



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Cause 149 of 2012**

**KENYA UNION OF COMMERCIAL**

**FOOD & ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**DELMONTE (K) LIMITED.....RESPONDENT**

**JUDGEMENT**

The Claimant has filed Suit on behalf of forty two (42) grievants alleging victimization and unfair dismissal by the respondent. She prays for unconditional reinstatement of the grievants to their employment and any further reliefs envisaged under section 49 of the employment Act. The Respondent has denied liability and contented that the grievants were guilty of illegal activity during the workers strike in October 2010 for which they were accorded a disciplinary hearing before dismissal. The case was on diverse dates between 25.4.2012 and 17.12.2012 when David N. Kagori testified as CW1 for the claimant and David Musudi testified as RW1 for the Respondent. CW1 told the court that he was employed by the respondent on 3.3.1980 as an Artisan. He was also a shop Steward and first Vice Chairman for the claimant. That he was dismissed on 21.10.2010 without being accorded any disciplinary hearing or even without being served with a show cause letter. That his rights under section 41 of the Employment Act were denied before dismissal. That he reported to work on 21.10.2010 and the guards at the gate escorted him to the respondent's office where the Personnel Manager gave him a dismissal letter. That he reported the matter to the claimant who in turn reported a dispute with the Labour Minister for conciliation. The Conciliator made his findings and a report. According to the CW1, the workers went on strike on 12.10.2010 which led to summary dismissal of workers on 14.10.2010 and afterwards a consent court order, Appendix 4 in which it was agreed that the workers were to return to work unconditionally except for 48 of them who would face disciplinary action. That of the said 48, seven were reinstated to their work but the rest dismissed without hearing. According to CW1, nobody was arrested or charged by the police for any illegal activity as alleged by the respondent. That in his dismissal letter, he was not accused of destroying any property. That during the strike period he was unwell and at the hospital. That he had no control over the 1700 striking workers. That only 41 were dismissed out of which 12 were Shop Stewards.

On cross examination, he confirmed that he was conversant with grievance handling in the respondent and referred to the CBA appendix 1. That only the General Secretary of the claimant can serve a strike notice to the respondent after amicable settlement of the grievances fails. He testified that the dismissal letter of 21.10.2010 accused him of participating in illegal activities but which activities were not specified. That the consent order dated 19.10.2010 reinstated 1660 workers who had been dismissed, 40 more who were involved in illegal activities were subject to appropriate disciplinary action.

He admitted that the grievants were the ones accused of participating in unlawful activities. He however denied acts of vandalism or obstruction of other workers from going to work. He was not able to recognize the car in the photographs 2 and 3 due to lack of number plates but he could recognize plates showing electricity wires being okay, people in photo 7 and 8 who were holding hands singing outside the respondent's gate. He could also see police officer in photo 9. According to him the photographs were for the striking workers but they did not indicate any violence or breach of the law.

Talking for the other greivants as their shop stewards, he contended that they received show cause letter after dismissal. That he also confirmed from the claimant's branch office the grievant did not receive show cause letters before dismissal. He admitted that only 5 of the 48 responded to the show cause letters and were reinstated.

That a security officer Mr. Thomas Nyamoti, recorded his statement on 9.12.2010, 3 months after dismissal. He denied that power supply was interfered with as alleged by Mr. Omolo in his statement, appendix 2. He further denied the statement by Omolo on grounds that the distance and the negotiation cover between Hanging Zone and the transformer prevented one from seeing properly. He concluded by saying that the dismissal was discriminatory on ground of office held in the union and ethnicity. On the other hand, RW1 told the court that he was in charge of Environment, Health and Safety. He was not sure whether or not a strike notice was served before the strike. Nevertheless he testified that the strike went on and the participants were dismissed. That letter, a consent order appendix15 was recorded on 19.10.2010 reinstating all the striking workers except 40 who were subjected to appropriate disciplinary actions for participating in unlawful activities.

According to him, the illegal activities included vandalizing cars, preventing other people from attending their work, disconnecting power supply to the factory, preventing conciliators from accessing the factory and interfering with the general public vehicles, all which led to calling for security. He relied on photograph in appendix 24 of the response.

That he relied on the CCTV footage and the statements given by witnesses to identify the culprits. He however told the court that the CCTV footage had disappeared mysteriously. He denied that the culprits were dismissed without hearing. He contended that they were first given a show cause letter to defend themselves which looked like the sample annexed as appendix 1A dated 21.10.2010.

That some employees responded and after consideration they were either dismissed or reinstated. That some like CW1 never responded and were dismissed according to some information from the office. He relied on a statement of the grievants on page 14 of the Response to prove that there was unlawful activities. That according to him the initial dismissal had been set aside, all workers reinstated by consent court order and later a new disciplinary process done starting with show cause letter being given and thereafter dismissal as per appendix 12 to the claim dated 29.10.2010.

He denied that the union officials were being targeted in order to distablize the union. That the respondent did not have bad blood with the shop steward. That although Mr. Chombo was on leave, statements showed that he was present. He denied that the respondent wanted to meet the retrenchment target he commended in 2008 though the dismissal of the grievants.

On cross examination, the witness confirmed that the firm workers officially use gate number 4 which was 100 – 150 metres away from the main gate. He confirmed that although strike started on 12.10.2010 the police were called in on 14.10.2010 but he could not confirm whether any arrests were made. That after the consent order identified 40 employees for disciplinary actions, the RW1 said that HR Officers served Show Cause letters on the Union members and disciplinary proceedings followed. He admitted that there was no evidence of a letter inviting the grievants to a disciplinary hearing and there are no minutes for such hearing if any were conducted. He confirmed that letter dated 21.11.2008 (Appendix 16) sets out the procedure for hearing. He also confirmed that after the show Cause letter, the

respondent did not write the grievants for disciplinary hearing before dismissal and as such the disciplinary procedure was not followed.

On further cross-examination he admitted that it was not possible to tell who did the vandalism during the strike but some people were identified possibly by security officers or supervisors. That the photographs only showed vandalism but not who did it. That the statement dated 9.12.2010 was recorded after the dismissal of the grievants. He confirmed that the vacancies left by the grievants have already been filled with new officers.

He also confirmed that CW1 and Gregory Mweu were not invited for disciplinary hearing after the Show Cause letter. He also confirmed that he was involved in the investigation because that matter fell within his docket of workers safety.

After the close of the testimonies, the two parties filed detailed written submissions for which the court remains grateful. I have carefully read the pleadings and considered the evidence adduced by the parties and the closing submissions. I have no doubt about my jurisdiction to preside over the dispute before me by virtue of Article 162(a) of the Constitution and section 12 of the Industrial Court Act. It is admitted in pleadings and evidence that the grievants were employed by the respondent in her factory at Thika. It is also not indispute that about 1700 workers went on strike between 12<sup>th</sup> – 19<sup>th</sup> October 2010 and were dismissed for absconding duty. It is also not in dispute that the strike was ended and all workers reinstated to their employment by a consent court order dated 19.10.2010 in Industrial Cause No. 1243 of 2010. it is also not in dispute that about 40 of the striking workers (not named) were to be subjected to appropriate disciplinary action for participating in unlawful activities.

The issues for determination are;-

1. Whether the grievants were unfairly dismissed from employment?

2. Whether the reliefs sought ought to be granted?

To answer the first issue, I am guided by section 47(a) of the Employment Act (The Act) which apportions the burden of proof between an employee and employer. Thus, the employee is to prove that unfair termination of employment or wrongful dismissal has occurred while the employer is required to justify the grounds for termination of employment or wrongful dismissal.

The evidence by the claimant is to the effect that the issue of participating in an illegal strike was settled vide consent order dated 19.10.2010 in Industrial Cause No. 1243 of 2010. That thereafter they were entitled to appropriate disciplinary hearing under section 41 of the Act before dismissal for the alleged participation in unlawful activities during the strike. CW1 has denied any service of neither Show Cause letter nor invitation to attend disciplinary hearing under section 41 of the Act. The RW1 maintained that the grievants were all served with Show Cause letter and indeed some of them responded. He has not given any evidence to prove the said service of the show cause letter to each respective grievant unless it was a general Notice pinned on the Notice Board. The answer is with the respondent who has withheld the evidence.

I am satisfied that the claimant has made out a case of unfair termination on the basis of procedure. Section 41 of the Act is in mandatory terms that an employer shall not terminate an employee on ground of misconduct before explaining to him in a language he understands and in the presence of a workmate or shop floor union representative of his choice, the reasons for which he intends to terminate his employment. It further forbids such termination before hearing and considering the representation from the employee and the person he chooses to accompany him to the explanation. This omission is fatal to the employer's case and it offends section 45(1) and (2)(c).

I have considered the decision by the Court of Appeal in *Kenya Revenue Authority Vs Menginya Salim Murgani [2010] eKLR*, in which it was held that fair hearing is not only possible in an oral hearing but also by exchange of written correspondences. I however wish to cautiously observe that the said court made such decision without considering section 41 of the Act which was not the law when the cause of action in the said Suit arose in 2001. The current law which came in force in 2008, has brought into place the said section 41 of the Act which is mandatory and any employer ignoring it in the Industrial Relations, does so at his own peril.

As regards the employer's attempt to justify the termination, section 43 requires him to prove the reason for termination. Section 45(2) requires the employer to prove that:-

(a) The validity of the reason for termination.

- (b) The reason is fair in relation to the;
- i). Employees conduct, capacity or capability
  - ii). Based on the operational requirements of the employment and
- (c) The employment was terminated through fair procedure.

I am not in doubt that according to the consent order dated 19.10.2010 in Industrial Court Cause No. 1243 of 2010, the reason for which the 40 or so workers were to face appropriate disciplinary action for participating in unlawful activities. The Show Cause letters which were allegedly served on all the 47 or so workers stated about ten charges thus,

**“-----you were identified as having taken part in most or all of the following unlawful activities during the period of the illegal strike between 12<sup>th</sup> to 19<sup>th</sup> October 2010----”**

To begin with the said charges were vague for duplicity. What was the respective grievant to defend him/herself against? This was witch hunting. It was outright victimization if not discriminatory charges. To begin with, the staff on strike was 1700 and without any investigations, 1660 were reinstated and about 40 subjected to “appropriate disciplinary action” vide a consent court order. The alleged source of information which led to identification of the culprits was allegedly CCTV Camera footages and witness statements. Mysteriously the CCTV footage disappeared and no evidence was availed in court. The statements were recorded after dismissal of the grievants. In my view that explanation is not enough to discharge the heavy burden on the respondent's shoulder of justifying the termination. In my view the reason for the termination was either of the ten charges in the Show Cause letter. Whereas the court was shown photos of broken windscreen, there is no single evidence to prove who out of the striking workers did it. Choosing only a few and blaming them is either victimization or selective punishment. As regards electricity disconnection, and obstruction of other workers and contractors accessing the respondent compound, there was no evidence to identify the culprits during the time of summary dismissal. In fact according to RW1, it was not possible to identify who did the unlawful activity except from the witness of the security officers and supervisors who recorded their statements after the grievants were dismissed.

As regards the procedure over and above my earlier findings, RW1 had on oath admitted that the disciplinary procedure was not followed. That the grievants were not invited to a disciplinary hearing before dismissal. Consequently, I find and hold that the procedure under section 41 of the Act was not followed. In my view section 7 and 8 of the Act subjects all employment contracts to the Act and leaves no room for respondent to invent his own disciplinary procedures which offend express provisions of the Act.

As a consequences of the observations and findings made herein above, the court arrives at conclusion that the dismissal of grievants was unfair, unlawful, discriminatory and a victimization of the grievants. The last issue to consider is whether the claimant is entitled to any remedy. The answer lies in section 35, 49 and 50 of the Act and of course the CBA.

In consideration of the circumstances under which the grievants were dismissed. I agree with the submissions by the Counsel for respondent that reinstatement is not the appropriate remedy to order. It is obvious that the issue of shop stewards being viewed as the initiators and vandals is a pointer that the relation between the grievants and the respondent will not improve.

The court will therefore grant prayers 2 relation to the remedies provided under section 49 and also section 35 of the Act. Thus;-

1. Each grievant will be paid by the respondent:-
  - a) Notice pay according to Clause 10(a) of the CBA.
  - b) Accrued Leave days if any.
  - c) Outstanding salary for days worked if any.

d) Twelve(12) months salary for unfair termination of employment.

e) Service pay in accordance with Clause 5 of the CBA.

1. The Respondent is also asked to issue Certificate of Service to each of the grevants.
2. The Respondent will pay costs and interests to the claimants from the date hereof.
3. The case will be mentioned within 30 days of today to confirm settlement.

Orders accordingly.

**Signed, Dated and Delivered** on the 22<sup>nd</sup> day of April 2013.

**Onesmus N. Makau**  
**JUDGE**