



**Wairimu v Eastern Produce (K) Limited (Siret Estate) (Cause 206 of 2017)  
[2022] KEELRC 13055 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13055 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 206 OF 2017  
CN BAARI, J  
NOVEMBER 3, 2022**

**BETWEEN**

**DORCAS WAIRIMU ..... CLAIMANT**

**AND**

**EASTERN PRODUCE (K) LIMITED (SIRET ESTATE) ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant lodged her suit vide a Statement of Claim dated May 11, 2017, and filed on May 17, 2017. She seeks a declaration that her termination from service was unlawful, unprocedural and unfair. She further seeks that she is issued with a certificate of service, compensation for unfair termination, cost of this suit and Interests at court rates from the time of filing suit until payment in full.
2. The Respondent entered appearance on July 20, 2017, and filed a memorandum of defence on August 2, 2017, and subsequently, and with the leave of the court, filed an Amended Memorandum of Defence on March 15, 2022.
3. The matter was first heard on June 27, 2022, when the Claimant testified in support of her. She adopted her witness statement and produced a bundle of documents filed in the matter as exhibits supporting her case.
4. On the same date, the Respondent called two witnesses, namely, Nicholas Maiwo and Dennis Gitaka, to testify on her behalf. The witnesses adopted their respective statements and produced documents filed in the matter in support of the Respondent's case.
5. Both parties closed their cases on the same date paving way to filing of submissions.
6. The Respondent filed submissions. The Claimant did not.



## **The Claimant's Case**

7. The Claimant's case is that she was employed by the Respondent as a Tea Plucker in the Respondent's Company from 10 May, 1996. It is her case that at the time of her unlawful termination, her salary was Kshs.13,000.00 per month excluding house allowance and other allowances.
8. It is the Claimant's case that she served the Respondent with dedication and without any warning or lawful warning in her employment records, until her unfair termination from service on December 7, 2016. The Claimant further states that her termination was made without any lawful reason and/or justification.
9. The Claimant avers that the Respondent summarily terminated her services on allegation that she had participated in an illegal strike which allegations are not true. It is her further case that the particulars of the alleged illegal strike were not given to her prior to her termination.
10. The Claimant states that on December 7, 2016, General Service Unit officers (GSU) were sent by the Respondent to evict her from her house, thus severing all avenues of redress with the Respondent.
11. The Claimant states that her termination was made without investigation being undertaken and that no evidence of such investigation was availed to her to enable her formally respond on the allegations of being a mastermind of the alleged illegal strike.
12. It is the Claimant's case that she was never accorded a fair hearing nor an opportunity to call a witness in her defence. The Claimant further contends that there was no disciplinary action carried by the Respondent, and that if there was any, it was not procedurally done as provided in the [\*Employment Act, 2007\*](#).
13. The Claimant states that the Respondent terminated her services without following due procedure as stipulated under the [\*Employment Act, 2007\*](#), for having failed to give reasons for termination and for failing to prove that the reason for the termination were fair reasons.
14. The Claimant prays that the court makes a declaration that her termination from employment was unlawful, unprocedural and unfair. she further prays that the Respondent is ordered to issue her with a certificate of service, cost of this suit and interest and compensation for unfair termination.

## **The Respondent's Case**

15. The Respondent's case is that she engaged the Claimant on various fixed term contracts, the last one being a fixed term employment contract which ran from September 10, 2016, to December 31, 2016, on a salary of Kshs.11,616.20 monthly, inclusive of rest days.
16. The Respondent states that in addition to the fixed term contract, the Claimant was also bound by the terms of the Collective Bargaining Agreement ("CBA") that was in force at the time.
17. It is the Respondent's case that the Claimant discharged her duties with the Respondent until her summary dismissal on December 7, 2016, for participating in an unlawful strike.
18. The Respondent further states that on April 23, 2015, the Kenya Plantation and Agricultural Workers Union (hereinafter the "Union") filed Industrial Cause No. 128 of 2015, Kenya Plantation and Agricultural Workers Union v. Siret Tea Company and Others seeking the Court's assistance to resolve pending issues in the 2014/2015 Collective Bargaining Agreement (hereinafter "CBA").
19. The Respondent states that during the pendency of the case, members of the Union engaged in an unlawful strike and absented themselves from work without lawful cause.



20. It is the Respondent's further case that she applied to Court and obtained orders on July 1, 2016, restraining its employees from engaging or continuing with the strike. The Respondent further states that on November 14, 2016, the Employment and Labour Relations court sitting at Kericho, delivered a judgment in which it awarded the Union *inter alia* a 15%:15% wage increase in respect of the years 2014/2015.
21. The Respondent states that she filed an application for stay of execution of the aforementioned Judgment at the Court of Appeal pending the hearing and determination of the appeal in Civil Application Number 83 of 2016 (UR No. 61 of 2016). The said application was certified urgent and came up for hearing on November 17, 2016 on which date the Court of Appeal granted stay of execution of the judgment.
22. It is the Respondent's case that the orders of the Court of Appeal were granted by consent of both the Union and the Respondent. The Respondent states that she informed her employees of the stay of execution by having the Consent and Order published on various notice boards within its tea estates.
23. The Respondent avers that on November 28, 2016, the Union began to incite its members and together with those employed by the Respondent to proceed on strike in protest, and to demand the immediate implementation of the judgment award.
24. It is the Respondent's contention that on various dates from 28<sup>th</sup> November, to December 6, 2016, the Union's members and employees benefitting from the CBA, engaged in an un-procedural strike and refused to work.
25. It is the Respondent's case that the employees marched through various estates owned by the Respondent demonstrating and destroying property including tea plants, thereby paralysing the Respondent's operations and threatened the Respondent's representatives with physical harm.
26. The Respondent states that to address the situation, and ensure resumption of operations, she issued notice to all employees including those at the Siret Tea Estate where the Claimant was working on November 28, 2016, notifying them that absenteeism from work without lawful cause amounted to gross misconduct warranting dismissal and loss of benefits in accordance with Clause 29(a) of the CBA.
27. The Respondent states that on December 6, 2016, she filed Kericho ELRC No. 168 of 2016 *Siret Tea Company Limited & Others v KPAWU* based on the violent and unlawful strike by its employees, and the court issued orders restraining the members of the Union from *inter alia* continuing in any string and destruction of property.
28. It is the Respondent's case that simultaneous with the court order, she issued a Return to Work Ultimatum demanding that all employees return to work by 10.00am, failing which disciplinary action would ensue.
29. It is the Respondent's case that the Notice issued on November 28, 2016, on gross misconduct was also re-issued to all employees at the Siret Tea Estate, this time communication both in English and Kiswahili.
30. The Respondent avers that at 10.00 a.m on the same date, the Respondent issued warning letters to all employees stating that they were required to return to work by 10.30am that day. The Respondent further states that the employees were also notified that disciplinary action would ensue for employees who failed to return to work as directed.



31. It is the Respondent's case that the Claimant was identified as one of the employees who participated in the aforementioned illegal strike and failing to report to her work station in spite of the various notices issued by the Respondent.
32. The Respondent states that the Claimant was requested to attend a disciplinary hearing at the Respondent's offices on December 7, 2016, to show cause why her employment contract should not be terminated. It is the Respondent's case that Notices were also issued to the Union in this regard and were placed on public notice boards with a copy to all employees.
33. The Respondent states that the Claimant was at all times aware of the circumstances and she failed, neglected and/or refused to resume her duties.
34. The Respondent states that the Claimant attended the disciplinary hearing held on December 7, 2016, and that she was given a fair and reasonable opportunity to defend herself.
35. It is the Respondent's case that the reasons the Claimant provided for absencing herself from work were unsatisfactory and thus the resolution to summarily dismiss her for gross misconduct.
36. The Respondent states that the Claimant was informed of her right of appeal against the decision to dismiss her, but that she willingly declined to take up.
37. The Respondent states that the Claimant was issued with a termination letter dated December 7, 2016, and her terminal dues were calculated and paid accordingly.
38. It is the Respondent's position that the Claimant is not entitled to the sums claimed in her Statement of claim.

### **The Respondent's Submissions**

39. The Respondent submits that this court finds the Claimant's dismissal justified as it had, on a preponderance of probability, sufficient reason to believe that the accusations levelled against the Claimant were true.
40. The Respondent submits that despite having been informed of the disciplinary action that would ensue, the Claimant wilfully and deliberately proceeded on the unprotected strike.
41. The Respondent submits that Section 43(2) of the [Employment Act, 2007](#) , provides that the reasons for termination are the matters that the employer at the time of termination genuinely believed to exist and which caused the employer to terminate. The Respondent further submits that as at December 6, 2016, it was her genuine belief that the Claimant had participated in an unlawful strike which necessitated an inquisition into the veracity of the claims by way of a disciplinary hearing.
42. The Respondent submits that the Claimant's termination was procedurally fair within the meaning of Section 41 of the Act, and that due process was followed before a decision was made to terminate her employment.
43. The Respondent submits that the Claim is not entitled to the reliefs sought in her Memorandum of Claim.

### **Analysis and Determination**

44. I have considered the pleading, the parties' oral testimonies and the submissions filed in the matter. The issues that fall for determination are:
  - i. Whether the Claimant was unfairly terminated; and



- ii. Whether the Claimant is deserving of the remedies sought

### **Whether the Claimant was unfairly terminated**

45. To establish fairness or lack thereof of a termination or dismissal, the court's role is to examine the Employer's adherence to the provisions of Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007. These provisions obligate an employer to abide by the tenets of both procedural and substantive fairness.
46. The Claimant's case is that she was dismissed unfairly, unprocedurally and unlawfully, for reason that the Respondent did not follow due process in her dismissal, for having failed to give reasons for her termination, and for failing to prove that the reasons for the termination were fair reasons.
47. The Claimant further contends that she was not accorded a fair hearing nor an opportunity to call a witness in her defence.
48. The return to work notice dated December 6, 2016, is said to have been issued at 9:30 a.m, and requiring the employees, including the Claimant to report to work by 10:00 a.m of the same day. The notice was a general notice to all the employees of Siret Tea Company.
49. On the day notice was issued for the Claimant and her co-workers to return to work, she was issued with a show cause letter inviting her to attend a disciplinary hearing on the December 7, 2016, for allegedly participating in an illegal strike, absence from duty and failure to follow instructions from management.
50. The Claimant was then dismissed summarily on December 7, 2016.
51. As concerns fair procedure, Section 41 of the *Employment Act*, 2007, requires that an employer, before terminating/dismissing an employee on the ground of misconduct, poor performance or physical incapacity, explains to the employee in a language the employee understands, the reasons for which the employer is considering termination.
52. The hearing of an employee before termination, is both a statutory and a constitutional requirement. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal stated:
- “Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct. The court stated that four elements must be discernable for the procedure to pass:
- a. an explanation of the grounds of termination in a language understood by the employee;
  - b. the reason for which the employer is considering termination;
  - c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
  - d. hearing and considering any representation by the employee and the person chosen by the employee.”
53. These requirements that have come to loosely be referred to as the minimum standards of fair hearing, are express provisions of the law that the employer is required to demonstrate compliance with as a matter of factual evidence.



54. The notice to show cause addressed to the Claimant, was as confirmed by the Respondent, issued on December 6, 2016, and the decision to terminate the Claimant reached in a sitting held on December 7, 2016, just a day after the notice.
55. The notice to return to work issued to the employees of the Respondent that included the Claimant, was said to have been issued at 9:30a.m, and required that the employees report to work at 10:00.am of the same date. In my view, a thirty (30) minutes notice to employees to report to work is unreasonable, bearing in mind that service of the notice was effected by pinning the same on the Respondent's notice Board.
56. Further, there was no proof that the Claimant and her co-workers received the return to work notice before the show cause letter that was issued in quick succession, having come on the same date that the Claimant was required to report to work.
57. The return to work notice and the notice to show cause, came just a day to the purported hearing, and the subsequent dismissal. In my view, a summary dismissal premised on such short notices is unlawful and unfair. It was not humanly possible for the Claimant to prepare any meaningful representation, procure a representative or witness within a day in readiness for the hearing.
58. It is my considered conclusion that the Respondent did not make effort to comply with the statutory minimums of fair hearing.
59. I find and hold that the Claimant's dismissal failed the procedural fairness test, and hence unfair.
60. On whether the Respondent met the substantive fairness test when dismissing the Claimant, the answer lies in the reasons for the Claimant's dismissal.
61. Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair and prove that the grounds are justified (See *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR) .
62. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee.
63. The Respondent's assertion is that as at December 6, 2016, it was her genuine belief that the Claimant had participated in an unlawful strike, which necessitated an inquisition into the veracity of the claims by way of a disciplinary action.
64. The consent order staying execution of the judgment in Kericho ELRC No. 128 of 2015 between *KPAWU v Eastern Produce Kenya Limited & 3 Others*, were subject to implementation of 7% and 8% wage increment that was agreed for the years 2014 and 2015. Further, the orders of injunction were directed at the Union and not specifically at the Claimant.
65. In *British Leyland v Swift* (1981) I. R. L.R 91, Lord Denning describe the test of what a reasonable employer could or could not do in the following words:

“The correct test is: was it reasonable for the employers to dismiss?

If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.....”



66. In my view, for the Respondent to summarily dismiss the Claimant on the basis of a strike that was called by her union and premised on court orders that were directed at the union, and for which the Respondent had herself not met her part of the bargain, is unreasonable.
67. I find and hold that the Respondent's reasons for dismissing the Claimant are neither valid, fair nor justified. The dismissal failed the substantive fairness test.

### **Whether the Claimant is deserving of the remedies sought**

68. The Claimant's prayers before this court are for a declaration that her termination from service was unlawful, unprocedural and unfair, issuance of a certificate of service, compensation for unfair termination, cost of this suit and Interests at court rates from the time of filing suit until payment in full.
69. The Court has found that the Claimant's dismissal fell short of the both the procedural and the substantive fairness test. To this end, a declaration is hereby made that the Claimant's dismissal is unlawful and unfair.
70. On the prayer that the Respondent be ordered to issue the Claimant with a certificate of service, the court record show that the Claimant was issued with a certificate of service dated December 14, 2016. The claim fails and is dismissed.
71. In regard to the claim for compensation for unfair termination, the court having found the Claimant's dismissal unlawful and unfair, entitles her to compensation in accordance with Section 49 and 50 of the *Employment Act*. (See *Benjamin Langwen v National Environment Management Authority* (2016) eKLR.
72. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the trial judge must justify or explain why a Claimant is entitled to the maximum award.
73. The Claimant was in the service of the Respondent from the year 1996 to December, 2016. In *Alfred Muthomi & 2 Others v National Bank of Kenya Limited* [2018] eKLR the Court held that in granting 12 months of salary compensation for unfair termination, it considered the Claimants long service.
74. The Claimant gave the Respondent 20 years of her youthful service, which in my opinion justify a maximum award. The Claimant is awarded 12 months' salary equivalent as compensation for unfair dismissal.
75. On the claim for pay in lieu of dismissal notice, it is evident that the Claimant was not issued with notice of the dismissal. The claim is merited and is hereby allowed.
76. The Respondent has not shown that the Claimant was paid service pay at the time of her dismissal and the same is hereby awarded.
77. The claims for unpaid rest days were not proved.
78. In sum, I make the following orders:
  - i. A declaration that the Claimant's dismissal is unfair.
  - ii. The Respondent to pay the Claimant 12 months' salary as compensation for unfair dismissal at Kshs. 139,394.40/-
  - iii. One month's salary in lieu of notice at Kshs. 11,616.20/-



- iv. Service pay at Kshs. 110,295/-
- v. Costs of the suit and interest thereon until payment in full.

79. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

Ms. Chumo h/b for Mr. Kirwa for the Claimant

Ms. Onyango present for the Respondent

Ms. Christine Omollo - C/A

