence.

4. In his written witness statement dated September 15, 2021, the grievant, Stanley Aranda states that he was employed by the respondent in June, 1998 and worked until October 1, 2018 when his services were terminated.
5. He avers that on the September 19, 2018 at around 2200 hours, while he was at work feeding stock of tea into line two machine, he ran out of stock and approached his line supervisor who, to his surprise, was dead asleep. When he woke him up and requested to be provided with more stock from the relevant personnel, the line supervisor turned against him and alleged that he was drunk and unable to feed into the said machine. The supervisor then gave him a gate pass and directed him to leave the respondent's premises.
6. Before leaving, the grievant inquired on whether he would be paid for the hours worked on the material day but he did not receive any response from the supervisor. When he insisted on an answer to his pay for work done, security guards were called and they attempted to forcefully eject him out of the respondent's premises as the police officers from Keritor Police station arrived and took him to the station.
7. The grievant further states that he was issued with notice to show cause dated September 20, 2018 requiring to respond within 2 days and he did so by his letter dated September 20, 2018 by which he denied the allegation of attending work while drunk and using abusive words to his line supervisor.
8. The disciplinary hearing was conducted as scheduled on the September 26, 2018 but according to the grievant, the respondent failed to produce evidence of the alleged intoxication. Consequently, the grievant maintains that his dismissal on October 1, 2018 was unfair and unlawful.
9. As a result of the foregoing matters, the grievant avers the matter was later escalated to the Ministry of labour whereupon a conciliator was appointment and a conciliatory meeting held on September



- 11, 2019. However, the parties could not agree and a certificate of disagreement was issued by the conciliator leading to the filing of this case.
10. The grievant maintained that for the 20 years he worked for the respondent, he maintained a clean record and the allegation of attending work while drunk was not true and therefore the termination was unfair.
 11. The respondent lined up four witnesses to support its case. Mr Joseph Ongosi, Peter Bosire Abuga, Joshua Maisiba and Christopher Odhiambo, filed written statements dated November 23, 2021.
 12. Mr Joseph Ongosi, is the respondent's supervisor in charge of collecting section under whom the grievant worked. He avers that on the September 19, 2018, while on duty at around 2200 hours, he noticed that the grievant was unable to collect leaf and feed to the machine as required and went to talk to him. Upon enquiry, the grievant told him not to ask foolish questions and it's at that point that he realized that the grievant was drunk. He immediately called the shift in charge, Mr Peter Bosire.
 13. When Mr Bosire came, he who also engaged in some verbal altercation with the grievant before Mr Bosire implored him to leave the premises. However, the grievant refused to leave and instead hurled more insults at him.
 14. As a result, the assistant in charge of the factory came with two guard to aid the issue and a few moments later the Police at Keritor Police station came in and took arrested the grievant. The issue was booked under OB number 02/20/9/2018 at the police station and all the witnesses recorded statements.
 15. Peter Bosire Abuga, is the respondent's Shift in Charge at the factory and states that on September 19, 2018 at around 23.00hours, he was informed by the grievant's Line supervisor Mr. Joseph Ongosi that the grievant had attended work while drunk and unable to work. He then went to the respective section and confirmed that indeed the grievant was intoxicated as he was physically unsteady, smelled alcohol and very abusive towards everyone. As a result, he ordered him out of the respondent's premises and return the following day but he refused.
 16. The Assistant Factory in Charge who had heard about the issue came with security guard and tried to eject him out of the premises. In the meanwhile, the Police were also called in and they took the grievant to Keritor Police station. Thereafter witnesses recorded their statements.
 17. Mr. Joshua Maisiba is the respondent's Security supervisor and states that on the September 19, 2018 at around 23.00 hours he received a phone call from Assistant Factory Manager, Elijah Langat who informed him that there an at the factory of a worker who was acting recklessly and being disrespectful to his supervisor. He then sent one of the guards by the name Paul Ondieki to call the grievant to his office but the grievant refused to comply. As a result, Mr. Maisiba went to the factory but the grievant refused to cooperate prompting him to call the police and the grievant was arrested. Thereafter he and other witnesses recorded statements at the police station.
 18. Mr. Christopher Odhiambo is the respondent's Factory Manager. He states that on September 20, 2018 he received a complaint from his assistant Mr. Elijah Langat that an employee by the name Stanley Aranda had reported to work drunk and caused disturbance. After listening to his said assistant and perusing witness statements recorded, he issued a Notice to show cause upon Stanley Aranda dated September 20, 2018. Thereafter a hearing notice dated September 21, 2018 was served upon the grievant for a disciplinary hearing on September 26, 2018.
 19. He stated that, the disciplinary hearing was conducted in presence of the grievant, Shop Stewards, assistant factory manager, Factory manager and a Legal officer. The allegations against the grievant were presented and the grievant was afforded an opportunity to defend himself which he did. After



the committee deliberated on the issues, it resolved to dismiss the claimant from employment and the grievant was issued with a termination letter dated October 1, 2018.

20. Finally, he states that on October 4, 2018 the grievant wrote to the respondent requesting for the case to be heard afresh, but the request was rejected by the respondent's letter dated October 15, 2018 for reason that the period within which to appeal against the termination had already lapsed. The witness believes that termination of the grievant's employment was done in accordance with the employment laws and prays for the suit to be dismissed with costs for lack of merits.

Submissions.

21. The claimant submitted on the issues whether the termination of the grievant's employment was wrongful and justified, and whether the grievant is entitled to the reliefs sought.
22. On the first issue, it was submitted that the reasons for termination as captured in the notice to Show cause and the termination letter were reporting to work under the influence of an intoxicant and hurling insults at his superiors but the same were never substantiated by the Respondent. According to the claimant, no evidence was tendered to ascertain the same during the disciplinary hearing that culminated in his dismissal.
23. It was argued that the grievant had worked for 19 years for the Respondent without any disciplinary issue and the hearing conducted on the September 26, 2018 was a means to an end and not aimed at promoting the elements of natural justice and fairness. To support his argument, the claimant relied on the case of [*Kenfreight \(EA\) Limited V Benson K Nguti*](#) [2016] eKLR.
24. The claimant also placed its reliance on [*John Rioba Maugo V Riley Falcon Services Limited*](#) [2016] eKLR where the Court held that smelling alcohol is not prove of intoxication and that the employer must prove that the employee was unwilling to work or incapable of performing his work.
25. Based on this case law, the claimant submitted that the Respondent did not demonstrate that the grievant was intoxicated neither did they show that the alleged intoxication affected his ability to work.
26. In conclusion, the claimant submitted that based on the circumstances herein, the grievant was terminated unfairly and therefore ought to be compensated as prayed for in the claim.
27. On the other hand, the respondent submits that the burden of proof lies with the employer as provided for under section 43(1) of the [*Employment Act*](#), to give reason (s) for the termination. These reasons however, are what the employer at the time of termination genuinely believed to exist before the said termination.
28. The respondent relied on the case of [*Kenya Revenue Authority V Reuwel Waitihaka Gitahi & 2 others*](#) [2019] eKLR where the court held that;

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services. That is a partly subjective test.”
29. Accordingly, it was submitted that the grievant reported to work under the influence of an intoxicating substance which hindered his work as he was unable to feed tea into the machine. This was corroborated by all the witnesses of the Respondent who said that the grievant smelled alcohol and was abusive to everyone who spoke to him. His conduct prompted security guards and the area police to be called in to remove the grievant from the factory.



30. As regards procedural fairness, it was submitted that that procedure provided under section 41 of the *Employment Act* was followed to the letter by according the grievant a fair hearing. For emphasis the Respondent relied on 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.”

31. In light of the above, the Respondent submits that the termination has passed both substantive and procedural fairness test and prayed for the suit to be dismissed with costs.

Issues for Analysis and Determination.

32. After careful consideration of the pleadings, evidence and the written submissions by the parties, there is no contention that the grievant was employed by the respondent until October 1, 2018 when he was summarily dismissed from service. The main issues for determination are:

- a) Whether the dismissal of the grievant was grounded on valid and fair reasons.
- b) Whether a fair procedure was followed before the dismissal.
- c) Whether the reliefs sought are merited.

Reasons for the Dismissal

33. The point of entry in determining the first question, is sections 43(1) of the *Employment Act* which states that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. Subsection (2) then provides that the reason(s) 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.

34. Section 45 of the act places a caveat that the reason for termination must be valid and fair in relation to the employee’s conduct, capacity and compatibility or employer’s operational requirements.

35. In this case the reasons for dismissal of the grievant was contained in the dismissal letter dated October 1, 2018 stated that: -

“Re: Dismissal

...As per the disciplinary hearing meeting held at the Keritor Factory Manager’s Office on 26th September, 2018 in the presence of the undersigned and the Shop stewards, it has been established that you did come to work drunk and when instructed to go back and sober up



you refused to leave the factory premises; leaving management with no option but to call in the police to safely take you out of the facility....

Your actions on the material day (19-9-2018) contravenes terms and conditions of your employment and thus constitute gross misconduct under clause 25(b) and (e) of the Collective Bargaining Agreement between KTGA & KP&AWU.

The Management having deliberated upon your issue and pleas; has decided to dismiss you summarily from employment with effect from October 1, 2018...

Yours faithfully,

...”

36. The grievant in his witness statement vehemently denied being intoxicated and instead averred that on the material day the stock of the tea he was feeding into the machine ran out of stock and he went to alert his line supervisor who he found sound asleep. When he woke him up to call for more stock from the relevant personnel, the line supervisor did not take it well and he accused him of being intoxicated and forced him out of the factory. However, he refused to go home because he was not told whether he would be paid for the hours worked.
37. The Respondent’s 1st witness, Joseph Ongosi, avers that while he was carrying on his duties he noted the grievant was unable to collect leaf and feed the Machine and on approaching him he noted that he was drunk. This statement was corroborated by Peter Bosire, the shift in charge who stated that when he was called by the line supervisor, he went to the section and confirmed that the grievant was physically unsteady and abusive towards everyone. He also noted that the grievant was smelling alcohol.
38. Section 44(4) (b) of the [Employment Act](#) entitles an employer to summarily dismiss an employee if:
“during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;”
39. The question that begs for answer is whether grievant herein was so intoxicated that he was unwilling or incapable to perform his work properly.
40. In the case of [John Rioba Maugo vs Riley Falcon Security Services Limited](#) [2016] eKLR , Onyango J held that: -
“Drunkenness is a very shaky ground to found liability for purposes of summary dismissal. First, drinking alone or smelling alcohol per se is not a ground for summary dismissal. Section 44(4) (b) specifically provides that the employee is liable for dismissal if; “during working hours, by becoming intoxicated, an employee renders himself unwilling or incapable to perform his work properly.
The employer therefore has the burden not only of proving intoxication, but also the unwillingness or incapability of the employee to perform his work due to such intoxication”
41. Accordingly, in this case the respondent is required to prove that it had genuine reasons to believe that the grievant was intoxicated during working hours which made him unwilling or incapable of performing his work. The grievant’s work involved operating a tea feeding machine. It follows that for his own safety, he needed to be alert and not to be under the influence of alcohol while performing his duty. The allegation that the grievant was intoxicated has been proved on a balance of probabilities because the three eye witnesses are in agreement that they saw the grievant unstable, abusing everyone and he was smelling alcohol.



42. In my view scientific proof is not mandatory if intoxication can be established by other means like in this case, where the employee was not only smelling alcohol but also unable to perform his work of feeding tea into the machine and became abusive until police had to be called to arrest him. Consequently, I find and I hold that the respondent has proved on a balance of probabilities that the reason for dismissing the grievant was valid and fair.

The procedure followed.

43. The minimum procedural requirement is set under section 41 (1) 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.”

44. The gist of the above provision is that the employer is obliged to act fairly before dismissing his employee for misconduct. In this case the claimant submits that the grievant was not accorded fair hearing before the summary dismissal. The respondent on the hand explained how it complied with above statutory procedure by issuing the grievant with a notice to show cause to which he responded in writing. Thereafter he was summoned to disciplinary hearing and he attended with shop stewards and defended himself. Finally, his representations were considered by the committee before resolving to dismiss him.

45. The grievant admitted to being taken through the disciplinary process in his pleadings and evidence. Consequently, I am satisfied that the employer has proved that the dismissal of the grievant was done in accordance with a fair procedure as required by the law.

Reliefs

46. Having found that the dismissal of the grievant was grounded on valid and fair reasons and that a fair procedure was followed, the court is satisfied that the dismissal was lawfully done and that it was fair. For that reason, the reliefs sought under section 49 of the *Employment Act* including reinstatement, salary in lieu of notice, compensation and general damages for unfair termination of employment are not merited and are declined.

47. Likewise, the claims for salary, leave, leave travelling allowance, and house allowance for the period after his dismissal are dismissed for lack merits and legal basis.

48. The CBA attached to the memorandum of claim, provides under clause 25 for payment of gratuity upon termination. However, clause 25(c) disentitles gratuity to any employee to who is terminated as a result of gross misconduct. On that basis the prayer for gratuity pay is denied.



49. Having considered all the materials presented to the court and for the reasons set out herein above, I find and hold that the claimant's suit lacks merits. It is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH 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 April 15, 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

