



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 383 OF 2018**

**KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT**

**VERSUS**

**SIBO WATER & SANITATION COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant, a Trade Union instituted this suit on behalf of her members namely, Walter Onyango Omollo, Wilson Omondi and Reuben Okumu Yada, vide a Statement of Claim dated 4<sup>th</sup> December, 2018, and filed in court on 6<sup>th</sup> December, 2018. The Claimant later lodged a Motion application seeking to amend her statement of claim, and which motion was allowed on 17<sup>th</sup> November, 2021.
2. The Claimant vide her amended statement of claim, seeks 12 months' salary in compensation for wrongful and unlawful termination, payment of salary in lieu of notice, an order directing the Respondent to release all salaries and allowances withheld and due to the Claimant's members by virtue of the suspension and costs of the suit.
3. The Respondent filed a Memorandum of Response to the Claimant's claim on 14<sup>th</sup> February, 2018.
4. During the hearing, all the grievants (**Walter Onyango Omollo, Wilson Omondi and Reuben Okumu Yada**) testified in support of the Claimant's case. They each adopted their witness statement and produced the list of documents filed in matter.
5. The Respondent presented one Loyce Apiyo Omoga, their Human Resources Director to testify on her behalf. She adopted her witness statement and produced the bundle of documents filed in support of the Respondent's case.
6. The Claimant filed submissions in the matter. The Respondent did not.

**The Claimant's Case**

7. The Claimant states that she has a subsisting recognition agreement with the Respondent dated 23<sup>rd</sup> June, 2016, which agreement, sets out the terms of operation and co-operation between her and the Respondent with respect to the Respondent's employees.
8. It is the Claimant's case that by virtue of the recognition agreement, she has preferred the claim on behalf of her members namely; Walter Onyango Omollo, Wilson Omondi and Reuben Okumu Yada, all former employees of the Respondent.
9. The Claimant states that on 10<sup>th</sup> September, 2018, their member, then an employee of the Respondent, the late Morris Odhiambo died due to inability to access urgent medical treatment due to the Respondent's failure to remit NHIF deductions which rendered his card inactive.
10. The Claimant states that the grievants were employees of the Respondent and at the same time, officials of the Claimant. It is the Claimant's further case that Mr. Walter Omollo was the Respondent's Deputy Technical Manager and the Branch Secretary of the Claimant union, while Mr. Reuben Okumu Yada was the Respondent's zonal coordinator and the Claimant's shop floor steward and Mr. Wilson Omondi was employed by the Respondent as Electromechanical officer and the Vice-Chairperson of the claimant's union.
11. It is the Claimant's case that the three grievants herein earned a monthly gross salary of Kshs. 29,450.00, Kshs. 34,950.00 and Kshs. 13,500.00 respectively.

12. It is the Claimant's further case that as a result of the death occasioned by the Respondent's breach of the Claimant's members' contract of service, the staff of the Respondent engaged in a go slow with the hope that the Respondent's management would address them in respect of the issues that faced their employment. It is the Claimant's case that although the management agreed to meet her members so as to address their issues, the meeting turned out to be a trap where some of the Claimant's officials were arrested.

13. The Claimant further avers that as a result of the intervention of the County Government, a meeting was held between the Claimants' membership and the Respondent's management, which meeting resulted in a return to work agreement conditional on the Respondent's management undertaking not to victimize the staff who took part in the go-slow.

14. The Claimant states that contrary to the agreement, the Respondent suspended her members who were also officials of the Union on allegations of inciting staff to strike, absconding duty and insubordination.

15. The Claimant states that the Respondent issued show cause letters to her members who were by then on suspension, and that her members responded to the show cause letters. The Claimant further states that contrary to the Respondent's assertion that she invited the grievants for a disciplinary hearing, the invitation letters were never received and so the grievants did not participate in the disciplinary process.

16. It is the claimant's case that the grievants were summarily dismissed from the service of the Respondent vide a letter dated 16<sup>th</sup> October, 2018 on the ground of gross misconduct.

17. It is the Claimant's case that the Respondent breached the terms and conditions of service of her members by failing to pay them salary, emoluments and benefits.

18. The Claimant further states that the Respondent subjected her members to anxiety, distress and uncertainty of their tenure of service.

19. The Claimant states that the Respondent's action of dismissing her members was unjustified and contrary to the rules of natural justice. The Claimant further states that the summary dismissal of the grievants was solely premised on their participation in union activities, hence their dismissal is unfair, unprocedural, and contrary to Articles 41 and 47 of the Constitution, Section 5 of the Labour Relations Act and Sections 41, 43, 45 and 46 of the Employment Act.

20. The Claimant prays that the court awards her the prayers listed in her statement of claim.

#### **The Respondent's Case**

21. The Respondent's case is that the grievants were dismissed for gross misconduct. It is the Respondent's further case that the grievants involved themselves in several acts of misconduct, including selling company water without authority, using the company's motor vehicles, disrespecting the company's senior management and participation in an illegal strike, hence their suspension and subsequent dismissal.

22. It is the Respondent's case that the grievants took part in a strike on 28<sup>th</sup> September, 2018, and that no notice was issued for the strike as required by law.

23. It is the Respondent's assertion that the grievants were not taken through a disciplinary hearing for reason that though they were invited for the hearing, they failed and/or neglected to attend and therefore, their dismissal was fair and lawful.

24. On cross-examination, the RW1 admitted that the reasons given for the summary dismissal of the grievants did not form part of the reasons stated in the notice to show cause addressed to the grievants. The witness further stated that the grounds for the dismissal were not specifically mentioned in the show cause letters.

25. The Respondent's witness further stated that the reason for the return to work formula was so that the employees are not victimized when they go back to work. The witness further stated that grounds for the dismissal were separate from the go slow, and that the grievants were dismissed for several other offences separate from the go slow.

26. The Respondent prays that the suit is dismissed with costs.

#### **The Claimant's Submissions**

27. It is submitted for the Claimant that although the Respondent's reasons for dismissing the grievants was mobilizing staff to participate in an illegal/unprotected strike, no evidence has been produced to show that indeed the grievants mobilized the Respondent's staff to take part in an illegal strike.

28. The Claimant submitted that the Respondent failed to adhere with the mandatory provisions of Section 41 of the Employment Act, 2007 that requires that employers explain to employees whenever a dismissal is contemplated the reasons for which the employer is considering dismissal. The Claimant cited *Nairobi Industrial Cause No. 100 of 2012- Collins Osoro Lukhale v AAA Growers Limited (2014) eKLR* to buttress this position.

29. It is further submitted for the Claimant that the Respondent failed to prove that the reasons it dismissed the grievants are valid and fair reasons and hence the dismissal was unfair.

30. The Claimant further submitted that the Respondent did not conduct the dismissal of the grievants under fair procedure as the mode of communication she choose was not effective. It is their position that the letters inviting them to attend the disciplinary hearing were sent through post and were received after the hearing date was past. It is the Claimant's submission that the grievants were dismissed without being accorded an opportunity to be heard contrary to the mandatory provisions of the Employment Act.

### **Analysis and Determination**

31. I have considered the pleadings, the witnesses' viva voce evidence and the submissions filed in the matter. The issues for determination are:

- i. Whether the grievants herein were unfairly and wrongful dismissed
- ii. Whether the Claimant is entitled to the reliefs sought

### **Whether the grievants herein were fairly dismissed**

32. A determination of whether or not an employee's dismissal is wrongful and unfair, is depended on the employer's adherence or otherwise, to the fairness principles, otherwise called the principles of natural justice enshrined in Section 41 of the Employment Act, 2007 and Article 47 of the Constitution, as well as the question of substantive justification per Sections 43, 45 and 47 of the Employment Act.

33. Section 41 of the Employment Act prescribes a procedure for every employer considering the dismissal/termination of an employee, and which procedure is a mandatory requirement.

34. The grievants admitted receipt of show cause letters and that they did respond to the issues subject of the show cause. They however denied receiving the invitations to appear for the disciplinary hearing and only received the letters after the hearing date was past.

35. The Respondent did not adduce evidence to show that the invitations were received by the grievants before the hearing date.

36. The Respondent in the opinion of this court did not intend to meet the requirements of Section 41 of the Employment Act, in not ensuring that the grievants were notified of the hearing dates before proceeding to reach the decision to summarily dismiss their services. In the case of *Mary Mutanu Mwendwa v Ayuda [2013] eKLR* the Court held that the Employment Act has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer, and is entitled to have a representative present. In a further case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR* the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

37. I find and hold that the procedure adopted by the Respondent in reaching the decision to dismiss the grievants failed the fairness test, with the result that the dismissal is procedurally unfair.

38. The question of substantive justification is a statutory requirement that is concerned with establishment of valid and fair reason(s) as the basis upon which an employer arrives at the decision to dismiss/terminate.

39. The letters summarily dismissing the grievants from the service of the Respondent clearly indicates the reason for the dismissal as taking part in an illegal strike, contrary to RW1's testimony that this was not the reason for them dismissing the grievants. The Respondent from her witness' testimony appeared not to be sure of the exact reasons for the dismissal of the grievants contrary to the requirements of Sections 43, 45 and 47(5) of the Employment Act, which demands that an employer must prove the reasons for termination/dismissal, prove the reasons are valid and fair and prove that the grounds are justified. (*See Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR*).

40. The Respondent's witness RW1 confirmed to this court that after the go slow, parties entered into a return to work agreement wherein, the Respondent undertook not to victimize the Claimant's members who took part in the go slow. The suspension and notices to show cause came immediately the return to work agreement was entered into.

41. RW1's assertion that the reasons for the suspension and subsequent dismissal of the grievants were unrelated to the go slow does not hold. Why for example were the grievants not suspended and taken through disciplinary action before the go slow, if indeed they were guilty of acts of misconduct separate from the go slow? Secondly, the show cause letters and the letters of summary dismissal state the go slow and/or illegal strike as the reason the grievants were dismissed despite the return to work agreement entered into between the Claimant and the Respondent.

42. The Respondent is in breach of her undertaking not to victimize the employees who took part in the go slow, and more so that the grievants were all union officials.

43. I find and hold that the dismissal of the grievants was procedurally and substantively unfair.

### **Whether the Claimant is entitled to the reliefs sought.**

44. The Claimant's claim is that the grievants are paid 12 months' salary in compensation for wrongful dismissal, payment of salary in lieu of notice, an order directing the Respondent to release all salaries and allowances withheld and due to the Claimant's members by virtue of the suspension and costs of the suit.

### **Compensation for wrongful Dismissal**

45. The dismissal of the grievants has been found to be both procedurally and substantively unfair. This holding entitles them to compensation for the unfair dismissal per Section 49 and 50 of the Employment Act, 2007.

46. The grievants were all union officials whom the Respondent seemed to have picked out for punishment after the go slow, even after undertaking in the return to work agreement not to victimize them.

47. The Respondent's action of picking out union officials for punishment is discriminatory, and a violation of the grievants right to belong to a union and their right to picket, guaranteed in the Constitution. This in my opinion justifies maximum compensation and are hereby award 12 months' salary each for the unfair and wrongful dismissal.

### **Payment of Salary in Lieu of Notice**

48. The grievants were evidently not given notice nor paid in lieu thereof. Termination notice or pay in lieu thereof, is a statutory requirement. Section 35 of the Employment Act states:

**“(1)A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be?**

.....

**(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.**

**(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.”**

49. The grievants not having been given dismissal notices nor paid in lieu thereof, are entitled to pay in lieu of the dismissal notice and are hereby award one-month salary each in lieu of notice.

### **An order directing the Respondent to release all salaries and allowances withheld**

50. The grievants did not prove the months and the amount that was outstanding and due to them from the Respondent. This claim was therefore not proved. It fails and is dismissed.

51. In whole, Judgment is entered for the Claimant against the Respondent as follows:

- i. 12 months' salary in compensation for unfair and wrongful dismissal at Kshs:353,400/-; Kshs. 419,400/- and Kshs. 162,600/- (**Walter Onyango Omollo, Wilson Omondi and Reuben Okumu Yada** respectively)
- ii. One month's salary in lieu of notice at Kshs.29,450/-; Kshs. 34,950/- and 13,550/ (**Walter Onyango Omollo, Wilson Omondi and Reuben Okumu Yada** respectively)
- iii. Costs of the suit and interest until payment in full

52. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21<sup>ST</sup> DAY OF APRIL, 2022**

**CHRISTINE N. BAARI**

**JUDGE**

### **Appearance:**

Ms. Owino h/b for Mr. Otieno for the Claimant

N/A for the Respondent

Christine Omollo- C/A