



Kenya Shoe and Leather Workers Union v Crown Industries Limited (Cause 1954 of 2017) [2022] KEELRC 3927 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 3927 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1954 OF 2017
L NDOLO, J
SEPTEMBER 22, 2022**

**BETWEEN
KENYA SHOE AND LEATHER WORKERS UNION CLAIMANT
AND
CROWN INDUSTRIES LIMITED RESPONDENT**

JUDGMENT

Introduction

1. In this dispute, the Claimant Union brings a claim on behalf of its members, Robert Ombati Makumba and Alfred Ayusa Kingi (the Grievants). The claim, which is documented in a Statement of Claim dated and filed in court on 27th September 2017, is against the Respondent, who at the material time, was the Grievants' employer.
2. In response to the claim, the Respondent filed a Reply on 24th September 2021. The matter went to trial where the Grievants testified on their own behalf. The Respondent called its Head of Human Resource, Anna Maragia. Thereafter, the parties filed written submissions.

The Claimant's Case

3. The Claimant states that the Grievants were employed by the Respondent on diverse dates; the 1st Grievant, Robert Ombati Makumba having been employed in the year 2008 and the 2nd Grievant, Alfred Ayusa Kingi on 23rd December 2012.
4. The 1st Grievant worked for the Respondent until 14th January 2017, when he was summarily dismissed. The 2nd Grievant was dismissed on 11th February 2017.
5. At the time of dismissal, the 1st Grievant earned a basic monthly salary of Kshs. 10,975 plus a house allowance of Kshs. 1646. The 2nd Grievant was paid a monthly salary of Kshs. 15,000.



6. The Claimant avers that the Grievants were assigned the duty of delivering goods to the Respondent's customer, Snoopy Ltd.
7. The Claimant adds that on the material day, the 2nd Grievant, Alfred Ayusa Kingi met a friend by the name Robert Ondeyo who was in need of a 3 litre clean adix. Kingi is said to have gone to a shop to buy the item for his friend.
8. The Claimant avers that on his way back, Kingi met one of the Respondent's mangers who accused him of carrying goods similar to the ones to be delivered to Snoopy Ltd.
9. The 1st Grievant, Robert Ombati Makumba was accused of allowing Kingi to go and purchase the subject item for his friend. The 2nd Grievant, Alfred Ayusa Kingi was accused of working for another person without authority from the Respondent Company.
10. The Claimant submits that the Grievants' summary dismissal was unlawful and unfair. The Claimant points out that the Grievants were not given an opportunity to defend themselves.
11. The Claimant seeks the following remedies on behalf of the Grievants:
 - a. Reinstatement without loss of employment benefits;
 - b. Re-engagement in comparable position to that held before dismissal;
 - c. In the alternative, the Claimant seeks the following:

1st Grievant: Robert Ombati Makumba

One month's salary in lieu of notice.....Kshs. 10,975.00

Leave pay for 2 years.....21,950.00

Gratuity for 9 years.....49,387.50 12 months'

salary in compensation.....131,700.00 Certificate of service

2nd Grievant: Alfred Ayusa Kingi

One month's salary in lieu of notice.....Kshs. 15,000.00 Gratuity for 4

years.....30,000.00

Salary for 8 days.....4,000.00

12 months' salary in compensation.....180,000.00

Certificate of service

The Respondent's Case

12. In its Reply dated 16th June 2021 and filed in court on 24th September 2021, the Respondent admits having employed the 1st and 2nd Grievants but denies that their dismissal was unlawful or unfair. The Respondent states that the actions of the two Grievants amounted to gross misconduct that warranted summary dismissal.
13. According to the Respondent, the 1st Grievant, Robert Ombati Makumba was employed as a general worker in the Dispatch/Packaging Department from 1st April 2011 with a basic salary of Kshs. 6,750 and a house allowance of Kshs. 1,013 per month. At the time of leaving employment, Makumba earned a basic monthly salary of Kshs. 10,975 and a house allowance of Kshs. 1,646.



14. The Respondent states that on 11th February 2017, the 1st and 2nd Grievants were assigned lorry registration number KBQ 017R to deliver goods at Gikomba, Kamukunji Area of Nairobi. They were to deliver 3 litre buckets to Snoopy Ltd.
15. The Respondent avers that while on duty and still offloading the goods, the 1st Grievant, Robert Ombati Makumba allowed the 2nd Grievant, Alfred Ayusa Kingi to run personal errands without seeking permission from the Company.
16. The Respondent further avers that one of its senior managers, a Mr. Nitin who happened to be within the area, saw Kingi holding a bundle of 3 litre buckets manufactured by the Respondent. Kingi is said to have been standing outside a shop that was not in the Respondent's supply chain and was far away from where the delivery motor vehicle was parked.
17. According to the Respondent, Kingi indicated that the bundle he was holding was a reject from Snoopy Ltd and that he was returning it back to the motor vehicle. The Respondent states that Snoopy Ltd had denied rejecting any product. Upon further inquiry by Mr. Nitin, Kingi is said to have stated that he had bought the bundle for his friend from a neighbouring shop.
18. By letter dated 13th February 2017, Makumba was asked to explain why he had given Kingi time off while in the course of duty without seeking authorisation from the Respondent. Makumba responded by letter dated 16th February 2017, indicating that he had given Kingi permission to buy a bundle of 3 litre buckets for his friend.
19. The letter of 13th February 2017 further required Makumba to show cause why disciplinary action should not be taken against him on account of a bundle of 3 litre buckets which was said to be missing from the Respondent's stock. According to the Respondent, the missing bundle was similar to the one found in possession of Kingi on 11th February 2017.
20. Makumba was additionally asked to provide an explanation as where he had got authority to allow Kingi to run personal errands during working hours.
21. Makumba was subsequently summarily dismissed on 17th February 2017 for allowing Kingi to perform his own errands during working hours, declining to acknowledge a notice to show cause letter and on account of a missing bundle of 3 litre buckets which was similar to the one found in Kingi's possession.
22. Regarding the 2nd Grievant, Alfred Ayusa Kingi, the Respondent states that he was issued with a show cause letter dated 13th February 2017 on allegations of negligence of duty.
23. In his response, Kingi denied running personal errands during working hours and stated that a customer had requested him to buy 3 clear buckets, which he did before meeting Mr. Nitin.
24. Kingi was summarily dismissed on 17th February 2017 for working for a third party, buying and selling the Respondent's products without permission and subjecting the management to harassment.
25. The Respondent avers that prior to the dismissal, Kingi had been issued with three notices to show cause for idling and engaging in a meeting during working hours and wilful neglect of duty.

Findings and Determination

26. There are two (2) issues for determination in this case:
 - a. Whether the Grievants' dismissal was lawful and fair;
 - b. Whether the Grievants are entitled to the remedies sought.



The Dismissal

27. The 1st Grievant's dismissal was communicated by letter dated 17th February 2017 stating thus:

“Dear Robert,

Re: Summary Dismissal

Reference is made to our show cause notice letter issued to you and your subsequent reply of the same on 16th February 2017 whose contents therein have been noted but found unsatisfactory because of the following reasons:

1. While you were allocated to deliver goods to snoopy Ltd with Alfred Kingi, you authorized him to leave and perform his own business without permission from the management.
2. Upon questioning, you declined to acknowledge the show cause notice, reasons best known to yourself.
3. The 3 litre bundle bucket found in Alfred's possession and you having confirmed that you allowed him to go and purchase the said bundle for a customer was later realized that the same bundle was missing from our stock.

The two of you were allocated to carry out offloading of goods at snoopy Ltd and back to the company for another task, you decided to offload alone which took more time than when you could have offloaded both of you together.

The above matters amounts (sic) to gross misconduct justifying dismissal of your services and as such the management has been left with no option but to summarily dismiss you from employment of this company w.e.f 14th February 2017 being the last day you worked. Arrange to collect your days worked salary and leave due from the HR.

For: Crown Industries Ltd

(signed)

James B. Mwangi

Human Resource Manager”

28. The dismissal letter issued to the 2nd Grievant on the same day reads:

“Dear Alfred,

Re: Summary Dismissal

Reference is made to our show cause notice letters issued to you and your subsequent reply of the same on 13th and 16th February 2017 respectively, whose contents therein have been noted and considered but found unsatisfactory because of the following reasons:

1. While you were sent on official duties, you were found working for another person without company's authority.
2. You were found buying and selling Adix plastics Ltd products without permission.



3. You subjected the management into (sic) harassment by giving a private number to a person who purported to be a government officer by the name Mr. Momanyi of telephone No. xxxx, who threatened the management of dire consequences if you will not be allowed back to work.

The above matters amounts (sic) to gross misconduct justifying dismissal of your services and as such the management has been left with no option but to summarily dismiss you from employment of this company w.e.f 11th February 2017 being the last day you worked. Arrange to collect your days worked salary and leave due from the HR.

For: Crown Industries Ltd

(signed)

James B. Mwangi

Human Resource Manager”

29. According to the dismissal letters, the 2nd Grievant, Alfred Ayusa Kingi was indicted for running personal errands while on official duty and the 1st Grievant, Robert Ombati Makumba was accused of complicity in the said offence.
30. In determining whether a termination of employment is lawful, the Court will inquire into the reason for the termination and the procedure followed by the employer in executing it.
31. Regarding the reason for termination, Section 43 of the *Employment Act* provides as follows:
 43. Proof of reason for termination
 1. In any claim arising out of termination of a 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.
 2. The reason or reasons 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.
32. In interpreting this provision, both the Court of Appeal and this Court have held that any reason that would cause a reasonable employer to terminate employment is a valid reason (see *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR and *Benard Mutboka Wambua v Bahari Forwarders Ltd* [2019] eKLR).
33. At the trial, both Grievants admitted in cross examination that Kingi was indeed found by one of the Respondent’s managers running an errand that was not part of the Grievants’ itinerary. This in my view, was a valid reason for termination of Kingi’s employment as contemplated under Section 43 of the *Employment Act*.
34. Regarding Makumba, there was no evidence of his participation in the said offence. Significantly, Makumba was not Kingi’s supervisor and could not therefore have given him permission to run the errand. In the circumstances, I find and hold that there was no valid reason for termination of Makumba’s employment.
35. The next question for determination is whether in dismissing the Grievants the Respondent observed due procedure. This procedure is codified under Section 41 of the *Employment Act* in the following terms:



41. Notification and hearing before termination on grounds of misconduct
 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.
36. The Respondent's witness told the Court that the Grievants were not subjected to the full procedure set out under the foregoing provision, ostensibly because the Grievants were not cooperative.
37. In its decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the Court of Appeal stated the following:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
38. For reasons that were not clear to the Court, the Respondent opted to short circuit the disciplinary process and thus failed to accord the Grievants adequate opportunity to respond to the charges levelled against them. This rendered the dismissal of both Grievants procedurally unfair.

Remedies

39. Flowing from the foregoing findings, I award the 1st Grievant, Robert Ombati Makumba ten (10) months' salary in compensation for unlawful and unfair dismissal and to the 2nd Grievant, Alfred Ayusi Kingi three (3) months' salary in compensation for unfair dismissal. In making these awards, I have taken into account the Grievants' length of service with the Respondent as well as the finding that the 2nd Grievant contributed to the dismissal.
40. I further award each Grievant, one (1) month's salary in lieu of notice.
41. The Respondent did not adduce any evidence to show that the 2nd Grievant was paid his salary for 8 days worked. This claim therefore succeeds and is allowed.
42. From the evidence on record, the Grievants were paid in lieu of pending leave and the claim thereon is therefore disallowed.
43. In opposing the claim for gratuity, the Respondent relied on the decision in *Bamburi Cement Limited v William Kilonzi* [2019] eKLR where the Court of Appeal held that for an employee to claim gratuity,



it must be provided for either in the contract of employment, collective bargaining agreement or statute. No such evidence was adduced before the Court and the claim for gratuity therefore fails.

44. In the end, I enter judgment in favour of the Grievants as follows:

1st Grievant: Robert Ombati Makumba

- a. 10 months' salary in compensation.....Kshs. 126,210
- b. 1 month's salary in lieu of notice.....12,621
- Total.....138,831

2nd Grievant: Alfred Ayusa Kingi

- a. 3 months' salary in compensation.....Kshs. 45,000
- b. 1 month's salary in lieu of notice.....15,000
- c. Salary for 8 days worked.....4,000
- Total.....64,000

45. These amounts will attract interest at court rates from the date of judgment until payment in full.

46. The Grievants are also entitled to certificates of service.

47. The Respondent will meet the costs of the case.

48. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022

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JUDGE

Appearance:

Mr. Julius Maina (Union Representative) for the Claimant

Mrs. Ochieng for the Respondent

