Kenya County Government Workers Union v Kitui County Government (Employment and Labour Relations Cause 608 of 2018) [2024] KEELRC 616 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 616 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 608 OF 2018

AN MWAURE, J

MARCH 14, 2024

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION .... CLAIMANT

AND

KITUI COUNTY GOVERNMENT .... RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant filed a Statement of Claim dated 9th April 2018.

Claimant's Case__**

2. The Claimant avers that the statement of claim concerns wrongful/unfair and illegal dismissal of two of its members; Pius Mwala Musili and Esther Ndanu Luka herein after referred as 'grievants'.

3. The Claimant avers that the grievants were employed by the Town Council of Mwingi on diverse dates and diverse capacities and were members of the Claimant.

4. The Claimant avers that the terms and conditions of service for the employees of Kitui Town Council were governed by a collective bargaining agreement, 2006 (CBA) concluded between the Association of Local Government Employers and Kenya Local Government Workers Union pursuant to a recognition agreement secured by the Claimant. The CBA was registered at the Industrial Court as RCA No. 144 of 2006.

5. The Claimant avers that Pius Mwala Musili (1st grievant) was employed by the Town Council of Kitui on 02.09.2022 as a draughtsman at the salary scale 13. The 1st grievant was elected as the Claimant's chairman for Mwingi Town Branch and registered as such by the Registrar of Trade Unions on 24.03.2006.

6. The Claimant avers that on 16.12.2008, the union's Mwingi Town Branch Secretary, James Mwendwa convened a meeting of its members to discuss the council's non-remittance of statutory deductions to their schemes including NSSF, NHIF, LAPTRUST and staff welfare.

7. During the meeting, the union agreed to participate in a sit in on 22.12.2008 at the Town Council offices in order to get the attention of the town council officials who had ignored the members request to remit their deductions. The Branch Secretary invited the town clerk and other civic leaders to address the members on their concerns.

8. The Claimant avers that on 22.12.2018, the members of the union staged the sit in as planned whereby the town clerk and other civic leaders addressed them. After consultation, there was consensus that the union members go back to work; the Chairman of the Council would convene a meeting on 06.01.2009 to address their grievances and there would be no victimization for union members for participating in the sit in.

9. The Claimant avers that vide a letter dated 24.12.2008, the Town Council of Mwingi suspended the 1st grievant on alleged grounds inter alia that the 1st grievant had organised and held an illegal meeting on 16.12.2008 which passed resolutions to lock out some of the council officers from performing their duties and to force employees not in the meeting to join in a strike to take place on 22.12.2008.

10. The Claimant avers that the 1st grievant vide a letter dated 06.01.2009, explained the circumstances under which the meetings on 16.12.2008 and 22.12.2008 were held and that they had the approval of the council and the agenda communicated to the council in advance.

11. The Claimant avers that the town council vide a letter dated 16.12.2009 invited the union to a joint staff committee scheduled on 22.01.2009 when the 1st grievant's disciplinary hearing was to take place.

12. The Claimant avers that the joint staff committee was convened and the 1st grievant and representative of the union attended the hearing. The 1st grievant was read the allegations and in his defence, offered an explanation that no strike had been organised or took place on 22.12.2008 as alleged; the sit in was organised by the union officials and was sanctioned by Mwingi town council civic leaders and that as an official of the union, his union activities are protected by the ILO Convention No. 98 and 135.

13. The Claimant avers that the town council issued the 1st grievant a termination letter dated 16.04.2009. But did not take to consideration his submissions but insisted the 1st grievant took part in an illegal strike.

14. The Claimant avers that the 1st grievant appealed his dismissal vide a letter dated 20.04.2009 but it has never elicited a response hence the town council and Public Service Commission (PSC) deliberately locked him out of an appeal which he was entitled to.

15. The Claimant avers that clause 30 of the Collective Bargaining Agreement (CBA) provides for a maximum period of suspension of 3 months. However, the 1st grievant was on suspension for more than 5 months from 06.01.2009 to 16.04.2009.

16. The Claimant avers that on the part of Esther Ndanu Luka ('2nd grievant'), was employed by the Urban Council of Mwingi as a Revenue Assistant by a letter of appointment dated 08.06.1994 on a salary scale S.19. Due to her exemplary service, she was promoted to a Senior Revenue Clerk at a salary scale A.12 on 12.03.2006 and subsequently as an Accountant III salary scale A.10 on 01.11.2008.

17. The Claimant avers that the 2nd grievant was a member of it union and participated in both meetings of 16.12.2008 and 22.12.2008 in her capacity as a member.

18. The Claimant avers that the 2nd grievant was suspended by the town council vide a letter dated 24.12.2008 on grounds that she was one of the ring leaders that organised the illegal meeting on 16.12.2008; and that she had passed resolutions amongst them, to lock out council officers from performing their duties.

19. The Claimant avers that the 2nd grievant responded vide a letter dated 06.01.2009 explaining the circumstances the meetings were held and the council was aware of the convention of the meetings and their agenda beforehand. Further, the meetings were sanctioned by the town council and attended by the council's civic leaders.

20. The Claimant avers that vide a letter dated 16.01.2009, upon request by the union, the town council invited the union to a joint staff committee scheduled for 22.01.2009 at Mwingi Town Hall for the purpose of hearing the 2nd grievant's disciplinary matter.

21. The Claimant avers that the hearing was held however the union representatives were not allowed to attend and/or participate in the hearing. During the hearing, the charges were read out to the 2nd grievant, who submitted her defence that she participated in the union activities as a member; in her capacity as a member, she did not have authority to organise union activities; all members of Mwingi Town Branch participated in both meetings yet she was the only one singled out for disciplinary action.

22. The Claimant avers that vide a letter dated 16.04.2009, the town council of Mwingi informed the 2nd grievant that the Council in Finance, Staff and General purposes Committee held on 31.03.2009 had decided to dismiss her which was adopted by the full council which sat on 31.03.2009 on grounds that she participated in an illegal strike.

23. The Claimant avers that in dismissing the 2nd grievant, the town council did not take into consideration the 2nd grievants submissions.

24. The Claimant avers that the town council of Mwingi grossly deviated from the disciplinary process laid down in clause 32 of the CBA which provides for two prior warnings before any employee is terminated from the Council's service. The grievants did not receive any prior warning(s) before they were terminated

25. The Claimant avers the grievants should have been subjected to the disciplinary process under Regulation 23 of the Public Service Commission (Local Authority Officers) as provided under clause 31 of the CBA but the town council failed to refer the matter to the Public Service Commission.

26. The Claimant avers that the grievants dismissal was in contravention of the terms and conditions of the CBA which does not make provision for summary dismissal.

27. The Claimant avers that the 2nd grievant appealed against the decision to dismiss her vide a letter dated 20.04.2009 to PSC.

28. The Claimant avers that the 2nd grievant received a letter dated 16.09.2009 from the town council of Mwingi informing her that PSC has disallowed her appeal and advised to apply for a review within 42 days from receipt of the letter.

29. The Claimant avers that the 2nd grievant applied for a review of PSC's decision by a letter dated 07.10.2009. The council vide a letter dated 11.10.2010 informed her application was unsuccessful but did not give reasons why it was declined.

30. The Claimant avers that the grievants reported a labour dispute to the Ministry of Labour in accordance to section 62 of the *Labour Relations Act* which was accepted and vide a letter to the union

dated 15.03.2011, a conciliator was appointed to facilitate conciliation between the parties and advised them to submit their written proposals within 7 days.

31. The Claimant avers that it submitted its proposal on 31.10.2011 and proceeded to attend a conciliation meeting which the town council did not attend. Thereafter, the conciliator failed to issue its report despite numerous pleas to the Ministry of Labour.

32. The Claimant avers that the Ministry of Labour vide a letter dated 21.05.2015 informed the union that the conciliation report had been issued but the same misplaced hence not delivered to the Claimant. The Ministry asked the Claimant to take the letter as a certificate issued under section 69(a) of the Labour Relations Rules.

Respondent's Case

33. In opposition to the Claim, the Respondent filed its statement of response dated 25th October 2018.

34. The Respondent avers that the grievants have never been employed, seconded, transferred or deployed into its services and remain strangers to the Respondent.

35. The Respondent avers that it is unaware of the meetings held 16.12.2008 and 22.12.2008 and if it did happen, the same were unlawful, illegal, unauthorised and without notice.

36. The Respondent avers that the said meeting and sit in were chaotic, riotious, unruly and disruptive gatherings carried out without law and order. The Claimant has failed to provide any evidence that the Town Clerk, Chairman of the Council or any other Council representative addressed such illegal gathering or that any of the alleged resolution were made.

37. The Respondent avers that the grievants suspension was reasonable, justifiable, fair and in accordance with the terms of service and laws applicable to the grievants' employment contracts to enable the Council investigate the alleged acts of gross misconduct.

38. The Respondent avers that the 1st grievant failed to show any approval of the said meetings from the Council. The disciplinary action and termination of the 1st grievant was for valid reason and in compliance with the law. The 1st grievant was granted an opportunity to make his defence which the Respondent found unmerited hence his summary dismissal for acts of gross misconduct and illegal activities.

39. The Respondent avers that the Council concluded the disciplinary process and had no capacity to lock the 1st grievant out of an appeal and if his appeal to PSC was not considered fairly, which is denied, the grievance ought to be addressed to the right party.

40. The Respondent avers that disciplinary action against the 2nd grievant was based on valid reasons as admitted by the Claimant include planning, participation and disruption of the Council's activities in a chaotic, unruly, illegal and unauthorised gathering which acts constitute gross misconduct.

41. The Respondent avers that the 2nd grievant was availed an opportunity to be heard in the presence of a representative of choice, call testimony in her defence and her subsequent dismissal was made on valid reasons after the charges against her were found merited.

42. The Respondent avers that the appellate and alternate legal processes were carried out in other forums however it is aware that the appeals and review to PSC were appropriately considered and the decision thereof communicated in accordance with the law.

43. The Respondent avers that the conciliation process and the current proceedings are irregular, invalid, incompetent and of no consequence as the Claimant was/is not privy or party to the employment dispute between the grievants and the Council as required by section 62(1) of the *Labour Relations Act* and the process was commenced more than 90 days from dismissal contrary to Section 63(3) of the *Labour Relations Act*.

44. The Respondent avers that Claimants locus standi to institute a suit in its name on behalf of the grievants on matters related to their employment contracts which the Claimant is not privy to.

45. The Respondent avers that the grievants case relates to loss of employment and the disciplinary action and dispute resolution processes undertaken under the guidelines of the *Employment Act* and Service Commissions Act concluded in 2009 upon dismissal of the grievants' appeal/review to PSC. Accordingly, the suit has been brought more than 3 years of the time of cause of action against the provisions of section 90 of the *Employment Act*.

46. The Respondents aver that it is a new creature of *the Constitution* and not a successor of the Town Council of Mwingi. The grievants' job description long ceased to exist upon dissolution of local authorities and their claim for reinstatement is misguided and unenforceable.

Evidence in Court

47. The Claimant's 1st witness, Pius Mwala Musili (CW1), the 1st says the grievant in the case, produced his witness statement and bundle of documents dated 09.04.2018 as his evidence in chief and exhibits.

48. During cross examination, CW1 testified that he was employed by the Town Council of Mwingi which translated to the county government after the 2010 constitution. However, he does not have a letter from the County Government of Kitui.

49. CW1 testified that he has a CBA document which provides if there is any conflict the statutory legislation will prevail. The CBA was for 2 years and it was to expire on 02.09.2007.

50. CW1 testified that the Town Council of Mwingi invited him for a disciplinary hearing which he participated with his witness. He was then served with a dismissal letter dated 24.12.2008.

51. CW1 testified he appealed the Town Council's decision to dismiss him to PSC and the appeal was disallowed.

52. CW1 testified that he was dismissed on 16.04,2009 and he lodged a complaint with the Claimant on the same week.

53. During re-examination, CW1 testified that he was employed by the Town Council of Mwingi but it transferred to county government and he became a county employee.

54. CW1 testified that he was invited for a disciplinary hearing by the Town Council but the Respondent did not consider his explanation hence he filed this case. He was not given an opportunity to address the committee.

55. CW1 testified that the CBA had lapsed but is valid until another is in place.

56. CW1 testified that he was suspended vide a letter dated 24.12.2008 and he reported the dispute to the Claimant immediately upon receipt of his termination letter.

57. CW1 testified that he was unfairly dismissed by the Kitui County Government as the allegation that he participated in an illegal strike is not correct.

58. The Claimant 2nd witness, Esther Ndanu Luka (CW2) testified that she is resident of Mwingi, running small businesses. She produced her witness statement and list of documents dated 09.04.2018 as her evidence in chief.

59. CW2 testified that she wants the court to reinstate her to her position and pay her lost salary. She was employed as an Accountant III in finance.

60. CW2 testified that she was suspended on 24.12.2008 and got a letter to that effect. She was later invited for a disciplinary hearing; however, she did not participate in the discussions or make any representations. A decision was them made to dismiss her employment.

61. CW2 testified that she challenged her dismissal before PSC which was disallowed.

62. CW2 testified that they immediately reported the dispute to the union which letter was delivered personally.

63. CW2 testified that the CBA lapsed by 01.09.2007 but it is valid until another one is signed and where there is complaint between the CBA and Laws of Kenya, the Laws of Kenya prevail.

64. CW2 testified that having exhausted the appeal, the Town Council sent them to PSC. She further testified that she did not complain that she was not heard.

65. During re-examination, CW2 testified that she wrote the apology letter as she had been victimised and she feared she would lose her job.

Respondent Evidence

66. The Respondent's witness (RW1), Helen Mutuku testified that she works as the Director, Human Resource Management, Kitui County Government, which position she has held since January 2014 to date.

67. RW1 adopted her witness statement dated 28.09.2023 and exhibits dated 12.10.2022 as her evidence in chief and exhibits.

68. RW1 testified that the grievants were not seconded to the county government of Kitui, they worked for the Town Council of Mwingi and they were terminated in 2009 and at the time there were no county governments.

69. RW1 testified that according to the records, the grievants were fairly dismissed and taken through a disciplinary hearing. They appealed to PSC and due process was followed

70. During cross examination, RW1 testified that she was not employed by Mwingi County Council and she did not interact with the grievants.

71. RW1 testified that Kitui County Government was not the legal successor of Mwingi Town Council and the two are distinct bodies.

72. RW1 testified that the documents annexed were from the Town Council which it got in order to understand the case. Even though they are distinct, the Respondent was able to get the documents.

73. RW1 testified that that employees have a right to participate in labour disputes and union members should not be victimised for participating in those activities.

74. RW1 testified that she received documents from Mwingi and Musili was a union chairperson and Esther Luka was a member of the local government workers union.

75. RW1 testified that the grievants were suspended for participating in the sit in by the workers union and they were then terminated from employment.

76. RW1 testified that she could not speak on the fairness of the dispute resolution mechanism as she was not present.

77. During re-examination, the documents produced are from the local government, Town Council of Mwingi and PSC and the documents are public government documents.

78. RW1 testified that the grievants were summoned to appear before the Finance Committee.

79. RW1 testified that the Respondent does not have any letters to confirm that the grievants were members of the union.

80. RW1 testified that before court, there is a letter from the 2nd grievant to the Town Council rendering an apology. However, she is not privy to the disciplinary hearing.

Claimant's Submissions

81. The Claimant submitted that the grievants' ordeal began with their acceptance of an invitation by the Claimant to attend a union branch activity held on 16.12.2008. Pursuant to the union's constitution, only the branch secretary is mandated to organize and convene union meetings, the grievants could not convene and/or organize the said activity.

82. The Claimant submitted that the Respondent singled out the grievants for punishment, leaving out the convener of the activity and other union members who participated. The false accusations levelled only against the grievants were discriminatory and reflected a determined will on the part of the Respondent to get rid of the grievants.

83. The Claimant submitted that as evidence by the grievants responses to the suspension, the meetings were convened for the sole purpose of collecting grievances from union members for submission to civic leaders. The Respondent did not avail any evidence to impugn the legality of the said union activity.

84. The Claimant submitted that the meetings were lawful union activities, it was sacred, protected by prevailing statutes. The Respondent had no right to prejudice the grievants. Accordingly, termination of the grievants on the basis of participating in the lawful activity/ meeting amounted to victimization and a breach of Section 4 (2) and 5(2) (c) of the Labour Relations Acts.

85. The Claimant submitted that the 1st grievant's suspension ran from 24.12.2008 until 26.06.2009 when he was terminated, a period of over 6 months. On the part of the 2nd grievant, she was suspended on the same 24.12.2008 and remained under suspension until April, 2009 when she was dismissed. The 2nd grievant remained in suspension for 4 months, contrary to the provisions of Section 30 (a) of the CBA. It relied on Victor Kiptoo Ngeno v A.O. Bayusuf & Sons Ltd [2013] eKLR and Peter Mbuthia Gitau v Kenya Revenue Authority [2019] eKLR.

86. The Claimant submitted that the disciplinary process and termination of the grievants was substantively unjustifiable as the Respondent lacked a valid reason to suspend the grievants. The actions of organizing and convening union activities were outside the grievants' mandate.

87. The Claimant submitted that the Respondent acted with malice, bias and ill intent as it singled out the grievants for punishment out of all Branch union officials and members and left out the person that actually organized and convened the meeting. Further, disciplinary process was managed by the very Civic leaders who has singled out the grievants, their fate was sealed at the point of suspension.

88. The Claimant submitted that the punishment meted out on the grievants was not commensurate to their alleged acts. Prior to the impugned acts of the grievants, they had maintained a clean employment record; to terminate a stellar employee on account of participating in a union activity demonstrates malice on the part of the Respondent. It relied on Michael Dowling vs. Workplace Safety & Insurance Board [2004] CAN LII 436 92, cited in Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR.

89. It was submitted for the Claimant that the Respondent is the natural and presumptive legal successor of the defunct Town Council of Mwingi as held by Kasango, J in Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008.

Respondent's Submissions

90. The Respondent submitted that it did not contest that the Claimant union entered into a CBA dated 29.11.2005 with the Association of the Local Government Employers which the Town Council of Mwingi had membership. Clause 51 of the agreement provides that it would remain in force for 2 years unless amended by mutual agreement hence it effluxed on 01.09.2007. The same did not contain any transitional clause intending its operation after the expire period.

91. The Respondent submitted that clause 3 of the CBA provides that the agreement shall be read in conjunction with the other governing laws and particularly the Public Service Commission (Local Authorities Officers) Regulations, 1984. The clause provides that in the event of any conflict the statutory legislations ought to prevail.

92. The grievants were suspended on 24.12.2008 and the applicable law in respect to the disciplinary process was the Public Service Commission (Local Authorities Officers) Regulations, 1984 ('Regulations'). It is the Respondent's submission that the grievants cannot be afforded any protection by the lapsed CBA as it did not have any legal effect at the time of their suspension. It relied on Mukiria Farmers Co-operative Society Ltd v Jacob Rukaria & 5 others [2017] eKLR.

93. The Respondent submitted that the rule 24(2) and (3) of the Regulations empowered the Clerk of the Mwingi Town Council to suspend the grievants without any salary. The grievants suspension letters disclosed that they caused incitement for an illegal strike which affected smooth operation of the Council. Rule 29(1) and (2) of the Regulations obligated the Clerk to initiate the disciplinary process against them as soon after the illegal strike.

94. The Respondent submitted that the grievants in their evidence in chief admitted that they participated in a sit in that led to locking out council officers from performing their duties, and this fits the description of a strike as defined by Section 2 of the *Labour Relations Act*. The sit in led to a cessation of its activities, the only logical conclusion is that it was a strike within the meaning of the *Labour Relations Act*.

95. It is the Respondent's submission that there was no malice in the grievants' dismissal and their conduct as union members was incompatible with the work ethics and legitimate expectation of the Council having been privy to the CBA. The Council had valid and fair reasons to terminate the grievant's employment.

96. The Respondent submitted that the grievants were accorded sufficient opportunities to challenge their dismissal and ultimately exhausted appellate mechanism to its logical conclusion. The grievants were accorded a fair hearing and it cannot be said that they were never afforded a fair hearing.

97. The Respondent submitted that the grievants were never victimised, the disciplinary process was resultant of their own individual actions leading to their termination. The Council never approved the said illegal strike as alleged by the grievants and no evidence was adduced to that effect. The grievants did not adduce any sufficient evidence of victimization and as such the claim remains a mere allegation.

98. The Respondent submitted that the grievants instituted a conciliation process to disguise the suit herein as atrade dispute upon dismissal of their appeals. The grievants opted to institute their complaints under the regulations pursuant to Section 13 of the Service Commissions Act (repealed). The conciliation process as invoked by the grievants is an afterthought to revive their claims in abuse of the due process of the law as their claims were heard and determined with finality.

99. It is the Respondent's submission that the claim is time barred by dint of Section 62(3) of the *Labour Relations Act* as the Claimant ought to have reported the dispute within 90 days of the dismissal. The grievants were dismissed on 16.04.2009, the claim herein is beyond the limitation period and the mere fact that there were pending appeals under the statutory framework does not suspend the running of time for purposes of commencing proceedings as held in G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR.

100. The Respondent submitted that it was established under *the Constitution* of Kenya and the transition to devolved governance legal framework, the uptake and transfer to the county Governments of labour and employment function previously exercised by the local authorities through delegated authority from PSC is subject to audit, apportionment of the said functions between the county governments and the national government where appropriate transfer, secondment and/or deployment of the staff to the County Governments. The grievants were never seconded, deployed or transferred to be employees of the Respondent by PSC and the Respondent never entered into an employment contract with the grievants.

Analysis and Determination

101. Having considered the pleadings, evidence presented and submissions of the parties, the main issues for determination were:

   a. Whether the grievants were victimized and discriminated on account of participating in the Claimant union activities

   b. Whether the suspension of the grievants was unprocedural

   c. Whether the disciplinary process was substantively unjustifiable

   d. Whether the Respondent is the successor of the Town Council of Mwingi

   e. Whether the claim is time barred

Whether the grievants were victimized and discriminated on account of participating in the Claimant union activities

102. The Supreme Court held as follows in respect to the burden of proving discrimination in the case of Simon Gwer & 5 Others vs Kenya Medical Research Institute & 3 Others (2020) eKLR:

> " It is already the standpoint of this Court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each

case. This is the context in which the rights-claim in the instant case, founded upon racial discrimination, is to be seen.

Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

> "…a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…."
>
> In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

103. In Kenya Union Of Domestic, Hotels, Educational Institutions, And Allied Workers [Kudheiha] v Lenana Mount Hotel [2014] eKLR the court held:

> " The Preamble to the ILO Constitution declares recognition of the principles of freedom of association to be a means of improving conditions of labour and establishing peace. The Declaration of Philadelphia reaffirms that freedom of expression and association are essential to sustained progress. ILO Convention 87 on Freedom of Association and Protection of the Right to Organize [1948], permits workers and employers to join organizations of their choosing without prior authorization. It was not for the Managing Director to authorize his Employees to join the Claimant Union. ILO Convention 98 on the Right to Organize and Collective Bargaining [1949] is emphatic on freedom of association at the workplace. Article 1 states that, workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Such protection shall apply more particularly to acts calculated to-:

a. Make the employment of a worker subject to the condition that he shall not join a union, or shall relinquish trade union membership;

b. Cause the dismissal of, or otherwise prejudice a worker by reason of union membership, or because of participation in union activities outside working hours, or with the consent of the employer, within working hours."

104. The grievants were suspended on the grounds that they organised and participated in the union meeting held on 16.12.2008; and passed resolutions amongst them, to lock out council officers from performing their duties.

105. The said meeting and sit in were activities of the Claimant Union, further the Town Council of Mwingi only targeted the grievants from all the other members in attendance and even the organiser of the activities, the Branch Secretary was not subject to the said disciplinary process.

106. The Claimant union laid evidence to show that the grievants were victimised for participating in union activities and the burden then shifted to the Respondent to prove the contrary. The claimants did not demonstrate who were the other employees who participated in the sit-in and were not disciplined. It is trite law that he who alleges a fact must prove it as provided in section 108 of the *Evidence Act* of Kenya.

The other issue is whether the suspension of the grievants was unprocedural

107. It is the Claimant's submission that the grievants were suspended for period exceeding 3 months contrary to the provisions of Section 30 (a) of the CBA.

108. The Respondent on the other hand submitted that the CBA effluxed on 01.09.2007 and did not contain any transitional clause after its expiry. The grievants having been suspended on 24.12.2008, the applicable law was the Public Service Commission (Local Authorities Officers) Regulations, 1984, therefore, the grievants cannot be afforded any protection by the lapsed CBA as it did not have any legal effect at the time of their suspension.

109. The Court of Appeal in Mukiria Farmers Co-operative Society Ltd v Jacob Rukaria & 5 others [2017] eKLR held that:

> "We do not, however, agree with the alternative argument advanced by counsel that the CBA was a nullity in view of government circulars issued on the retirement age. In the first place, as correctly held by the trial court, the circulars were no substitute for the law. In the second place, Section 61, LRA, appears to cover "the public sector where there is no collective bargaining". There was collective bargaining in this matter and the resultant CBA was lawfully registered with the court as by law required. There was no vacuum after expiry of the CBA as alluded to by the trial court. All workers continue to be protected under *the Constitution* and the employment and labour laws enacted by the legislature. In sum, the first ground of appeal succeeds."

110. Further, CW2 testified during cross examination that a complaint based on the CBA and Laws of Kenya, the Laws of Kenya prevail. In view of the foregoing, the applicable law was the Public Service Commission (Local Authorities Officers) Regulations, 1984 and the suspension was procedural.

111. In view of the above the CBA provisions are inferior to the statutory law and the claimants cannot depend only on a lapsed CBA and so their suspension was not unprocedural.

Another issue is whether the disciplinary process was substantively unjustifiable

112. It is the Claimant's submission that grievants could not organize and/or convene a union activity as this was outside their mandate. Further, the Respondent singled out the grievants for punishment out of all Branch union officials and members and left out the person that actually organized and convened the meeting and all branch union members that participated in the union activity. This implied malice, bias and ill intent by the Respondent.

113. The Court of Appeal discussed the test of substantive justification in Co-operative Bank of Kenya Limited –Versus- Banking insurance & Finance Union (K) [2017]eKLR where the holding in British Leyland UK Ltd –Versus- Swift (1981)IRLR 91 was quoted thus:

> " ....Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that all these cases are subjective, within which an employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him."

114. As discussed above, the Town Council of Mwingi dismissed the grievants for participating in union activities. The town council did not demonstrate a verifiable and valid reason to dismiss the two grievants even though the court has demonstrated hereinbefore that the allegation of discrimination has not been proved by the claimants.

Whether the Respondent is the successor of the Town Council of Mwingi

115. In J.A. M. Umenda & another Vs. Municipal Council of Kisii & 6 others, Environment & Land Court of Kenya at Kisii Judicial Review Application No. 3 of 2013 [2013]eKRL Okong'o J. stated:

> " Section 33 of the sixth schedule to *the Constitution* 2010 provides that an office or institution established under *the Constitution* of Kenya, 2010 is a legal successor of the corresponding office or institution or under a former Constitution or under a former Act of Parliament in force immediately before the effective date of *the Constitution* of Kenya, 2010 whether known by the same name or a new name County Government under the new Constitution took over the powers and functions of the local authorities as they were recognized and defined under the old Constitution and the local Government Act pursuant to the provisions of the said Section 33 of the sixth schedule to *the Constitution* of Kenya 2010, County Governments are therefore the natural and presumptive legal successors of the defunct local authority."

116. In view of the foregoing, the Respondent is the successor of the Town Council of Mwingi.

117. It is key to note however that the grievants' termination and their subsequent applications for appeal and review of the Town Council's decision were done before the inauguration of *the Constitution* of Kenya, 2010 on 07.04.2010. Therefore, the grievants were never absorbed as the Respondent's employees as they were terminated before the transition from town council to county governments and they cannot be said to have been employees of the respondent.

Whether the claim is time barred.

118. The Court of Appeal in Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another [2016] eKLR held as follows:

> " Section 90 of the *Employment act* stipulates that;
>
> > "Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a

contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

For us it is clear from our reading of section 90 aforesaid that there are no exceptions to the three year limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof. This was not a case of a continuing injury or damage but one of a single act of termination. In any case the respondents have not specified when the injury or damage ceased for time to have began to run. Secondly the learned Judge did not rely on the continuing injury or damage but on the fact that the parties engaged in negotiations. Those negotiations began when time had began to run following the termination of the respondents' services.

While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of section 90 of the *Employment Act* even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.

By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in Divecon v Samani (1995 – 1998) I EA 48 at p. 54

> " No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."

119. In the case of John Kiiru Njiri vs University of Nairobi (2021) eKLR the court expressed itself thus:

> " Section 90 of the *employment act* is framed in mandatory terms. A claim based on a contract of employment must be filed within 3 years from the date the cause of action arose. This court is denied jurisdiction to extend time to file suits not lodged in court 3 years from the date the cause of action arose."

120. The crux of this matter is that this case is still time bared and the clam dated 9th April 2018 is dismissed accordingly as the cause of action took place around 2008.

121. The court orders each part to meet their costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF MARCH, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE