**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)**

**CIVIL APPEAL NO. 53 OF 2016**

**BETWEEN**

**MOHAMMED YAKUB ATHMAN & 18 OTHERS……APPELLANTS**

**AND**

**KENYA PORTS AUTHORITY……..……RESPONDENT**

*(Being an appeal from the Award of the Employment and Labour Relations Court of Kenya at Mombasa (Rika, J.) dated 29th February, 2016*

*in*

*Industrial Court Claim No. 448 of 2015)*

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**JUDGMENT OF THE COURT**

The appellants were employees of the respondent. Some of them were officials of the Dock Workers Union that represents Unionisable Employees of the respondent which in turn is an affiliate of Trade Union Congress of Kenya, *"Tuc-ke"*.

Through Kenya Gazette Supplement **Number of 12** of **6th February, 2015**, the National Hospital Insurance Fund (*"N.H.I.F")* reviewed upwards monthly contributions payable by employees from Kshs.320/- to Kshs.1,700/-. The revised rates aforesaid were resisted by the Dock Workers Union to no avail. This forced Tuc-ke to issue a strike notice to the cabinet secretary for labour, dated 19th June, 2015 on the ground that the revised NHIF rates were not preceded by adequate social dialogue and had implemented the decision without adequately consulting Tuc-ke and its affiliates. It demanded that the revised rates be suspended immediately, and deductions dating back to 1st April, 2015 refunded to the employees.

The respondent as well as the Minister failed to heed the notice, hence on 1st and 2nd July, 2015 the appellants went on strike. However, the appellants' action did not go down well with the respondent for soon thereafter, the appellants were served with letters of summary dismissal on account of "***participation in an industrial strike, which resulted in stoppage of work***" while others were accused that "***on Saturday 27th June, 2015, you incited other employees and showed disrespectful behaviour during union strike……"***

The appellants were convinced that the decision to dismiss them from employment was unfair and unlawful. Accordingly, they lodged a claim with Employment and Labour Relations Court at Mombasa praying for:-

**(i) A declaration that the termination of their employment was unconstitutional, illegal and or unprocedural;**

**(ii)An order of reinstatement and activation of the system so that they could gain access to the port;**

**(iii) Reinstatement into their staff houses from which they had**

**been evicted;**

**(iv) Injunction to restrain the respondent from interfering with their occupation of the staff houses and to stop their eviction therefrom;**

**(v) Compensation for loss suffered during the illegal eviction;**

**(vi) General damages for pain and suffering;**

**(vii) Costs.**

In response, while conceding that it had indeed summarily dismissed the appellants on the dates shown in their respective letters of summary dismissal, the respondent maintained that NHIF dues were revised by law and it would have been acting in breach of the law, by acceding to demands of the union to suspend its implementation. That the deductions were not as a result of a unilateral decision or wrongful conduct on the part of the respondent but were born of statute, imposing an obligation on the respondent to deduct or be penalized. It further pleaded that the strike was unlawful and unprotected as there was an order of injunction issued in Petition Number 62 of 2015 restraining the Tuc-ke from engaging in the strike over the NHIF that bound the appellants and their union.

Parties agreed to proceed with the claim by way of written submissions and witness statements on record.

The appellants' submissions were along the lines that their dismissal was unjustified and procedurally flawed. That the managing director of the respondent did not initiate proceedings as required by carrying out investigations; issuance of 72 hour notice to them to exculpate themselves and thereafter a report forwarded to the Board of Directors for its decision. That there was no meeting of the Board of Directors to deliberate on any report and decide on the appropriate sanctions. That **Article 41(1)** of the Constitution guaranteed every person the right to fair labour practices which included the right to fair remunerations, and the right to strike. That under **Section 46** of the Employment Act an employee's participation in a lawful strike did not constitute fair reason for dismissal. Similarly that **Section 76** of the Labour Relations Act, allows a person to participate in a strike if the trade dispute concerns terms and conditions of service.

The revised NHIF contributions concerned the terms and conditions of employment, and therefore was a proper subject of an industrial action under Section 76 of the Labour relations Act. That the National Hospital Insurance Act requires the NHIF Board to deliberate, consult and agree with employees and employers before making decision to revise the rates. The NHIF Gazette Notice raising the rates did not issue following the participation of the appellants as contemplated by the law. Finally, the appellants submitted that even if the court was to find the strike illegal, their summary dismissal did not observe the requirements of **Section 41** of the Employment Act and was therefore unfair and unlawful. That participation in an illegal strike in any event, does not constitute an act of gross misconduct under **Section 44(4)** of the Employment Act.

Replying, the respondent submitted that some of the appellants participated in an unlawful strike on 27th

June, 2015 which turned violent, when they refused to go back to their work stations as ordered but instead physically accosted Salim Chingabwi, the General Manager, Human Resources and Administration and one, Komore. To the respondent, the conduct of the appellant on that date fitted the description of a strike under **Section 2** of the Labour Relations Act. Again all the appellants were involved in the strike on 1st and 2nd July, 2015. The strike was purportedly called by Tuc-ke, and was aimed at compelling the respondent to suspend or cease the enhanced NHIF deduction. Much as the right to strike is a fundamental right under **Article 41(2)** of the Constitution, it was the position of the respondent that it was a limited right. That a strike could only be in connection to an existing dispute between an employee and an employer which was not the case here. Under **Section 76(1) (a)** of Labour Relations Act, a person may strike if the trade dispute concerns terms and conditions of employment. A trade dispute does not include a difference or disagreement between an employer and a federation of employees and that a strike called by a federation of trade unions cannot be a protected strike under **Section 76** of the Labour Relations Act.

The respondent further submitted that Legal Notice number 14 of 2015 was in the nature of legislation, which every person had an obligation to obey. That **Section 80** of the Labour Relations Act deems persons who participate in strikes contrary to the provisions of the Act, to have acted in breach of their contracts of employment, and liable to disciplinary action. Such persons are not entitled to any protection under the Employment Act for the period of the strike. Accordingly, the respondent was justified in summarily dismissing the appellants under **Section 80** of the Labour Relations Act as read with **Section 44 (3)** of the Employment Act. With regard to the procedural fairness, the respondent submitted that it was impossible to hear the appellants, as they absented themselves from their work stations. The involved employees were a large number, and it was not practical to hear each one of them.

Having weighed carefully the contrasting positions in the dispute held by the respective parties, **Rika, J.** rendered his decision on 29th February, 2016 and opined that:-

> **"……. The right to strike under Article 41 of the Constitution, and other associational rights under Articles 36 and 37 are not absolute. The respondent was justified in summarily dismissing the particular claimants. Even had the strike of 27th June, 2015 conformed to the demands of the law, the conduct of the claimants in manhandling Management Officers by barricading the officers and throwing stones during the strike, would justify their dismissal under Section 44 (4) and 45 of the Employment Act, 2007……Our Labour Relations Act concerns itself mainly with specific strikes on tractable disputes between employees and employers, not general strikes called by umbrella Trade Unions over political or social-economic subjects……A strike is not aimed at extracting concessions from third parties, such as the NHIF or the Government.……Participants of a general strike, which an employer has nothing to do with, cannot therefore seek protection under the Constitution……If the KPA had nothing to do with the strike ……then it cannot be that there was a dispute between the KPA on one hand and the employees and their union on the other hand……..A general strike called with the purpose of changing the law, and in disregard of the judicial process, is essentially a call against legal order. It is revolutionary… aimed at overthrowing a legal order. It does not have protection under the Constitution and the Labour Relations Act……The respondent did not seek guidance from the Constitution of Kenya, the Disciplinary Handbook, the Employment Act and rules of natural justice, before arriving at the summary dismissal decision. It was bound to do this ….. in the present case, there is evidence the employees were available for disciplinary hearing after the storm at the port had calmed. The respondent deactivated the claimants from its access system. They were not allowed entry to the port after 2nd July, 2015….. Furthermore the respondent went ahead to invite job applicants to fill in the vacancies alleged to have been created by the claimants' absence, even before hearing the claimants. Dismissal for majority of the claimants was on July, 2015, a day after the strike action petered out……. Even in cases where it is obvious an employment offence has taken place, procedural requirements must be met before termination. The court is in agreement with the claimants' submission that they were denied procedural fairness. In this respect, termination of their contracts of employment was unfair……"**

Pursuant to the reasoning above, **Rika, J.** decreed that:-

> **1) Termination of the claimants' contract of employment was based on valid grounds, but did not follow a fair procedure, and was therefore unfair.**
>
> **2) The respondent shall pay to the claimants 6 months' gross salary each, in compensation for unfair termination.**
>
> **3) The respondent shall pay to the claimants all their terminal benefits.**
>
> **4) The respondent shall issue to the claimants at least 30 days' notice, if it intends to have the claimants vacate the staff houses, and both parties shall ensure such a process is carried out humanely and without resort to violence.**
>
> **5) All terminal benefits and compensation shall in any event, be paid to the claimants, before they are removed from the staff houses.**
>
> **6) Parties shall meet their costs of this litigation.**

This appeal has been instituted by the appellants on nine grounds that may be summarized as follows; that the learned Judge erred in law and fact in finding that the appellants participated in an illegal strike; in believing that the refusal by **Justice Lenaola** to stay the implementation of the revised NHIF rates in **Petition No. 61 of 2015** barred the appellants from initiating a strike under **Section 76** of the Labour Relations Act; in finding that the strike called by Tuc-ke had no legal basis or in any way justifiable while the same conformed to the provisions of Section 76 of the Labour Relations Act; in failing to hold that once a strike notice had been issued by the appellants, the respondent was under a duty to file a claim seeking to declare the same illegal; in wrongly applying the law after finding that the respondent did not comply with its own disciplinary procedure or with the provisions of Section 41 of the Employment Act; by failing to appreciate that participation in an illegal strike is not a ground for summary dismissal; in failing to order reinstatement of the appellants to their employment and staff houses and finally by failing to order that the respondent do pay the appellants costs of the claim.

The appeal was canvassed by way of written submissions. The appellants in their 13 page written submissions contend that there was no evidence to support the allegations of the belligerent behaviour of the appellants or roughing up of some management officials or hurling of stones at an ambulance, that the CCTV footage filed in court does not show the appellants committing the acts, that even if the events of 27th June, 2016 could be construed as amounting to a strike, the appellants should still not have been summarily dismissed in the face of the agreed return to work formula. They further submitted that the trial court misapplied the provisions of **Section 2** of the Labour Relations Act because there was no cessation of work by the appellants on the material day, no common intention or understanding was proved by the respondent regarding the appellants' activities complained of and in any event Section 44(4) of the Employment Act, does not list participation in an illegal strike as one of the matters that amount to gross misconduct so as to justify summary dismissal of an employee.

The appellants further submitted that the trial court erred in imputing a trade dispute between the appellants and the respondent when the appellants had merely gone to inquire from their employer about irregularities and delay in releasing their payslips. With regard to the proceedings in **Petition Number 61 of 2015** the appellants submitted that the respondent having failed to produce in evidence pleadings and the order of injunction, the respondent had failed to prove its allegations and therefore it was wrong for the trial court to rely on unproved fact to find for the respondents.

With regard to NHIF, the appellants submitted that any issue that affects the remuneration and or wage of an employee including the NHIF contributions concerns the terms and conditions of employment as stated under **Section 76** of the Labour Relations Act and any dispute arising in respect thereof warrants an employee to exercise his or her fundamental right to strike. In any event implicit in **Section 4** of the National Hospital Insurance Fund Act is the requirement that in order for the Board of NHIF to exercise

authority regarding regulation of contributions it has to deliberate, consult and agree with the contributor and the remitter which was not the case here. That failure by the board to call on the appellants' representative (Tuc-ke) to participate in the discussions that led to the revision of NHIF contributions, which discussions touched on the human rights of the appellants vide **Article 41** of the Constitution, laid a basis for a trade dispute-under **Section 76** of the Labour Relations Act. In conclusion, the appellants submitted that they were guided by the law and conducted themselves within the ambit of the law and therefore participated in a lawful strike contrary to the assertions of the respondent and ought therefore not to have been summarily dismissed.

In reply, the respondent submitted that the appeal was wholly unmeritorious. On the question of CCTV viewing, the respondent submitted that the order was reviewed and vacated when the trial court directed that the claim proceed on the basis of the record. In any event the appellants did not object to that directive. That the appellants' own witness statements concede that there was a '*return to work agreement*'. Such an agreement can only be entered into after there has been a strike or desertion from place of work. The respondent also disputed the contention by the appellants that the trial court relied on hearsay evidence in reaching the determination that the appellants had participated in an illegal strike. On the submission of the appellants that the return to work formula vitiated the summary dismissals, the respondent's argument was that this was never their case in the trial court. In any event parties are bound by their pleadings. For this proposition, the respondent relied on the following case law; **Kenindia Assurance Company Limited V Otiende [1989] 2 KAR 162**, **UAP Provincial Insurance Company Ltd V Michael John Beckett [2013] eKLR** and **Thuweiba Maka & Others V Aisha Juma & Another [2016] eKLR**. The respondent further submitted that no evidence was led or presented to show that the strike was not illegal. The burden of showing so lay with the appellants which they failed to discharge and the trial court cannot be blamed for arriving at the conclusion that the strike was illegal. More so when the strike was even called by Tuc-ke, a party unknown to and unrecognized by the respondent.

Finally, the respondents submitted that the appellants had created a complete atmosphere of fear and destruction. They were not even willing to dialogue with the respondent. In those circumstances the appellants could not have been given the opportunity to be heard.

This Court has consistently applied the principle that as a first appellate court, it is bound to consider all the evidence which was adduced before the trial court, analyse and evaluate it afresh before coming to a decision one way or another, of course without overlooking the conclusions of the trial court. See **Festus Ogada V Hans Mollin [2009] eKLR**.

To our mind, the central issue in this appeal is whether the appellants participated in an illegal strike with the consequence that they were summarily dismissed and whether the summary dismissal was procedurally fair.

Two incidents happened at the appellants' workplace at the material time. To the respondent those incidents amounted to unlawful strikes. However, to the appellants there were no strikes and even if there were, they were lawful. The incidents we are talking about happened on 27th June and 1st and 2nd July, 2015. The one of 27th June, 2015 involved the 15th, 16th and 17th appellants together with Ismael M. Njeru, Fahdi Bwana, Juma Jabir Rashid and Mwajefa Hamisi, hereinafter ***"the concerned appellants"***. According to the concerned appellants, their payslips for the month of June, 2015 were delayed. They were received on 26th June, 2015 instead of the normal 24th June, 2015. And when the payslips were received they contained some unexplained deductions. The concerned appellants then decided to enquire about the deductions from the respondent's head office on 27th June, 2015. According to their own written statements, they stated that '*almost all employees gathered at the head office*'. Subsequently and in consultation with their union and the management of the respondent a "*return to work formula*" was agreed upon and the matter ended.

However, the respondent's evidence is that indeed there was an illegal strike on 27th June, 2015 orchestrated by the concerned appellants. What triggered the illegal strike was the introduction of the biometric clocking system. The unexplained deductions contained in the payslips was as a result of data

gleaned from the biometric system which captured data on absentees, late-comers and early–leavers among the employees. This is the information that was used in preparing the disputed payslips. To the respondent, the appellants and other employees were protesting against deducted wages resulting from their hours of absence. They even turned violent by roughing up management officials, Chingabwi and Komara sent to calm them down. Indeed, they hurled stones at the ambulance that was rushing injured Komara to hospital. As if that was not enough, they barricaded Chingabwi at the workplace all day and forced him to sign a return to work formula before he was let go.

From the foregoing, there can be no doubt at all that indeed there was a stoppage of work at the concerned appellants' work stations on that day. As conceded by the appellants in their written statements, almost all the employees went to the head office. They had left their stations of work without the permission and or authorization of the respondent. Further it was alleged by the respondent, which fact was not seriously disputed by the appellants,that stones were thrown at management officials who attempted to calm things down. The only feeble response to this allegation was that if CCTV footage had been viewed by the court it would have shown that no such incident occurred.

From the record before us, parties agreed before the trial court that the claim be processed through written submissions and witness statements filed, without necessarily calling any witnesses followed by highlighting of the respective written submissions. The parties duly filed their written submissions but for one reason or another over a long period of time they were unable to avail themselves for highlighting those submissions. Tired of the game being played on it, the trial court reviewed and vacated the orders for highlighting of submissions and on viewing of CCTV footage, directed that it would give its decision on 29th February, 2015 on the basis of the contents of the record before it. It is noteworthy that the appellants did not object to the course adopted by the court in disposing of the claim. The appellant cannot now turn around and claim that the trial court relied on hearsay, uncorroborated, unsupported and or unsubstantiated facts contained in the written statements of the respondent's witnesses or complain that the trial court wrongly disregarded the CCTV evidence. Even in the absence of CCTV evidence, there was other equally important evidence that proved that the concerned appellants were belligerent in their conduct towards the management staff of the respondent and which indeed confirmed the fact of an illegal strike. The witness statement of Chingabwi details the conduct of the concerned appellants during the strike as does the investigation report. All this evidence, as the trial court correctly found, remained uncontroverted. Therefore the contention by the appellants that the allegations of belligerent and violent conduct of the concerned appellants were not proved cannot, in the light of the foregoing, be upheld.

It was against this background of unrest and belligerent behavior that a return to work formula was agreed upon. As correctly observed by the trial court, a return to work formula in itself is an acknowledgment that there was withdrawal of labour preceding the return to work formula. It is an admission that there was a strike. It is unlikely that there would be a return to work formula without a preceding strike. With this kind of evidence, how could the concerned appellants claim that there was no strike? **Section 2** of the Labour Relations Act defines a strike as:-

> **"cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work for the purpose of compelling their employer or an employers' organisation of which their employer is a member to accede to any demand in respect of a trade dispute"**

Given this definition, there can be no doubt that on 27th June, 2015 the concerned appellants ceased to work, and acting in combination, in common or in concert refused to work. They converged at the respondent's head office demanding the recall of the biometric clocking system, and a refund of money deducted from their June 2015 salaries. All the elements constituting a strike as defined above were present.

The concerned appellants' participation in the illegal strike and incitement as well as disrespectful and violent behavior towards their line supervisors and managers constituted gross misconduct. As evident from the letters of summary dismissal served on each of them, they were all dismissed for gross misconduct, a ground available for summary dismissal contrary to their submissions. We are therefore in

agreement with the trial court's conclusions that:-

> **"……. The 21st to 27th claimants were therefore summarily dismissed on justifiable grounds. They were engaged in a violent wildcat strike, during which management officers were insulted and assaulted. The claimants absented themselves from their appointed places of work, and camped at the head office from dawn to dusk on the 27th June, 2015. They did not have the authorization of their employer, or have lawful reasons, to be absent from work. The decision to summarily dismiss them was justifiable, under Section 80 of the Labour Relations Act, and Sections 44(4) and 45 of the Employment Act, 2007….."**

The concerned appellants have advanced an alternative argument that the return to work formula vitiated the summary dismissals. However, in our view, this argument is misplaced. This was never their case before the trial court as is evident from their amended statement of claim. It is trite law that a party is bound by its pleadings and cannot raise a matter for the first time on appeal unless perhaps it borders on jurisdiction, when this was not canvassed in the court below. **See Kenindia Assurance Company Limited and Thuweiba Maka & 3 Others** (supra). The concerned appellants' case in the trial court was that there was no strike at all on 27th June, 2015, an allegation which as we have demonstrated was patently false.

With regard to the second strike of 1st and 2nd July, 2015 and in which apparently all the appellants participated, there is no dispute that it occurred. Indeed, it is not contested in paragraph 8 of the amended statement of claim appellants admit taking part in the strike. The issue for determination and which the trial court aptly captured was its legality. The appellants' position was that they were aggrieved by the implementation by NHIF board, of the revised monthly rates of employees' contribution to the fund. Tuc-ke, wrote to the cabinet secretary in charge of labour matters on 19th June, 2015, rejecting the new NHIF rates, threatening a strike if the same was not withdrawn. The Cabinet Secretary and the respondent did not budge within the 7 days demanded by the appellants. Accordingly, on 1st and 2nd July, 2015, the appellants went on strike.

The position of the respondent was that the strike was illegal on account of the fact that prior to this, Tuc-ke had moved the High Court, at Nairobi in Petition Number 61 of 2015 in which it sought an order staying the implementation of the revised NHIF rates. On 15th June, 2015, **Lenaola, J.** (as he then was) declined the stay sought. Further Tuc-ke had no recognition agreement with the respondent and nothing was brought to its attention showing the affiliation of the Dock Workers Union to Tuc-ke. On what basis then was Tuc-ke calling the strike? The respondent also took the position that acceding to the request would have breached the law. Tuc-ke having petitioned the High Court on the legality of the revised NHIF rates, why would they then call a strike rather than pursue the judicial remedy? In any event Tuc-ke was a stranger to the respondent. No wonder the trial court concluded that the strike called by Tuc-ke had no legal basis nor was it justified and the appellants placed themselves beyond the protection of law.

In order to obtain protection of the law as demanded by the appellants in their submissions, they should have acted legally and within the armbit of the law so as to obtain protection of the law. Perhaps this was a classic case of the application of the *maxim Ex Turpi Causa non Oritur actio* as submitted by the respondent. The maxim simply means that the appellants are seeking to rely on their own wrong to obtain a remedy- a thing a court of justice frowns upon. Again and as correctly observed by the trial court, the law regulating strikes in Kenya contemplate strikes, on tractable disputes between employers and employees, not a strike called by umbrella Trade Unions over political or socio-economic subjects. A strike is not aimed at extracting concessions from 3rd parties, such as the NHIF or the Government as was the case here. The right to strike guaranteed under Article **41(2) (d)** is limitable under **Article 24(5) (d)** of the Constitution. There are also provisions in the Labour Relations Act such as **Section 2**, which limits the right to strike, by respectively defining parties to a strike, the subject matter of a strike and the purpose of a strike. Therefore participants of a strike, which an employer has nothing to do with, as was the case here cannot seek the protection of the Constitution, contrary to the submissions of the appellants. The strike had nothing to do with the right to fair labour practices, that is, the right to fair remuneration and to go on strike. Nor was it a lawful strike. For as long as it involved a 3rd party, NHIF who the

respondent had no control over and a challenge to a statute to which again the respondent had no control over, it was an illegal strike.

In a nutshell, the subject matter of the strike was something the respondent could not influence. The respondent could not suspend or halt the implementations of the law without inviting penal consequences. The strike was in the circumstances totally unnecessary, more so, as the judicial mechanism had already been invoked by Tuc-ke to redress the collective grievance over NHIF rates, a fact known to all parties. The appellants' submission on this aspect that the existence of the petition in the High Court was not proved as the order and the pleadings of the same were not availed in court is bereft of merit and the height of dishonesty. Is it not Tuc-ke that was the petitioner? The documentation on record flies in the face of this submission by the appellants. On the whole, we are in agreement with the findings of the trial court that the strike was not a protected strike within the meaning of **Section 79** of Labour Relations Act and the respondent had substantive ground in summarily dismissing the appellants, for their participation in the general strike under **Section 80** of the Labour Relations Act, **Section 44 (4)** and **45** of the Employment Act and the respondent's disciplinary Hand Book.

Having established that there were two strikes, that the said strikes were illegal and therefore the respondent was entitled to summary dismiss the appellants, were the appellants nonetheless entitled to procedural fairness as contemplated by **Section 41** of the Employment Act?. The respondent's position was that summary dismissal pursuant to **Section 80** of the Labour Relations Act did not call in the application of Section 41 of the Employment Act on procedural fairness. On the other hand, the appellants' position was that an employee participating in an unprotected strike is deemed to have acted in breach of his contract but that does not disentitle such an employee from the procedural protection under **Sections 41** and **45** of the Employment Act. Relying on the case of **Kenya Plantation and Agricultural Workers Union V Roseto Flowers (2013) eKLR**, the trial court held and rightly so in our view that Section 80 of the Labour Relations Act does not exclude the application of Section 41 of the Employment Act on procedural fairness. Thus even where there is reason to deem the conduct of the employee as amounting to fundamental breach of his contract of employment, there is always an obligation on the part of the employer to hear the employee before termination.

But the respondent's position is that the appellants had created a complete atmosphere of fear and destruction and were not willing to dialogue and these being the circumstances, they could not be given the opportunity to explain or be explained to and therefore the right to be heard was not breached. Similar arguments were made before the trial court but it was not persuaded at all. The trial court considered the fact that the respondent did not advert to the Constitution of Kenya, the respondent's own Disciplinary Handbook which places high premium on the application of the rules of natural justice in disciplinary proceedings and the Employment Act, before arriving at the summary dismissal decision. In this case, there was evidence that the employees were available for disciplinary hearing if at all after the storm at the port had dissipated, for their entry into the port had been deactivated. Moreover, the dismissal for the majority of the appellants came a day after the strike had for all intents and purposes fizzled out. Therefore the argument that the appellants had created a complete atmosphere of fear and despondency rendering their right to be heard impossible cannot hold. In any case, the respondent's case in the trial court was that due to the sheer number of the appellants, it made it impossible to subject each to a hearing before they were summarily dismissed. The sheer number of employees involved in a matter, the subject of disciplinary proceedings does not in any way absolve the employer from meeting the demands of procedural fairness under the law. As observed by the trial court, in such a case, the employer and the employee or his union must devise a mechanism which would enable a collective process to take place without violating the substantive and procedural rights of the individual employee.

From all that we have said, the irresistible conclusion must be that this appeal is bereft of merit and is accordingly dismissed with no order as to costs.

**Dated and delivered at Malindi this 31st day of March, 2017**

**ASIKE- MAKHANDIA**

**……..**

**JUDGE OF APPEAL**

**W. OUKO**

**…….……...**

**JUDGE OF APPEAL**

**K. M’INOTI**

**…….....**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**