



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 82 OF 2017**

**IBRAHIM MUKOLWE.....CLAIMANT**

**VERSUS**

**BUTALI SUGAR MILLS LTD..... RESPONDENT**

**JUDGMENT**

1. Ibrahim Mukolwe (the Claimant) sued Butali Sugar Mills Ltd (the Respondent), alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Memorandum of Reply denying breach of contract or that the termination of the Claimant's employment was unfair. The Claimant joined issue with the Reply.
3. The Cause was heard on 4 March 2020, when the Claimant testified and 17 May 2021, when the Respondent's Human Resources Manager testified.
4. Pursuant to Court directions, the Claimant filed his submissions on 16 June 2021. The Respondent's submissions which should have been filed by 17 July 2021, were not on record (the Court will consider the initial submissions filed by the Respondent when filing the Response on 7 July 2017).
5. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

**Procedural fairness**

6. Section 35(1) of the Employment Act, 2007 requires the employer to issue a written notice of termination of employment while section 41 the Act obligated the employer to hear representations from the employee before deciding whether to terminate the employment contract.
7. The Respondent issued a show-cause notice dated 1 April 2014 to the Claimant. The allegation against the Claimant was set out in the letter, and he was requested to respond in writing, which he did.
8. The Respondent then invited the Claimant to attend a disciplinary hearing, and he appeared for the hearing on 23 April 2014. Union representatives were present but left the hearing without notice.
9. Despite being notified of the charges in the show-cause notice and being requested to respond in writing and appearing for an oral hearing, the Claimant asserted that he was not afforded an opportunity to be heard.
10. On the basis of the evidence on record, the Court finds that the Respondent was in compliance with the statutory tenets of procedural fairness.

**Substantive fairness**

11. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent was expected to prove the validity and fairness of the reasons leading to the termination of the Claimant's employment.

12. The reason which led to the termination of the Claimant's employment was that he had been found on 31 March 2014 with 20 litres of diesel which he intended to take out of the Respondent's premises.

13. The Claimant stated in his written response that his supervisor requested him to give the jerry can of diesel to someone he would send and that when the person came, he handed him the diesel, whereupon he was arrested by guards.

14. The Respondent's witness testified that the Claimant was arrested by a security guard while in the process of handing over the jerry can of diesel to a colleague.

15. The Claimant did not attempt to explain where the diesel came from. He was caught red-handed by a security guard.

16. The Court finds his explanation that a supervisor had instructed him to give the diesel to another person an afterthought after he was red-handed.

17. The Court finds that the Respondent established the existence of valid and fair reasons to terminate the Claimant's employment.

18. Compensation and salary in lieu of notice are thus not available remedies.

### **Breach of contract**

#### **Leave**

19. The Claimant sought Kshs 5,540/- on account of accrued leave.

20. The Respondent did not produce any records as contemplated by section 10(3) of the Employment Act, 2007 to show that *pro-rata* leave was paid.

21. The Court will allow this head of the claim.

#### **Service pay**

22. A copy of the Claimant's payslip produced in Court shows he contributed to the National Social Security Fund.

23. By dint of section 35(5) & (6) of the Employment Act, 2007, he is not eligible for service pay.

#### **Certificate of Service**

24. The Claimant did not rebut the Respondent's witness testimony that a certificate of service was issued. If he did not collect it, he should.

#### **Conclusion and Orders**

25. The Court finds and declares that the termination of the Claimant's employment was fair.

26. However, the Court finds in favour of the Claimant in respect to accrued leave and awards him:

(a) Accrued leave                      Kshs 5,540/-

27. The Claimant has only succeeded partially. No order on costs.

28. The Court regrets that the judgment could not be delivered on 3 November 2021 due to other official engagements.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

#### **Appearances**

For Claimant Mr Kirwa instructed by Mwakio Kirwa & Co. Advocates

For Respondent Mr Ouma instructed by the Federation of Kenya Employers

Court Assistant Chrispo Aura