Sotik Highlands Tea Estate Ltd v Kenya Plantation and Agricultural Workers Union (Civil Appeal 8 of 2017) [2024] KECA 258 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 258 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 8 OF 2017

F SICHALE, P NYAMWEYA & WK KORIR, JJA

MARCH 8, 2024

BETWEEN

SOTIK HIGHLANDS TEA ESTATE LTD ..... APPELLANT

AND

THE KENYA PLANTATION AND AGRICULTURAL WORKERS UNION ..... RESPONDENT

(Being an appeal arising from the Judgment of the Employment and Labour Relations Court at Kericho (D.K. Marete, J.) delivered and dated 30th June 2016 in ELRC CAUSE No. 218 of 2015)

JUDGMENT

1. This appeal arises from the judgment of D.K. Marete J. of the Employment and Labour Relations Court (E&LRC) at Kericho in Cause No. 218 of 2015 which was in favour of the respondent, the Kenya Plantation and Agricultural Workers Union. From the Memorandum of Appeal dated 9th March 2017, the appellant, Sotik Highlands Tea Estate Ltd, is dissatisfied with the judgment of the E&LRC on the following grounds:

   " i. The Learned Judge erred in law and fact in dismissing the Appellant's counterclaim for losses suffered as a result of the unprotected strike, despite holding that the Respondent participated in an unprotected strike;

   ii. The Learned Judge erred in law in awarding damages in respect of employees who participated in unprotected strike;

   iii. The Learned Judge erred in law in finding that there was lapse of procedure by the Appellant and that termination of the employees was unlawful as he failed to consider that;

      a. The Appellant demonstrated that it followed the procedure under Section 41 of the *Employment Act* when dismissing the former employees;

b. The Respondent had admitted in their witness statements dated 15th April 2014 and the Supporting Affidavit of Jeremiah Omwansa dated 14th June 2012, that the former employees had heard the Appellant's representatives reading the Notice to Show Cause letters to them and that they were informed by the Appellant to collect the said letters;

c. That disciplinary show cause hearings were held; and

d. He had no jurisdiction to deal with a matter not pleaded.

iv. The Learned Judge erred in fact and law in;

a. Holding that the matter arose out of contest between traditional tea plucking and mechanical tea harvesting, this was never pleaded as the cause of the illegal strike, in fact the dispute did not concern mechanical harvesting at all; and

b. He had no jurisdiction to deal with a matter not pleaded;

v. The Learned Judge erred in law in penalising the Appellant for the former employees' deliberate failure to attend the show cause hearings or respond to the invitations to show cause hearings;

vi. The Learned Judge erred in fact and in law in holding that no personal intervention in the dismissal process was demonstrated, as the Appellant adduced evidence demonstrating that each employee was given an opportunity to attend a show cause hearing and represent their individual cases;

vii. The Learned Judge erred in fact and in law in holding that the strike was pre-empted by the Appellant's "methodology and communication strategy" as it was demonstrated that the former employees went on an illegal strike without any notice to the Appellant;

viii. The Learned Judge erred in fact and law in holding that the appellant relied on the ultimatum principle when the appellant evidently stated in its submissions that it did not rely on this principle at all, and adduced evidence to prove that each employee was individually issued with show cause letters;

ix. The Learned Judge was partisan and failed to consider the Appellant's submissions, witness statements and evidence tendered;

x. The Learned Judge failed to deal with issues of perjury and false testimony in respect of the Respondent's witness. The court erred in failing to find that Jeremiah Omwansa perjured himself in his testimony."

2. The respondent's case was premised on the Amended Memorandum of Claim dated 15th April 2014 and supported by the statements of Stephen Nyamweno, Jeremiah Omwansa and Wilson Asamba. In summary, the claimant's case was that both the appellant and the respondent had a valid recognition agreement which gave rise to several collective bargaining agreements. The grievants were employees of the appellant and members of the respondent. On 7th June 2012 the grievants reported to work at 7.00am and began their duties as tea pluckers in Field No. 25. At about 7.30am, the work of the grievants was disrupted by the mechanical tea plucking supervisor, Daniel Maeba Omwenga, who informed them that they should clear the area since he intended to embark on harvesting tea using tea plucking machines. The grievants sought clarification from the supervisor with regard to the changes but none was forthcoming. The grievants further sought the intervention of the deputy general manager who also did not offer any explanation but instead summoned the police, who came and

ordered the workers out of the farm. In the process of evicting the grievants from the farm, a running battle ensued and 4 members of the respondent were injured. On 7th June 2012, at about 11.00am, the respondent's branch secretary came in to intervene and secured a meeting with the appellant's management which meeting was scheduled for 1.45pm and attended by the appellant's management and workers' representatives and it was agreed that the workers take a break and resume work the following day at 7.00am.

3. The respondent further claimed that on 8th June 2012, the grievants reported to work and resumed tea plucking until 10.00am when the appellant's general manager accompanied by other management staff came and ordered them to vacate the tea plantation. The chief shop steward sought audience with the general manager but this was declined and the police cleared the grievants from the farm. At 11.00am on the same day, the respondent's branch secretary sought audience with the general manager without success. The appellant then proceeded, with the help of police officers, to seal all entrances to the plantation thereby denying the grievants access to their work place. The same fate would befall the respondent's officials and the Labour Officer who attempted to visit the appellant's premises on 9th June 2012 and 11th June 2012. The respondent also stated that the appellant declined and refused to heed the recommendation of the County Labour Officer to rescind the decision to lock out, suspend, terminate and dismiss the grievants. The respondent's case was that the appellant's actions were unfair, unprocedural and unlawful by dint of sections 41, 43, 44, 45, 46 and 49 of the *Employment Act*. Further, that the appellant's action of withholding of the grievants' salary for May 2012, and involvement of the police to intimidate workers was unlawful and an indicator of use of excessive force to silence workers agitating for their rights. Additionally, the respondent claimed that the objective of the appellant's actions was to dismiss the grievants and replace them with tea plucking machines. Consequently, the respondent prayed for a reinstatement order or in default salary of 12 months, payment of the May 2012 salary, a declaration that the grievants' termination was unlawful as well as payment of all other dues under the law, including one month's salary in lieu of notice, plus the costs of the suit.

4. For the appellant, their case was premised on the Amended Memorandum of Defence and Counter-Claim dated 18th June 2014 supported by the statements of Stephen Okun, Mr. Daniel Maeba Omwenga, George Aricheni Nyakamba, Silas Juma and Doreen Kituku. In a nutshell, the appellant denied the respondent's claim in toto insisting that theirs was a case of lawful termination after unprotected strike, and they also asserted a counterclaim. In summary, the appellant's case was that on 6th June 2012, they were made aware of numerous anonymous leaflets scattered all over the estate citing a myriad of issues and calling for a strike. On the 7th June 2012, the grievants engaged in an illegal strike in the morning and despite being urged to return to work, they defied the pleas and instead persuaded workers in other estates to join in. According to the appellant, during the unrest it was the respondent's branch organizing secretary and branch secretary who encouraged the workers to continue with the strike.

5. The appellant asserted that despite the strike being unprotected, it instituted a return to work formula by issuing warning letters at 11.00am, 11.30am, 12.30pm and 2.00pm. Two meetings were also held at 1.40pm and 2.30pm with the grievants whereupon it was agreed that they return to work forthwith. The appellant also averred that the grievants were served with show cause letters on 8th June 2012 requiring them to explain why they should not be dismissed for engaging in an illegal strike. The letters were read out through a loud speaker by the appellant's estate manager in English and Kiswahili while mentioning the names of the grievants. The appellant deposed that the apart from 8 employees, the grievants declined to turn up for the disciplinary proceedings. It was the appellant's case that this was the chain of events that led to the grievants' summary dismissal. Upon dismissal, a notice was

issued to the labour officer, and to the grievants to collect their dues but they declined. The appellant counterclaimed for Kshs. 3,581,025/= being rent due from the grievants who had declined to vacate residential premises allocated to them, and Kshs. 1,904,570.19 being financial loss as a result of the unprotected strike on 7th June 2012.

6. In his judgment, the learned trial Judge identified three issues for determination, namely, whether the termination of the employment of the grievants was wrongful, unfair and unlawful; whether the claimant (now the respondent) was entitled to the relief sought; and the issue of costs. On the first issue, the learned Judge found that even though the grievants were involved in an unprotected strike, the same was prompted by the methodology and communication strategy of the appellant. The learned Judge proceeded to hold that there was a lapse in the procedure adopted by the appellant in the dismissal of the grievants hence their termination was wrongful, unfair, unprocedural and unlawful. On the second issue, the trial court took into consideration the grievants' contributory faults leading to their termination. The court considered the fact that the dismissal of the grievants had not followed due process and awarded them their unpaid salary for May 2012, one month's salary in lieu of notice and terminal benefits. The grievants were also ordered to yield vacant possession of the appellant's houses. On the issue of costs, the learned Judge ordered the parties to bear their own costs of the proceedings.

7. This appeal came up for hearing on the virtual platform on 16th October 2023. Learned counsel Ms. Opiyo appeared for the appellant and learned counsel Mr. Aduda represented the respondent. Ms. Opiyo had filed submissions dated 31st October 2022 while Mr. Aduda had filed submissions dated 23rd November 2022. Counsel for the parties opted to rely on their written submissions and made brief oral highlights.

8. In support of the appeal, Ms. Opiyo submitted that the learned Judge erred in holding that there was a lapse of procedure by the appellant and in finding that termination of the employees was unlawful. Counsel urged that the trial court did not conclusively address the issue of illegal and unprotected strike pointing out that under section 80 of the *Labour Relations Act*, the appellant was justified to fire the employees who had participated in an unprotected strike. She reiterated that the appellant followed the due process and procedure and that the trial court erred in finding that the appellant invoked the ultimatum principle in dismissing the employees. Ms. Opiyo relied on the cases of Barclays Bank of Kenya Ltd v Evans Ondusa Onzere [2015] eKLR and East African Portland Cement Company Ltd v Ismael Otieno Ondingo, CA No. 13 of 2016 to urge that the trial court failed to consider the corroborating evidence being the show cause letters and that the termination notices referred to the show cause letters. Counsel also relied on the case of Sotik Highlands Tea Estate Ltd v KPAWU [2017] eKLR to argue that the learned Judge erred in placing a high burden of proof on the appellant with respect to the show cause letters and disciplinary proceedings.

9. It was also Ms. Opiyo's submission that the learned Judge erred in penalizing the appellant by awarding damages for wrongful dismissal notwithstanding the grievants' failure to attend the disciplinary hearings. Relying on the cases of Peter Njuguna Chege v Timsales Ltd [2020] eKLR and Reuben Ikatwa & 17 others vs Commanding Officer British Army Training Unit Kenya & Another [2017] eKLR, counsel urged that the appellant could not be blamed for the grievants' deliberate failure to appear for the disciplinary hearings despite being summoned by the appellant. Counsel argued that as a result of apportioning the blame to the appellant, the learned Judge fell into the error of finding that the termination of the affected employees was wrongful, unfair and unprocedural. Counsel relied on the case of East African Portland Cement Ltd vs Ismael Otieno Ondingo CA 13 of 2016 to urge this Court to undertake a circumspective consideration of the case and find in favour of his client.

10. Counsel also submitted that the learned trial Judge erred in awarding salaries for May 2012 as the same had been paid. Further, that the trial court also erred by directing the Commissioner of Labour to

calculate the final dues arguing that this confirmed that the judgment was incomplete. In support of her proposition that a judgment has to be complete, counsel relied on the case of Kenya Revenue Authority vs Menginya Murgani [2010] eKLR.

11. Ms. Opiyo further submitted that the learned Judge erred in dismissing the appellant's counterclaim arguing that upon finding that the strike was unprotected, the court ought to have reached a concurrent finding that the respondent was responsible for damages incurred by the appellant as a result of the strike. She relied on the decision of Rika, J. in Robert Kaingu & others v Cook "N" Lite [2019] eKLR to argue that a union is responsible for the losses suffered by an employer as a result of an unprotected strike.

12. Turning to the appellant's contention that the learned Judge erred in declining to allow the counterclaim, counsel referred to the cases of KPAWU v Uniliver Tea Kenya Ltd [2017] eKLR and Mohamed Yakub Athman & 29 others v Kenya Ports Authority [2016] eKLR and submitted that an undefended counterclaim is uncontroverted and ought to be allowed. Counsel urged us to consider the counterclaim and enter judgement for the appellant.

13. Counsel additionally submitted that the finding by the trial court that the dispute arose out of a contest between traditional tea plucking and mechanical tea harvesting was not pleaded hence the trial court had no jurisdiction to deal with the issue.

14. Finally, counsel contended that the trial court erred by failing to find that the evidence of CW1 Jeremiah Omwansa was susceptible to perjury. Counsel consequently urged us to allow the appeal and counterclaim with costs.

15. In response, Mr. Aduda proposed that the appellant's counterclaim was properly dismissed. He submitted that employment relations are personal in nature and not collegiate hence the allegation of union representatives being complicit in the damages allegedly suffered by the appellant was not proved. In support of this submission, counsel relied on section 107 of the *Evidence Act* as well as the cases of Muriungi Kanoru Jeremiah v Stephen Ungu M'warabua [2015] eKLR and Kenya Pipeline Company Ltd v Corporate Business Forms [2019] eKLR.

16. Mr. Aduda adverted to sections 41 and 43(1) of the *Employment Act* to submit that the appellant did not provide sufficient evidence to prove that the process of termination adhered to the requisite procedural edicts. According to counsel, the trial court properly rendered itself on this issue thereby correctly penalizing the appellant for the default. Counsel relied on the cases of Muthaiga Country Club vs Kudheiha Workers [2017] eKLR and Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others [2019] eKLR to buttress this argument and to point out that the onus is upon an employer to prove the reasons for termination. Counsel also submitted that the learned Judge properly found that there was lapse of procedure on the part of the appellant in summarily dismissing the affected employees.

17. On the appellant's assertion that the learned Judge veered off the pleadings by determining that the dispute arose as a result of the competition between traditional tea plucking and mechanical tea harvesting, counsel submitted that the learned Judge's statement on the issue was obiter dicta and not the ratio decidendi of the court's judgment.

18. Finally, counsel submitted that the alleged perjury by Jeremiah Omwansa was not an issue for determination by the trial court and the learned Judge cannot therefore be faulted for not commenting on the issue. In the end, counsel urged us to dismiss the appeal with costs.

19. We have given due consideration to the record of appeal and submissions by the advocates for the parties. This is a first appeal and consequently, our mandate is akin to a retrial where we are to

independently re-appraise the evidence and draw our own inferences. This mandate is captured in Rule 31(1)(a) of the Court of Appeal Rules, 2022 and has been explained in several decisions of this Court including that of Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR where it was held that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

20. In our view the following issues determines the appeal, namely, whether the termination of the grievants was lawful, fair and procedural; whether the grievants were entitled to some or all the reliefs granted; whether the counterclaim was merited; and, who bears the costs of this appeal.

21. At the heart of this appeal is the question as to whether the termination of the grievants was lawful, fair and procedural. This issue arises out of grounds iii, v, vi, vii, and viii of the appellant's appeal. For starters, section 45(1) of the *Employment Act* (E.A.) bars an employer from unfairly terminating the employment contract of an employee. As per the provisions of section 45(4)(b) of the E.A., one of the grounds for holding that a termination of employment is unfair is where the employer did not act in accordance with justice and equity in terminating the employment of the employee. Additionally, sections 45(2) and 43 of the E.A. obligates the employer to prove the reason or reasons for the termination and the fairness of the procedure adopted in the termination. Failure to which such termination is held to be unfair.

22. Section 47(5) of the E.A. on the other hand provides that the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. Section 41 of the E.A. provides for the procedure to be followed during termination of an employment contract while section 45(5) of the E.A. legislates the matters to be considered when assessing whether the termination was just and equitable. The factors include the procedure adopted by the employer in reaching the decision to dismiss, the communication of such a decision and the handling of any appeal by the employee against the decision, the conduct of the employee, and the extent to which the employer has complied with any statutory requirements connected with the termination.

23. In Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, this Court summarized the import of the above cited provisions thus:

> "There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."

24. In National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR, the Court cited with approval the procedure elaborated in the earlier decision of Janet Nyandiko vs Kenya Commercial Bank Limited [2017] eKLR where it was stated thus:

> "Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.
>
> The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.
>
> Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

25. In the present case, the appellant's contention is that the grievants were partly to blame for their termination as they willfully participated in an unprotected strike and also declined to respond to the show cause letters or appear for their disciplinary proceedings. The respondent on the other hand asserts that the appellant's action of barring them from their places of work, suspending them and ultimately terminating their contracts of employment was unlawful, illegal and unfair.

26. From the evidence on record, it is a matter of concurrence between the parties to the dispute that there was termination of the grievants' employment with the appellant. Similarly, it is also not in dispute that on the 7th June 2012, there was employee unrest at the appellant's Field No. 25. From the evidence on record, and as found by the trial court, the grievants participated in an unprotected strike. We agree with the learned Judge's finding because the grievants' agitation through labour unrest was not in compliance with sections 76, 78 and 79 of the *Labour Relations Act*, which in general, regulates strikes. The aforementioned provisions of the law provide the procedural requirements for strike actions, such as prior conciliation and strike notification. The grievants in this case did not adhere to these requirements and the end result was inevitably an unprotected strike. Having concluded that the grievants were engaged in an unprotected strike, it follows that under section 80 of the *Labour Relations Act*, the grievants were deemed to have acted in violation of their contracts of employment and were liable to disciplinary action,and forfeiture of any payment and any other benefit under the *Employment Act* during the two-day strike period. The grievants having participated in an unprotected

strike were stripped of the protection accorded by section 46(i) of the E.A to employees who participate in a lawful strike. It therefore follows that the grievants having engaged in an unprotected strike, the appellant was entitled to initiate disciplinary proceedings and the reason for dismissal was valid.

27. Having found so, the other consideration that we are obliged to make is whether the procedure adopted by the appellant in reaching the decision to dismiss the grievants, and the communication of that decision to the grievants was fair and in accordance with justice and equity. Evidence of the procedure adopted by the appellant in reaching the decision to dismiss the grievants is captured in the evidence of DW2 Stephen Okun as follows:

> "On 08/06/2012, I went to field no. 25 and requested the employees to assemble at the hospital and show cause on abscondment of duty. Here, I read out all the names of the employees and the contents of the show cause letter. This place is spacious and had been arranged for disciplinary proceedings.
>
> Only about 8 employees formed up for disciplinary hearing. Hearing were done for these. I prepared dismissal letters for all the others. Dismissal were passed in their houses personally or through their dependants. This affected 232 workers only 4 out of 236 passed the test."

28. If indeed the appellant proceeded as per the testimony of DW2 then the procedure adopted confirm that the right of the striking grievants to a fair process before dismissal was adhered to. It is the appellant's case that both the respondent and the grievants failed to respond to the show cause letters or turn up for the disciplinary hearings rendering the grievants liable for termination hence they were legitimately terminated. It is, however, observed that issuance of notices by the appellant to the grievants was done collectively to a group and not to individual employees. This appeal therefore majorly turns on the procedure adopted by the appellant in effecting the disciplinary proceedings and the ultimate termination of the grievants' contracts of employment. The appellant relied on Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & Another (supra) in support of the correctness of procedure adopted in dismissing the respondent's members. However, we observe that in the cited decision there was sufficient evidence of service of summons for disciplinary hearings which the appellants declined to adhere to. The same situation applied in the other case of Mukoma vs Cannon Assurance Ltd [2022] KECA 86 (KLR) cited by the appellant. These authorities are therefore distinguishable from the current scenario as what is challenged is the mode of service of the summons for disciplinary proceedings and the manner in which such hearings were to be conducted.

29. In our view, dismissal from employment can only be said to comply with the law where the procedure adopted affords the individual employee an opportunity to know the allegations leveled against him or her and gives the employee a chance to respond to the allegations by being offered an opportunity for a fair hearing. Such a process must adhere to the principles of fair administrative action and fair hearing under Articles 47 and 50(1) of *the Constitution*, and the various provisions of the E.A., and in particular section 41 thereof. Upon considering the evidence adduced at the trial, we find that the appellant resorted to a collective or blanket disciplinary procedure against the strikers. In such a situation it cannot be said that all the grievants were present at the site where the notices were read out. For instance, CW1 who told the trial court that he was testifying on behalf of all the other grievants denied awareness of the disciplinary proceedings. His testimony was that his dismissal letter was handed over to him by his son. It is our view that notwithstanding the fact that the grievants had participated in an unprotected strike and the appellant was entitled to dismiss them, the procedure adopted was devoid of the principles of justice and fairness. Whereas the reasons for termination were ripe, the procedure engaged in the dismissal of the grievants did not pass the constitutional tests of fair administrative action and fair hearing as well as the procedure enshrined in the E.A.

30. For avoidance of doubt, we find that even though termination of the grievants' contracts of employment was available to the appellant as a solution to the unprotected strike, the appellant was still obligated to comply with the due process legislated in the E.A. The procedure adopted in this matter did not live to this expectation. Ultimately, we agree with the trial Judge that the termination of the grievants by the appellant was unfair and unlawful.

31. The next issue is whether the appellant's counterclaim was merited. The main bone of contention is whether the respondent was liable for the damages arising out of the unprotected strike. The respondent is a trade union whose members, as we have found, engaged in an unprotected strike. The appellant put forward a case seeking compensation for damages incurred as a result of the unprotected strike. According to the appellant, the respondent was complicit in the manner in which the strike unfolded.

32. The question is whether a union is liable for losses arising from an unprotected strike. When B. Ongaya, J. of the E&LRC was faced with the question as to whether a trade union can be held liable for losses arising from an unprotected strike in Red Lands Roses Limited v Kenya Plantations and Agricultural Workers Union [2020] eKLR, he opined that it was not. His view was that:

> " The alleged loss was squarely within the withdrawal of labour and the employer has failed to establish a reason for recovery beyond the statutory remedies and actions already referred to by the Court. Further in this case the Court has found that parties engaged in unprotected lockout and strike and there is no material and submissions made on apportionment of liability in that regard. The Court considers that the statutes do not prescribe the consequences of unprotected lockout to the employer as section 80 of the *Labour Relations Act*, 2007 does for employees in unprotected strike. The Court holds that one consequence upon an employer in event of an unprotected lockout like in the instant case must be that the employer cannot recover the accruing losses under the contract of service in purported implementation of the cited statutory recovery from the employee or, recover as against the trade union."

33. However, in Robert Kaingu & others v Cook "N" Lite (supra) when Rika J. was faced with the same question he clearly affirmed that a union is liable for damages arising from an unprotected strike. This is what the learned Judge stated:

> " There is no doubt that the Claimants had contractual obligation to discharge their functions in accordance with their terms and conditions of service, as negotiated, concluded, and from time to time reviewed, by their Employer and their Union. They acted completely outside the law and contract which regulated their employment. They ought to compensate the Respondent for lost business.
>
> ... Although the amount of business loss has not specifically been proved, the Court is in agreement that the strike action resulted in business loss to the Respondent, which a reasonable adjudicator ought not to ignore, in addressing this Claim. As the Claimants were defying their Employer and their Union, and pouring into the streets demanding the County Governor intervenes in their workplace grievances, production lines were at a standstill at Cook 'N' Lite. The Court cannot overlook the effect wildcat strikes have upon production. The Claimants abused the legitimate right to strike. They disregarded established industrial relations machinery. They ignored the *Labour Relations Act*, the Labour Contracts established between the Respondent and the Claimants' Union, and the Industrial Relations Charter. Protected strikes are not delict, or in breach of the

employment contract. The Employer however can, where the strikers are involved in wildcat strikes, sue for contractual or delictual damages. If the Employees' Trade Union is involved in prohibited strike, damages can be recovered from the Union. Employees who reject the advice of their Union, and engage in prohibited, outlaw strikes, expose themselves to direct liability for losses suffered by their Employer as a result of the illegal industrial actions..."

34. Maybe a foreign tour will help to give a clearer perspective on this issue. Unlike the Kenyan situation, in South Africa, section 68 of the *Labour Relations Act* No. 66 of 1995 provides for concise remedies that the Labour Court can grant in the event of an unprotected strike. The provision states that:

> " Strike or lock-out not in compliance with this Act
>
> (1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock- out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction—
>
> a. ...
>
> b. to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to—
>
> i. whether—
>
> (aa) (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
>
> (bb) the strike or lock-out or conduct was premeditated;
>
> (cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and
>
> (dd) there was compliance with an order granted in terms of paragraph (a);
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> ii. the interests of orderly collective bargaining;
>
> iii. the duration of the strike or lock-out or conduct; and
>
> iv. the financial position of the employer, tradeunion or employees respectively."

35. In the Kenyan context, the *Labour Relations Act*, 2007 which legislates on strikes and lock-outs does not have a provision equivalent to section 68 of the South African *Labour Relations Act*, 1995. Perhaps, the provision that comes to our minds which is closest to section 68 of the South African *Labour Relations Act* is section 12 of the *Employment and Labour Relations Court Act*,2011 which empowers the E&LRC at sub-section (3) to issue remedies, including ordering:

> " (v) an award of compensation in any circumstances contemplated under this Act or any written law;

vi. award of damages in any circumstances contemplated under this Act or any written law;

vii. .... or

viii. any other appropriate relief as the Court may deem fit to grant."

36. Addressing the question of liability of trade unions in respect to losses occasioned to an employer during an unprotected strike, the South African Labour Court in Rustenburg Platinum Mines v Mouthpiece Workers Union [2002]1 BLLR 84 (LC) held that:

> "It is manifest that in relation to a strike, three requirements must be satisfied before the questions, whether compensation as contemplated in sub-section 1(b) is to be awarded, and if so, in what amount, arise for determination. In the first instance, it must be established that the strike does not comply with the provisions of Chapter IV of the Act. Secondly, the party invoking the remedy must establish that it has sustained loss in consequence of the strike. Thirdly, it must be demonstrated that the party sought to be fixed with liability participated in the strike or committed acts in contemplation or in furtherance thereof."

37. And in Mondi Ltd-Mondi Kraft Division vs Chemical Energy Paper Printing Wood & Allied Workers Union and Others [2005] 26 ILJ 1458 (LC), the same Court faced with a claim for damages against a trade union due to loss of production held as follows:

> " The applicant's claim lies in delict under the lex aquilia. [The] applicant is relying on the doctrine of vicarious liability. It must prove a wrongful act, i.e. one accompanied by culpaor dolus committed by someone other than the first respondent but for which the respondent is legally liable, which caused the applicant to suffer a loss that is foreseeable. Furthermore the applicant must show that the act upon which it relies for its claim for damages is an offence. The applicant must prove that the first respondent is a socius criminisor is guilty on the doctrine of common purpose. It cannot be held liable if its alleged act of authorising its agent was not criminal. All the elements that give rise to liability must pass muster under section 67(8) before the protection under section 67(6) is lost. The intention is to enable any person who suffered loss as a result of conduct that constituted a criminal offence to claim damages from the criminal himself or herself and since there cannot be vicariously liability for a crime the entity that would otherwise be vicariously liable continues to enjoy immunity unless the criminal act was authorised in which even the person would himself be guilty of a crime and in any event directly liable."
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> The Court went on to add that:
>
> "To saddle a party with vicarious liability the relationship between the actual culprit and the person sought to be held liable must be established to see if it falls within the class that the law regards and imposing liability upon an innocent party. I am not dealing with an employer and employee since it is common cause that the persons who committed the delict were not employees of the union. The only other possible basis is that of agency. The test is much more restricted and while it is notionally possible that a shop steward's committee may in peculiar circumstances be authorised to act as agent for the union and render the union vicariously liable that is most unusual and not in circumstances such as the present where there is no evidence whatsoever that any organ of the union supported the conduct in question let alone authorised it. It had to be alleged and proved that the union as principal authorised, instigated or ratified the commission of the delict.... What is more a principal is not vicariously liable for unauthorised acts of his agent even if the act was ancillary to carrying out the mandate."

38. Even though the question as to whether a trade union can, in certain circumstances, be held liable for loss arising from a legit strike is not one before us, the Supreme Court of the United States when dealing with a claim for losses arising from a legitimate strike in Glacier Northwest, Inc. vs International Brotherhood of Teamsters Local Union No. 174, No. 21-1449, 598 U.S. held that trade unions can be found culpable for the actions of its members if the union fails to take reasonable precautions to protect against a foreseeable imminent danger. In that regard, the Court held thus:

> "The Union failed to "take reasonable precautions to protect" against this foreseeable and imminent danger. Beth any Medical Center, 328 N. L. R. B., at 1094. It could have initiated the strike before Glacier's trucks were full of wet concrete—say, by instructing drivers to refuse to load their trucks in the first place. Once the strike was underway, nine of the Union's drivers abandoned their fully loaded trucks without telling anyone—which left the trucks on a path to destruction unless Glacier saw them in time to unload the concrete. Yet the Union did not take the simple step of alerting Glacier that these trucks had been returned. Nor, after the trucks were in the yard, did the Union direct its drivers to follow

> Glacier's instructions to facilitate a safe transfer of equipment. To be clear, the "reasonable precautions" test does not mandate any one action in particular. But the Union's failure to take even minimal precautions illustrates its failure to fulfill its duty.
>
> Indeed, far from taking reasonable precautions to mitigate foreseeable danger to Glacier's property, the Union executed the strike in a manner designed to compromise the safety of Glacier's trucks and destroy its concrete. Such conduct is not "arguably protected" by the NLRA; on the contrary, it goes well beyond the NLRA's protections."

39. In light of the cited decisions, we are of the opinion that whereas section 80 of the *Labour Relations Act* limits compensation, suffered in an unprotected strike or lock-out to denying an employee any payment or other benefit under the E.A. for the period the employee participated in the strike, section 12 of the *Employment and Labour Relations Court Act* gives the E&LRC power to order an award of compensation or of damages in any circumstances contemplated under the Act or any written law. The Court can also provide any other appropriate relief as it may deem fit to grant. We think, that limiting the employer to the remedies available under section 80 of the *Labour Relations Act* without considering the import and wide options available under section 12 of the *Employment and Labour Relations Court Act* would not only result in injustice to employers but also encourage unregulated strikes. It is also important to appreciate that under section 12 of the *Employment and Labour Relations Court Act* the E&LRC has exclusive original and appellate jurisdiction to hear and determine, among other disputes, disputes between an employer and a trade union. The section also clearly indicates that a claim, complaint or an application may be lodged against a trade union. It follows that the reliefs available under section 12(3) would be available to an employer who sues a trade union. From the comparative jurisprudence referred to above, we have no doubt that an action for compensation for any loss suffered in an illegal strike can be brought against trade unions.

40. On our part, we add that for a claim by an employer against a trade union to succeed, the test established by the South African Labour Court in Rustenburg Platinum Mines vs Mouthpiece Workers Union (supra) must be called into play. The employer must first prove that the strike was unprotected; second that the damages suffered were as a result of the unprotected strike; and third, that the trade union was complicit in the strike either by calling for the strike or participating in it.

41. It is therefore our finding that in the event of an unprotected strike, an employer can, where the employees cause destruction or other losses, sue for damages. If the employees' trade union is involved in the prohibited strike, we do not see why damages cannot be recovered from the union. However, as is required in any claim for damages, liability must be established through adduction of evidence. The actual damage or injury caused to the employer must be proved. Above all, there should be nexus between the damage and the union for without such connection, any loss suffered by the employer cannot be attributed to the union.

42. Turning to the appeal before us, we note from the record that there was no direct evidence linking the respondent to the strike by the grievants. What we decipher is that the grievants, on their own motion moved to engage in the strike independent of their trade union which only came in after the grievants had boycotted work. The strike was spontaneous and not within the control of the respondent. The respondent's participation or contribution was after the strike and was geared towards finding a solution to the unrest. The appellant therefore did not establish a link between the damages allegedly incurred and the respondent. There was therefore no justification established for the trial court to allow the appellant's counterclaim.

43. In furtherance of the argument that the counterclaim ought to have been allowed, counsel for the appellant also submitted that the counterclaim ought to have been allowed because the respondent

did not reply to the counterclaim. On this, we observe that it was upon the appellant to prove its counterclaim but it failed to do so. It is trite that he who alleges must prove. Therefore, not every claim that is not opposed must succeed. We therefore do not find error in the trial Judge's terse disposal of the issue of the counterclaim as follows:

> " The allegations of union representatives being party to the aggrandizement of the commotion and strike are not demonstrated and therefore cannot be relied on or stand. The counter-claim is, on this note, dismissed for want of merit."

44. In respect to the damages awarded to the grievants, the appellant is aggrieved by the decision of the learned Judge to award damages to employees who participated in an unprotected strike. On this issue, we point out that despite the learned Judge finding that the there was an illegal industrial action by the grievants, he also made a finding that the termination of their employment contracts was unfair and unprocedural. The remedies available for wrongful and unfair termination are provided at section 49 of the E.A. and include:

> " (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
>
> (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph
>
> (a) which the employee would have been entitled to by virtue of the contract; or
>
> (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

45. The reliefs under section 49 of the *Employment Act* are discretionary in nature. This position has been affirmed by the Supreme Court in Kenfreight (E.A) Limited v Benson K Nguti [2019] eKLR as follows:

> " When giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.
>
> The Black's Law Dictionary 9th edition at page 534 defines judicial discretion as follows:
>
> "the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right"

46. In order for this Court to interfere with remedies awarded by the E&LRC an appellant should question the exercise of discretion by the learned Judge. In that respect, we are guided by the pronouncement of this Court in National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR that:

> " Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this appeal, it is guided by the principles enunciated in numerous case law from this Court.

> In the case of Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others [2014] eKLR, it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice."
>
> In this case, we find no reason to interfere with the trial court's exercise of discretion.

47. Specifically, with regard to the award of the salary for the month of May 2012 to the grievants, it is evident that the respondent pleaded for the same under Part 4.2 of the Amended Memorandum of Claim. The appellant on its part denied the allegations at Paragraph 20 of their Amended Memorandum of Defence and Counterclaim. However,no evidence was adduced in support of the position adopted by the appellant. In our view, the appellant simply made a denial of the respondent's claim. If indeed the salaries had been paid, why were there no payment vouchers or any other form of proof of payment adduced as evidence? In the end, we find that it has not been demonstrated by the appellant that the awards made by the trial court were made injudiciously and we therefore find no reason to attract our interreference with the discretion of the trial court.

48. Another issue raised by the appellant was that the judgment of the E&LRC was incomplete as the learned Judge issued an order directing the Commissioner of Labour to compute amounts payable to the grievants. We agree with the appellant that judgements should be complete as was held in Kenya Revenue Authority v Menginya Murgani [2010] eKLR that:

> "With respect, it was erroneous to convert a judicial function into a ministerial function. Both the award and the level or quantum of damages is in our view, judicial functions which the superior court cannot rightfully delegate to a Deputy Registrar. Indeed, both aspects are appealable to this Court and not to the superior court whereas orders of the Deputy Registrar under Order 48 are appellable to the superior court.
>
> The Deputy Registrar's ministerial powers are set out in Order 48. There is no provision in law for delegating any judicial functions to the Deputy Registrar. Any such delegation would be a nullity. A judgment must be complete and conclusive when pronounced and therefore it cannot be left to the Deputy Registrar to perfect it."

49. However, we hasten to add that the circumstances of this case were different from those of the above cited case. In this case, the boundaries within which the Commissioner of Labour was to act were already defined under orders (ii), (iii) and (iv) of the judgment which required the Commissioner to calculate the grievants' salary for the month of May 2012, one-month salary for unlawful termination and the terminal dues uncollected at the time of termination. We are therefore satisfied that the impugned judgment was precise, unambiguous and complete and the order was merely meant to facilitate the realization and execution of the judgment.

50. Finally, we address the issue as to who bears the costs of this appeal. The norm with regard to costs is that they follow the event. This is so, unless the court for good reason otherwise order. In this appeal, no reason has been advanced as to why costs should not follow the event. As we have already found the appeal to be without merit, it follows that the appellant should meet the costs incidental to the appeal. In the end, we find that the entire appeal is without merit and dismiss it with costs to the respondent.

51. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OFMARCH, 2024

F. SICHALE

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR