



**Kenya Union of Sugar Plantation & Allied Workers v West Kenya Sugar Company Limited; Pachanga (Aggrieved Party) (Employment and Labour Relations Cause 39 of 2021) [2022] KEELRC 12909 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12909 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE 39 OF 2021**  
**JW KELL, J**  
**OCTOBER 13, 2022**  
**(FORMERLY KSM ELR CAUSE NO. E022 OF 2021)**  
**IN THE MATTER OF TRADE DISPUTE**

**BETWEEN**

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

**AND**

**WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT**

**AND**

**CHARLES MUKOTSA PACHANGA ..... AGGRIEVED PARTY**

**JUDGMENT**

1. The claimant, a registered union within the Republic of Kenya *vide* memorandum of claim dated January 4, 2021 and filed March 11, 2021 on behalf of its member the grievant following their termination from employment of the respondent sought the following orders:-
  1. A declaration that the decision and action of the respondent in terminating the employment of the grievant Mr Charles Pachanga Mukotsa was wrongful.
  2. An order for the grievant to be compensated as follows:-
    - i. Minimum 12 months compensation for loss of job at gross pay of monthly gross pay of Kshs 34,809.3x12 = Kshs 417,711.60.
    - ii. Three months payment *in lieu* of notice as per CBA clause 9c, Kshs 34,809.30x3 = Kshs 104,427.90



- iii. 28 days annual leave balance for the year 2015 as per the CBA clause 16;  
 $(34,809.30 \times 12) \times 8 \text{hrs} \times 28 \text{days} =$   
2496  
Kshs 37,486.90.
- iv. 15 days service pay for each year worked  $(34,809.30 \times 12)$   
2496  
 $8 \text{hrs} \times 15 \text{days} \times 1 \text{years} =$  Kshs 220,905.20
- v. Salary arrears arising from underpayment while working as a supervisor May 14<sup>th</sup> to  
31<sup>st</sup> April 2015 Kshs  $(34,452.21,847 \times 12 \text{mths} =$  Kshs 151,260.00  
May 1, 2015 to April 2016 Kshs  $(34,452.24,032) \times 12 \text{months} =$  Kshs 125,040.00
- vi. Total underpayment Kshs 276,300.00
- vii. Compensation for psychological damages and injured feelings Kshs 1,000,000.  
Grand total Kshs 2,056,831.60.

3. The claimant together with the memorandum of claim filed bundle of documents at pages 6 to 47 of the bundle.
4. The claimant in addition filed witness statement of Charles Pachanga Mukotsa on May 9, 2022.
5. The claim is opposed. The respondent entered appearance through the law firm of M/S O&M Law LLP and filed response dated August 28, 2021 and received in court on the November 15, 2021 together with list of witnesses, witness statement by Duncan Abwao of November 10, 2021 and list of documents dated November 10, 2021 together with the bundle of documents paginated as 1 to 12.
6. The respondent further filed supplementary list of documents dated May 16, 2022 being final dues tabulation and confirmation receipt.
7. The claimant's case was heard on the May 18, 2022 with the grievant testifying on oath as a witness of fact and was cross examined by counsel for the respondent, Mr Ondiwo.
8. The respondent's case was heard on the May 18, 2022 with one of witness of fact namely Duncan Abwao who testified on oath and was cross-examined by the claimant's representative, Mr Akhonya.
9. The parties filed written submissions after the closure of the defence case.
10. The claimant's written submissions drawn by Jeremiah Akhonya, the union representative, are dated June 15, 2022 and received in court on the July 7, 2022.
11. The respondent's written submissions drawn by O&M Law LLP Advocates are dated June 21, 2022 and received in court on the June 24, 2022.

### **Claimant's Case**

12. The claimant case in summary is that the grievant was employed by the respondent on July 1, 2006 as a mechanical fitter in the mechanical department where he served in that capacity for 7 years and in march 2013 he was appointed a mechanical supervisor, That he was not paid as a supervisor. In April 2013 the company started paying him acting allowance for supervisory duties but the allowance was less than he was entitled to under the CBA clause 7 (e) which required he be paid 25% of his basic salary.



13. That the grievant acted beyond the period required under clause 7 of the CBA an issue he raised with the mechanical engineer who advised him to follow up with the Human Resources Manager.
14. That the grievant raised the issue of acting beyond the required period without confirmation with the human resources on several occasions in 2013, 2014 and 2015 and was told to wait. That the grievant had no disciplinary issues for the employer to deny him promotion.
15. That in January,2015 the management stopped payment of acting allowance. That the grievant visited the human resources office where he was informed that the acting issue was under discussion between the union and management and that they were working to pay lumpsum in April same year.
16. That the union pushed for confirmation of employees who had acted for a long time in senior positions and the management issued a memo on the April 9, 2015 to that effect.
17. That there were rumours that some people had been left out of promotion and that the confirmation was changed to May 2015. That the grievant's engineer informed him his name had been left out and advised he sees the Human Resources Manager before the confirmation list was submitted to the Managing Director for approval.
18. The grievant stated in his adopted claim that he visited the human resources manager's office to seek clarification on the confirmation into the acting position who openly asked for Kshs 200000/- which he failed to give. That the human resources manager threatened to get him out of office for complaining to the General Manager on the confirmation. That the human resources manager asked the security to keep a close eye on him.
19. The grievant claimed that on March 28, 2016 he went to supervise the injection pump with a fitter and his helper carrying a bag of bolts but the security confronted them at the site and found a bag of sugar following which he received a show cause letter which led to his termination of employment.
20. The grievant stated he was invited to a disciplinary hearing April 26, 2016 which was postponed and he was never invited to another hearing. That he received a letter of termination dated May 10, 2016 referring to siting of May 3, 2016. The grievant denied attendance of the disciplinary meeting on May 3, 2016.

### **Respondent's Case**

21. The respondent, through the witness statement of Duncan Abwao, does not dispute the employment history of the grievant. The facts leading to termination are not in dispute save for denial by the grievant that he was hostile. The respondent states that the grievant was taken through disciplinary hearing on the April 26, 2016 and minutes recorded. That the employment of the grievant was summarily terminated for gross misconduct under the *Employment Act* and as per the grievant's employment contract as well as the respondent's policies. The respondent states that there were valid reasons for the termination of the grievant from employment and having been heard before the termination then the claim for unfair termination cannot stand against it.

### **Determination**

#### **Issues for determination**

22. The claimant in its written submissions addressed the issues of salary and housing underpayment, lack of valid reason for the termination, lack of procedural fairness, annual leave payment and notice pay.
23. The respondent in its written submissions identified the following issues for determination :-



- a. Whether the grievant was summarily dismissed for justifiable reasons;
  - b. Whether the respondent adopted a lawful procedure before dismissing the grievant; and
  - c. Whether the grievant is entitled to the prayers sought.
24. 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 reason or reasons for summary dismissal of the grievant from employment
  - b. Whether the respondent followed a fair procedure before summarily dismissing the grievant from employment
  - c. Whether grievant is entitled to reliefs sought by the claimant.

### **The Relevant Law**

25. 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.”
26. 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.....”
27. 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.
28. Section 46 of the [Employment Act](#) provides for reasons that do not constitute fair reasons for dismissal.



29. 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.”

30. 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.

31. 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.’”

32. 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.

### **Whether there was valid reason or reasons for summary dismissal of the grievant from employment**

33. 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).

34. The letter of termination of the employment of the grievant dated May 10, 2016 (page 45 of the claimant’s bundle of documents) the reason for the termination is stated therein as follows:- ‘You failed to demonstrate and convince the management that the sugar found hidden in the non- functional injection pump where you were working was not what the fitters carried for you. You told the fitters that the bag was carrying caustic sugar but told the security it was carrying old bolts. However, when the security demanded to see the bag and content you were unable to produce the bag. Your action was outright theft which is criminal and detrimental to the company. Considering the magnitude and nature of offence the management hereby invoke section 44 (4)(g) of the Employment Act to terminate your services with effect from May 11, 2016...’”

35. Prior to the termination letter the grievant was issued with a show cause letter dated April 7, 2016 on same allegation but adding the grievant was hostile when questioned(CPM4).

36. The grievant replied to the said show cause *vide* letter dated April 11, 2016 and denied knowledge of the sugar bag or having been hostile to the security manager who found the sugar bag in the chamber of a stalled injection pump.



### **Evidence During Cross-examination Of The Grievant.**

37. The grievant confirmed that he received the show cause letter dated April 7, 2016 (page 2 of the respondent's bundle) and that he responded (page 3 of the respondent's bundle). The grievant on being asked who gave him instruction to visit the injection pump he told the court on that day he got a complaint. The grievant denied it was Shatimba who informed him there was a problem at the pump. The grievant told the court he went to the injection pump with 2 employees, the grievant did not deny that he instructed the 2 employees to carry the sack with bolts and he admitted the 2 employees carried the sack. The grievant told the court that the 2 employees sorted the issue at the pump in his presence and he was their supervisor.
38. On further cross-examination, the grievant told the court there was a security officer inside the pump house. It was put to the grievant that in the show cause it was stated he was spotted with 2 officers carrying a bag of sugar headed to the pump house and confirm whether a search was done and sugar found of which he responded in the affirmative. The grievant told the court he was outside the pump house when the search was done. The grievant told the court that there were other sacks on the floor of the pump house. The grievant confirmed there was sugar found inside as per his response. The grievant told the court it took 12 to 15 minutes to repair the pump. The grievant admitted that in his response to the show cause letter he did not state that he found anyone in the house.
39. The grievant told the court he knew the deputy security officer but did not know in what position he was working in. When asked if he showed the deputy security the sack he was carrying the grievant responded it was down there on the floor of the pump house. The grievant told court they had carried bolts which they collect and used to keep them in one place.
40. During re-examination the grievant told the court he was not given the statement of the deputy security, that the security stopped them when they were leaving, that he was not given the statement by the deputy security stating he refused to show him the sack they had carried and that there was no sack inside the pump.

### **Evidence During Cross-examination of DW (Duncan Abwao)**

41. DW told the court his evidence that the deputy security spotted the fitter and helper carrying the sack and stated he relied on the investigation report of the security (produced at page 10 of the respondent's bundle of documents).
42. DW told the court the said document was an incident report by security and that it was not signed. DW told the court the document was authored by their security office.  
  
DW confirmed that in the report it is not recorded that the grievant was hostile when confronted. DW confirmed that the deputy security did not give a statement. At page 11 of the respondent's document DW confirmed no witness statement of the officers who were with the grievant.  
  
DW confirmed the termination letter referred to sugar hidden at the pump. That at page 32 of claimant's bundle no sugar was stolen but attempt. DW confirmed letter at page 32 and the termination letter varied as the later referred to cooling tower.  
  
DW told the court the fitter and helper told the deputy security they were carrying bolts. They did not know what they were carrying. That the fitter and helper did submissions and not statements. DW told the court the grievant had time to face the fitter and helper.



## Determination

The claimant submits that the court ought to consider the conduct of the employee upto the time of employment. That there was no witness to implicate him for being rude or hostile and that the allegations malicious and fabricated. The claimant at cross examination of DW brought out letter by Mechumo at page 32 of the claimant documents which referred to cooling tower and the injection pump.

The respondent submits that it the inconsistencies in the account of the events of the incident by the grievant which led the employer to conclude that the grievant was engaged in case of attempted theft and recommended summary dismissal for gross misconduct. The respondent summaries the inconsistencies to be under its submissions of which the court highlights next paragraph.

The court finds and determines there were indeed material inconsistencies between the testimony of the grievant and his statement adopted as evidence-in- chief like for example in his statement he stated that when he arrived at the injection pump house the 2 employees informed him that they had fixed the issue and the pump worked well while at cross-examination he stated that the employees sorted the issue at the pump house in his presence and he was their supervisor. Further the grievant stated that the deputy security confronted them as they were leaving when he saw the 2 employee carrying something and during cross-examination said the bag was at the floor with other bags.

The court finds that the grievant admitted that the bag with sugar was found in his presence at the pump house and further that in his response to the show cause he had not indicated they had found anyone in the injection pump house. The grievant failed to disclose to the court who had instructed him to visit the injection pump house.

The court finds the reference to a cooling tower in the letter by Mechumo (page 32) not material to cast doubt on the facts of the incident leading to the show cause letter against the grievant as the other facts are consistent. The grievant did not lead evidence to demonstrate that the reference by Mechumo to cooling tower instead of pump house was material to the claim.

The respondent submits that disciplinary hearing is not a mini- court. That the employment contract requires an extreme level of trust and where the trust is broken , then it is reasonable for the employer to dismiss the employee. To buttress this submission the respondent relies on the decision in *Michael Njoroge Mugo v Laikipia University* (2018)e KLR where the court held that : ‘it is now accepted that a disciplinary hearing is not a mini court where there strictures of a court room trial must be observed.’” The court has already held that the employer is obliged to comply with the provisions of section 41 of the *Employment Act*. The standards and procedures of court trial are not applicable in disciplinary procedures thus the authority cited is upheld.

The respondent further relies on the decision of Court of Appeal in *Judicial Service Commission v Gladys Boss Shollei & another*(2014) eKLR where the court held that the courts should not micro manage the human resources function of other institutions be they in public or private.

The court on a balance of probabilities finds and determines that the respondent had a justifiable and valid reason to summarily dismiss the employee under section 44 (4)(g) of the *Employment Act* for the attempted theft. Further court finds and determines the trust between the employer and employer had broken down hence the justification to break the relationship. In this case the court upholds the decision of the court in *Michael Njoroge Mugo v Laikipia University* (2018)e KLR(supra).

## Whether the respondent followed a fair procedure before summarily dismissing the grievant from employment

Section 45 (2) of the *Employment Act*(supra) provides for criteria of determining whether there was unfair termination. The respondent submits that statutory procedure was followed prior to the summary dismissal.



Section 41(2)(supra) provides for the procedure for termination of employee under section 44 of the [Employment Act](#).

The claimant led evidence that the grievant was invited *vide* letter of April 25, 2016 (page 44 of the claimant's documents) for hearing on the April 26, 2016 which was postponed.

During cross-examination of the grievant he told the court that the said scheduled hearing of April 26, 2016 did not take place and the grievant was informed he would be invited again. The grievant told the court he was never invited for another date of hearing and instead received letter of termination dated May 10, 2016.

During examination in chief of DW, the witness told the court the hearing scheduled for April 26, 2016 was rescheduled to May 3, 2016 where the employee attended. During cross examination DW told the court that minutes of the proceedings were signed by one person called James and were not approved. That Mr Mechumo who issued the show cause and termination letters to the grievant was the chairman of the meeting and did not sign the minutes.

The respondent produced the minutes of the proceedings of May 3, 2016 titled 'minutes of disciplinary hearing for Charles Pachanga' (grievant) (page 6 of the respondent bundle of documents dated November 10, 2021). In the same minutes the statement of the grievant is recorded and his answers at cross-examination. In the minutes the evidence of the fitter Joel Wafula is recorded.

The claimant submits that there is no evidence that the grievant was invited to the hearing or he attended, that the attendees did not sign the minutes nor did the chairman. That none of the witnesses were called including Nehemiah who was the union treasurer at the material time to confirm validity of the minutes.

The respondent submit that the grievant was invited for hearing on the April 26, 2012 which hearing took place on the May 3, 2016 and minutes were produced. That while the grievant capriciously testified to not have attended the hearing he confirmed in his documents before court to have attended the hearing as stated in paragraph 11 and 12 of the memorandum of claim. The grievant confirmed to have attended the disciplinary hearing where he claims to have satisfactorily defended himself before the disciplinary hearing.

The court finds that the claimant in paragraph 11 and 12 of the memorandum of claim stated that he attended the disciplinary hearing and defended himself. The respondent produced the minutes of the meeting held on May 3, 2016 which indicated that the claimant was represented by its treasurer Nehemiah Muchina. It is trite law parties are bound by their pleadings.

Taking into account the foregoing evidence the court finds and determines that it is more probable than not that there was disciplinary hearing of the grievant on the May 3, 2016 which he attended and the hearing complied with the requirements of section 41 of the [Employment Act](#) as the claimant had been invited earlier, had received a show cause letter indicating the charges he was facing, he attended the hearing in the company of Nehemiah Muchina, the union representative, the witnesses evidence is recorded and the minutes of the proceedings were produced. The court finds that it is not a requirement under the [Employment Act](#) and or under the CBA between the parties that the minutes must be signed by all persons attending. The minutes were signed by the author and the claimant did not file reply to response to challenge the defence.

The court finds and determines that the respondent complied with the mandatory procedure provided for under section 41 of the [Employment Act](#) before termination of the employment of the grievant.

### **Whether grievant is entitled to reliefs sought by the claimant.**

The court having found the termination was lawful and fair considers the question of terminal benefits



## **Notice pay**

On notice pay the respondent produced evidence of payment of 2 months notice. The respondent submits that clause 9 of the CBA which provides for 3 months' notice is not applicable following summary dismissal of the grievant and instead clause 8(ii) applies which states that summary dismissal shall be handled in accordance with the law. The claimant submits that in cases of summary dismissal notice pay is not applicable as held in *Vincent Abuya Obunga v Mast Rental Service Limited*(2019)eKLR and in *Consolatta Kemunto Aminga v Milimani High School* (2019)eKLR where court held that an employer who had made payments in lieu of notice to an employee who had been summarily dismissed was more than generous.

The claimant submits that the payment of 2 months notice was contrary to the binding CBA between the parties providing for 3 months.

The court finds and determines that there two modes of separation with employer under the CBA. Clause 8 (ii) covers the case of separation by summary dismissal and clause 9 covers normal termination. The court finds and determines the claimant was dismissed under clause 8(ii) hence the claim for extra month under the CBA is not valid. The court upholds the cited decisions of *Vincent Abuya Obunga v Mast Rental Service Limited*(2019)eKLR and in *Consolotaa Kemunto Aminga ve Milimani High School* (2019)eKLR to apply in the instant claim to the effect that an employee under summary dismissal where the court finds fair termination is not entitled to notice pay. The court finds that it was out of generosity the two months' notice pay was paid the grievant having been lawfully summarily dismissed from service..

## **Claim For Leave**

The grievant was paid his dues as per the supplementary document filed by the respondent. During the hearing the grievant admitted the claim for leave days was a mistake, the claim is disallowed.

## **Salary Underpayment**

The claimant submits that the grievant was underpaid which claim was based under the CBA of 2012 to 2015. During cross-examination DW told the court that the grievant was paid basic salary of Kshs 24,032. That the salary for supervisor was Kshs 32,000/- depending on the department but that was the least payable amount. That the salary under job group UG6 of the CBA was Kshs 24,032 which was what the grievant was earning. That the grievant was paid as a helper. That the grievant was supervisor fitter and helper at same time, that they ought not have earned the same, that the grievant was acting from April 2012 to 2013 and that the grievant's last payslip did not have acting allowance.

During re-examination DW told the court that under the CBA there was no provision for salary of mechanical supervisor and no CBA was produced for the period the grievant was acting.

The claimant submits that in absence of supervisor scale the respondent ought to have applied new rate of mechanical fitter general UG10 for the month of May 2016 which is now Kshs 38,601(page 27 of the claimant's bundle). That the terminal dues ought to have been based on job group of mechanical supervisor.

The respondent submits that they produced evidence of payment of acting allowance between 2014 and 2015 to the grievant. That the grievant having not been confirmed to the acting position he reverted back to his original position as evidenced by payslips of 2016 in the mechanical department. The court noted that the respondent did not disclose the scale into which the grievant reverted to in the mechanical department.

The respondent's testimony of DW was that the grievant was a supervisor fitter and that the least paid at that position was Kshs 32000/=. In the internal memo dated March 14, 2013 the grievant is addressed by the human resources department as mechanical fitter general. Under the CBA dated October 6, 2015(page 2027) the position of fitter general is at UG 10 at salary of Kshs 36,076/.



The court finds that the grievant as fitter general fell under scale of UG10 CBA. Further the court determines that under section 90 of the Employment Act underpayment of salary is a continuing injury and awards the grievant underpaid salary for last 12 months of employment as claimed for total Kshs 125,040/-

#### **Underpaid House Allowance.**

The claimant submits on underpayment on housing allowance which is not under the prayers in the claim and the item is disallowed on that basis. Parties are bound by their pleadings and the court cannot award that which is not pleaded in the claim.

#### **Service Pay**

The court finds that the claimant did not justify the basis of the claim for service pay. The court perused the CBA and the same is not provided for. The respondent submits that it is not payable as the claimant under NSSF and provident fund. The court agrees with the respondent that the grievant had social security as envisaged under section 35(6) of the Employment Act having been under NSSF and provident fund as evidenced by his payslips which the claimant produced as his evidence in court. The claim is without merit and is disallowed.

#### **Claim For Psychological Damages And Injured Feelings.**

This was hinged on claim of ill motive and alleged bribery request for promotion which was not substantiated. The court having found lawful and fair summary dismissal finds that the claim has no basis and disallows the same.

#### **Conclusion And Disposition**

43. The claimant has partially succeeded in its claim against the respondent and the court enters judgment for the grievant as follows:-
- a. Award of underpayment of salary for 12 months of Kshs 125,040/-subject to statutory deductions.
  - b. The respondent to issue the grievant with certificates of service pursuant to the provisions of section 51 of the Employment Act.
  - c. The claimant is awarded interest on award amounts at court rates ` from date of judgment
  - d. No order as to costs.
45. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 13<sup>TH</sup> OCTOBER 2022 IN OPEN COURT AT BUNGOMA.**

**J. W. KELI,**

**JUDGE**

In the presence of

Court Assistant -Brenda Wesonga

For Claimant:

For Respondent :

