



**Kenya Building, Construction, Timber and Furniture Industries
Employees Union v Timsales Limited (Cause E029, E030 & E031 of 2021
(Consolidated)) [2023] KEELRC 8 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 8 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E029, E030 & E031 OF 2021 (CONSOLIDATED)**

**HS WASILWA, J
JANUARY 17, 2023**

BETWEEN

**KENYA BUILDING, CONSTRUCTION, TIMBER AND FURNITURE
INDUSTRIES EMPLOYEES UNION CLAIMANT**

AND

TIMSALES LIMITED RESPONDENT

JUDGMENT

1. The Claimant union brought these claims on behalf of its members; hereinafter the ‘Grievants’ via three memoranda of claims all dated June 9, 2021. The grievants in cause E029 of 2021 are indicated to be 71, in E030 of 2021 they are 505 while in Cause E031 of 2021 they are 30 grievants making a total of 606 Grievants. All these claims were consolidated and ELRC Cause number E029 of 2021 was marked as the lead file.
2. Each claim sought for similar reliefs which are as follows; -
 1. A declaration that the grievants dismissal from employment by the Respondent is wrongful, unfair, unprocedural and/or unlawful.
 2. An order that the grievants be reinstated to their employment or in the alternative, the Respondent, with involvement of the parties, compute and pay to the grievants terminal dues made up of;
 - a. Notice pay in terms of clause 19 of the Collective bargaining agreement.
 - b. Leave pay.
 - c. Retirement(Gratuity) terminal benefits under clause 19 of the Collective Bargaining agreement.



- d. Days worked and not paid for.
- e. Any Other dues payable as per the CBA.
3. A declaration that the grievants right to dignity, fair labour practices, remuneration, reasonable working conditions, economic and social rights guaranteed and protected under Articles 28, 41 and 3 of the Constitution, 2010 have been violated by the Respondent.
4. Compensation in terms of Article 23(3)(e) of the Constitution.
5. Compensation at the rate of 12 months' gross salary for wrongful and unfair dismissal in terms of section 49(1)(c) of the Employment Act.
6. A certificate of service for each grievant.
7. Costs of this suit and interest on all the amounts herein.
8. Any other or further relief the court may deem fit to grant.

Claimants case.

3. The grievants in all the claims herein are members of the claimant union who were employed by the respondent in various capacities on diverse dates as captured in the claims.
4. It is averred that the grievants served the respondent faithfully with dedication and commitment for several years. That they all had clean records and in appreciation, the respondent promoted them from one cadre to another and reviewed their salaries upwards from time to time.
5. The claimant states that the grievants were employed on shift with grievants in Cause E031 of 2021 working in first shift that was done between 7am and 3pm, the second shift was taken up by grievants in cause E029 of 2021 commencing from 3pm to 11 pm, while the last shift was taken up by grievants in E031 of 2021 which began at 11pm till 7am.
6. It is alleged that the respondent did not pay the grievants their salaries for June, 2018 till sometimes in July, 2018, when the employees approached the Respondent and demanded to be paid their salaries. It is alleged that instead of paying the employees, the Respondent resorted to locking the said employees out of its premises beginning the morning of July 25, 2018 on allegation that they had participated in unprotected strike.
7. The Claimant states that the grievants who reported to duty at the 3pm shift found the gates locked and being manned by guards and policemen who directed them to go away. They conceded and went back home. The Claimant added that none of the grievants herein was at the said work place on the said date.
8. The grievants who had gone home were not recalled by the Respondent, forcing the Claimant to file a case in Nairobi ELRC Cause number 1282 of 2018; Kenya Building Construction, Timber and Furniture Industries Employees Union v Timsales Limited challenging the lockout, which case was dismissed on June 21, 2019 with direction for the Respondent to proceed with disciplinary hearing on the employees.
9. Sometimes in July, 2019 soon after judgement was delivered in the Nairobi case, the Respondent issued notices to the grievants to show cause why they had absconded duty and for malicious damage of their property. These notices, however, were not served personally upon all grievants and only a few who managed to get the information from the Respondent were heard in a disciplinary hearing while



majority who were not served learnt later of their dismissal vide the letters of dismissal dated August 1, 2019.

10. The Claimant contends that the dismissal of the grievants was unfair and unlawful because; Neither the Claimant or the grievants were notified of the charges against the said employees, no reason was given for the termination, the Respondent ignored the explanation given by those that responded to the notice to show cause, they were not subjected to any disciplinary hearing and that none of the grievants had absconded duty rather that they were locked out and ordered to leave the said vicinity by the guards and policemen manning the Respondent's premises. The Claimant added that none of the grievants was at the Respondent's work place at the time of the alleged destruction.
11. In light of the foregoing, the Claimant avers that the grievants' rights to fair labour practices, remuneration and reasonable working conditions guaranteed under Article 41 of the Constitution was violated. Further that the abrupt termination violated the rights of the grievants under Article 43 of the Constitution.
12. During hearing the Claimant called two witnesses; Kennedy Oketch, the Claimant's Branch secretary and Henry Aluga Mkobero, the Shop steward as CW-1 and CW-2 respectively.
13. CW-1 adopted his witness statement dated June 9, 2021 filed together with the claim and a further statement filed on March 4, 2022 which basically reiterated the claim. In addition, he stated that there were three shift with the day shift taking the lion share of employees about five hundred, the evening shift about 78 and the night shift around 30 employees. He stated that the Respondent issued notices to show cause dated July 1, 2019 a year on, on offenses that were allegedly committed on July 25, 2018. In the said letters to show cause the charges were absconding duty, failing to return back to work and destroying the Respondent's property worth Kshs 500,000.
14. He told this court that, the union tried to resolve the issue between the grievants and the respondent after the ruling of the court in Nairobi but the respondent refused and indicated that it will proceed with disciplinary hearing as directed by the court. He stated that most employees had left Elburgon area where the factory was situated and therefore the notices could not reach them. Furthermore, that no notice was send via post as alleged.
15. He testified that the charges on absconding duty is not viable because, the grievants were working in shift and therefore is not possible to abscond duty at the same time when others had not reported for their shift. On alleged destruction of property, the witness testified that only two of their members as evidenced by the letter by the labour officer were charged for destruction of property out of the 10 employees who were implicated.
16. Upon cross examination, CW-1 told this Court that the main issued that led to the sit down was delay in payment of June salaries. He confirmed that only a few employees who banked with Equity had been paid at the time of the meeting. He avers that he raised concerns on the meeting that some of the employees had not been paid despite assurance by the Respondent and upon further consultation, the Respondent gave direction that the premises will be closed and everyone was ordered to leave. He denied any ultimatum given to workers to go back to work and maintained that they were all ordered to leave.
17. Upon further cross examination, he admitted that the Court ruled against them and held that the employees had engaged in unprotected strike. He also stated that the grievants were not invited for the disciplinary hearing and thus could not participate in the disciplinary process.



18. On re-examination the witness testified that the Court in Nairobi gave direction for the Respondent to proceed with disciplinary process in accordance with the CBA and the [Employment Act](#), which was not followed.
19. CW-2 testified that he had worked for the Respondent from 2002 to 2018 and was a shop steward. He adopted his statement of 29.2.2022 and upon cross examination, he testified that he reported to work on the first shift on the material day. He admitted that workers withdrew labour. He stated that the issue raised was delayed salary which the Respondent told them it had been paid but in actual sense the first person was paid thereafter around 1 pm. He testified that the delay in salary payment had been going on from January and therefore the workers demanded to be addressed on the issue. He avers that the Human resource officer went to the main office and upon return informed them that the company had been closed and directed them to leave. He stated that most shop stewards were not in the premises at the time of the said sit in.
20. Upon further cross examination, CW-2 testified that after 25th, July, 2018 the Respondent called one worker after the other to return back to work. He reiterated that there was no notice at the gate as alleged. He testified that notice to show cause were issued even before the case in Nairobi was heard and determined. He stated further that disciplinary hearing was conducted though many employees did not participate in.
21. On re-examination he testified that he was last in the company on the July 25, 2018 and has never received any communication from them.

Respondent's case.

22. The Respondent filed separate response to each of the claim on the July 26, 2021 raising similar concerns in each of the claim. The Respondent admitted to employing all the grievants but took issue with the number of employees listed in each of the claim and averred that in Claim No. E029 of 2021 four names are repeated while three grievants have made similar claim in either of the other two related causes. In Claim No. E030 of 2021 one grievant is repeated while claims for two grievants are duplex. In Claim No. E031 of 2021, the list does not contain any names between numbers 310 and 399. Similarly, the list does not contain names at Nos.146 and 405 and between numbers 410 and 499. Also, nine names are repeated in Cause No.E031 of 2021. Two of the grievants appearing as Nos.308 and 186 are currently working with the Respondent. The grievant at No.308 was deployed to Kisumu at the time the unlawful and unprotected strike occurred and was not affected. One grievant in this category subjected himself to disciplinary process in August 2018 and was allowed back to work. Further, three grievants in Cause No. E031 of 2021 are deceased and their families are yet to take out letters of administration in respect of their estates. Accordingly, in Cause No. E031, there are only about 308 grievants and in total about 400 grievants in the consolidated claims.
23. It is averred that all the grievants were engaged in either of the shifts on the material day, the July 25, 2018, however that they were involved in unlawful and unprotected strike, absconded duty and engaged in destruction of the Respondent's Property.
24. Prior to the said strike, the Respondent had issued an internal Memo to all its employees on or about June 30, 2018 indicating that their June salaries would not be paid on time. Nevertheless, that the grievants engaged in unprotected strike on the July 25, 2018 despite receiving their June salaries in full.
25. Immediately when the strike was about to start, the Respondent called the Claimant's officials to call off the strike but he refused demanding for the grievants to be paid July salaries when the month



- was not yet over. Another meeting was held between the claimant and the respondent under the chairmanship of federation of kenya employer but the claimant was adamant in calling off the strike.
26. It is averred that the respondent issued an ultimatum upon its employees who are the grievants to report back to work but they all refused and only waited for instruction from the claimant who was not cooperative. Soon thereafter, the respondent issue notices to show cause on all its employees to show cause why disciplinary action should not be taken against them for absconding duty and destroying the respondent's property. Save for a handful of employees, the rest of the grievants did not attend the disciplinary hearing despite being invite to defend themselves.
 27. It is averred that while the disciplinary proceedings were going on, the Claimant sued the Respondent in Nairobi ELRC Cause number 1282 of 2018 challenging alleged lockout and in effect shielded its members from undertaking the disciplinary process. The Court in its finding directed the County labour office to carry out investigation and ascertain whether there was a lock out. The labour officer returned a finding that the grievants had engaged in unlawful and unprotected strike and the Court of June 21, 2019 dismissed the Claimant's suit giving them the green light to proceed with the disciplinary process.
 28. The Respondent avers that upon receiving the Orders of the Court, it issued fresh notices to the grievants and invited them to disciplinary hearing scheduled on various dates. However, that most of the employees responded to the show cause letter but only a handful of employees appeared before the Respondent to be heard. The Respondent then dismissed the employees who did not give satisfactory explanation and those that failed to attend hearing sometimes in August, 2019.
 29. The Respondent maintained that it never chased away the grievants rather that they downed their tools and left the Respondent without leave or lawful cause. Further that all those employees that had left the Respondent's premises were served through post and others were able to see the post that had been conspicuously place at the Respondent's premises. The Respondent maintained that the grievants were given ample time to defend themselves.
 30. Furthermore, that the issue on whether they were locked out or participated in unprotected strike was dealt with in the Nairobi ELRC Cause number 1282 of 2018 and Nakuru ELRC Cause number 58 of 2019; *Peter Njuguna Chege V Timsales* were the Court found the grievant having participate in an unprotected strike which grievant was one of the employees of the Respondent at the time.
 31. Lastly, that the grievants were away from work from July 25, 2019 till August, 2019 as such absconded duty for a whole year without any lawful cause, therefore that the claim is not warranted and should be dismissed with costs.
 32. In support of its case, the Respondent called one witness; Philip Agutu, the Respondent's assistant Human Resource officer as RW-1. He adopted his witness statement of 23.7.2021 and clarified that CW-1 is not a grievant in this case. He testified further that there was delay in payment of June, 2018 salaries because of the logging ban put in by the government, a fact which they notified all employees vide an internal memo. He testified that after the strike of July 25, 2018, some employees reported back to work on July 26, 2018 as demonstrated by the muster roll. He stated that he issued notices to show cause upon all employees and invited them to disciplinary hearing however that the grievants herein did not respond to the show cause or appear in the disciplinary hearing.
 33. He testified that the company was never closed at any point and infact that the muster roll show some employees were working till evening of the material day. He added that most employees camped outside and were only removed when they became rowdy throwing stones at the office and pulling down the Respondent's perimeter wall.



34. Upon termination, the witness avers that he paid the grievants all their dues for all the days worked. He reiterated that they are ready and willing to issue certificate of service.
35. Upon cross examination RW-1 testified that the strike began in the morning at around 6am all the way to 3pm when the first shift was at work. She admitted that the 2nd Shift were yet to arrive when the issues arose. He testified that the Respondent's property was destroyed when employees became rowdy at around 3pm when shift two was about to take over and therefore that the destruction was done by a mix of shifts.
36. Upon further cross examination, the witness testified that the employees were peaceful until the time the Branch secretary arrived that they became rowdy. He testified further that the notices to show cause were done in two batches and others were send via post. He then admitted that some of the letters did not have addresses.

Claimant's submissions.

37. The Claimant submitted on three issues; whether the principle of ultimatum applies in the circumstances, whether the dismissal of the grievants was a result of valid reason and done in terms of fair procedure and whether the Claimant is entitled to the reliefs sought.
38. On the first issue, it was submitted that the principle of ultimatum does not apply in Kenya because it is not provided for under the constitution and statutes. To support this, they cited the case of *Kenya Plantation and Agricultural workers Union V Roseto Flowers* [2013] eKLR where the Court held that;

“The Court has considered the submissions and finds that under our constitutional and statutory regime in employment and labour relations law, the string that flows throughout is that employers must uphold due process in a fair procedure in terminating employment on account of poor performance, misconduct and even ill-health. The constitutional and statutory law does not provide for the ultimatum principle as it obtains in South Africa and as submitted for the Claimant, in absence of legislation on ultimatum principle, the Court finds that the Court may not coin an interpretation as to apply it in cases of strikes in Kenya's employment and labour relations. The Court upholds the opinions as consistently elaborated in the cases cited for the Claimant. To answer the second issue, the Court holds that the ultimatum principle does not apply in event of an unlawful strike and the employer is required to apply rules of natural justice as provided for in the provisions of the Constitution and the legislation.”

39. On the second issue, it was submitted that the Respondent failed to accord the grievants substantive and procedural fairness before terminating them and reinforce this by relying on the case of *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR. It was argued that the Notice to show cause and the termination letter had similar charges levelled against all the grievants both who were in the premises and those whose shifts had not started and those who were yet to begin their shift such as the 2nd shift who were denied entry into the Respondent's premises. It was argued further that the letters to show cause were issued upon a few employees to the exclusion of other and upon hearing the Respondent came up with a uniform conclusion and finding that the grievants participated in an illegal strike when some of the employees such as the 2nd shift were not in the premises at the time the alleged sit in was conducted, therefore disregarding the explanation given by the said employees.
40. With regard to the reason for termination, the Claimant submitted that the reason given were uniform for being absent from work, and destroying Respondent's property, when some of these employees in the 2nd and 3rd shift were turned back at the gate that was manned by Guards and police and therefore



their failure to work on the said date was due to action by the Respondent in locking them out as evidenced by the letter of Mr. Kirui the labour officer dated July 26, 2018 and the Claimant's National secretary general letter of September 10, 2018 couple up with their suit in ELRC Cause number 1282 of 2018 complaining of the said lock out.

41. With regard to the charge of destruction of property, the Claimant submitted that, there was no evidence tabled either in the disciplinary hearing or this Court to back up this charge. Furthermore, that the allegation was never reported to the police, therefore it remained as an allegation and that reason for termination was not proved.
42. It was submitted that the charges as appearing in the show cause letters were different from the issues dealt with in the disciplinary hearing because during hearing the issue of participating in unprotected strike came up when the same was not in the Show cause letter, making it impossible for the grievants to respond and in the end prejudicing them. To support this argument, the Claimant relied on the case of *Kenya Union of Commercial Food and Allied Workers V INSTA Products (EPZ) Limited* [2017] eKLR where it was held that;

“Section 80 of *Labour Relations Act* No. 14 of 2007 provides:

“(1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with the Act is deemed to have breached the employee's contract and –

- (a) Is liable to disciplinary action; and
- (b) Is not entitled to any payment or any other benefits under the *Employment Act*, during the period the employee participated in the strike.”

30. This provision is not a carte blanche for mass sacking of employees alleged to have participated in a strike without subjecting each employee to a disciplinary process in terms of the disciplinary code of the organization and or in compliance with Section 41 of the *Employment Act, 2007*. In the present case, there was no attempt by the Respondent at all to provide each employee with a notice to show cause with opportunity for the employee to explain why he/she ought not to be dismissed from employment summarily as happened to the 58 grievants in this case. In any event, the onus is on the Respondent to demonstrate to the Court that each of the employees participated in an unlawful strike and considering personal circumstances of the particular employee, he/she is liable to summary dismissal. It is a lawful defence to a charge of absenteeism from work under Section 44 (4) (a) of the *Employment Act* No. 11 of 2007 to show that the employee was on leave or away on other lawful cause. This is the reason why each employee must be presented opportunity to defend themselves against summary dismissal from employment. Accordingly, the Claimant has proved on a balance of probability that the summary dismissal of the 58 grievants was not for a valid reason and was not effected in terms of a fair procedure contrary to Sections 41, 43 and 45 of the *Employment Act, 2007* and the court so finds.”

43. Similarly, the claimant submitted that the respondent ought to have demonstrated that indeed each of the grievant who was dismissed participated in the unprotected strike to justify the termination meted against them.



44. On procedural fairness, it was submitted that due procedure was not followed and in other cases the employees were heard and retained while other were fired when the set of facts were similar, therefore discriminating against other employees. In this they cited the case of *Rift valley Railways(K) Limited v William Nembe Obora & 74 others* [2016] eKLR where the Court in finding a section of the workforce to have unfairly terminated held that;

“In the case before us, the appellant not only failed to accord the Respondents opportunity to be heard, it also acted in a discriminatory manner - which compounded the unfairness and was patently inequitable. As we have already observed, the appellant's entire workforce in Nairobi was in excess of 500. The record shows that almost the entire workforce in Nairobi participated in the activities of June 30, 2011. They were all served with letters of summary dismissal of the same date July 1, 2011. Yet, only the respondents, a quarter of the said workforce, were not reinstated whereas the rest were reinstated in circumstances we have found unclear.”

45. On the reliefs sought, the claimant submitted that the prayer of reinstatement is no longer viable as it is time barred. It then argued that the respondent in abruptly terminating the services of the grievants subjected them to mental anguish and violated their right to dignity provided for under article 28, their right to fair labour practices under article 41 of the *Constitution* and therefore they ought to be compensated for the said violation as stated under Article 23 of the Constitution. In addition, the Claimant submitted that the termination generally went against the law and therefore the grievants should be compensated under section 49 of the *Employment Act* as prayed for in the claims with costs and interest.

Respondent's submissions.

46. The Respondent on the other hand submitted on two issues; Whether the grievants were dismissed lawfully and fairly and Whether the grievants merit the reliefs sought.

47. On the first issue, it was submitted that the grievants were dismissed pursuant to valid and fair reasons and were accorded numerous opportunities to be heard as provided by law. It is argued that the Claimant did not demonstrate any unlawfulness or unfairness in the grievants' dismissals as provided for under section 47(5) of the *Employment Act*. It was argued the Court in ELRC Cause number 1282 of 2018 found the grievants to have participated in unprotected strike, further that this Court in Nakuru Elrc Cause number.58 of 2019 – *Peter Njuguna Chege v. Timsales Limited* made a finding that the dismissal was lawful and fair and dismissed the cause with costs, where the Claimant in that case was one of the employees as the grievants in these suits.

48. The Respondent submitted that the Claimant's witnesses confirmed that employees withdrew labour or sat in on July 25, 2018 due to delay in payment of June 2018 salaries, which issue they had been notified that there would be a delay in payment of the salary. Therefore, that the action taken by the Respondent after the grievants failed to return to work was justified in the circumstances. To support this, it cited the case of *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR at paragraph 67 the Honourable Court held that:-

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the *Employment Act* 2007. The Employer was not required to have conclusive proof of the Claimant's involvement.



49. Also the case of *Kenya Revenue Authority v Reuel Waitbaka Gitabi & 2 others* [2019] eKLR at page 8 the Court of Appeal held that:-

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.

50. It was argued that after July 25, 2018, some employee reported back to work and continued working for the Respondent and despite being called back to work, the grievants together with other employees never reported back to work and even after being advised by the Court to proceed with disciplinary hearing, the grievants failed to attend the disciplinary hearing leading to their termination. To support this the Respondent relied on the case of *Anthony Kiogora Mwiti v Kingdom Bank Limited* [2022] eKLR the Honourable Court cited with approval *Halsbury’s Laws of England*, 4th Edition, Vol. 16 (1B) para 642, thus:-

“...in adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

51. Accordingly, it was submitted that the Respondent had all the reasons to terminate the services of the grievants and urged this Court to find in their favour as it did in *Peter Njuguna Chege v. Timsales Limited* [2020] eKLR and dismiss the causes herein with costs.

52. On procedure followed, the Respondent submitted that it issued all the grievants with notices to show cause and those who did not collect their letter were send via registered post. They were then invited for disciplinary hearing where a few opted to attend but did not give satisfactory explanation leading to the dismissal while those that failed to attend were automatically dismissed from employment therefore justifying the dismissal. To support this argument, it relied on the case of *Lamathe Hygiene Food v Wesley Patrick Simasi Wafula & 8 others* [2016] eKLR at page 4 the Court of Appeal held that:-

“That being the case, what option was available to the appellant? Under Section 44(3) & (4)(c) of the *Employment Act* an employer whose worker has breached the contract of employment and/or willfully neglected to perform his duties under the contract may summarily dismiss such an employee. As observed by this Court in the case of *Maseno University v Universities Academic Staff Union* [2015] eKLR, an employer is entitled to summarily dismiss a worker who engages in an illegal strike and in the process, absconds duty. Indeed, the provisions of Section 44 of the *Employment Act* as aforesaid provides for summary dismissal.

53. On the allegation of discrimination raise, the respondent argued that the issue has been raised at submission stage without their benefit of giving a proper response as such is baseless and unfounded. Further that the report made by Mr. Abuto indicates that employees at work as at the time of the report



i.e. October 17, 2018 went through disciplinary process. Since it was not pleaded, the Respondent could not bring material to demonstrate as much and to countenance this allegation at this point would be trial by ambush. It then relied on the case of *Independent Electoral and Boundaries Commission & Anor v. Stephen Mutinda Mule & 3 Others* [2014] eKLR where Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v. Nigeria Breweries PLC SC 91/2002* the Court stated as follows: -

“It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

54. Also in the case of *Elizabeth O. Odhiambo v. South Nyanza Sugar Co. Ltd* [2019] eKLR at paragraph 16 the Honourable Court stated as follows: -

“The Court, on its part, is itself bound by the pleadings of the parties. The duty of the Court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The Court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

55. Furthermore, that the employee who returned back to work were subjected to disciplinary hearing in August, 2018 a few weeks after the unprotected strike unlike the grievants who only appeared for hearing a year after leaving employment.

56. On the reliefs sought, the Respondent submitted that the grievants were terminated lawful and therefore did not required to be issued with notices of termination as was held in *Peter Mbithi Mutua v Athi River Steel Plant Limited* [2014] eKLR at paragraph 22 the honourable court held that:-

“The claimant was summarily dismissed for a demonstrable act of gross misconduct and is not entitled to notice pay.”

57. With regard to leave pay, the respondent submitted that the claimant did not state what leave pay is and its basis thereof, they did not disclose the period relating to this head of claim, the claim for leave is not specifically pleaded and therefore is incapable of being specifically defended and granted. It relied on the case of *Raphael Munyoki Mairu v Circleline Agency Limited* [2022] eKLR where the Court held that:-

“The Claim for unpaid annual leave days was not specifically pleaded, and was not proved. The same is declined.”



58. On Gratuity, the Respondent submitted that Clause 18 (a) of the collective agreement provides for payment of gratuity to employees of the Respondent based on the years served. However, clause 19 (iv) contains a proviso on payment of gratuity in the following terms:-

“Provided that an employee who resigns or who loses his job on disciplinary grounds will not be entitled to receive any gratuity.”

59. Therefore, that since the grievants were dismissed from employment on grounds of gross misconduct, they do not merit payment of gratuity as pleaded or at all. They then cited the case of *Kenya Plantation & Agricultural Workers Union v Migotiyu Plantations Limited* [2021] eKLR at paragraph 142 the Honourable Court held that:-

“Having found that termination of the grievants was substantively fair, the terminal dues claimed under the CBA including but not limited to gratuity are declined.”

60. With regard to compensation for violation of the grievants constitutional rights, the Respondent submitted that no evidence was led by the Claimant to demonstrate that the Respondent subjected it or its members to unfair labour practice or that the Respondent violated any of their rights under the Constitution of Kenya to warrant the said compensation. They relied on the case of *Elizabeth Wasbeke And 62 Others V Airtel Networks (K) Ltd & Another* [2013] eKLR

61. With regard to compensation for alleged unfair termination, the Respondent submitted that the grievants were dismissed lawfully and fairly. Therefore, there is no basis for payment of compensation in the circumstances. It then relied on the case of *Javan Omulama Kature v. Managing Director Pemwe Security Services* [2017] eKLR where the Court stated that: -

“Compensation is not due in a case where the Claimant was the author of his own termination of employment. To compensate his conduct would be an affront on justice and would be contrary to the rule of law and what is expected of a civilized society such as ours.”

62. In conclusion, the respondent urge this court to dismiss all the three claims herein with costs.

63. I have examined all the evidence and submissions of the parties herein.

64. The issues for this court’s determination are as follows;

1. Whether there were valid reasons to terminate the services of the grievants.
2. Whether the grievants were subjected to a fair disciplinary process.
3. Whether the grievants are entitled to the remedies sought.

Issue no. 1

65. On the issue of validity of reasons leading to the termination of the grievants, the respondents issued dismissal letters to the grievants indicating that they had participated in an illegal and unprotected strike on 25/7/2018 and also destroyed the respondent’s property.

66. The respondents further averred that this reason was proved beyond reasonable doubt as determined in the Nairobi ELRC Cause No. 1282/2018 by Hon. Maureen Onyango in her ruling of 21/6/2019.

67. This claim was filed by the claimant union against the respondent seeking certain orders including readmitting locked out workers into their respective work stations.



68. The court determined that the employees participated in an unprotected strike by staging a sit-in at the respondent's premises.
69. I will not revisit the issue of whether the workers participated in an unprotected strike or not because the matter is now res judicata.
70. The respondents also averred that the grievants destroyed company property. On whether this is true or not, I take note of the fact that the grievants in these claims are around 400. Out of these only 2 were charged in court.
71. The claimants submitted that the claimants worked in 3 shifts. The claimants in cause 31/21 were those working in the 1st shift between 7am to 3pm. The 2nd shift which is for claimants in cause E29/21 were to be at work from 3pm to 11pm and the last shift which is grievants in E31 of 2021 which was to begin at 11pm till 7am.
72. There is no evidence that all these workers including those in 2nd and 3rd shift were at the work place and participated in the strike and destruction of property when they were not at work.
73. The workers in 2nd shift aver that when they arrived for their shift, the gates had been closed and they couldn't get to work.
74. This fact is also supported by the evidence of the respondents who stated that when the striking workers started causing trouble, police were called who disbursed them and police were now manning the gates.
75. It is therefore true in the circumstances that the workers in 2nd shift and 3rd shift were actually locked out due to chaos that had ensued during the day at the time of the 1st shift.
76. This position was confirmed by RW1. The insistence that these grievants were present and destroyed property is therefore not true.
77. It is therefore my finding that the existence of valid reasons in respect of the grievants in causes 30/2021 & 31/2021 is not established and this is contrary to the provisions of Section 43 of the [Employment Act](#) 2007 which states as follows;-

“43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Issue no. 2

78. Section 41 of the [Employment Act](#) 2002 states as follows;-

“41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering



termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.

79. It is the law that none should be condemned unheard. In this claim, the Respondents have averred that after the ruling in Cause 1282 of 2018 they subjected the grievants to a fair disciplinary process.
80. The Respondents aver that they issued the grievants with show cause letters. These letters were dated 1/7/2019 addressed to the grievants who were not at work.
81. RW1 admitted in evidence that some of these letters had no addresses. Indeed there is no show letter exhibited in Court which has an address.
82. Some of the grievants have indicated they were never served with show cause letters and only learnt of their dismissals later without being heard.
83. The show cause letters and even some of the letters inviting the grievants for a disciplinary hearing were indeed never served upon the grievants.
84. There is no proof of service of the majority of the grievants save for the handful who attended without proof of service of the grievants with a show cause letter and letter inviting them to be heard, it cannot be said that the grievants were subjected to a fair hearing.
85. It is therefore my finding that the grievants were condemned without being given a chance to be heard and were not subjected to a fair disciplinary process and this is contrary to Section 45 (2) of the [Employment Act 2007](#) which states as follows;-
45. (1).....
- (2) A termination of employment is unfair if the employer fails to prove-
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason-
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure”.

Issue no. 3

86. The Claimants sought various remedies for the grievants including reinstatement.
87. However the remedy of reinstatement is not viable given the expiry of the 3 years provided for under Section 12 of the [ELRC Act](#).
88. The grievants are however entitled to payment of their terminal dues as follows;-
1.
 - a) Notice pay



- b) Leave pay
 - c) Gratuity payment as per Clause 19 of the CBA
 - d) Days worked and not paid for
2. The grievants are also entitled to compensation equivalent to 6 months salary given their dismissal without due process.
 3. Each grievant should also be issued with a certificate of service.
 4. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.
 5. In view of the big number of grievants involved and in view of the fact that some grievants are deceased and no letters of administration was taken out, the exact number of grievants as per the claims will be computed by the parties with the help of the County Labour Office Nakuru and the figures submitted to Court for adoption as part of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muli for Respondent – present

Magatta for claimant – present

Court Assistant - Fred

