



**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI.**

**(Coram: Charles P. Chemmutut, J.**

**A.K. Kerich & J.C. Odaga, Members.)**

**CAUSE NO.8 OF 2001.**

**KENYA LOCAL GOVERNMENT WORKERS' UNION.....Claimants.**

**- v -**

**MOMBASA MUNICIPAL COUNCIL.....Respondents.**

**Issue in Dispute:**

**Wrongful summary dismissal of:-**

- 1. Mohamed Gari – Foreman (Branch Chairman).**
- 2. Juma Mbaya – Headman (Branch Vice-Chairman).**
- 3. Julius Ole Apale – Malaria Control Officer (Branch Secretary).**
- 4. George W. Wanyama – Senior Clerical Officer (Assistant Branch Secretary).**
- 5. Joseph N. Njagi – Foreman (Branch Treasurer).**
- 6. Fathiya M. Kombo – Clerical Officer II (Assistant Branch Treasurer).**
- 7. Zakia A. Mohamed – Nursery School Teacher (Branch Women Leader).**

**Boniface M. Munyao, National General Secretary, for the Claimants (hereinafter called the Union).**

**J.N. Namasake, Principal Executive Officer, F.K.E., for the Respondents (hereinafter called the Council).**

**A W A R D.**

The Notifications of Dispute, Forms 'A', dated 6<sup>th</sup> October 2000, together with the statutory certificates from the Minister for Labour and the Labour Commissioner under Section 14, subsections (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 14<sup>th</sup> February 2001, and the dispute was listed for mention on 23<sup>rd</sup> February 2001. On this date, Messrs. Munyao and Namasake, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 9<sup>th</sup> March and 9<sup>th</sup> April 2001, and the dispute was fixed for hearing on 30<sup>th</sup> April 2001. Mr. Munyao submitted his memorandum on 9<sup>th</sup> March 2001, and Mr. Namasake belatedly filed his reply statement on 28<sup>th</sup> April 2001, and the dispute was heard as stated hereinabove, i.e. on 30<sup>th</sup> April, 2001.

I need not recount or refer in detail to the mass of allegations in the parties' written memoranda or statements as I think they are not relevant for the purposes of this award. In fact, during the hearing of this dispute the representatives of the parties realized the futility and irrelevance of the allegations and the issue in dispute is, therefore, kept free from them. Suffice to say, however, that the Council is a member of the Association of Local Government Employers, with which the Union has had a recognition agreement and has also entered into several collective agreements, the latest of which was signed by the parties on 25<sup>th</sup> March 1994, and registered by the Industrial Court on 12<sup>th</sup> July 1994, under RCA No.134 of 1994. Mr. Namasake for the Council stated that the restructuring within the Local Authorities placed a heavy financial burden on them and are only trudging on their way. Therefore, the employees need not expect prompt payment of their salaries or wages like any other well-established establishments.

Messrs. Mohamed Gari, Juma Mbaya, Julius Ole Apale, George W. Wanyama, Joseph N. Njagi, Ms. Fathiya M. Kombo and Ms. Zakia A. Mohamed (hereinafter called the grievants) were the employees of the Council and also trade union officials who were elected as such under Section 29(1) of the Trade Union Act, Cap.233, Laws of Kenya. On 14<sup>th</sup> December 1999, the grievants were served with a common or identical show cause notice why a disciplinary action should not be taken against them for "defiance of lawful instructions", or willful disobedience of a lawful and reasonable order by refusing to work as drivers/loaders. This action against the grievants was taken after the employees of the Council had earlier on allegedly staged three illegal strikes during the year and consequent upon a return-to-work formula without victimization. The grievants were said to have taken a leading role or part in an illegal strike inasmuch as they instigated the other employees to stage the illegal strike. The enquiries which were held by the Council into the charges against all the seven grievants culminated in their summary dismissal on 22<sup>nd</sup> December 1999, and the common letter of their summary dismissal reads as follows:-

"RE: SUMMARY DISMISSAL.

The Municipal Council of Mombasa at their meeting held on 22<sup>nd</sup> December, 1999, adopted Minute No.629/99(1) of the Establishment Committee which resolved – arising from the illegal work boycott which you staged and participated in from 8<sup>th</sup> to 9<sup>th</sup> December, 1999 – that you be summarily dismissed from the services of the Council in accordance with the Employment Act Cap.226 section 17 (c) and (e).

This is to inform you that with effect from the date of this letter you are summarily dismissed from the Council services.

(Sigd.)

**M.K. Mumba**

TOWN CLERK".

In a nutshell, Mr. Munyao contended that the grievants were not given personal hearing by the Council before issuing the orders of dismissal and that the action taken against them was illegal, unjustified and with a motive of unfair labour practice and victimization on account of their union activities. He submitted further that the decision to dismiss the grievants was also contrary and in violation of Article 13 of the parties' Memorandum of Agreement and ILO Conventions Nos. 98 and 135. In the circumstances,

Mr. Munyao prayed that the grievants be unconditionally reinstated to their posts from which they have arbitrarily, unlawfully and illegally been dismissed by the Council on 22<sup>nd</sup> December 1999, without loss of benefits and privileges.

On the other hand, Mr. Namasake resisted or opposed the demand on the ground that the grievants were summarily dismissed for actively inciting or persuading fellow employees to stage an illegal work boycott and for themselves taking a prominent part in the said illegal work boycott. Therefore, their conduct was objectionable and the decision to summarily dismiss them was taken in the interest of safe and peaceful working atmosphere of the Council. Accordingly, the grievants were rightly dismissed for good and sufficient reasons and they deserved no sympathy; and hence, their demand for reinstatement should be rejected.

In this case, the grievants, who were active branch officials of the Union, were summarily dismissed as aforesaid allegedly for illegal work boycott which they staged and participated in; and Section 17(c) and (e) of the Employment Act, Cap.226, Laws of Kenya, under which they suffered

summary dismissal state as hereunder:-

"17 Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal:-

(a).....;

(b) .....

(c) if the employee wilfully neglects to perform any work which it was his duty to have performed or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) .....

(e) if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

(f) .....

(g) .....

“Wilful” would mean an act done intentionally, knowingly and purposely as distinct from an act done carelessly, thoughtlessly, heedlessly or inadvertently. First, so far as “willful neglect” of work is concerned under Section 17(c) hereinabove, the offence did not specifically form part of the notice to show cause and the purported letter of dismissal of the grievants; and, in my view, this allegation has no legal significance and it is rejected as bad in law. Secondly, in order to amount to misconduct, disobedience of an order or command under Section 17 (e) of the said Employment Act, must fulfil the following ingredients:-

(i) it must be lawful, and

(ii) it must be reasonable.

It is on record that between 7<sup>th</sup> and 10<sup>th</sup> December 1999, about 1,000 employees of the Council assembled to demand their three (3) months’ salary arrears, but the Council did not serve any charge-sheets or notices to show cause on all the employees although their alleged offence was the same. Surprisingly, the Council only picked the grievants, some of whom were on leave during the alleged strike, for disciplinary action and punishment. The conduct of the employees in demanding their three (3) months’ salary arrears did not amount to disobedience as envisaged by Section 17(e) of the said Employment Act in view of the fact that employees in this country are in general not economically well-off, and any delay in payment of their dues may create some reasonable grumbling by them (see *Cause No.50 of 2000: Kenya Union of Commercial, Food & Allied Workers v. Security Holdings Ltd.*). The order, if any, might, therefore, have been lawful but not reasonable.

I have carefully gone through the submissions of the parties, and I agree with the views expressed by Mr. Munyao that the action taken by the Council against the grievants smacked of partiality and amounted to unfair labour practice and victimisation of the entire branch officials of the Union purely on account of their trade union activities. In selecting the grievants for disciplinary action and punishment, out of about 1,000 employees, the Council was actuated by a motive to victimize them for their trade union activities. The action was also in violation or contravention of Article 13 of the parties’ Memorandum of Agreement, the Industrial Relations Charter, the provisions of I.L.O. Conventions Nos.98 and 135 and the principle of natural justice embodied in the maxim: *audi alteram partem* (no man shall be condemned unheard). On the other hand, I find that the submission by Mr. Namasake lacks credence and that the authorities cited therein and relied upon by him are distinguishable and do not apply in the peculiar circumstances of this case where the entire officials of the Union were summarily dismissed on account of their trade union activities.

Keeping in view all the circumstances of this case, along with the documentary evidence of the parties on the record, I am of the opinion that the summary dismissal of the grievants was legally wrongful and unjustified, and accordingly I award and order as follows:-

**ORDER.**

In exercise of the powers conferred on this Court by Section 15(1)(i) of the Act (Trade Disputes Act), I order that the grievants be unconditionally re-instated to their jobs or posts from the date of their summary dismissal, i.e. on 22<sup>nd</sup> December 1999, without loss of their full salaries and all other benefits, allowances, privileges and continuity of service with effect from the said date. It is ordered further that the grievants shall unconditionally report to their respective departments of the Council within 15 days from the date of this award.

Before I part with this case, I would like to draw the parties’ attention to a mass of irrelevant and unsubstantiated allegations in their written memoranda or statements before this Court. This is highly undesirable as it merely results in unnecessary waste of valuable time and delay in perusing the record and writing the award. I cannot but express my disappointment of such a course.

Copies of this award be forwarded to the Permanent Secretary, Ministry of Local Government, and the Town Clerk, Mombasa Municipal Council.

I have sought and considered the advice or opinion of both members of the Court in making this decision.

**DATED** and delivered at Nairobi this 5<sup>th</sup> day of July, 2002.

**Charles P. Chemmutut,**

**JUDGE.**