



**Kenya Shoe and Leather Workers Union v Crown Industries Limited (Cause 1953 of 2017) [2022] KEELRC 12917 (KLR) (11 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12917 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1953 OF 2017  
K OCHARO, J  
OCTOBER 11, 2022**

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

**JUDGMENT**

**Introduction**

1. The claimant presented itself as a registered union within the provisions of the [Labour Relations Act 2007](#), to represent the interest of employees working in the shoe industries, tanning of hides and skins, plastics, rubber making, cushion making, shoe shops, shoe laces, polythene bags and such the respondent herein on behalf of one Vincent Akama Kaengo [the grievant] seeking the following reliefs:

a. Re-engagement to a position comparable to that which he was employed in, prior to his dismissal or other reasonable suitable work at the same wage.

In the alternative

- a. One month notice pay *in lieu of* notice, Kshs 10,000.
- b. 12 days worked, Kshs 41,380.
- c. Gratuity for 6 years, Kshs 32,850.
- d. 12 months compensation for unfair dismissal, Kshs 131,400.
- e. Certificate of service.
- f. Costs of this suit.



2. Upon being served with summons to enter appearance, the respondent filed a memorandum of appearance dated October 18, 2017 and a statement of defence dated May 2, 2018. The claim was denied in toto, the grievant's entitlement to the reliefs sought too.

### **The claimant's case**

3. The claimant presented the grievant to testify in support of its claim herein. The witness urged the court to adopt his witness statement dated September 28, 2017 as his evidence in chief and the documents that were filed herein contemporaneously with the statement of claim as the claimant's documentary evidence.
4. The grievant stated that he came into the employment of the respondent on the April 21, 2010, in its Dispatch Department, up to the December 11, 2017 when his employment was unfairly terminated.
5. At the time of the termination, he was earning a monthly basic salary of Kshs 10,950 and a house allowance of Kshs 1,646.25.
6. He testified that he was a loader in the forestated Section. A customer would place his order for commodities through the respondent's sales department, and it is after the sales department clears the order, that the matter could reach the dispatch department for loading. Once the loading of the ordered commodities into the delivery motor vehicle was done, loading documents would be generated to enable the release of the commodities for delivery to the customer.
7. The grievant testified that on the November 5, 2016 the respondent accused him that he had delivered only 10 pieces of baby chairs to its customer, [Choppies Enterprises Kisumu], instead of 100 pieces that had been loaded on motor vehicle KBV 130 W, from its premises.
8. The grievant asserted that contrary to the allegations by the respondent, he did deliver to its stated customer, the exact number of chairs that had been loaded for delivery, 10 [ten] pieces of chairs and that the customer acknowledged receipt of the same. The customer did not raise any issue over the quantity.
9. He testified that the difference on the figures [on quantity] on the invoice, and that on the LPO can only be attributed to a clerical error.
10. Subsequently, the difference on the figures became an issue, that required to be resolved. The respondent's Human Resource manager wrote him a letter requiring an explanation from him on the anomaly. He did a response.
11. The grievant asserted that after the response, the respondent did not get back to him. They did not call him before any disciplinary panel, they just terminated his employment.
12. He was not at any time called to a forum accompanied by his colleague, whereat he would defend himself against the accusation that were levelled against him.
13. The termination of his employment was without any valid reason, and in the process leading to the termination, fair procedure was not embraced.
14. He asserted that contrary to the respondent's allegation, he was only paid Kshs 15,000 which was paid into his account on December 15, 2016. He did not receive any cheque from the respondent. The amount that was paid into his account was an advance salary, and bonus.
15. In his evidence under cross examination the witness stated that after loading the commodities, he would confirm the quantity loaded, accompany the same for delivery, and at the point of delivery



- confirm the delivered goods. It was the first time the respondent was complaining about under-loading against him.
16. However, referred to a letter dated March 14, 2012, the witness admitted that the same was a warning letter over under-loading.
  17. The grievant reiterated that he was not at all given an opportunity to defend himself against the accusation.
  18. He received Kshs 15,000 which was paid into his account on the December 15, 2016, a day before his dismissal.
  19. The LPO was for 10 [ten] pieces whilst the delivery note indicated 100 [hundred] pieces, the difference can be attributed to the person who keyed in the figures on the LPO into the system, therefore multiplying the quantity by ten. The duty of inputting the figures was one that fell on the shoulders of the sales department.
  20. The witness contended that in his response, he indicated that he delivered what was requisitioned and loaded.

### **The respondent's case**

21. The respondent presented Ms Ann Maragia to testify on its behalf. The witness moved this court to adopt her witness statement dated May 2, 2018 as her evidence in chief, and admit the documents that the respondent filed under the list of documents of the even date and those that were filed under a supplementary list of November 8, 2021, as the respondent's documentary evidence.
22. The witness stated that the grievant was employed by the respondent on April 1, 2010 as a general worker in the Dispatch/Packing Department with a basic salary of Kshs 10,975 and house allowance of Kshs 1,646.25 monthly. The amount was subject to monthly statutory deductions [PAYE, NSSF, NHIF].
23. The grievant during the said employment period exhibited indiscipline and behaviour that continually violated the terms of his contract of employment. On a number of occasions particularly on the March 14, 2012, September 17, 2012 and on December 15, 2013, he was issued with warning letters, as a result.
24. On or about the November 5, 2016 he was tasked to deliver 100 [one hundred] pieces of baby chairs to the respondent's customer, Choppies Investments in Kisumu, by motor vehicle KBV 130V. However, he only delivered 10 pieces, therefore less 90 pieces.
25. The witness stated that on noting the anomaly, the client called the respondent's head office seeking a clarification. The delivery note had more chairs than those that were delivered.
26. The grievant was immediately summoned for an explanation and in response, he affirmed that he had delivered 100 pieces of baby chairs to the client, delivery which was acknowledged by the stamping on the delivery note.
27. The witness stated that on the December 9, 2016, the grievant was sent to Kisumu by the respondent with instructions to sort out the issue with the customer, by confirming the number of chairs delivered to, and those received by, the client.
28. The witness alleged that on return, the grievant confirmed that the customer had only received 10 pieces of the baby chairs instead of 100 pieces which were loaded into the vehicle. He further confirmed that he had initially lied to the respondent's management concerning the number of chairs delivered to the client.



29. The respondent got prompted to issue him with a show cause letter on the December 14, 2016. After considering his representations, the respondent decided to summarily dismiss him for the reasons that were put forth on the summary dismissal letter.
30. The respondent company settled all dues owed to the grievant prior to and subsequent to his dismissal.
31. In her evidence under cross examination, the witness stated that the customer had ordered for 100 pieces of the chairs. Further, that on the credit note the customer indicated that it had received the items as per the LPO.
32. The invoices were normally prepared by the accounts department. The accounts department was asked to give an explanation. Investigations were carried out concerning the matter, and the show cause letter was issued as a result thereof.
33. The witness admitted that she did not have any document to prove that there was a meeting whereat the grievant's conduct was discussed.
34. In her evidence in re-examination, the witness confessed that she was not sure how the order for the chairs was made. The customer indicated on the receive document that 90 chairs were not received.

#### **The claimant's submissions**

35. The claimant's submissions largely recaptured the facts of this matter and the evidence by the witnesses.
36. It was submitted that the respondent's Human Resource officer never undertook investigations on the sales department, department that was in charge of writing the delivery notes, to ascertain whether or not the anomaly was as a result of a clerical error.
37. The respondent did not place before the court any evidence to demonstrate that it did carry out a stock check to confirm whether or not the 90 chairs did leave its premises.
38. Contrary to the Provisions of Article 50 of the Constitution, the grievant was not given an opportunity to defend himself against the accusations that were levelled against him. Contrary to the requirements of Section 41 of the *Employment Act*, he was not given an opportunity to exercise his right of accompaniment contemplated under the Provision.
39. The claimant submitted that the court be pleased to uphold the findings and recommendations of the Ministry of Labour and Social Protection conciliator dated July 4, 2017, for a reinstatement of the grievant without loss of benefits.

#### **The respondent's submissions**

40. The respondent distils three key issues for determination, thus: -
  - a. Was the grievant unfairly terminated?
  - b. Whether the grievant was informed of the reasons for his termination.
  - c. Is the grievant entitled to the prayers sought in the memorandum of claim?
41. The respondent submitted that the grievant was issued with a notice to show cause to explain the anomaly. The show cause letter was based on material facts relating to the material incident. The management examined the grievant's response on the delivery of less goods to the customer contrary to the quantity indicated in the invoice, and found the same untenable hence the summary dismissal.
42. The grievant was heard before the summary dismissal.



43. The grievant had several warning letters against him, on his conduct while in the employment of the respondent. This is a relevant factor that this court should not lose sight of. Section 45[5]c] makes it a factor for consideration by a court charged with the task of interrogating whether or not a termination of an employee's employment was just and equitable.
44. It was submitted that Section 43 of the *Employment Act* requires an employer to give reasons for the termination of an employee's employment in order for the termination to be considered fair.
45. In support of this submission, the respondent placed reliance on the case of *Evans Kamandi Misango v Barclays Bank of Kenya Limited* [2015] eKLR, thus:

“To my mind the burden placed on the employer by Section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. The Halsbury's Laws Of England [4<sup>th</sup> Edition Volume 16] at page 482 expounds this principle as follows: -

“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts.

The basis of this approach [the range of reasonable test] is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take another; the function of a tribunal as an industry jury is to determine whether in particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal fails within the band the dismissal is fair; but if it fails outside the band it is unfair.....”

46. On the reasons that were brought out in the dismissal letter, one can safely hold that there was sufficient reason for the dismissal of the grievant. The grievant's action was fundamentally in breach of his obligation under his contract of employment warranting a summary dismissal.
47. The respondent argued that the grievant having been issued with a notice to show cause his claim for notice pay under Section 36 of the *Employment Act* cannot lie.
48. On the payment for 12 days worked as sought by the claimant, it was submitted that ample evidence was placed before this court demonstrating that the grievant was paid Kshs 15,000 for the month of December, 2016.
49. It was further submitted that gratuity is given to an employee at the discretion of the employer. In this matter, the claimant has not laid any basis to attract the court's direction that the employer pays the gratuity sought.

### **Determination**

50. From the material placed before this court, the following issues emerge for determination, thus: -
  - a. Whether the dismissal of the grievant from employment was fair.
  - b. Whether the grievant is entitled to the reliefs sought or any of them.



### **Whether the dismissal of the grievant's employment was fair.**

51. It is common cause that the grievant's employment was brought to an end through a letter captioned "Summary dismissal of your services" dated 16<sup>th</sup> December 2016.
52. Whenever a court is invited to interrogate fairness in a termination of an employee's employment or summary dismissal of an employee from employment, it becomes enjoined to consider two aspects. The procedural and substantive fairness. Procedural fairness has to do with the procedure leading to the decision to terminate the employment of the employee or summarily dismiss him, while substantive fairness speaks to the decision itself.
53. This court has had an occasion before, to state that the two aspects are statutory components of a fair termination or summary dismissal, and absence of any of them or both of them has a legal effect, the termination or summary dismissal shall be rendered unfair.
54. Section 41 of the *Employment Act* provides for the procedural fairness aspect. The provision commands that any employer intending to terminate an employee's employment or dismiss an employee shall inform the employee the grounds upon which the intended action is premised, allow the employee to make representations on the grounds, and subsequently consider the representations before making the decision to terminate or dismiss the employment. View should not be lost of the fact that the said Provision bestow upon the employee a right of accompaniment. The employee should be allowed to be accompanied by a union representative [if he or she is a member of a union] or with a colleague, at the time when the employer is notifying the employee of the accusations and taking his or her representations.
55. Imperative to state that it is the duty of the employer to prove that there was adherence to procedural fairness. There is ample evidence that the grievant was served with a show cause letter, and that he made a response thereto. His response was contained in the letter dated December 14, 2016. It is not difficult therefore to hold that the information component of procedural fairness was present. However, the respondent was under duty to go beyond establishing presence of this component by showing that the hearing and consideration components were present too.
56. The grievant contended that contrary to what was expected of the respondent, it did not accord him an opportunity to defend himself against the accusations. His right of accompaniment under Section 41 of the *Act* was not availed to him.
57. The respondent's witness did not place before this court any material to demonstrate that the grievant was heard before any disciplinary panel. That he was accorded an opportunity to defend himself before such a panel.
58. The respondent submitted that it is not contested that the grievant was served with a couple of warning letters. According to the respondent, in view of the issued warning letters, the grievant was heard and cannot be heard to assert that he was not granted an opportunity to be heard as contemplated in the Act. I found considerable difficulty in understanding how the warning letters that preceded the material incident can be equated to a hearing. With due respect to Counsel for the respondent, the submission is devoid of reason and logic.
59. In the upshot it is my conclusion that the respondent did not discharge the burden of proof under Section 45 [2] of the *Employment Act*. The summary dismissal was not procedurally fair.
60. Section 43 of the *Employment Act* places a legal burden on the employer to prove the reason or reason[s] for termination of an employee's employment. However, this Provision cannot be read in isolation



from the Provisions of Section 45 [2], which bestow upon the employer a further burden, to prove that the reason[s] was valid and fair.

61. The two Provisions mentioned hereinabove speak to substantive fairness, and it is through these lens that I shall interrogate whether there was substantive fairness in the determination of the grievant's employment.
62. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the court held: -

“..... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
63. It is not in dispute that the grievant was summarily dismissed from employment. Section 44 [4] of the *Employment Act* provides for actions and inactions of an employee that may amount to gross misconduct so as to justify his or her summary dismissal. However, it is important to state that the list therein is not an exhaustive list. An employer can summarily dismiss an employee on account of a conduct outside those in the catalogue for as long as the account has a characteristic as I will demonstrate hereinafter.
64. It was the respondent's case that the claimant's acts that were brought out in the summary dismissal letter namely: -
  - a. That he grievant gave false information to the management initially on the total number of baby chairs delivered to Kisumu on November 5, 2010 as one hundred [100] pieces.
  - b. That after visiting the customer in Kisumu on December 9, 2016 he changed the total number of the chairs delivered to 10 [ten] pieces from hundred [100] pieces, change which exposed him as dishonest.
  - c. He accepted to be held liable for the ninety [90] pieces of chairs that he alleged got lost on transit and agreed that his salary be deducted.
  - d. On November 1, 2016 one bag of shoes valued at Kshs 6,400 [six thousand four hundred] for Yogi Household Limited got lost on transit in his care.
65. At this point this, the court must state that it is not enough for an employer to state that an employee committed one or more of those actions obtaining in the list provided for in Section 44 [4] of the *Act*. An employee's misconduct does not inherently justify a summary dismissal unless it is “so grave” that it intimates the employee's abandonment of the intention to remain in employment. See in *Laws v London Chronicle Limited* [1959] 2AII L. 2 285, the court held:

“Since a contract of service is but an example of contracts in general so that the general law of contract will be applicable, it follows that if summary dismissal is claimed to be justifiable the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.”
66. Whether an employee's misconduct warrants dismissal requires an assessment of the degree and the surrounding circumstances, the contextual approach – *Darious Kiseu Mwamburi v Co-operative Branch of Kenya Limited* [2021] eKLR.



67. Therefore, the court is enjoined to consider real presence of the employee's alleged acts of omission or commission, the context which they occurred, and the gravity of the same.
68. This court has agonised over the accusation[s] that were levelled against the grievant, his response to the show cause letter and the admission therein that he had committed to take responsibility for the lost 90 [ninety] chairs, and conclude that if indeed the loaded chairs were ten [10] as he asserted & not 100 [one hundred] there would not have been any reason for him to commit himself to compensate for the 90 [ninety] chairs.
69. I have no reason to doubt that he gave contradictory information to the respondent's management on the number of the chairs delivered, exposing him as dishonest.
70. My above stated position is emboldened by the fact that in his evidence in chief he testified that throughout his tenure up until the dismissal date, he had not been issued with any warning letters. However, cross examined on the warning letters, the respondent's exhibits, he admitted receipt of the same. This exposed him as a person whose evidence is not creditworthy.
71. Under Section 44 [4] [c] an employee's wilful neglect to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly, shall be a ground for summary dismissal.
72. I have no doubt that the conduct of the grievant, the subject matter of the dismissal, fell under the category of the actions contemplated in the above-stated provision.
73. The court has not lost sight of the fact that the grievant testified that in his position as a loader, he would load the goods and accompany them for delivery. No doubt a position that called for trust.
74. By reason of the foregoing premises, and applying the contextual approach, I am persuaded that, the grievant was in fundamental breach of his conditions of service and that owing to the diminishment of trust the employer-employee relationship would no longer subsist.
75. In conclusion, the summary dismissal was substantively justified.

### **Of the reliefs**

76. The claimant sought that this court does direct that the grievant be re-engaged. The court takes cognizance of the fact that the relief for reinstatement or re-engagement is one of those reliefs that the court has authority to grant. However, the court cannot lose sight of the limitation that is imposed by the laws on the authority to grant the relief and more particularly that it cannot where the matter is being concluded 3 years after the termination or dismissal of an employee. In this matter the dismissal occurred almost six [6] years ago therefore, by operation of the law, it is a remedy I cannot grant.
77. Section 49 [1] [c] of the *Employment Act* provides for a compensatory award for matters where the court has found the termination or summary dismissal as unfair. The grant of the remedy is normally discretionary. It is granted considering the circumstances of each case. In this matter the court has considered that liability is attaching against the respondent, only for non-adherence to procedural fairness, that the grievant contributed to the determination of his employment and award compensation only to an extent of 4 [four] months gross salary, Kshs 50,385.
78. The claimant sought for an award of notice pay under Section 35 as read with Section 36 of the *Employment Act*. Considering the Provisions of Section 43 [3] that describes when a summary dismissal can occur and this court's holding that the dismissal was substantively fair, the court cannot have any justification to make an order for notice pay.



79. In the *Bamburi Cement Limited v. William Kilonzi* [2016] eKLR, the court of Appeal stated:

“..... The award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of the contract or upon resignation or retirement or upon death of an employee, as a lumpsum amount at the discretion of an employer.”

80. The payment being at the discretion of the employer, it can only be enforced against the employer if the same finds foundation in the contract of employment. In this matter it was not established by the claimant that the grievant’s contract of employment did provide for gratuity. I decline to make any award under this head.

81. In the upshot, I enter judgment for the grievant in the following terms: -

- a. A declaration that the dismissal of the grievant from employment was procedurally unfair.
- b. Compensation pursuant to Section 49 [1] [c] of the *Employment Act*, Kshs 50,385.
- c. Interest on [b] above at court rates from the date of this Judgment till full payment.
- d. Costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2022.**

.....

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of:

Mr. Julius Maina the for claimant.

Ms. Kibeba holding brief for Ms. Ochieng for the respondent.

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**OCHARO KEBIRA**

**JUDGE**

