



Kenya Union of Sugar Plantation & Allied Workers v West Kenya Sugar Company Limited (Cause 71 of 2021) [2022] KEELRC 3834 (KLR) (7 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 3834 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 71 OF 2021**

**JW KELI, J
JULY 7, 2022**

BETWEEN

**KENYA UNION OF SUGAR PLANTATION & ALLIED
WORKERS CLAIMANT**

AND

WEST KENYA SUGAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant, a registered union *vide* amended statement of claim dated July 12, 2021 and filed July 13, 2021 on behalf of its member, Gordon Ogada, following his termination from employment of the respondent seeking the following orders:-
 1. A declaration that the suspension and termination of the grievant, Mr Ogada, was based on his role as a unionist and it's wrong, unfair, unlawful and unprocedural.
 2. A declaration that in respect to prayer and upon the declaration in one above, the said union official be paid his full salary and benefits for the period of suspension as in line with the parties' CBA clause 8 f.
 3. An order for the reinstatement of Gordon Ogada back to his employment without loss of benefits and salary from the date of termination.
 4. That in the alternative to prayer 3 above;
 - i. An order for maximum compensation of upto 12 months gross salary for loss of job.
 - ii. Payment of all the accrued leave days.
 - iii. Payment of salary arrears arising from salary underpayments as a holder GTT II with experience as from April 1,2015 .



5. An order against the respondent, his managers and agents from intimidating, victimizing , dismissing and terminating union officials or shop stewards on account of their role as trade union officials.
 6. An order against the respondent that no official or member of the union shall/be disciplined, dismissed or terminated on account of this present suit.
 7. Any other orders deemed fit for purpose of justice.
 8. Cost of this suit is awarded to the claimant.
2. In addition the claimant filed claimant's list of additional documents dated July 12, 2021, claimant's list of additional documents dated November 4, 2020, witness statements of Gordon Ochieng Ogada(grievant) filed in court on the January 11, 2022.
 3. Further the claimant relied on documents filed under claimant's further affidavit sworn on the September 30, 2020 by Jeremiah Akhonya and documents under Notice of motion application dated July 9, 2020 filed in court on the July 9, 2020.
 4. The claim is opposed. The respondent filed replying affidavit sworn by Martin Chisaka on August 13, 2020 and annexed bundle of documents.
 5. The respondent further filed response to the memorandum of claim on November 16, 2020 and also respondent's list and bundle of documents under list dated November 13, 2020.
 6. There was a preliminary objection on the amended claim filed in court on the December 4, 2020 following which a ruling was issued by Justice Radido on July 1, 2021 doing away with amended claim filed on December 4, 2020 and granted leave for filing of the instant claim dated July 12, 2021 and filed in court on July 13, 2021.
 7. The claimant further filed list of additional documents (Vol 2) dated February 21, 2022 and received in court on the February 22, 2022.
 8. The court heard the claimant's case on the February 23, 2022 with one witness Gordon Ogada (grievant) who testified on oath and was cross-examined by counsel for the respondent. On the same day the defence case proceeded with one witness of fact Duncan Obwao who testified on oath evidence and was cross examined by the representative of the claimant.

The Claimant's Case

9. As per the undated grievant's witness statement filed in court on the January 11, 2022 which he adopted as his evidence in chief states that he was employed by the respondent in July 2014 as fit helper in the medical department on casual basis until January 13, 2014 when he was promoted to the position of welder GTT 11 to which he was confirmed on April 1, 2015. He stated that the respondent was not paying the required CBA salary despite having complained and the union having written to the accounts manager for correction. He was a union official elected in 2016 as union branch vice chairman.
10. That the events leading to his sacking was lock-out following termination of contracts of some employees. That he called the branch secretary who addressed the workers and entered the factory after the gates were opened. That branch secretary addressed the crowd in presence of the police and they had a meeting with the management. That entire day there was no work in the morning section which was manned by the police and no one was allowed in.



11. That he worked until July 9, 2020 when he was issued with suspension letter, on July 11, 2020 he was issued with show cause letter which he replied on July 14, 2020 while on suspension he was called on July 18, 2020 and issued with invitation letter to appear for disciplinary hearing which he attended on the July 22, 2020. The grievant alleges that the respondent did not find him guilty of all the allegations levelled against him but victimized him for having a close relationship with the branch secretary for having called him and for standing close to him when he addressed the workers. That the committee tried to coach security guards to testify against him and denies he was the person captioned in the photo relied on. He alleges the committee was biased as the security manager who was a panelist coached a security guard against him. That he appealed against the termination but says the appeal was a sham as it was done in haste and the video and photo relied on were not produced.

The Respondent's Case

12. The defence case is outlined in the witness statement dated November 13, 2020 of its witness of fact Duncan Abwawo who adopted the same as his evidence in chief. The respondent alleges that the matter of the alleged lock-out and alleged unfair termination of the claimant's member is subjudice being subject of ELR Case No 47 of 2020 [Kenya Union of Sugar Plantation and Allied Workers v West Kenya Company Ltd](#) which was pending ruling before Justice Nduma Nderi .
13. Consequently, the respondent urges the court to strike out paragraphs 3,4,5,6,7 and 19 of the claim for being *subjudice*.
14. That the contracts of 770 employees serving under fixed contracts expired on June 30, 2020 (Item 2). That the said employees ceased to be employees upon expiry of their contracts. That on July 1, 2020 the said 770 employees and other rioters (strangers) gathered at the gates of the respondent morning hours and started violent riots threatening other employees reporting to work with intention to disrupt operations of the respondent.
15. The respondent had to close gates to avoid any forcible entry and destruction of property. That some of the employees who had already reported to duty opened back gate meant for trucks and tractors and allowed access of the crowd. The respondent called police to manage the situation which had led to stoppage of working.
16. On investigation the respondent identified enablers of the rioters who included the grievant. Upon conclusion 5 the said enablers were issued with warning letters. That it was apparent the grievant was guilty of gross misconduct and was terminated apparently after due process and paid notice, accrued salary upto July 29, 2020, accrued leave days (item 9)
17. The parties filed written submissions after closure of hearing.
18. The claimants written submissions are dated March 8, 2022 drawn by Jeremiah Ingalia Akhonya and received in court on the March 19, 2022.
19. The respondent's written submissions dated April 1, 2022 drawn by O&M law LLP Advocates were received in court on the April 5, 2022.

Determination

Issues for determination.

20. The claimant addressed the following issues in its written submissions.
 - a. Underpayment of salary and house allowance.



- b. Unfair termination of Gordon Ochieng Ogada
 - c. Covid 19 protocols
 - d. Victimization of the grievant employee on account of union activities.
21. The respondent in its written submissions identified the following issues for determination :-
- a. Whether the reasons for the claimant’s termination were valid and fair.
 - b. Whether the respondent followed a lawful procedure in terminating the service of the claimant
 - c. Whether the claimant is entitled to the prayers sought.
22. The court upon carefully considering the case of both parties and the issues they have addressed was of the considered opinion the issues placed before court for determination of the dispute are as follows:-
- a. Whether there was valid and reasons for termination of the employment services of the grievant.
 - b. Whether the grievant was victimized on account of union activities
 - c. Whether the respondent followed lawful and fair procedure in termination of the employment services for the claimant.
 - d. Whether grievant is entitled to reliefs sought.

Whether there was valid reason or reasons for termination of the services of the Grievant Gordon Ochieng Ogada.

The relevant law.

23. 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.”
24. 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.....”



25. 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.
26. Section 46 of the *Employment Act* provides for reasons that do not constitute fair reasons for dismissal as follows:-
- “The following do not constitute fair reasons for dismissal or for the imposition of disciplinary penalty:-
- c. An employee membership or purported membership of a trade union.
 - (d) The participation or proposed participation of an employee in the activities of a trade union outside working hours or with the consent of the employer within working hours.
 - (e) An employee seeking of office as, or acting or having acted in the capacity of an officer of a trade union or a worker’s representative
 - (d) An employee’s refusal or proposed refusal to join or withdraw from a trade union.
 - (i) An employee participation in a lawful strike.”
27. 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.
28. In the instant claim the claimant on behalf of its member the grievant who it was not disputed was also a union official has laid down their basis of the claim. The burden of proof of reasons for termination of employment lies with the employer under section 43 and 47 (5) of the *Employment Act* as outlined above.
29. In the letter for termination of service of Gordon Ochieng Ogada, the grievant, dated July 29, 2020 by the respondents Human Resource & Administration Manager, it is stated that on July 1, 2020 the grievant reported to work around 7.50 am. He proceeded to clock in and failed to report to his department. Later he was seen at the gate opening for staff to pass through. The gate in question is meant to be used by trucks and tractors not pedestrians. The letter also refers to the show cause letter dated July 10, 2020 which the respondent says the grievant did not answer satisfactory. It is also states that during the hearing it was proved beyond reasonable doubt that indeed the grievant was spotted



- by guards opening the prohibited gate to give access to the persons standing outside the gate. That he was captured on camera opening the gate an act of defiance of Covid 19 protocols.
30. These reasons are reflected in the disciplinary hearing minutes of July 22, 2020. The grievant denies he opened the gate and that he was not the person in the photo and that the security person was coached to mention him by the security supervisor who was a panelist.
 31. During cross examination the grievant said he found not more than 20 people at main gate reading memo and there were many people outside the gate. The grievant said he was on duty that day. He got in and clocked in. Grievant said other 5 people got disciplinary letters and were reinstated. He did not know why they were reinstated. The grievant admitted to have attended the disciplinary hearing with a representative and says they did not sign minutes as they asked for corrections. He did not have evidence of the request. The grievant said the security produced photos at the hearing which they did not agree with. The grievant denied record of minutes 9 (page 99) of having called the union officials inside the factory. The grievant admitted that on July 1, 2020 he did not work. He agreed that the committee after hearing dropped some of the charges. The grievant admitted that there was unsatisfactory issue of him not having gone to the place of work. In re- examination, the grievant said the 5 other people who also received the show cause letters were union members. He said he was prevented from entering the factory by the security manager a witness of the employer.
 32. He said the issue of his relationship with the branch secretary was discussed.
 33. During cross examination of the respondent's witness of fact, the witness said, there were approximately 770 persons at the gate being employees whose contracts had ended on June 30, 2020. He stated that the memo was issued morning of July 1, 2020. He agreed the grievant never addressed the crowd. He admitted under the minutes the grievant was wearing a mask. The grievant was asked why he did not call the chairman, that he was seen standing next to the branch secretary, he agreed the workers had fixed contracts, he denied that he had in court in cause No 110 of 2013 had given the union mandate to represent them, he stated that the grievants and representative refused to sign the minutes, he admitted they appealed and referred to minutes of appeals "JIA08" under further affidavit. He admitted that the appeal committee did not review the photos and admitted the grievant had disputed he was one captured in the photo opening the gate.
 34. He said the witnesses were not invited on appeal. He admitted there was allegation of coaching witness by Gari (Security supervisor) and that this was not put into test. He admitted that they did not get a statement from person manning gate 2 which witness Kennedy said had been locked by chain.
 35. The respondent's witness told the court that the grievant did not work that day. He admitted that same day there was a meeting between union and management and that the grievant attended as a union official. On re-examination the witness referred to exhibit 'KUSPAW16' to demonstrate 3 of the persons issued show cause were not officials of the union. He said as at July 1, 2020 persons at the gate were not employees of the respondent for reason of their contracts having ended. The grievant did not observe 1.5 meters distance and was not wearing mask when he accessed unauthorized entrance and leading crowds inside. The question about fact of not having attended to work at his department on reporting to work in the morning was established against the grievant. This is one of the reasons under the termination letter and in the disciplinary hearing there was a witness Kennedy Ndombi who appeared at the hearing and gave a statement and said he saw a person open the unmanned gate and also to learn it was Ogada. Ogada admitted that Kennedy (security guard) appeared before all the 6 hearings and repeated same testimony.
 36. The grievant was assistant union chairman. He admitted that after he found crowd at gate he did not call his chairman but the branch secretary who is not an employee. The claimant admitted he



had specific instructions to report for general shift by his supervisor. He said his supervisor did not complain. It appears to the court that the grievant prioritized his union official work to that of his employment. Indeed he clocked in and decided not to go to his place of work. This action would appear to be in breach of various provisions of the *Labour Relations Act*. Section 56 of the *Labour Relations Act* envisages access to employer's premises by (trade union with recognition agreement, 'b)- holding meeting with members of the trade union and other employees outside of working workers(emphasis given), (3) any dispute concerning the granting of access or the conditions upon which access is to be granted, may be referred to the industrial court under certificate of urgency." The law does not envisage a situation where the union officials would force entry or hold meetings with its members or their employee within working hours. The grievant being a union official ought to have known the limitation of the law on actions of the union but defied the same by failing to report to work during working hours and mobilizing for holding chaotic meeting with ex employees during working hours and disrupting entire operation of the respondent.

37. Section 80 of the *Labour Relations Act* provides as follows:- '(1) an employee who takes part in, calls, instigates or incites others to take part in a strike that is not compliance with this Act is deemed to have breached the employee's contract and (a) is liable to disciplinary action; and (b) is not entitled to any payment or any benefit under the *Employment Act* during the period the employee participated in the strike."
38. The grievant admitted that he knew the chairman had already reported to work. That he did not consult with him or the management but called the branch secretary who is not an employee instead. The court finds that the employer had reason to suspect sinister motive. Considering the evidence and standard of prove on and balance of probabilities in civil cases it is evident that there existed valid reason to terminate the services of the grievant being failure to report to place of work and proceeding on errands on terminated employees. The court finds that the employer has also had reason to believe the grievant facilitated the crowd to enter the premises of the respondents considering he admitted to not have reported to his place of work, called the branch secretary instead of his chairman (who was at work) or engaged management, admitted to have been next to the branch secretary addressing the crowd.
39. The claimant relies on a criminal case No 175 of 2013 *Eric Indimuli Siaya v Republic* (2016) eKLR to state the eye witness ought to have been produced in court. The said guard Mr Ndombi being still in employment. They submit RW was not a credible witness. The court finds that the statement having been recorded in minutes of the disciplinary meeting attended by grievant and his representatives, produced in court, RW being custodian of records of employment with respondent was competent to produce the record.
40. The failure to report to the place of work is a recognized valid reason to terminate employment under section 44 (4) (a) of the *Employment Act*. The court also takes note that these persons alleged to have been in the crowd had ceased to be employees and hence the grievant cannot be heard to have failed to report to work to attend to them on basis of a lock -out. He was not protected. The submissions that the said 770 person were locked-out cannot apply if their contracts had ended. The grievant says there was a lock out.
41. What is a lock-out? The *Labour Relations Act* (NO 14 of 2007) defines lock-out to mean, " the closing of a place of employment, the suspension of work or the refusal by the employer to continue to employ any number of employees—
 - a. For the purpose of compelling any employees of the employer to adopt any demand in respect of article dispute; and



b. Not for the purpose of finally terminating employment”.

42. It is not in dispute the memo leading the grievant to call the branch secretary and addressing the persons outside and inside the gate was on notification of end of contract for 770 persons who had been on fixed contract. Their contracts having expired night before.
43. Consequently, it cannot be said that their being outside the gate amounted to a lock-out within the above definition. They were no longer employees hence not workers for purposes of union representation by officials like the grievant. Perhaps that explains why the chairman of the branch had reported to work and was at work.
44. The respondent is not farfetched to state that the action of the grievant led to all the commotion or incited the crowd affecting the operation of the company . The court finds and determines that authority relied on by the claimant in *Mumias Sugar Company Ltd v Kenya Union Of Sugar Plantation And Allied Workers* Petition No 24 of 2016 is not relevant to the instant case as there was no lock-out on the material day.
45. The court finds and determines that consequently the respondent has discharged its burden of proving valid reasons for termination of the employment of the grievant.
- Whether the grievant was victimized on account of union activities.
46. The claimant submits that the respondent instituted lock-out on July 1, 2020 by locking main gate and only permanent employees were allowed vide small gate. That the locking was to compel the 770 persons to sign new contracts on individual basis. On this matter the court already found that the contracts having ended which is not in dispute, the said 770 were not employees of the respondent at that time hence no lock-out within the definition under the *Labour Relations Act*. The argument by the claimant is unreasonable as contracts are signed by individuals and the court finds no fault on such requirement by employer. Since the allegation is founded on mistaken belief of lock-out, the claim of victimization of the grievant due to his union duties fails. The court already found there existed with the employer valid and if I may add lawful reasons to terminate the employment of the grievant.
47. The court is guided by the court of appeal whose decisions are binding on his own in its decision in *Judicial Service Commission v Gladys Bsss Shollei & Another*, 2014 eKLR Where it stated that inter alia “ courts do intervene in employee disputes but even as they do so they must appreciate that the work place must be allowed and enable to operate in a manner that is productive and harmonious. In the determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However the discretion must be exercised fairly. The question being whether the in the circumstances the sanction was reasonable .”
48. Further the court (supra)held that “ if it was reasonable to dismiss him, then the dismissal must be upheld as fair even through some other employers may not have dismissed him. The test then established being whether a reasonable employer would have dismissed the employee considering the circumstances of the case.”
49. The court in this case finds that a reasonable employer would have dismissed the grievant for reasons already disclosed being failure to report to place of work under section 44 of the *employment Act* and participating in activity of persons no longer workers of the respondent and without lawful basis leading to halt of operations of the employer. There was no lockout to warrant his interventions as union official in the manner he did.



Whether the Respondent followed lawful and fair procedure

The relevant law

50. Section 41 of the *Employment Act* provides for the procedural fairness to be complied by an employer considering termination of employment contract of an employee. The key issue being to inform the employee in language they understand the reason or reasons the employer is considering termination of employment and the employee is entitled to have another employee or shop floor Union representative of his choice present during this explanation.
51. The claimant in the claim paragraph 29 states that the disciplinary hearing was unfair and did not meet the threshold requirement of fairness prompting the grievant and union branch chairman to refuse to sign the minutes. That the grievant appealed and the appeal was not credible as the same was a sham which lasted for less than 5 minutes without re-examining the evidence and submissions of the union representative and the aggrieved employee.
52. The respondent submits it complied with the provision of section 41 being issuance of notice to show cause, hearing notice and conducting the hearing and the minutes produced in court indicate compliance.
53. The court finds that there was substantial compliance with provisions of section 41 the grievant having been informed of allegation against them and given an opportunity to respond and was represented by chairman of the union at the hearing. The grievant was also heard on appeal and minutes produced. The court is of the opinion that signing of minutes by grievant or its representatives is not a statutory requirement under section 49. In the instant claim it was not disputed the claim was heard and had opportunity to question employers witnesses and was represented. It is also not in dispute the claimant was informed in language they understood the reasons for their termination from employment.
54. On the appeal the law required the employee been given opportunity to do so. This was done but the claimant faults it for taking short time and not re-evaluating the submission of the union representatives and the grievant. The minutes of the appeal are produced as "JIA 08" under the claimant's further affidavit of September 30, 2020. It is recorded the appeal disciplinary hearing for Gordon Ogada was held on August 28, 2020 at the registry agriculture block Chaired by RW. with the grievant and his representative Yusto Luchivya attending. The representation of parties are recorded.
55. The court finds no fault with the record. The employer is entitled to give the sanction it feels appropriate.
56. The chairman (representative) appealed to employer to forgive Ogada and reinstate him. The court found that the action of the employer was reasonable. The authorities cited by parties are noted and were considered.
57. The court finds and determines there was procedural fairness in the termination of the employment of the grievant.

Whether Claimant is entitled to reliefs sought.

58. The claimant submits that the grievant was underpaid under the CBA. That he was classified under UG9 of the CBA based on his GTI II certificates acquired in August 2008 (KISPAW11) page 7 & 8 of the amended claim. That he was promoted on January 13, 2014 and reassigned to perform duties as welder UG7 which promotion was confirmed on March 31, 2015 though a GTT II certificate holder (KUSPAW 12 at page 9 of the amended claim). That under the recognition agreement clause 2 (e)



(KUSPAW 1 A), the respondent is obliged to employ and promote any employee as per terms as agreed under the CBA. That the issue of underpayment was raised by the union in letter dated June 23, 2014 (KUSPAW 13) but was not solved occasioning grievant continuous injury of underpayment till termination date. That the CBA is a binding and enforceable document under section 54 under the *Labour Relations Act*. That the grievant was underpaid and was entitled to award of salary arrears from 2015 to 2019 in line with CBA terms. (KUSPAW 14 at page 26 of amended claim and KUSPAW 10 page 43 from 2017 to 2019 of the additional documents).

59. The claimant submits that this would also apply to other allowances paid under salary including housing allowance.
60. The respondent submits that there is no proof that grievant was ever promoted to the post of welder GTII. That during cross- examination the grievant confirmed he was never promoted to any such post. That he was employed as a welder who as per the CBA falls under job category UG7. He has no basis of claim.
61. During cross-examination the grievant confirmed he was promoted to UG7 and had no other letters. He said his complaint was in court of which is letter by the union (KUSPAW 3). The claimant relied on the CBA dated May 1, 2015 to April 30, 2017 . The claimant was promoted on the March 31, 2015 before the said CBA was signed. There is no evidence before the court that he was ever promoted after the relied CBA came to effect.
62. Consequently, the court finds it has no basis to find underpayment.
63. Considering the finding of valid reasons and existence of procedural fairness in the decision, prayers 1,2 and 3 as amended fail. Prayer 4 (i) on compensation fails. On the prayer of accrued leave days, the claimant does not indicate the number of days. In the witness statement of the grievant filed in court on November 4, 2020 the grievant does not claim any unpaid dues. In the letter of termination of the grievant's employment dated July 29, 2020 (page 123 of the respondent's documents) it is indicated that his dues subject to statutory deductions would include salary upto July 29, 2020, accrued leave days if any, Notice pay as per the collective bargaining agreement and any other amount owed by the company. The issue of terminal dues was not raised at the hearing nor in the submission of claimant. The court draws inference that the terminal dues were paid as per the termination letter of employment.

Conclusion and disposal

64. The claimant's case on behalf of the grievant is found to be without merit and is dismissed. Each party to bear own costs in the suit.

DATED,SIGNED AND DELIVERED AT BUNGOMA THIS 7TH DAY OF JULY, 2022.

J. W KELI,

JUDGE.

In the presence of:-

Court Assistant : Brenda

Claimant : Jeremiah Akhonya

Respondent: Mr Andiwo

