



**Kenya Plantation & Agricultural Workers Union v Del Monte
Kenya Ltd (Employment and Labour Relations Cause E009 of 2022)
[2022] KEELRC 13233 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13233 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E009 OF 2022
ON MAKAU, J
NOVEMBER 17, 2022**

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT

AND

DEL MONTE KENYA LTD RESPONDENT

JUDGMENT

1. The claimant is a registered trade union and it brings this suit on behalf of her member Mr Anthony Ndavu (hereinafter called the grievant). The claimant alleges that the grievant was employed by the respondent as a general field worker on February 15, 1995 and worked diligently until April 3, 2019 when he was summarily dismissed by the respondent for gross misconduct. The claimant avers that the dismissal was unfair and unlawful and prayed for unconditional reinstatement or in the alternative the respondent be ordered to pay the grievant damages, costs and interest.
2. The respondent filed response to the claim on March 29, 2022 admitting that the grievant was its employee until it dismissed him for fraudulently soliciting and receiving money from service providers to secure porridge supply tender in the company. It further averred that the grievant was accorded an opportunity to defend himself from the said offence in writing and orally during a disciplinary hearing convened on March 29, 2019 but he failed to absolve himself from the misconduct. It denied that the grievant was earning a monthly salary of Kshs 40,955.00. Finally it denied that the grievant is entitled to the reliefs sought and prayed for the suit to be dismissed with costs.
3. The parties agreed to dispense with oral hearing and adopted the written statements by their respective witnesses plus the documentary evidence filed. They then agreed to dispose of the suit by written submissions.



Evidence

4. The claimant relied on the grievant's written statement dated February 8, 2022. In brief he stated that he was employed by the respondent on February 15, 1995 as General Field Worker in the Agriculture Department. In November 2018, his workmate Mr Jackson Ngugi invited him to meet his friend at Kenol. They then met the friend with six other people including their workmate Mr Kinuthia. After introduction, one of the people said he was interested in the tender for supply of porridge to the company employees and the grievant informed him that one is required to apply for tender in writing to the company for consideration.
5. The grievant further stated that when the time for him to leave came, one of the men gave him an envelope and told him that it was his lunch and transport reimbursement. Upon reaching home he found that the envelope contained Kshs 20,000.00. Again on December 25, 2018, Mr Kinuthia called him and enquired about his Christmas and thereafter sent to him Kshs 4,000.00.
6. The grievant went on to state that in March 2019, Mr Henry Kamau Mwaniki from Mwithi Village Murang'a County reported to Ngati Police Post that between October and December 2018, he gave out Kshs 240,000.00 to Mr Jackson Ngugi and Mr Michael Kinuthia, employees of the respondent to aid in securing tender for supply of porridge to the respondent's plantation employees. Thereafter, the grievant was served with a show cause letter on March 26, 2019 charging him with involvement in a fraudulent act to facilitate a supplier to secure tender to supply porridge to the respondent company.
7. The grievant confirmed that he responded to the show cause letter and on March 29, 2019 he was invited to attend a disciplinary hearing and he complied. Thereafter he was served with a letter for summary dismissal dated April 3, 2019 citing the reason as gross misconduct contrary to section 44 of the *Employment Act*, collective bargaining agreement and the company code of conduct and business ethics policy. He appealed against the dismissal but the appeal failed.
8. Thereafter the claimant union reported the matter to the Labour Office for conciliation and upon hearing the parties, the conciliator recommended that the grievant be reinstated or his dismissal be reduced to normal termination. He maintained that his salary at the time of the dismissal was Kshs 40,955.00 and in total he served for 24 years.
9. The respondent adopted the statement of its Industrial Relations Head Ms Martha Atudo dated March 24, 2022. In brief the witness admitted that the grievant was employed by the respondent as a General Field Worker in the agricultural department until April 3, 2019 when he was summarily dismissed for gross misconduct of soliciting money from a service provider in order to help him secure a tender to supply porridge to the respondent.
10. She further stated that the grievant was served with a show cause letter and he responded in writing. Thereafter he was invited for disciplinary hearing on March 29, 2019 and he attended but he failed to absolve himself from the alleged misconduct and he was summarily dismissed from service. He appealed by letter dated April 8, 2019 but the same was dismissed because there was sufficient and justifiable grounds for the dismissal, namely, involvement in fraudulent act of receiving money from service provider to secure tender from the respondent for supply of porridge.
11. The witness further stated that the matter went to the Ministry of Labour for conciliation but the parties disagreed and on March 18, 2021 parties were given room to take further action.
12. She further stated that, after the dismissal, the grievant was paid for the days worked and was also issued with a certificate of service as per the dismissal letter. She contended that the claimant is not entitled to



the reliefs sought because he was lawfully dismissed from employment. Therefore, she urged the court to dismiss the suit with costs.

Submissions

13. The claimant submitted that the dismissal of the grievant was not substantively fair because the money he received was not a bribe but a token of appreciation from the people he was requested to meet by his workmate Mr Ngugi. It was further reiterated that the money was not received as inducement to help secure a tender for supply of porridge to the company as alleged. It was also argued that the grievant was not in a position to secure a tender for the supply of porridge to the company.
14. The claimant contended that the respondent has not proved that the money given to the grievant was to facilitate the giver to secure a tender to supply porridge to the Respondent. In the claimant's view, the allegations against the grievant were not substantiated and therefore they remain just allegations.
15. The claimant further submitted that the grievant's rights under article 50 of the *Constitution of Kenya* were disregarded during the disciplinary hearing session as the same was not aimed at realizing that natural justice and fairness was observed. It was further submitted that explanations given by the grievant at the disciplinary hearing and his appeal were not considered. It was submitted that the employer did not take into consideration the grievant's long service of 24 years without any warning letter. In brief the claimant submitted that fair procedure was not followed contrary to section 41 of the *Employment Act*.
16. Finally the claimant submitted that the grievant is entitled to the reliefs sought because his dismissal was based on an invalid reason and the procedure followed was not fair. For emphasis, reliance was placed on the Court of Appeal decision in the case of *Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR, *Raymond Cherokewa Mrisha v Civicon Limited* [2014] eKLR, *Loice Otieno v Kenya Commercial Bank Limited* [2013] eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the courts were unanimous that termination of employment by the employer is unfair if it is not based on a valid reason and/or fair procedure was not followed.
17. On the other hand, the respondent submitted that the dismissal of the grievant was fair because he was accorded hearing as required under section 41 of the *Employment Act* and that the reason for the dismissal was justifiable. It contended that the grievant received Kshs 20,000.00 from a third party who declared interest in obtaining tender for supply of porridge to the Respondent.
18. It submitted that the grievant admitted that he indeed received the money which he call lunch and transport reimbursement. The respondent maintains that it genuinely believed that the said money was a facilitation to give the third party the tender to supply porridge to the respondent.
19. For emphasis, the respondent relied on the case of *Alphonse Machanga Mwachanya v Operation 680 Ltd* [2013] eKLR, *Amos Ogamba Bosire v Wakenya Pamoja Savings Credit Society Ltd* [2017] eKLR and *Walter Ogal Auro v Teachers Service Commission* [2013] eKLR where the courts were unanimous that termination of employment by the employer is unfair unless it is grounded on valid and fair reason and that fair procedure was followed.
20. Finally the respondent submitted that the dismissal of the grievant was done in compliance with the law and it was justified. Consequently the court was urged to dismiss the suit with costs.

Analysis and Determination

21. Having considered the pleadings, evidence and submissions, it is evident that the grievant was employed by the respondent until April 3, 2019 when he was dismissed for gross misconduct. Section



45 of the Employment Act makes the following provisions regarding termination of employment contract –

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

22. In view of the above provisions, the issues for determination in this suit are;
- a. Whether the reason for the dismissal was valid and fair.
 - b. Whether a fair procedure was followed.
 - c. Whether the claimant is entitled to the reliefs sought.

Reason for the Dismissal

23. In this case the reason for the Dismissal is contained in paragraph one and two of the Dismissal letter dated April 3, 2019, thus:

“Reference is made to the incidence of March 20, 2019 and investigations pertaining to a complaint on solicitation and payment to secure provision of porridge and tea tender for a third party in Del Monte Kenya Limited.

During investigations it was established that you were involved in a fraudulent act of receiving money from the complainant against Employment Act section 44, parties collective bargaining agreement and the company code of conduct and business ethics policy.”

24. The claimant has admitted that he received Kshs 20,000 from a stranger who had declared his interest in getting a tender for supply of porridge to the respondent company. He made the admission in his written response to the show cause letter and in his defence during the disciplinary hearing. He has also admitted the same in his pleadings, written statement and written submissions herein. He pleads innocence but the employer genuinely believes that the money was given as a bribe to facilitate the granting of the tender for supply of porridge.

25. Section 43 of the Employment Act provides that:

- “(1) (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.



- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
26. The court has considered the circumstances under which the money was received by the grievant from a stranger as lunch and transport reimbursement. The claimant further stated that he was not in capacity to award tender in the company. But after careful consideration, this court is not satisfied by the explanation given by the grievant. First, the amount of Kshs 20,000 is substantial amount of money to be spent on one person for lunch and road transport.
27. Secondly, during the disciplinary hearing, the grievant stated that in January 2019, Michael Kinuthia asked him to plan for a strike because the person who gave them the money is demanding refund. The said statement was made in the grievant’s response to the show cause letter where he stated that the people who gave them the money needed a strike for a boycott of the porridge.
28. Putting all factors together, the court finds that the employer has established that the grievant received money fraudulently from a service provider with intention to facilitate awarding of a tender for supply of porridge to the company. Even though the grievant was not in a capacity to award the said tender, he was a gun for hire to cause boycott of services from the tendered supplier so that the new people could get the tender. Consequently, the court is satisfied that the respondent has proved that the reason for the dismissal of the grievant was valid and fair since it related to the grievant’s conduct.

Procedure Followed.

29. The minimum procedural requirement is set under section 41 of the *Employment Act* which provides that:
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
30. In this case, the respondent has adduced evidence to prove that it accorded the grievant an opportunity to the grievant to defend himself both in writing and orally before a committee. The grievant also admitted that he was served with a show cause letter and he responded in writing. He further admitted that he was invited to a disciplinary hearing on March 29, 2019 and he defended himself. He also admitted that he wrote an appeal but the same was declined and the dismissal upheld.
31. The above facts confirms that the grievant was informed by the employer the reason for which his dismissal was being considered and that he was also afforded a fair opportunity to defend himself before the dismissal. Consequently, the court is satisfied that the employer has proved that the dismissal was done in accordance with a fair procedure as required under section 41 and 45 of the *Employment Act*.



Reliefs

32. In view of the finding that the dismissal of the grievant was grounded on a valid and fair reason and that a fair procedure was followed, the court holds that the dismissal was fair and lawful. Consequently, the claimant is not entitled to reinstatement to his employment or compensation under section 49 of the Act.
33. I gather support the case of *Walter Ogal Anuro –v- Teachers Service Commission* (2013) eKLR where the court held that:
- “ 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 to effect the termination.”
34. Again in the case of *Pius Machafu Isindu vs. Lavington Security Guards Limited* [2017] eKLR the Court of Appeal stated as follows;
- “ There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination / dismissal (section 43); prove reasons are valid and fair (section 45)... among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
35. The court will also not grant the prayer for leave, leave travelling allowance and gratuity because the same lacks particulars and have not been proved by evidence.
36. In the end the suit is dismissed with costs for lack of merits.

DATED, SIGNED AND DELIVERED AT NYERI THIS 17TH DAY OF NOVEMBER, 2022.

ONESMUS N MAKAU

JUDGE

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

