



Kenya Union of Commercial, Food and Allied Workers v Winyitie Dairy Farmers Cooperative Society & another (Cause E017 of 2021) [2022] KEELRC 13176 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13176 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E017 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS CLAIMANT

AND

**WINYITIE DAIRY FARMERS COOPERATIVE SOCIETY 1ST RESPONDENT
LAIKIPIA DAIRLY FARMERS COOPERATIVE SOCIETY LTD 2ND RESPONDENT**

JUDGMENT

1. This matter was brought to court by way of an amended memorandum of claim amended on May 31, 2021. The issue in dispute is therein cited as;

Unlawful Termination of Patrick Maina Ndumia

2. The 1st respondent in the 1st respondents statement of response dated August 18, 2021 denies the claim and prays that this be dismissed with costs.
3. The 2nd respondent has remained mum, through and through.
4. The claimants case is that she is a registered trade union in the section involving the respondents activities and industry. Thus the relationship *inter partes*.
5. The claimants further case is that the 1st respondent involves in the business of buying milk from farmers and selling the same to main milk processors like Muki or KCC. She is the forerunner for the 2nd respondent.



6. The claimants other case is that at all material times to this suit, the name of the 1st respondent remained until service of summons to enter appearance and memorandum of claim when she realised that the respondents name had changed to that of the 2nd respondent.
7. Her further case is that The grievant was employed by the 1st respondent as a cooling attendant (machine operator) in June 2015 through a competitive interview process. His duties included;
 - i. Ensuring no access to the cooling room without authorization.
 - ii. Cleaning of the cooling machines after the milk is packaged in the tanker.
 - iii. Keeping the record of the milk that was cooled each day and what time the milk was collected from the cooling machine to the processing factory.
 - iv. Ensuring that the milk does not cool to very lower degree that is not suitable because it can be ice leading to less milk hence loss to the company.

He earned Kshs 9000.00 but this was reduced to Kshs 7000.00 when milk reduced and without his knowledge. With decrease in milk production the grievant was deployed to transport as supervisor of other transporters and recorder of milk collected. In April, 2019 he in good faith gave 3 months notice to the 1st respondent to terminate his services. Two days thereon, the chairman called him and told him not to report to work the following day marking the last day of employment with the 1st respondent.
8. It is the claimant's further case that the grievant was employed by the respondent as a cooling attendant (machine operator) in June, 2015 after a competitive interview process of which after qualifying he was informed through an SMS message by the Company Secretary, Ms Tabitha Wangari Wambui. His duties included;
 - i. Ensuring no access to the cooling room without authorization.
 - ii. Cleaning of the cooling machines after the milk is packaged in the tanker.
 - iii. Keeping the record of the milk that was cooled each day and what time the milk was collected from the cooling machine to the processing factory.
 - iv. Ensuring that the milk does not cool to very lower degree that is not suitable because it can be ice leading to less milk hence loss to the company.
9. The grievant earned Kshs 9,000/= but this was reduced to Kshs 7,000.00 when milk reduced. This was without his knowledge.
10. His other case is as follows;
 13. The process of collecting and transporting milk involved donkeys and a pulling cart. However, the respondent had the donkey but did not have the cart.
 14. The grievant and the respondent verbally agreed as follows;
 - i. To pay for the donkey cart Kshs 2,000.00 per month.
 - ii. To pay for maintenance in form of food and medicine expenses of Kshs 3000.00 for the donkey because is engaged the whole day for effective service delivery.
 15. The grievant started collecting milk from farmers and delivering the same to Winyitie Dairy Farmers Cooperative Society premises where the milk is put together for onward transmission to the major milk processors i.e. KCC or Muki.



11. The claimant's further case is that the grievant was not given any reason for termination in contravention of section 43(1) of the Employment Act, 2007 provides as follows;

“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.”

12. Further, she submits that when the milk reduced due to harsh weather conditions, the 1st respondent transferred the grievant to transportation of milk from the farms to the company's premises using a donkey cart which the parties agreed that the cart was to be paid for on a monthly basis and the donkey maintained in medicine and food by the employer. The grievant is therefore entitled to recompense for expenses incurred in this exercise.

13. He prays as follows;

- i. Reinstatement of the grievant back to his position which he held prior to dismissal without loss of benefits.
- ii. In the alternative and where the reinstatement is not tenable, the grievant be paid the following as his terminal dues;
 - i. Notice 11,602.00
 - ii. Days worked in April 11,602/26 x 4 1,784.92
 - iii. Service 11,602/26 x 15 x 4 26,773.84
 - iv. Annual leave not taken 26/26 x 11,602 x 4 44,248.00
 - v. Off days -195 days 11,602/26 x 195 x 1 ½ 130,522.50
 - vi. Public Holidays worked
-60 days 11,602/26 x 60 x 2 53,547.70
 - vii. Underpayments June 2015- June 2016
(9,364-9,000)x 12 4,168.00
June 2016-Dec.2016
(11,050 -9,000)x 6 12,300.00
Jan 2017-Jun 2016
(11,050-7,000)x 6 24,300.00
July, 2018-Mar.2019
(11,602-7,000)x 9 41,418.00
 - viii. 12 months compensation 11,602.00 x 12 139,224.00
Unfair termination
Total 489,896.96
- iii. Certificate of service
- iv. Cost of the suit to the claimant



- v. Any other relief this honourable court may deem fit to grant
14. The respondents case is a denial of the claim.
 15. It is her case that the grievant was on a salary of Kshs 9,000.00 but no more. She also admits employment but clarifies that entry date was July 18.
 16. The respondent's other case is that the grievant exit from employment was a consequence of malpractice on the grievant part by adulterating milk (doctoring) by adding sugar, salt, blue band and water to raise its density. He was given several warnings on this but refused to heed while the milk recipients continued to raise complaints. This led to his termination from employment.
 17. The respondent's other case is that the respondent continued selling milk to KCC contrary to the company rules and in his name thus the sacking.
 18. Further, the respondent avers that the claimant took a loan with the respondent and this is as yet not settled.
 19. The issues for determination therefore are;
 1. Whether the termination of the grievant by the respondent was wrongful, unfair and unlawful?
 2. Whether the claimant is entitled to the relief sought?
 3. Who bears the costs of this cause?
 20. The 1st issue for determination is whether the termination of the grievant by the respondent was wrongful, unfair and unlawful.
 21. The claimant's written submissions dated June 29, 2022 attest to the following;
 3. Despite the opportunities given to the parties to have an amicable solution, the 1st respondent refused and/or ignored the invitations extended to them by the conciliator who on August 14, 2020 issued a referral certificate to the effect that the dispute remained unsettled.
 3. The referral certificate reads in part "having made attempts to amicably settle the matter, I hereby confirm the dispute still remains unresolved owing to the management lack of co-operation by failing to attend meetings and avail any written proposals as and when required."
 3. The parties do not have a recognition agreement however the grievant is a member of the claimant union.
 22. The claimant rubbishes the theory of milk adulteration and complaints by buyers and faults this for lack of supporting evidence. She tabulates the milk processing and selling diary which involves grades of two levels and submits that at both of these, the grievant was not involved, or at all. It was not the grievant's responsibility or even involvement in grading milk before sale.
 23. The claimant further submit that the grievant accepts the loan and intended to clear this and this is why he choose to remain in employment until clearance of his outstanding loans. This was however interrupted by termination and this against his plans.
 24. The claimant further denies the greivants owing Kshs 33,365.00, Kshs 1,950.00 and Kshs 6,388.00 and submits that these are strange and unknown to the grievant and in the absence of evidence to this extent, these amount to nought. They are a fabrication and lies.



25. The claimant further seeks to buttress her case by relying on section 36 and 41 of the *Employment Act, 2007* all of which come out as follows;

"36. Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section."

26. Again, section 41 (1) of the *Employment Act, 2007* comes out thus;

"41 Subject to section 42(1), an employer shall before terminating the employment (1) 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."

27. She further relies on article 41 (1) and (2) (b) of the *Constitution of Kenya, 2010* which comes out thus;

"41. Every person has the right to fair labour practises.

(1)
(2) Every worker has the right-

(b) to reasonable working conditions;"

28. It is her case and submission that the grievant's termination of employment was unlawful for want of form and process.

29. The claimant in her brief final submissions filed on July 2, 2022 reiterates her case as pleaded and presented.

30. The respondents did not file any written submissions in support of their defence.

31. The claimant's case is that the termination of the employment of the grievant by the respondent came up immediately he issued a 3 year notice of termination of employment. The claimant submits that this was to take into account the grievant's loan obligation with the 1st respondent but denies any further and unsubstantiated liability to the employer.

32. It is her case that upon forwarding his notice for termination of employment, he was met with orders for not reporting back to work and therefore a termination of his employment.

33. The claimant ably demonstrates his case by producing the following documents; Subsisting collective bargaining agreement inter partes. A letter of unfair and unlawful termination of employment of the grievant dated August 28, 2019. A letter on a trade dispute dated January 15, 2020. Letters dated May 20, 2020 and August 14, 2020 reporting in conclusion of the trade disputes due to lack of co-operation by the respondent. Grievant's letter of resignation. Respondent's letter alleged as grievant's letter of resignation. The undated agreement to continue paying the loan. Letter dated August 22, 2019 from Waweru Kiragu & Associates Advocates.

34. The respondent has not in any way rebutted the abundant case of the claimant. Instead, they merely deny the claim. I therefore find a case of wrongful, unfair and unlawful termination of employment and hold as such.



35. The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having succeeded in a case of unlawful termination of employment, she becomes entitled to the relief sought.
36. I am therefore inclined to allow the claim and order relief as follows;
- i. One month salary in lieu of notice.....11,602.00
 - ii. 4 Days worked in April 2019, $11,602/26 \times 4$ 1,784.92
 - iii. Service pay $11,602/26 \times 15 \times 4$ 26,773.84
 - iv. Underpayments June 2015- June 2016
 $(9,364-9,000) \times 12$ 4,168.00
 June 2016-Dec.2016
 $(11,050 -9,000) \times 6$ 12,300.00
 Jan 2017-Jun 2016
 $(11,050-7,000) \times 6$ 24,300.00
 July, 2018-Mar.2019
 $(11,602-7,000) \times 9$ 41,418.00
 - v. 10 months compensation $11,602.00 \times 10$
 Unfair termination 116,020.00
 Total of claim 238,366.76
 - vi. A certificate of service be issued to the grievant by the respondent within 30 days of this judgment of court.
 - vii. The cost of this suit shall be borne by the respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

Lilian Manene for the claimant union.

Mr. Achoki holding brief for Waweru Kiragu instructed by Waweru Kiragu & Company Advocates for the Respondent.

