



Kenya Union of Commercial, Food and Allied Workers v Endarasha Dairy Farmers Co-operative Society Limited (Cause E018 of 2020) [2022] KEELRC 4137 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4137 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E018 OF 2020
DKN MARETE, J
SEPTEMBER 28, 2022**

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS CLAIMANT

AND

ENDARASHA DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by way of a memorandum of claim dated December 22, 2020. The issue in dispute is therein cited as;
Unfair/unlawful termination of James Ndungu
2. The respondent in a respondents defence and counter claim dated February 8, 2021 denies the claim and prays that this be dismissed with costs. She also puts in a counter-claim and prays for costs thereof.
3. The claimant's case is that she is a union who is involved in the respondent's industry and sector.
4. It is her case that the grievant joined the respondent between 2005 and 2019 and worked in different positions beginning with washing cans, loader in the field, and milk truck driver and was lastly posted to local sales at the plant, a position he held until his unfair and unlawful termination.
5. His employment history is as follows;
 1. The grievant was employed verbally on May 31, 2005 as a General Labourer involving washing of milk cans and going round buying milk and loading the same. This he did up to the January, 2016.



2. The grievant started at a salary of Kshs 3,000 per month which kept increasing uneven such that by January 2016 he was earning Kshs 10,700.
3. In February, 2016 the grievant was given a position of truck driver involving going round collecting milk. He held this position up to December, 2016.
4. On January, 2017 up to the time of his summary dismissal, he was working at local sales.
6. His duties involved milk collection, weighing and recording for onward transmission to the main buyer, Daima Dairy Grader. On August 14, 2019, he received a letter on milk adulteration and he was called to explain to the disciplinary committee and that he was expected to co-operate.
7. On the same date, the respondent's cashier came in and demanded the days sales, keys and record book with a note that he should not report to work the following day. On the following day, he went to enquire on his fate with the manager and was told that this would be answered by the chairman.
8. The claimant's other case is that he was served with a warning letter dated August 30, 2019 to which he answered on September 2, 2019.
9. The claimant was issued with an undated letter of summary dismissal and on February 4, 2022 he referred the matter to the Ministry of Labour for appointment of a conciliator.
10. Attempts to resolve this through a conciliator failed.
11. The claimant in the penultimate claims that he was condemned unheard and prays as follows.
 25. The grievant was never issued with any notice but was orally told to go home only to be followed later with a warning letter.
 - i. Reinstate the grievant and treat him in all respects as if his employment has been continuous.
 - ii. Re-engage the grievant in work comparable to that in which he was employed prior to his dismissal, or other reasonably suitable work.
 - i. Notice = 21,418.50
 - ii. Annual leave $26/26 \times 21,418.50 \times 1 = 21,418.50$
 - iii. Prorate leave $8/12 \times 26 \times 21,418.50/26 = 14,279.00$
 - iv. Off (rest) days -696 days $-21,418.50/26 \times 696 = 573,343.00$
 - v. Public holidays $21,418/26 \times 171 = 140,864.53$
 - vi. Underpayments:-
 - a. 2016 $15,239.10 - 10,700 = 4,528.10 \times 11 = 49,809.1$
 - b. 2017 $20,398.55 - 14,134 = 6,264.55 \times 12 = 75,174.60$
 - c. 2018 $21,418.50 - 15,300 = 6,118.5 \times 12 = 73,422.00$
 - d. 2019 $21,418.50 - 16,465 = 4,953.5 \times 8 = 39,628.00$
 - vii. 12 months $\times 21,418.50$ being compensation for unfair Termination = 257,022.00



Total 1,266,379.23

12. The respondent's case is a denial of the claim. She also offers a counter-claim.
13. The respondent's case is that the cashier does not have the authority to dismiss or suspend any of her workers.
14. It is her further case that the grievant absconded duty on August 14, 2018. He never submitted any explanation and that the letter of explanation now presented was never received, or at all.
15. The respondent further denies a dismissal of the grievant orally or in any other manner.
16. It is her further case that the grievant was an unskilled worker without a contract of employment who handled assignment for the respondent. He operated as a general clerk and was legitimately terminated from employment for his misconduct and therefore cannot lay a claim against the respondent.
17. The respondent in a counter claim raises a claim for Kshs 133,656.00 being loss incurred by herself due to the claimant's failure to adhere to his duties and thereby adulterating milk to the loss of the respondent. She in the penultimate prays the claimant's case be dismissed and her counter claim be allowed.
18. The issues for determination therefore are;
 1. Whether the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful?
 2. Whether the respondent is entitled to the counter claim as set out?
 3. Whether the claimant is entitled to the relief sought?
 4. Who bears the costs of the claim and counter claim.
19. The 1st issue for determination is whether the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submission dated August 25, 2021 lays down a case of unlawful termination of employment.
20. It is her submission that the grievant was served with the 1st letter of complaint of milk adulteration but not the second one. It is her further case that the notice in the 2nd letter was brief and short for a meeting scheduled on the following day. He in toto faults the entire disciplinary process for being shoddy and inadequate and not being in compliance with section 41 of the [Employment Act, 2007](#).
21. The respondent discounts a case of unlawful termination of employment and brings out one of lawful termination. She in toto reiterates her case as pleaded and prays as follows;
 - a. Judgment be entered for the respondent against the grievant for the sum of Kshs 133,656.00 with interest at commercial rates from October 22, 2019 until payment in full and
 - b. Cost of the suit to be borne by the claimant.
22. The respondents in furtherance of her case submit a case of misconduct on the part of the claimant. This is as follows;

“The grievant was summarily dismissed by the respondent on account of the following misconduct:



- a. The grievant performed his duties carelessly and improperly by adding water to fresh milk, a process known as adulteration.
- b. The grievant was absent from his place of work without reasonable leave.
- c. The grievant used abusive language when he appeared before the management board of the respondent which was inquiring about allegations against him involving milk adulteration.
- d. The grievant was guilty of insubordination when he attended the board on various dates he decided not to answer any questions raised by the Management Board. The court in *Mathew Lucy Cherusa v Poverelle sisters of Belgamo T/a Blessed Louis Palazzalo Health Centre* [2013] eKLR quoted with approval the case of *Jackson Butiya v Eastern Produce Kenya Limited* (Industrial Court Cause No 335 of 2011] where the trial court stated that;

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the court to supervise the internal grievance handling processes between employers and employees. The role of the court is to ensure that such processes are undertaken within the law.”

23. Again, In the case of *Fridah Nyabonyi Abuya v Virtual HR Services Limited* [2021] eKLR the court held that;

“The insults made to her superiors, and consequent failure to report to work after March 11 and refusal to attend to a client all amount to gross misconduct, which in turn warranted her summary dismissal.”

24. This matter tilts in favour of the claimant. His case overwhelms that of the respondent. He has established a case pursuant to sections 41, 43 and 45 of the *Employment Act, 2007*. This is a case of invalid reasons for termination and abuse of termination process. It is his submission that failure on these two aspects renders his termination unfair and unlawful.
25. The respondent has made various attempts at establishing a case of lawful termination. This is by relying on the misconduct of the claimant by allegations of adulteration of milk worth Kshs 133,656.00 to her loss and detriment. However, this is not established in evidence. When questioned as to what action she took against this alleged criminal act on the part of the claimant, she fails to account.
26. Again, she has failed to controvert the claimant’s case that all this time, the claimant was not involved in any assessment of quality of milk before delivery as this was the province of other sectors of the respondent. His was only milk collection besides other duties. I therefore find a case of unlawful termination of employment and hold as such. This answers the 1st issue for determination.
27. The 2nd issue for determination is whether the respondent is entitled to the counter claim as set out. She is not. The counter claim is not established on a balance of probabilities. The claimant has laid out a more probable case for unfair termination of employment and against the counter claim.
28. The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having succeeded on a case of unlawful termination of employment, he becomes entitled to the relief sought.



29. I am therefore inclined to allow the claim and disallow the counter claim and order relief as follows;

- i. One(1) months salary in lieu of noticeKshs21,418.00
- ii) Twelve (12) months salary as compensation for unlawful termination of employment - Kshs 21,418.00 x 12Kshs 257,016.00
Total of claim Kshs 278,434.00
- iii) The costs of the claim and counter claim shall be borne by the respondent.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

- 1. Lilian Munene for the claimant union.
- 2. Mr. Sagini holding brief for Orina instructed by Orina Riech & Company Advocates for the Respondent.

