REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmuttut, J.,

A.K. Kerich & P.P. Ooko, Members.)

CAUSE NO. 114 OF 1998.

KENYA GAME HUNTING & SAFARIS WORKERS' UNION.....Claimants.

v.

RHINO SAFARIS LTD.....Respondents.

Issue in Dispute:-

"Wrongful dismissal of Mr. John Bwire", (hereinafter called the grievant).

P.K. Kosgei, Advocate, of M/S Kandie Kimutai & Co., Advocates, for the Claimants (hereinafter called the Union).

M. Onyango (Mrs.), Executive Officer, F.K.E., for the Respondents (hereinafter called the Company).

A W A R D.

The Notification of Disputes, Form 'A', dated 9th September, 1998, together with the statutory certificates from the Labour Commissioner and the Minister for Labour under Section 14(7) and (9)(e) and (f) of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act), were received by the Court on 26th October, 1998, and the dispute was listed for mention on 11th November, 1998. On this occasion, Messrs. J.M. Ndolo, General Secretary, and J.M. Namasake, Principal Executive Officer, F.K.E., who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements by 14th December, 1998 and 25th January, 1999, and the dispute was fixed for hearing on 15th April, 1999. Mr. Ndolo belatedly submitted his memorandum on 5th January, 1999, and Mrs. Onyango filed her reply statement on 11th March, 1999. However, by her letter, dated 8th March, 1999, Mrs. Onyango urged the Court to reschedule the hearing of the case because of the absence of the General Manager of the Company during the week. In the circumstances, the dispute was brought forward for mention on 7th April, 1999, to fix another convenient or suitable date for hearing. On 29th March, 1999, Mr. Ndolo informed the Court that the Union had appointed Mr. P.K. Kosgei, to act on its behalf in this matter, and the latter filed his notice of appointment on 7th April, 1999, and duly appeared for the Union. On this date, Mr. Kosgei applied to submit an amended memorandum within two weeks, and Mrs. Onyango did not object to the application for amendment. Accordingly, Mr. Kosgei was directed to submit the same by 21st May, 1999, which he did, and Mrs. Onyango was allowed to file a supplementary reply, if any or necessary, by 5th May 1999, and the dispute was fixed for hearing on 10th June, 1999. Mrs. Onyango did not file any supplementary reply thereto. The dispute was consequently heard on 22nd July 1999, and the final submissions were made on 22nd September, 1999.

The Company is a tour operator, which was incorporated in Kenya under the Companies Act, Cap. 486, Laws of Kenya, as a limited liability concern in 1970. Its activities include acting as an agent to overseas tour operators by meeting their clients upon arrival in the country and organising their accommodation and tours throughout the period of their visit or stay in the country.

The parties have a valid recognition agreement which was signed on 10th April 1994, and had also entered into a collective agreement for the period 1st July, 1994 to 30th June, 1996. According to Mrs. Onyango, this collective agreement is still in force because no new collective agreement has been negotiated by the parties.

The learned counsel for the Union, Mr. Kosgei, submitted that the grievant was appointed by the Company in 1980 as a Reception Officer, Union App.I, and served in this capacity until 1986 when he was verbally promoted to the post of Head of Airport Operations, Union App.2. But his efforts to obtain a confirmation or clarification did not yield any positive response, Union App.3. In the circumstances, therefore, the grievant was entitled to extra duty allowance. He stated that the grievant served the Company diligently and with a clean or unblemished employment record, during or under the stewardship of the Company's former General Manager, Mr. Anthony Miranda, but he started experiencing harassment and hostility at the workplace after the departure of Mr. Miranda from the Company in 1989, and his replacement by Mr. Lacty de Sousa, who was employed by the Company as a Tours Officer in the same year with the grievant, i.e. in 1980. Mr. Kosgei pointed out that, for reasons known only to himself, Mr. Lacty de Sousa never liked the grievant and sought to undermine him at every angle with a view to hounding him out of his employment with the Company. Therefore, the dismissal of the grievant on 27th August, 1997, amounted to purely witch-hunting and malice on the part of Mr. Lacty de Sousa.

Mr. Kosgei averred further that in the letter of dismissal, Union 4, which made reference to internal memoranda, dated 24th, 26th and 27th April and 17th June 1997, the following main charges were leveled against the grievant:-

(a) That he missed the transfer of the Company's clients who arrived in Kenya on 24th March, 1997 aboard Egypt Air Flight.

(b) That on 10th August 1997, and in disregard of a warning issued to him on 23rd November 1995, for a similar sale of an excursion to Hayes and Jarvis clients through third parties, he sold Mr. & Mrs. Butler a Nairobi National Park tour for US$ 128, without channeling the tour through the Company.

The grievant strongly denied the charges, Company Ann. 5(a) to (d).

Mrs. Onyango conceded that the grievant was employed in 1980, i.e. on 1st August 1980, but as an Airport Representative; and his duties included, inter alia:-

(i) meeting clients, checking them in at hotels and briefing them about safari arrangements;

(ii) meeting clients on flights as allocated in the office diary;

(iii) briefing clients on optional excursions available to them locally through the Company and their pre-booked safari itineraries, and

(iv) following up problems experienced by the clients when de-briefing them.

The grievant also received other duty allocations from time to time from either the Tours Manageress, Ms. Lesley Cade, who was his immediate supervisor, or from the General Manager, Mr. Lacty de Sousa, Company Ann.I(a) to (c). The position, therefore, demanded a lot of dedication, personal commitment and integrity. Mrs. Onyango stated further that the grievant retained his position as Airport Representative until 27th August 1997, when he was summarily dismissed on account of gross misconduct, for diverting business from the Company to himself and for gross insubordination.

The parties attempted to settle the matter at their own level, but failed to resolve it through the voluntary machinery. Consequently, the Union reported a formal trade dispute to the Minister for Labour, who accepted it and appointed Mrs. E. Mukanga of Nyayo House Labour Office to act as the Investigator; and in his subsequent report, which was released to the parties on 25th August, 1998, the Minister found, *inter alia*, that the grievant, who had worked for the Company for 17 years, was dismissed on account of missed airport transfer and unauthorised sale of the Company excursion to non-clients; that the grievant did not actually miss the transfer assignment but arrived late at the airport to handle the matter, and the duration of lateness was compounded by early arrival of the rescheduled flight and that the driver, who was assigned to collect him to the airport, had a tyre puncture on the way; that the clients were attended to at the airport by the

Manageress, who was also an employee of the Company, and there was no complaint of delay or neglect by the clients; that the grievant was not served with any warning letter on the alleged dereliction of duty, and yet the same was cited as one of the reasons for his summary dismissal; that the grievant was lastly issued with a warning letter, which had since expired, in 1995 and the same should, or ought to, have been expunge from the record, and that the investigation of the un authorised sale of the Company excursion to non-clients was conducted in bad faith or *mala fide* because the grievant was not accorded an opportunity to be heard or defend himself. In the circumstances, the Minister recommended that the summary dismissal of the grievant be reduced to normal termination of service, and he be paid his terminal dues or benefits in terms of the collective agreement in force at the material time.

Finally, the Minister appealed to the parties to accept the recommendation as a basis of settlement of this dispute. The Union accepted the recommendation, but the Company rejected it on the ground that the Investigator had taken into account irrelevant factors and ignored material facts by the Company. Hence this dispute for consideration and determination.

The learned counsel for the Union, Mr. Kosgei, submitted that the grievant did not miss the said transfer but merely arrived at the airport late because the bus or vehicle that picked him had a tyre puncture on the way, and there was, therefore, an inevitable delay in fixing the puncture. Furthermore, the Egypt Air Flight arrived earlier than expected; and, in the circumstances, the grievant was not to blame for the delay or the early arrival of the flight, and he should not have been punished for it. In any case, the Company's Tour Manageress arrived at the airport earlier than the grievant and attended to the clients. On the allegations of sale of a Nairobi National Park tour to Mr. & Mrs. Butler, Mr. Kosgei asserted that the same have not been satisfactorily proved because:-

(i) The grievant was not called to attend the interview held by the Tour Manageress with Mr. & Mrs. Butler at Landmark Hotel concerning the matter, and the clandestine investigation process adopted by the Company offended against the principles or rules of natural justice.

(ii) There was no proof from a handwriting expert to show that the document relied upon by the Company, Company Ann.10, was written by Mr. & Mrs. Butler as it was signed by one person only and not dated. In the circumstances, Mr. Kosgei averred, the Court should reject it as worthless piece of paper for lack of evidence from Mr. & Mrs. Butler regarding its authenticity; and similarly Company Ann.3(c) and (d), allegedly authored by Messrs. N. Kitchenside and Allan Hard, should also be rejected for the same reason.

(iii) The Company's reliance on a warning letter that was more than 12 months old was a blatant violation of Clause 7 of the parties' collective agreement, Company Ann.6, which clearly stipulated that:-

"If an employee completes 12 months from the date of the last warning recorded on the file without offences, then the previous warnings will be cancelled".

Therefore, the warning letters, dated 25th February, 1992, and 23rd November, 1995, were clearly more than 12 months old and should have been ignored or cancelled or expunged from the record.

(iv) The investigation process that culminated in the grievants' dismissal was improperly conducted as it was done in total secrecy and disregard of the cardinal rules of natural justice.

Mr. Kosgei averred that one of the rules of natural justice stated that "one cannot be a judge in one' s cause". In this case, he said, the Company's General Manager, Mr. Lacty de Sousa, who had an inexplicable grudge against the grievant, was the complainant, the investigator, the prosecutor and the judge because all the letters or memoranda written to the grievant emanated from him, and in some of the memoranda he stated that he was investigating the case. Under the circumstances, the prospect of bias in the investigation against the grievant was not even likely but real; and the grievant could not expect justice, or objective and impartial processing of his case, from Mr. Lacty de Sousa as the latter was biased against, and was on a mission to remove, the grievant from the service of the Company as shown at page 2 of the letter of dismissal, Union App.4, where Mr. Lacty de Sousa stated as follows:-

"On Sunday, 10th August whilst I was on duty in the office I found a piece of paper in our office, which indicated the name of the 2 Hayes and Jarvis clients, a room number and a local excursion (copy attached). I recognised the names as being Hayes and Jarvis clients, Mr. & Mrs. Butler who had arrived into the country that morning and were booked on the Serengeti Safari having been met by you that morning".

Mr. Kosgei submitted that the "confession" by Mr. Lacty de Sousa of going to the grievant's office in his absence with the hope of finding any documents or evidence that might incriminate the grievant reflected on the desperate act of a Manager seeking to pin any offence

on the grievant with a view to justifying his dismissal, and this was a perfect evidence of the witch-hunting complained of by the grievant. He pointed out that the three page letter of dismissal, Union App.4, issued to the grievant was unusual and curious by ordinary standards because letters of dismissal are usually short or brief outlines of the offence committed, coupled with statements communicating the decision to dismiss and finally statements on the final dues payable, if any. Mr. Kosgei asserted that the grievant's letter of dismissal was an essay on the alleged offences, followed by detailed alleged evidence in support of the management's accusations and by long statements allegedly to justify the act of dismissal, and finally by a brief statement on the terminal dues. He, therefore, submitted that the letter of dismissal reflected on the guilty conscience of the author, Mr. Lacty de Sousa, and hence the long statements in defense of the decision by the Company to dismiss the grievant. Otherwise, if Mr. Lacty de Sousa was persuaded that the decision was justified, then he would have issued a simple letter of dismissal as it is normally done, but since he very well knew that the decision was unjustified, he had to justify it to himself and then to the rest of the world.

Mr. Kosgei contended that the grievant suffered further malice as shown by the assumption that he wrote the anonymous letter, dated 20th February 1998, which was addressed to the Office of the President long after his dismissal. He averred that there was no even a single iota of evidence to suggest that the grievant wrote the said letter. After all, he said, the letter was not even signed; and, in the circumstances, he urged the Court to ignore it. Mr. Kosgei argued further that the grievant was also not accorded or given a fair hearing and opportunity to defend himself; and, in support of this contention, he relied on the **Privy Council** case of *Kanda* V. *Government of Malaya, (1962) A.C. 322,* in which it was observed that:-

> **"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused person to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and he must be given a fair opportunity to contradict them**".

Therefore, Mr. Kosgei maintained that:-

(a) The grievant should have been given copies of all the statements made against him instead of learning about them from the letter of dismissal, Company Anns. 8 and 9.

(b) He should have been invited to attend the interview between the Tour Manageress and Mr. & Mrs. Butler at Landmark Hotel so that he could respond to the allegations against him there and then.

(c) He should have been invited to attend the interview between the management and the fellow employees, i.e. Mr. Peter Kimanga, Mrs. Margaret Asava and Mr. Peter Thuo, who made statements against him, and the grievant should have been accorded an opportunity to contradict them in their presence, Company Ann. 7(b)(c) & (d).

Mr. Kosgei maintained that the said employees were pressurized by the management of the Company to write the statements in the manner that they did in order to incriminate the grievant and urged the Court to disregard them as they were obtained through undue influence or duress or were not tendered voluntarily as shown in the findings of the Minister, Union App.I. He stated that the documents or correspondence on the record in the Union's original submission, Company Anns.2 to ll, are clear evidence of frequent and systematic harassment and witch-hunting against the grievant, and a reflection of determined will on the part of the management of the Company to get rid of the grievant from the Company. The grievant was even threatened with dismissal for attempting to change his residence, Company Ann.7.

On the question of uniforms, Mr. Kosgei submitted that the agreement between the Company and the grievant was that the latter would wear his uniforms while meeting clients only, but whenever the grievant was not engaged with clients he was at liberty or free to wear his own attire. In the circumstances, the management's complaint on the grievant's failure to wear uniforms was also part of the pattern of harassment against him set in motion by the top management. Mr. Kosgei denied that the grievant harboured hatred against the Tour Manageress, either on racial or gender grounds or otherwise, and that he never authored the letter to the Office of the President. The grievant, he said, did not also resent the General Manager nor coveted his position or job; but, on the contrary, he respected him as his boss. But for unknown reasons, the General Manager detested the grievant and set in motion the scheme of harassment that eventually led to his dismissal. As regards the alleged sale of excursion by the grievant, Mr. Kosgei asserted that the allegations were not proved against him.

In conclusion, Mr. Kosgei submitted that the grievant, who had served the Company for a period of 17 years, with a clean and productive record, was dismissed or punished so as to deny him his gratuity benefits under the parties' collective agreement. He pointed out that the case of the Company was weak and unsupported by any evidence, while the evidence on the record abundantly showed outright harassment and witch-hunting by the top management of the Company against the grievant. For these reasons, and since re-instatement of the grievant will not be a viable remedy in view of the General Manager's hostility towards him, Mr. Kosgei urged the Court to find that the decision to dismiss the grievant was harsh and wrongful, and prayed that the grievant's dismissal be reduced to normal termination of service and he be paid the following terminal dues:

(i) Pay in lieu of notice.

(ii) Gratuity.

(iii) Any leave due.

(iv) Maximum compensation for loss of employment.

(v) Any other relief that the Court may deem fit to grant.

In rebuttal, Mrs. Onyango for the Company submitted that during his tenure as Airport Representative, the grievant received several letters regarding dishonest and negligence of duty, and he never appealed against any of them as the allegations were true and justified. In the circumstances, the grievant never earned any promotion as alleged by the Union. The Company accused the grievant of a myriad of shortcomings and misconducts, e.g. negligence of duty, dishonesty, illegal gratification, disobedience, insubordination, unsatisfactory work, e.t.c., committed between February 1992 and August 1997, for which he was given verbal and written warning letters, Company Anns.2 to 8. Mrs. Onyango submitted further that under the European Economic Community Consumer Protection Regulations, 1992, for package travel, holidays and tour, the tour operators are responsible to ensure that services provided to their clients are handled by reputable, properly vetted and adequately insured agents, and that the tour operators are also liable for all risks arising out of travel packages organised through them, Company Ann.11. After all, she said, the Company was entitled, under the Employment Act, Cap.226, Laws of Kenya, and the parties' collective agreement, to dismiss an employee for offences less serious than those committed by the grievant. She maintained that the grievant had worked with the Company for sufficiently a long time and he understood his responsibilities well, but he deliberately chose not to perform them to its satisfaction. The grievant was also aware of the regulations under which the Company operated and the risks to which he was exposing it. Therefore, what the grievant was doing was illegal, deliberate and contrary to the express Company regulations; and, in the circumstances, he must bear the full consequences of his actions. However, the Company had offered to the grievant his terminal dues amounting to Kshs.37,551/=, but he did not collect it, Company Ann.12.

Finally, Mrs. Onyango urged the Court to find that the demand was misconceived, frivolous and intended to intimidate the Company. Accordingly, she prayed that the action taken by the Company against the grievant be upheld and the demand by the Union be rejected.

The main point argued before me by the learned counsel for the Union, Mr. Kosgei, was that the dismissal order could not be passed by Mr. Lacty de Sousa in this cause because he was the complainant himself. But, on the other hand, Mrs. Onyango argued that the grievant had committed the said misconducts and he was justifiably dismissed.

The dismissal of an employee is a penalty or punishment which has serious consequences and it cannot be brought about without issuing a notice to the employee concerned and without giving him a reasonable opportunity to defend himself. Such a dismissal amounts to an economic death; and before this extreme penalty is awarded or imposed, the person who has the authority to dismiss the employee should at least hear the employee personally. Therefore, an employee who is alleged to have committed, or required to answer a charge, of misconduct, as in the instant case, must know not only the accusation but also the testimony by which the accusation is supported. He must also be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given the fullest opportunity of defending himself, or a chance to rebut the evidence let against him. This is the barest minimum of a domestic enquiry and this requirement must be substantially fulfilled before the result of the domestic enquiry can be accepted. The maxim: *audi alteram partem* (no man should be condemned unheard) is one of the golden threads of our jurisprudence; and whenever any person or body of persons is empowered to take decisions after *ex post facto* investigation into facts which would result in consequences affecting a person, property or other right of another person, then in the absence of any express words in the enactment giving such power, excluding the application of the principles of natural justice, the Courts of law are inclined generally to imply that the power so given is coupled with the duty to act in accordance with such principles of natural justice as may be applicable to the facts and circumstances of a given case.

On careful perusal of the submissions of the parties and the annexures on the record, Mr. Lacty de Sousa was the complainant of almost all the charges against the grievant, and he was also the punishing authority. In the circumstances, the contention of the learned counsel for the Union, Mr. Kosgei, is well founded because no officer of any establishment can be allowed to become a prosecutor, a judge or punishing authority when he himself is the complainant. This means that no man can be a judge of his own cause; and it is one of the well-recognised principles of administration of justice that justice should not only be done but it should manifestly and undoubtedly be seen to be done. *In Rex.*V.*Sussex Justices, Ex parte McCarthy, (1927), 2 K.B. 476, Swift J.*,observed that

"nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".

It is very clear that the position of Mr. Lacty de Sousa was that of a complainant and an interested person or a witness, and he was so connected with the case as to prejudge it. Therefore, he could not be a judge and punishing authority to pass a final order of dismissal against the grievant. Accordingly, his order was bad in law and cannot be sustained.

With the foregoing discussion, **I AWARD** and **ORDER** as follows:-

(a) That the summary dismissal of the grievant be reduced to normal termination of service.

(b) That the grievant be paid all his terminal benefits, including pay in lieu of notice, gratuity, pay of unavailed leave, if any, e.t.c., in terms of the parties' collective agreement in force at the material time of his wrongful dismissal.

(c) That, in addition, the grievant be paid ten (10) months' basic salary, which he was earning at the time of his wrongful dismissal, as compensation for loss of employment.

Both members of the Court concurred with this decision.

DATED and delivered at Nairobi this 6th day of November, 2003.

Charles P. Chemmuttut,

JUDGE.