



**Kegoye v Kaimosi Tea Estates Limited (Cause 31 of 2021)
[2022] KEELRC 13033 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13033 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 31 OF 2021
JW KELI, J
OCTOBER 27, 2022
IN THE MATTER OF TRADE DISPUTE**

BETWEEN

GLADYS ALUSA KEGOYE CLAIMANT

AND

KAIMOSI TEA ESTATES LIMITED RESPONDENT

(FORMERLY KSM ELR CAUSE NO. 166 OF 2017)

JUDGMENT

1. The Claimant vide a statement of claim dated April 27, 2017 and filed in court on April 28, 2017 following her termination from employment by the Respondent sought the following orders:-
 - a. A declaration that the claimant's termination from employment was unlawful, unprocedural and unfair.
 - b. The sum of Kshs 1338,376.93/-
 - c. Certificate of service
 - d. Costs of this suit and interest in (b)above at court rates from the time of filing the suit until payment in full and
 - e. Any other further and better relief the honourable court may deem just and fit to grant.
2. The Claimant together with the memorandum of claim filed his verifying affidavit sworn on the April 27, 2017, claimant's issues for determination, claimant's list of witnesses, claimant's witness statement, claimant's list of documents all of even date and the bundle of documents.
3. The Claimant in addition filed reply to defence dated April 23, 2018 filed in court on the May 2, 2018.



4. The claim is opposed. The Respondent entered appearance through the law firm of Wachira Wanjiru & Company Advocates and filed response to the claim dated April 10, 2018 and received in court on the April 12, 2018 together with respondent's list of documents dated April 10, 2018 with the bundle of documents, the respondent's list of witnesses dated April 10, 2018 and the witnesses statements of Joshua Kathini, Lucy Mwangangi and Charles Sulwe all dated April 10, 2018.
5. The Respondent on the May 12, 2021 filed in court Notice of Preliminary Objection dated May 11, 2021 on the ground that the claimant's cause of action is time barred by virtue of section 90 of the Employment Act as 1 year had lapsed from the date when the cause of action arose on March 12, 2015 and that the claim was an abuse of the court process and should be struck out with costs being borne by the claimant. The court directed the preliminary objection be heard together with the claim.

Claimant's Evidence .

6. The Claimant's case was heard on the March 14, 2022 with the claimant testifying on oath as a witness of fact, adopting her statement of claim and witness statement dated April 27, 2017 as her statement in chief, producing bundle of documents under list of documents dated April 27, 2017 and which documents were marked as exhibits 1 to 9 and was cross-examined by counsel for the Respondent, Ms Wachira.

Respondent's Evidence

7. The Respondent's case was heard on the same date with one witness of fact namely Joshua Kathini who testified on oath, adopted his statement as the Respondent's Evidence in chief, produced the Respondent's documents under list of documents dated April 10, 2018 and marked as Respondent's exhibits numbers I to II. The witness was cross-examined by the Claimant's Counsel Mr. Kirwa.
8. The parties filed written submissions after the hearing.
9. The Claimant's written submissions drawn by Mwakio Kirwa & Company Advocates are dated June 20, 2022 and received in court on the July 4, 2022.
10. The Respondent's written submissions drawn by Wachira Wanjiru & Company Advocates are dated September 21, 2022 and received in court on even date.

Claimant's Case

11. The Claimant case in summary as per statement of claim dated April 27, 2017 and reply to defence dated April 23, 2018 is that she was employed by the Respondent as supervisor grade 3 with effect from July 11, 2000 earning a gross salary of Kenya shillings 12,341/- as at the time of termination. That she served diligently until March 12, 2015 when the respondent unfairly terminated her employment summarily without following right procedure on grounds of made up allegations of gross misconduct. That she worked for 15 years since 2000 without a warning or lawful warning in her records. She claims for compensation for unfair termination and other dues.

Respondent's Case.

12. The Respondent relied on memorandum of reply dated April 10, 2018 and respondent's exhibits under list of documents dated April 10, 2018 and witness statement of Joshua Kathini of even date. The case of the respondent was that the claimant having been employed on the August 1, 2000 and the services terminated on the March 12, 2015 on reason of abusing staff members and management staff on the March 6, 2015 and March 7, 2015 and insubordination. That on the March 11, 2015 the



claimant was issued with show cause letter on basis of abusive language and insubordination. That on the March 12, 2015 hearing was conducted at the respondent's premises in the presence of shop steward Charles Sulwe and Stephen Kipgeyo. That prior to the hearing the claimant was issued with a warning letter dated March 10, 2015 after which she promised to change. After issuance of summary dismissal letter the claimant informed the employer she was on sick leave but none had been granted to her. The claimant delivered the letter on the April 14, 2015. That the claimant availed to the employer letter dated March 17, 2015 from the Moi Teaching and Referral Hospital on the March 18, 2015 6 days after her dismissal together with a sick leave granting her 14 days sick leave. The claim was denied in totality.

Determination

Issues for determination

13. The claimant in their submissions identified the following issues for determination:-
 - a. Whether the respondent was aware of the claimant's mental sickness and if yes whether the claimant was fit in the circumstances to undergo through a disciplinary process
 - b. Whether the claimant was unlawfully and unprocedurally and unfairly terminated from employment by the respondent
 - c. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in the statement of claim
 - d. What other remedies are available to the claimant in the circumstances
 - e. Whether the claimant is entitled to an award of certificate of service and
 - f. Who should pay costs and interest in the suit.
14. The Respondent in its written submissions identified the following issues for determination :-
 - a. Whether the respondent was aware of the claimant's mental sickness to be fit to undergo her disciplinary hearing
 - b. Whether the claimant's termination was fair and lawful
 - c. Whether the claimant is entitled to prayers sought
15. The court upon carefully considering the case for 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 the respondent was aware of the claimant's mental sickness and if yes whether the claimant was fit in the circumstances to undergo through a disciplinary process
 - b. Whether the claimant's dismissal from employment was fair and lawful
 - c. Whether Claimant is entitled to reliefs sought

The relevant law

16. 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.”

17. 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.....”

18. 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.

19. Section 46 of the [Employment Act](#) provides for reasons that do not constitute fair reasons for dismissal.

20. 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.”

21. 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.

22. Section 41 of the [Employment Act](#) provides for procedural fairness as follows:- ‘41. (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.”

23. In the event the employer is contemplating termination of employment vide summary dismissal under section 44 of the [Employment Act](#), the employee is entitled to hearing pursuant to the provisions of section 41(2) to wit: -“(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.” The court finds and determines this was the applicable law in the instant claim.

Issue 1. Whether the respondent was aware of the claimant’s mental sickness and if yes whether the claimant was fit in the circumstances to undergo through a disciplinary process.

24. The Claimant’s case as per statement dated 27th April 2017 was that she served diligently until 12th March 2015 when the respondent unfairly terminated her employment summarily without following right procedure on grounds of made up allegations of gross misconduct. The issue of being unwell was not disclosed in the claim or the statement of the witness adopted as evidence in chief. The parties are bound by their pleadings. The Claimant brought up the issue of being unable to recall events at the hearing. During cross-examination the claimant told the court she could not recall what was happening on the 12th March 2015. The claimant denied seeking to see the Manager on the 6th and 7th March 2015 but confirmed having attended clinic on the two days. When asked whether she believed the statement of the clinic officer and not the Manager, she responded that she was just told. The Claimant confirmed she received a warning letter from the employer and responded. That her daughter directed her on the response but she was not called as a witness. On whether on leaving the hospital she informed anyone she could not remember what happened on the dates of 6 and 7th march 2015 the claimant responded that she was told by the secretary there was a letter and that she was not given attention.
25. On further cross-examination of the Claimant on whether in her response (page 37 of her claim) she indicated the events or what was going on the claimant responded that she did not address the events of 6th to 12th march 2015. The Claimant confirmed that the Moi Teaching and Referral Hospital gave her two sick offs one by Dr. Kilonzo for 14 days dated 16th March 2015 and another sick off by the hospital of 17th March 2015 of one week off. Asked whether after the 1 week off she presented herself to employer, the claimant said her brother was dealing.
26. The Claimant confirmed that after the 2 weeks sick off she did not report to work on the 25th march 2015 and also after the review by hospital of 24th march 2015.
27. The Claimant confirmed that on the 13th April 2015 when she reported back she wrote a letter and that there was no further medical report after 24th March 2015 and 13th April 2015 treatment.
28. The Claimant confirmed she had not sought the attendance of Dr. Gakinya who wrote report of 17th march 2015 as her witness. The claimant confirmed that the medical report of 10th march 2015 following further observation on 9th march 2015 stated she was fine.
29. The Claimant confirmed she was a prayerful person on the neighbours allegation that she prayed all night on 7th march 2015. On the report of 10th march 2015 it was written she was to seek spiritual guidance.
30. The respondent under the witness statement of Joshua Kathini stated that the claimant availed to the employer letter dated 17th March 2015 from the Moi Teaching and Referral Hospital on the 18th march 2015, 6 days after her dismissal together with a sick leave granting her 14 days sick leave.

Court finding on issue 1.

31. It is the finding of the court that the employer was not aware of mental sickness of the claimant as at time of dismissal as she delivered the letter diagnosing her of mental depression dated 17th march 2015 on 18th March 2015, 6 days after dismissal from employment. The court has no capacity to make a



finding of mental sickness of the Claimant. The burden of proof lay with the claimant to prove her allegation of mental illness which can only be done through evidence of a medical doctor. The court took notice of lack of pleading of mental sickness as the reason of absence from work without leave yet parties are bound by their pleadings. The Claimant had opportunity to respond to averments and plead mental sickness but did not do so in her reply to defence. It is the opinion of the court that only a certified medical doctor could declare the mental state or fitness of the claimant to participate in the hearing proceedings. No such certification was presented to the employer prior to the dismissal. The court, on basis of the foregoing reasons finds that there is no evidence that the employer was aware of the claimant's alleged mental sickness.

Issue 2.

Whether the claimant's dismissal from employment was fair and lawful

32. The burden to prove valid reasons for the termination of the employment lies with the employer as contemplated under section 43 and section 45(2) of the *Employment Act*(supra). Section 45 (2) summarizes fair reasons for termination to be:

‘The reason for the termination is a fair reason:-

- iii. Related to the employees conduct, capacity or compatibility or
- iv. Based on the operational requirements of the employer.”

33. The Respondent's witness Joshua Kathini(RW) told the court the claimant was issued with a show cause letter dated 11th march 2015. RW admitted that the claimant did not sign the show cause letter. RW during cross- examination admitted that in all company documents there is a place for signing. That the first warning letter dated 10th march 2015 had a provision for the claimant to sign (exhibit 8). RW told the court the letter was witnessed by the union representative . The said person was not a witness before court. RW could not tell if the claimant was a member of the union. RW confirmed that the claimant was not deducted union dues. RW did not produce letter of invitation of the claimant to the alleged meeting of 7th march 2015. The summary dismissal letter dated 12th march 2015 does not refer to any show cause letter but to incident of 6 and 7th march 201.

Court decision on the reason for termination

34. It is the court's finding that there was no prove that the alleged show cause letter dated 11th March 2015 was served on the claimant. Further the reasons for her dismissal were not proved as valid as the factory manager she allegedly embarrassed was not called to testify nor was a another witness from the management staff called to corroborate the alleged abusive behavior. The court finds that all the allegations in statements filed of Nelson, the head security officer, Wycliff Simiyu and David Mutai remain allegations for lack of production by the authors. None of these persons were called as a witnesses. The court does not find the said statements to be of probative value on the reason for the dismissal as the claimant was not given opportunity to be heard on the same. The court finds that the reasons given under the summary dismissal letter were not proved to have existed and as justified as provided under Section 43 of the *Employment Act*.

Procedural fairness.

35. Section 41(2) of the *Employment Act* provides for the mandatory process to be complied with before the termination of employment on basis of summary dismissal. The employee must be explained in



a language they understand the reason the employer is contemplating the dismissal in the presence of fellow employee or union representative and given opportunity to be heard. This is a mandatory procedure. The witness statement of RW was to the effect that on the 12th March 2015 a hearing was conducted at the respondent's premises in the presence of shop steward Mr. Charles Sulwe and Stephen Kipyego. That prior to the hearing the claimant was issued with a warning letter dated 10th march 2015 after which she promised to change but did not.

36. During cross-examination the claimant told the court that her in response to the summary dismissal she did not address events of 12th march 2015. The obligation to comply with the provisions of section 41 of the *Employment Act* lies with the employer who is contemplating termination of employment for any reasons. The respondent must discharge that burden for the termination process to pass muster.
37. RW confirmed during cross-examination that the claimant was not deducted union dues under her pay slips (claimant's exhibit 5). RW told the court that with respect to hearing on the 12th march 2015 the claimant was present. On the notice to appear, RW told the court that the claimant was called to the meeting by the immediate manager. The minutes of the hearing were not produced. At re-examination RW relied on paragraph 3 of the summary dismissal where it is written that on the 7th march 2015 the senior divisional manager called the claimant to the office to explain her behavior but she declined. And on paragraph of the statement of Joshua Kathini 5 it is written that on the 12th march 2015 a meeting was called between the shop stewards, the management and the claimant where her conduct was brought to her attention and it was unanimously agreed that her behavior was a case of gross misconduct.

Court decision on issue 2

38. The court finds that the dismissal letter is witnessed by Stephen Kipyego only, no evidence that the show cause letter was served on the claimant, no evidence was produced on the invitation to the meeting like the call log of the said manager to the claimant and no minutes of the alleged hearing were produced.
39. The court finds that the process followed in the summary dismissal by the Respondent of the claimant failed to meet the threshold of section 43 and 41 of the *Employment Act*. The employer did not notify the claimant in advance of the reasons he was contemplating the termination of her employment. The court found no evidence that the show cause letter was received by the claimant and had no space for her signature. The first warning does not amount to notice of reasons the employer is contemplating termination. A warning is a sanction on its own as a disciplinary measure. That the first warning letter dated 10th march 2015 had a place for the claimant to receive and was witnessed by Stephen Kipyego. The court did not find a reason why the show cause letter and dismissal letter had no place for the claimant to sign on receipt.
40. The court found that alleged reference to meetings under letter of summary dismissal was not proof of hearing as envisaged under section 41 of the *Employment Act*. RW admitted there was no formal invitation of the claimant to the hearing and the Respondent failed to call as witness their manager who is alleged to have called the claimant for the meeting. No minutes of the said hearing were produced before the court. The court finds that the claimant discharged her burden under section 47(5) of the *Employment Act* by laying basis of unfair dismissal for lack of valid reasons and hearing. The burden then shifted to the respondent to justify the existence of valid reason for the termination and prove of compliance with section 41 of the *Employment Act*. This reasoning of the court is consistent with the authority cited by the respondent in *Antony Mala Chivati v Malindi Water and Sewage Company Limited*(2013)eKLR to the effect that in a case of summary dismissal there exists obligation on the



employer to hear and consider any representation by the employee before making the decision to dismiss or give other sanction.

41. The court finds and determines that the process followed in the termination of the employment of the claimant was not in compliance with section 41 of the *Employment Act* and hence flawed. Specifically the court found there was no proof of notice to attend hearing, no proof of delivery of the notice to show cause to the claimant and no proof of the hearing proceedings as contemplated under section 41 of the *Employment Act* which could easily have been done by production of the minutes on the proceedings of the said hearing. The summary dismissal of the claimant is determined as unlawful and unfair.

Issue 3:

Whether Claimant is entitled to reliefs sought

on the claim for the sum of Kshs. 1,338,376.93/-.

42. The claimed sum of Kshs.1,338,376.93 is tabulated under paragraph 11 of statement of claim.

Ruling On The Preliminary Objection By The Respondent Dated 11th May 2021.

43. The Respondent on the 12th May 2021 filed in court notice of preliminary objection dated 11th May 2021 on the ground that the claimant's cause of action is time barred by virtue of Section 90 of the *Employment Act* as 1 year had lapsed from the date when the cause of action arose on 12th March 2015 and that the claim is an abuse of the court process and should be struck out with costs being borne by the claimant. The court directed the preliminary objection be heard together with the claim. The Claimant did not submit on the preliminary objection.

Decision of the court on the preliminary objection

44. The Court of Appeal in *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* [2015] eKLR considered the meaning of continuing injury under section 90 of the *Employment Act* and held as follows:- 'According to the Black's Law Dictionary, continuing injury is defined as:- "An injury that is still in the process of being committed. An example is the constant smoke or noise of a factory." (emphasis added). This definition connotes an injury that continues to happen at the time the claim is lodged and/or ongoing. In the context of an employment relationship, it presumes that the parties are still on a continuous engagement at the time of claim. What comes to mind is where for example, the dispute pertains to an industrial strike and one of the parties has moved court on account of an injury that continues to be suffered during the subsistence of the employment and /or strike. However, in this case, it is not in dispute that at the time the claim was lodged, the employment relationship had already been severed. Indeed, it is the termination that gave rise to the course of action. Any claims arising therefrom could therefore no longer be termed as continuing injury.'
45. The Court of Appeal decisions are binding on this court. Applying the said decision the preliminary objection fails as it was the dismissal of the claimant from employment of the respondent that led to the instant claim hence not a continuing injury. In the decision of *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* [2015] Eklr the Court of Appeal considered the decision of the trial court which had capped the awards on unpaid dues to 3 years under section 90 of the *Employment Act* and upheld the decision as valid. The court is well guided and will apply the said decision in determination of the claims sought.



46. The court proceeds to consider the claims under paragraph 11 of the statement of claim for the tabulated sum of Kshs. 1,338,376.93/- guided by the above decision of Court of Appeal in *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* [2015] eKLR.

Underpayment

47. On underpayment the respondent denies underpayment and relies on the CBA. The said CBA was not produced as evidence in court. There was no proof of the union deductions from the claimant's payslips produced in court. The claimant told the court she was not under the union.. The court finds and determines that the minimum statutory wages applied to the claimant and that she was not a union member. The Claimant cited several legal notices of 2012 and 2013. The legal notices were not produced. The legal notices are public documents and the court was able to access. The letter of employment referred to the claimant as supervisor grade 3 (claimant's exhibit 3). The court considered the said notice which are published and did not find the said position of the claimant of supervisor grade 3. The court finds that the claimant relied on the position of artisan grade 3 under the legal notices. The concise oxford dictionary defines word artisan as a skilled worker who make things by hand. The court considered the contents of the letter of warning letter dated 10th march 2015 by the respondent and found that the position of supervisor grade 3 was that of a skilled worker the equivalent to artisan grade 3 under the legal notices which cites areas under category of all municipalities and Mavoko, Ruiru and Limuru Town Councils. The court finds that the claimant was underpaid and awards for 3 years only for period between March 2012 to march 2015 thus:-
- i. Legal notice 64 of 2012 to apply from 1st March to April 2012 11 (11835-11004) x2 months total award Kshs 1662/-
 - ii. From 1st May 2012-1st January 2013
Legal Notice No. 71 of 2012
(13385.40-11004)x 8 months total award 19051.20/-
 - iii. From 1st January 2013 - 1st may 2013
Legal Notice No. 71 of 2012
(13385.40-12341)x 4 months total award kshs. 4177.60/-
 - iv. From 1st May 2013 to 12th march 2015
Legal Notice No.197 of 2013
(15259.35-12341) x 23 months total award 67122.05
Total award for underpaid salary (Kshs 1662+19051.20+ 4177.60+67122.05) kshs 92,012.85/-
Notice pay in liue
48. Having found unfair and unlawful termination the claimant is entitled to notice pay of 1 month as sought. The court awards the claimant notice pay of 1 month in liue for Kshs. 15,529.35/-.

Compensation for unfair termination

49. The claimant was found to have been terminated unfairly. The court considered that there was evidence from the employer clinic she was unwell at the material time of termination and that ought to have



been taken into consideration. That she had been issued with first warning on 10th march 2015 and terminated on the 12th march 2015 which is hardly enough time to change behaviour and that she was still unemployed. The court considered that the claimant was not a suitable case of reinstatement. The court finds and determines that this was a case deserving of maximum award and awards 12 months gross salary as compensation for unfair termination under section 49(1)(c) of the Employment Act Thus Kshs. 15259.35 x 12 total Compensation for unfair and unlawful termination award of Kshs. 183,112.20/- .

Leave claim

50. The court finds that the claimant was away for days in 2015 without leave of the employer or doctor as per her testimony on cross examination. The claim is disallowed.

Claim for overtime

51. Overtime is a claim that requires strict proof. The same was not referred to in the witness statement of the claimant. The court looked into the payslips filed by the claimant and found she was consistently paid overtime. The claim is disallowed.

Certificate of service

52. The claim is allowed. Certificate of service being a statutory right of every employee on exit from employment notwithstanding the reasons for their termination under Section 51 of the Employment Act, the same to issue.

Conclusion and disposition

53. The Court enters judgment for the claimant against the respondent as follows: -
- a. A declaration that the claimant's termination from employment was unlawful, unprocedural and unfair.
 - b. Compensation award the equivalent of 12 months salary (minimum statutory wage of Kshs.15259.20 applied) of total sum of Kshs 183,112.20/- .
 - c. Notice payment in lieu for Kshs.15,529.35/-.
 - d. Award for underpaid salary for three years (Kshs 1662+19051.20+ 4177.60+67,122.05) Kshs 92,012.85/-
 - e. (awards in b, c and d above subject to statutory deductions).
 - f. The Respondent to issue the Claimant with certificate of service pursuant to the provisions of section 51 of the Employment Act.
 - g. The Claimant is awarded interest on award amounts at court rates from date of judgment.
 - h. The Respondent to bear costs of the suit.

54. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 27TH OCTOBER 2022 IN OPEN COURT AT BUNGOMA.



J. W. KELI,

JUDGE.

In the presence of :-

Court Assistant -Brenda Wesonga

For Claimant: Ms Wachira

For Respondent : Mr Kirwa

JUDGMENT IN CLAIM NO. 31 OF 2021	0
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