Kenya County Workers Union v Bomet Water and Sanitation Company Limited (Cause E015 of 2021) [2022] KEELRC 12999 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12999 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE E015 OF 2021

ON MAKAU, J

OCTOBER 27, 2022

BETWEEN

KENYA COUNTY WORKERS UNION ..... CLAIMANT

AND

BOMET WATER AND SANITATION COMPANY LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. This suit is brought by Kenya County Government Workers Union, on behalf of its 42 members (herein after called the grievants) and it is contained in the Memorandum of Claim dated November 15, 2021. The claimant seeks the following reliefs;

    a. A declaration that the grievants' fundamental rights and freedoms under Article 41, 47 and 50 of *the Constitution* have been violated.

    b. A declaration that the Respondent's decision to terminate the grievants was and remain unlawful, illegal and hence null and void and of no legal effect.

    c. An order for unconditional reinstatement of the grievants to their formers positions without any loss of benefits and without any conditions.

    d. In the alternative to prayer (c) above, the Respondent be orders to fully compensate the grievants for the unlawful and unfair termination being 12 months gross salary as at the time of their termination and that the claimant members be paid actual pecuniary loss suffered since the date of termination, including salary and allowance as would have been earned and all other accruing allowances from the respective dated of appointment to date.

    e. In the alternative to prayer (c) above, the Respondent be ordered to issue certificates of service to the grievants.

f. Costs of this claim.

g. Any other relief that this Honourable Court may deem just to grant.

2. Respondent filed a Response to Claim on December 1, 2021 denying all the averments in the claim and maintaining that the claimant had not exhausted all internal dispute resolution mechanism and also that the termination of the grievants was justified and thus not illegal.

3. An application and preliminary objection by the respondent were heard and ruling delivered on the February 10, 2022, declining the Prayers sought. The main suit then proceeded for hearing, where the claimant called one witness and the Respondent summoned three witnesses. Both parties also filed written submissions.

The Claimant's Case

4. The Claimant states that by the letters of October 18, 2021 and October 26, 2021, the Respondent terminated the employment of the following employees (grievants);

1. Koech Kimutai Josphat
2. Judy Chebet
3. Patrick Tanui Cheruiyot
4. Naomi Chirchir
5. Victor Koech
6. Terer Kiptoo Dennis
7. Edwin. Mutai
8. Simon Rono
9. Vincent. Koskei
10. Simon Kipsang Bii
11. Hillary. Mutai
12. David Kipsigei Ngeno
13. Lazarus Kiplangat Rono
14. Bernard Koech Kiprotich
15. Koskei Mike
16. Philip K Chepkwony
17. Augustine Sigei
18. Emmanuel Koech
19. Eric Chepkwony
20. Japheth Kiplangat Korir
21. CorneliusKibet lanagat

22. Kiprotich Philip Rop
23. Charles Milgo
24. Kiprono Kilel Lawrence
25. Cherotich Purity
26. Elkana Kipngetich Langat
27. Ngeno Japheth
28. Tesot Sagenya Bernard
29. Korir Vincent
30. Bernard Langat
31. Koech Patrick
32. Bernard Sang
33. Paul Rono
34. Wesley Koros
35. Zeddy Chepkoech
36. Charles Mogire
37. Kipkoech Korir
38. Wycliffe Sang
39. Elisha Tonui
40. Joseph Korir
41. Tonny Cheruiyot
42. Bethuel. Kipkorir Kirui

5. Prior to the termination, the claimant, wrote to the Respondent the letter of October 7, 2021 agitating for its members interest with respect to unpaid salaries from August, 2021 to October, 2021, unpaid pension from August, 2018, unremitted shares to Saccos and unremitted staff welfare fund.

6. Instead of responding to the said grievances, it is alleged that the Respondentintimidated, victimized and threaten the claimant's members with dire consequences, which threats were culminated in their dismissal from employment.

7. It is also alleged that the dismissal of the said members did not follow due procedure of the law in that the Respondent based its allegation on a non-existent Human Resource Manual which neither the claimant nor its members were aware of.

8. The claimant further avers that the Respondent issued notices to show cause on a Saturday of October 8, 2021, which occurred as a result of industrial unrest occasioned by non-payment of salaries from August, 2021. However, it was contended that the notice given was not adequate to make a response since they had only Sunday and Monday to respond to the notices and attend hearing on Tuesday the

October 12, 2021. Besides the said Monday was a public holidays since the October 10, 2021 fell on a Sunday.

9. The claimant maintained that since the notice was extremely short they could not participate in the disciplinary hearing of October 12, 2021. In their view the move by the Respondent to carry out disciplinary hearing within such a short time was actuated by malice and aimed at locking out the response and defence of the claimant's members.

10. The claimant avers that the termination of services of its members went against the spirit of *the constitution* and particularly Article 50 on the right to fair hearing. The termination was also contrary to the dictates of Section 4 of *Fair Administrative Actions Act*.

11. During hearing Josephat Koech, Claimant's Bomet Branch Secretary and an employee of the Respondent, testified as CW-1. He was employed by the respondent as Area Technician and Technical Supervisor for Chepalungu area. He stated that on 6th and October 7, 2021, he joined the other employees to seek audience from the Human Resource Manager and the Managing Director concerning the non-payment of salaries for August and September, 2021, unremitted pension, Sacco shares and allowances stretching back to 2018. However, they did not secure any audience from the Managing Director since he was away and therefore they took their grievances to the Governor.

12. He further testified that on October 9, 2021, he was called by the Human Resource officer to collect his Show cause letter and he complied. The letter directed him to give his response by October 12, 2021 and attend a Disciplinary hearing on October 14, 2021. Since Sunday October 10, 2021was a public holiday the same was forwarded to Monday October 11, 2021 which meant that he did not have adequate time to make his response. Nevertheless, he wrote his response but upon presenting it alongside other 30 employees, they were denied entry by the security. He testified further that during hearing on October 14, 2021, police were guarding the premises and they were denied entry to the disciplinary hearing.

13. Finally, he denied that any strike or picketing took place and maintained that all the employees were at work on October 6, 2021 but merely sought audience of the Managing Director and the Human Resource officers on the said issues.

14. Upon cross examination by Leteipa Advocate, the witness testified that he was only aware of the Human Resource Manual of 2014. He further testified that they followed the correct procedure in addressing their grievances adding that they had raised the issues through various letter previously. He denied the alleged ejecting of staff from offices, barricading the offices and the gate or interrupting any service on October 6, 2021 contending that the consultative meeting was held over lunch hours in the board room.

15. On further cross examination, he testified that they notified their Union headquarters of their grievances but no notice of strike was issued because none took place.

16. In re-examination, he maintained that the grievants were innocence and they were denied a fair hearing before dismissal. He then adopted the bundle of documents on page 20-990 of the claimant's record, Registers, production records and tabulations as Claimant's exhibit 1-4 respectively.

The Respondent's Case

17. In its Response to Claim dated 29 November, 2021 and filed in court on 1stDecember, 2021, the Respondent challenged the jurisdiction of this Court on the basis that the claimant had not exhausted all internal dispute resolution mechanism because the affected employees had a chance to appeal their claim to the Public Service Commissions as provided for under section 77 of the *County Government*

Act as read with section 85 and 86 of the *Public Service Commission Act*. The filing of this suit according to the Respondent violated Article 47 of *the Constitution* and section 9(1-4) of the *Fair Administrative Actions Act*.

18. The Respondent also challenged the authority by the Claimant to institute this suit on behalf of its members and avered that the employees ought to have filed their individual claims.

19. The Respondent admitted that as at October 6, 2021, it had not paid its employees salary for August and September 2021, but they later paid the August salary. It also admitted that it was yet to pay for the month of September going forward, because it had not received funds subsidy from the treasury of Bomet County. It averred that its funding comes the County Government of Bomet in addition to the revenue collection.

20. It is the Respondent's case that early October, 59 employees engaged in a spontaneous and illegal strike that interrupted the company operation and service delivery, informing the decision by the Respondent to issue Notice to show cause and invitation for disciplinary action against the 59 employees.

21. Out of the 59 employees, 23 employees never responded to the notice to show cause, while 36 responded and showed up for the disciplinary hearing. After the disciplinary hearing 41 employees were found culpable of the various offenses and their services were terminated. Another 16 employees were given stern warning, one was found innocent while the case against one, Kipkoech Korir was still pending for determination.

22. Contrary to the allegation by the claimant, the Respondent averred that the Notice to show cause were served individually on the employees on 7th and 8th October, 2021 which was on a Thursday and Friday respectively and not a Saturday as alleged.

23. Further, the respondent averred that the disciplinary hearings were carried out from October 12, 2021 to October 25, 2021 and as such each employee was accorded ample time to defend themselves. Therefore that the termination of the 41 employees was arrived at after subjecting them to due process.

24. During the hearing the Respondent called three witnesses. The first witness, RW-1, was Patrick Langat, the Managing Director of the Respondent. He adopted his statement of May 13, 2022 and in addition testified that there are 216 staff members spread over 14 schemes of water, which supply water to the entire county of Bomet and some parts of Kericho county. He adopted disciplinary committee book let, HR Manual, letters of appointment, disciplinary hearing minutes for Kosgei Kibet, termination letters and resolution of the board as Respondent's exhibits 1-6 respectively.

25. In addition, he testified that on the October 6, 2021, he was out of the office but he was informed by the Human Resource manager that a section of the employees had a meeting in the board room and later held demonstrations and ejected staff from their offices and barricaded the offices before proceeding to the governor's office. He stated that the demonstration affected water supply in chepalungu, Magombet operations and Bomet water treatment works which stopped for 6 hours while Kamureito scheme was closed since no workers attended duty.

26. He further testified that the number of staff absent from duty on the said date was established by the HR officer who took a rollcall. He contended that the staff who were absent and participated in the illegal strike were issued with show cause letters and invited for disciplinary hearing. He confirmed that he did not sit in the disciplinary hearings but he testified that he considered the reasons given for the dismissal of the grievants and proceeded to sign their dismissal letters.

27. RW-1 testified further that one employee called Kosgei Kibet had already been dismissed on September 30, 2021 for fraud and was not among the employees who were subjected to hearing based on the illegal strike.

28. Upon cross examination by Okech advocate, RW-1 testified that he is the one that appointed the chairperson that chaired the second disciplinary committee. He stated that the two committees were chaired by Benard Kirui and Erick Towett. He clarified that Erick Towett was not the disciplinary chairperson but due to the number of employees involved, he appointed him temporarily to handle disciplinary hearing for some of the employees. He maintained that the show cause letters were served on the employees on the 7th and October 8, 2021 and the reason the strike was illegal is because no notice was served on them by the claimant or its members.

29. Upon further cross examination he testified that the HR Manual provide for counselling of employees before Notice to show cause could be issued but clarified that no counselling was required when the offense is one of grave nature.

30. RW-2 was Gilbert Matet Kipkoech, the Human Resource and Administration Manager. He testified that he was the one that issued the grievants with notice to show cause and also sat in various disciplinary committee meetings as the secretary. He stated that during hearing, the grievants were represented by fellow employees and were duly informed of their rights and procedure of the disciplinary hearing. He then adopted his written statement dated May 13, 2022 as his evidence.

31. Upon cross examination by Oketch Advocate, the witness testified that the dismissal of the grievants was done fairly after a disciplinary process. He testified that he was the one that served the show cause letters on 7th and October 8, 2021 but confirmed that some employees came for their letter on October 9, 2021. He testified further that since the employee who were subjected to disciplinary hearing were many, the managing director appointed his assistant Ms Maureen Chepngetich to assist in taking the minutes.

32. RW-3 was Erick Towett, the Respondent's low income consumer coordinator. He adopted his statement of May 13, 2022 and in addition testified that initially there was one disciplinary committee but due to the large number of staff involve, he was appointed to chair the second disciplinary committee. He testified that all the employees who appeared before him had one witness and all had been served with show cause letters. He testified that the employees were informed of the procedure to be followed in the disciplinary hearing and were given time to make their submissions. He also testified that the disciplinary hearing run from 12th to October 26, 2021.

33. Upon cross examination by Oketch Advocate, the witness testified that he was appointed as a member of the Disciplinary committee and orally directed to chair the second disciplinary meeting. He stated that he was not paid September salary as all other employees.

Claimants Submissions.

34. The claimant submitted on four issues;whether the termination failed the substantive fairness; whether the procedure for the termination was fair; whether the Constitutional rights of the grievant were violated; and whether the Claimant is entitled to the prayers sought in the Claim.

35. On the first issue it was submitted that the termination for the alleged of industrial unrest, that allegedly destabilized water delivery to various parts of Bomet County, was not justified since the Claimant's witness produced revenue collection, daily water attendance register which showed production and revenue collection for Magombet, Chepalungu, Kamureito and Bomet Water treatment works which were allegedly affected by the industrial action on October 6, 2021.

36. It is the claimant's submission that there was no valid reasons proven or set out by the Respondent to justify the dismissal of the grievants from employment since there was no strike on the October 6, 2021 and if there was any, the same is allowed under clause 15.4 of the Respondent's Human Resource Manual 2014.

37. It also submitted that the photographs relied on by the Respondent are not admissible and this Honourable Court cannot make out who the persons in the photographs are, where they were taken from and by whom. Further, they contended that the provisions of section 106B of the *Evidence Act* on admissibility of Electronic Records were not complied with.

38. On the second issue, the claimant submitted that the procedure followed before the said termination wrong and it violated Clause 11.5.3 of the HR manual by prematurely proceeding to issue notices to show cause, hold disciplinary hearing and then dismiss the employees. The said clause provides that –

> " offences considered liable to summary dismissal as per the provisions of the *Employment Act, 2007* and subsequent legislation, the head of department/supervisor will refer the case to the human resource officer for further deliberation by the Staff Advisory Committee and appropriate recommendation to the MD,".

39. It further argued that Clause 11.9(e) under which the show cause letters were issued to all the Claimants was violated by the Respondent when they failed to caution, reprimand or counsel the employees before subjecting them to disciplinary hearing and as such the disciplinary process was flawed. The clause states –

> " In the case where an employee has been counseled/cautioned/reprimanded over a breach of code of conduct, and where no improvement has been noted thereby, or the offence is such that it constitutes major misconduct, the human resource office shall issue to the employee a "show cause" letter with a copy furnished to the head of department."

40. To support their case they relied on the case of *Walter Ogal Anuro vs Teachers Service Commission* [2013]eKLR where the court held that:

> " This Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

41. The claimant further submitted that the procedure followed before the termination, was unlawful, irregular and had a predetermined outcome from the onset. It argued that the minutes and hearings conducted were a sham since the disciplinary committee was not properly constituted and it made inconsistent and baseless findings.

42. The claimant took issue with the short notice in which the grievants were directed to submit their responses to the Notices to show cause and attend hearing. The reliance on the Human Resource manual 2020 was also challenged as the same was not served upon the employees beforehand. It was argued that the employees were not represented by any official from the union as contemplated under the Human Resource manual.

43. The claimant also highlighted several irregularities such as; instances where some employees were denied entry to the disciplinary hearing venue to present their case; a chairperson of the committee not present during disciplinary hearings, no secretary to take minutes in some panels; and several

person who were adversely mentioned but never subjected to disciplinary or their services terminated. Consequently, it was argued that the disciplinary hearings were conducted in a haphazard manner with no consideration for the rules of natural justice and urged this Court to find that the process was flawed.

44. For emphasis, reliance was placed on the case of *Zephania O. Nyambane and another vs. Nakuru Water and Sanitation Services Company Limited* [2013] eKLR were the court held that:

> " In such cases, it is the view of the court that the employer fails to demonstrate good faith in invoking the disciplinary procedure and it is justified for the employee to infer bad faith calculated to lead to imposition of a punishment including dismissal at all costs and means. The court holds such to be unfair disciplinary process falling short of due process of justice. Further, where the reasons alleged in the notice or the show-cause letter are substantially at variance with the reasons for termination as was the case in the present dispute (as per the show-cause letter and the termination letter reproduced in this judgment), the court holds that the reasons for the termination must be found to have been invalid and the termination therefore unfair. Thus to answer the second issue for determination, the court finds that the alleged reasons for termination were never established as they were fictitious as not established to exist at the time of the termination and therefore not valid."

45. The claimant also relied on the case of *David Wanjau Muhoro vs. Ol Pajeta Ranching Limited* wherein Rika J held that the employer has an obligation to avail the employee sufficient opportunity to prepare for the hearing.

46. It was argued that from the evidence and facts laid before this Court, shows that the Respondent did not serve the grievants with the Show Cause letters in good time. Further, none of the Respondent's witnesses set out the manner in which this service was carried out and therefore the disciplinary process ought to be faulted by this Court.

47. On the third issue, it was submitted that Article 10 of *the constitution* was violated by the Respondent who has demonstrated a lack of good governance, transparency and accountability in the manner in which the termination of the Claimant's members was carried out. Further, that Article 41, 47, and 50 of *the Constitution* was infringed when the grievants where denied adequate time to respond to the notice to show cause and attend the disciplinary hearing.

48. As regards the last issue for determination, the claimant urged this Court to reinstate the employees considering the wishes of the employees, the circumstances of the termination, length of service, and the chances of securing alternative job opportunity within the said region.

Respondent's Submissions.

49. The Respondent on the other hand, submitted on the issues whether the termination of the claimant's members met both the substantive and procedural fairness; whether the claimants participated in the strike; whether the strike was lawful; whether the Constitutional rights of the grievants were infringed; and whether the orders prayed for are available to the claimant.

50. On the first issue it was submitted that the reason for termination of the 41 employees was for participating in an illegal strike which caused disruption of services at the Respondent and several parts of Bomet County. It was argued that the participation in the strike without affording notice to the employer was illegal and a cause for disciplinary action.

51. In defining what amounts to industrial unrest, the Respondent cited the case of *Mohammed Yakub Athman & 18 Others v Kenya Ports Authority* (2017) eKLR where the Court of Appeal dismissed the

employees appeal because they had admitted in evidence that they stopped work and left their work stations without permission and employer's authority.

52. The Respondent submitted that although an industrial action can be called by the Union as a way of agitating their issues, such action can only be called within the confines of section 76 of the *Labour Relations Act* as read with section 78 of the said Act.

53. It was further argued that where a Collective Bargaining Agreement (CBA) provides for ways of resolving disputes, then the same should be followed to the letter since it binds both the employer and the employees. For emphasis reliance was placed on the case of *County Government of Kakamega & another v Kenya National Union Of Nurses & another* [2017] eKLR held that

> "It is the opinion of this court that parties negotiating in essential services ought to take advantage of the provisions of section 78(1)(a) and (b) of the *Labour Relations Act* and build into the recognition and collective bargaining machinery the manner in which deadlocks during collective bargaining in essential services should be managed so that the public interests likely to be affected by strikes in essential services are protected while at the same time not compromising the rights of employees who are the beneficiaries of such negotiations. Where parties fail to do so as in the instant case, it is the opinion of this court that the position in section 78(1) (f) and 81(3) will apply, that is, that strikes in essential services are prohibited."

54. In the instant case, the Respondent submits that the recognition agreement between it and the claimant provided for mechanism under Part 3 on dispute resolution mechanism that ought to have been followed by the claimant and its employees before the industrial action was called.

55. On whether due procedure was followed before termination, the Respondent submitted that once the industrial action was called and services halted, the Respondent took action and issued show cause letters to all employees who were implicated. They were then subjected to disciplinary hearing from October 12, 2021 to October 26, 2021 and thereby affording each employee ample time to defend themselves before a decision was made.

56. On the notice being short, the Respondent submitted that the grievants were all served with the said notices within the same period and out of the 59 employees implicated, 36 responded to the show cause letter and attended hearing while 23 failed to respond or attend disciplinary hearing. This according to the Respondent indicates was sufficient time considering that most employees responded to the show cause letter and attended hearing and the minority who failed to responded acted so to their peril.

57. To support the foregoing submission, they relied on the case of *Charles Fundi Njiru v Board of Management Baricho High School* [2020] eKLR where Nzioka Wa Makau J held that an employee who fails to attend a disciplinary meeting called cannot turn around and claim he was not heard or that he was not afforded an opportunity to defend himself.

58. The Respondent also relied on the case of *Gideon Akwera v Board Of Governors Church On The Rock Academy* [2015] eKLR where Nzioka Wa Makau J dismissed the suit because the Claimant was reluctant and obstinate in his refusal to either to defend himself on allegation that he was told not to step in the premises of the employer but had not shown any letter that he wrote protesting the denial of access.

59. On the reliefs sought, the Respondent submitted that the claimant has not demonstrated the elements under section 49(4) of the *Employment Act* to warrant the reinstatement sought. To support their case, they relied on the Court of Appeal decision in *Kenya Airways Limited vs. Aviation & Allied Workers*

Union Kenya & 3 Others [2014] eKLR where it was held that whereas the remedy of reinstatement is discretionary, the court ought to be guided by factors stipulated in section 49(4) of the *Employment Act* which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be offered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer.

60. In view of the foregoing submissions, the Respondent urged this Court to disallow the claim in its entirety with costs.

Analysis and determination.

61. I have carefully considered the parties' pleadings, evidence and the rival submissions and it is a fact that the grievants were all employees of the respondent until 2021 when they were dismissed from service for misconduct. Section 45 of the *Employment Act* bars an employer from terminating his employee's contract of service unless there is a valid and fair reason and the termination is done in accordance with a fair procedure.

62. The said Section makes the following provisions regarding unfair termination of employment–

> "(1) No employer shall terminate the employment of an employee unfairly.
>
> (2) A termination of employment by an employer 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."

63. The main issues that commend themselves for determination in the instant suit are: -

a. Whether the dismissal was for a valid and fair reason.

i. Whether there was a strike on October 6, 2021, in which Claimant's members participated.

ii. Whether the strike was a legal strike.

b. Whether fair procedure was followed before the dismissal.

c. Whether the constitutional rights of the grievants were violated by the respondent..

d. Whether the Claimant is entitled to the reliefs sought.

The reason for termination

64. Section 43 of the *Employment Act* provides that in any legal proceedings challenging termination of an employee's employment the employer shall prove the reason and in default, the termination is deemed unfair within the meaning of section 45 of the Act. The provision is set out below:

> " 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."

65. The employer must demonstrate to the satisfaction of the Court the reason for terminating the services of the employee was valid and it related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements.

66. In the instant case, the reason cited for the termination was that the Grievants participated in an illegal strike on October 6, 2021. The Claimant on the other hand denied that there was a strike on the said date and maintained that only a meeting of the staff was held in the board room to seek audience with the management concerning unpaid salaries among other grievances but when they failed to get audience there they took the issue to the Governor.

67. To support its case, the Respondent relied on photographs showing people carrying placards protesting the non-payment of their salaries, that they are listed in CRB and for disbandment of Respondent's Board. Some photographs showed people seated in a board room. The photographs (page 261-271 of bundle 1 marked exhibit 1) were produced as exhibits without any objection from the claimant. Its counsel never even challenged the photos during cross-examination of the defense witnesses. The Claimant admitted also that the grievants held a meeting in the boardroom and thereafter marched to the Governor's office.

68. The Claimant has urged this Court in submissions stage not to admit the photographs in evidence because they have not been accompanied by a certificate as contemplated under section 106B of the *Evidence Act*. Indeed, the said photographs were not accompanied by the certificate as contemplated under the *Evidence Act* but since the advocate did not object to their production during hearing, the same cannot be objected to now. Doing so amounts to an afterthought.

69. The photographs produced by the Respondent indeed shows some people congregated in a room that looks like a board, other photos show people carrying placards stating that "We are listed in CRB" and "pay salary" standing outside premises labeled Human Resources, while other photos show people marching carrying placards. CW-1 sought to justify the meeting by stating that it was carried out over lunchtime break. The said witness also testified that he works at chepalungu, about 30 kilometers from Bomet town while the other employees came from their work stations to Bomet town.

70. In my view the evidence before the court is sufficient to support the finding that on October 6, 2021, the grievants absented withdrew their labour and absented themselves from their designated place of

work participate in strike to agitate for their right to payment of salary and other benefits. It does not require the discernment of a genious, a prophet or even a magician to tell that employees are on strike.

71. It is as obvious that there is a strike as when a group of employees downed their tools due to some unresolved employment related grievances, like when seen walking away from work or are gathering at the work place demanding for some rights, either quietly or shouting or singing or even crying, they may also be peaceful or violent and destructive targeting the employer or third parties.

72. I gather support from the case of *Mohammed Yakub Athman & 18 Others v Kenya Ports Authority* (2017) eKLR where the Court of Appeal held that;

> " From the foregoing there can be no doubt at all that indeed there was stoppage of work at the concerned appellants' work stations on that day. As conceded by the appellants in their written statements, almost all the employees went to the head office. They had left their stations of work without the permission and authorization of the respondent..."

73. The conduct of the grievants calling for meetings without notice to its employer or Union and proceeding to demonstrate within the Respondent's premises and thereafter marching to take their grievances to the Governor's office without following dues procedure provided for under the Human resource manual and the *Labour Relations Act* was illegal.

74. It is evident from the record that the claimant and by extension its members did not issue notice of the said industrial action at least seven days as provided for under section 76(c) of the *Labour Relations Act* as read with clause 15.4 of the Respondent's Human Resource Manual. Moreover, since the Respondent is an essential service provider, being that it deals with delivery of water in Bomet County, its employees are ordinarily prohibited from engaging in strike and lock out as contemplated under section 78(1)(f) of the *Labour Relations Act*.

75. Without such notice the strike was unprotected. Further even where a notice has been issued in accordance with section 76 of the *Labour Relations Act, 2007* before going on strike the party relying on the same must show the efforts taken to engage in conciliation and referral to the court for resolution.

76. The Claimant relied on minutes of July 1, 2021, to allege that they attempted negotiation but failed. However, the said minutes relate to a recognition agreement and as such the issues that informed the industrial unrest herein were not referred to any conciliation under the Act before the grievants engaged in the unprotected strike on October 6, 2021.

77. What is more worrying is that the employees are engaged in essential service where the law limits the right of employees to engage in strike.

78. In conclusion, I find and hold that the respondent has proved on a balance of probability that the reasons given for dismissing the grievants was justified because they participated in an unprotected strike. The employer has also established by evidence and the claimant has also conceded that on October 6, 2021, the grievants absented themselves from their work station without authority of the employer or a just cause and that entitled the employer to summarily dismiss them from employment by dint of section 44 (4) (a) of the *Employment Act*.

79. It is important to clarify here that the claim for Mr. Kosgey Kibet is not well founded. He was not dismissed for the strike and therefore his claim is not established.

Procedural fairness

80. The minimum procedural requirement is set under Section 41 (1) of the *employment Act* which provides that:

> "(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."

81. The evidence burden of proof is upon the employer to establish to the court that it complied with the above mandatory procedure before dismissing the grievants. From the evidence before Court and the testimonies of the witnesses for both the claimant and the Respondent, it is evident that each of the grievants were served with a notice to show cause inviting them to defend themselves both in writing and orally before a disciplinary committee.

82. There is evidence that out of the 59 employees who were served with the show cause notices, 36 responded and were subjected to disciplinary hearing. The testimonies from the defense witnesses that the said grievants were accompanied by fellow employees was not been rebutted as they were not called to give evidence before this court. Therefore I must arrive at the conclusion that the dismissal of the grievants was done in accordance with a fair procedure since they were all afforded a fair opportunity to defend themselves in writing and orally before the dismissal was decided.

83. In reaching the foregoing conclusion, I have considered and found no merits in the testimony by CW-1 when he alleged that the time given to respond to the show cause notice and then attend the disciplinary hearing was not adequate. He did not show any attempt by himself or other grievant to request for additional time for writing the response to the charges in the show cause notice or asking for adjournment of the hearing to a far date in order to prepare for the hearing. In fact CW1 admitted that he wrote his response and took it to the office but he and 30 other employees were denied access by the company security. He also said that they were barred from attending their disciplinary hearing by the police who were manning the premises.

84. However, none of the other 30 employees who were allegedly denied access to deliver their responses or attendance of their hearings were called to give evidence in support of the allegation by the CW1. The claimant has also not produced any correspondence written by the grievants protesting against the alleged denial of access to deliver their responses or attend their disciplinary hearing. I therefore reiterate that the grievants were accorded an opportunity to defend themselves before the dismissal but some rejected.

85. In the case of *Charles Fundi Njiru V Board of Management Baricho High School* [2020] eKLR Nzioka Wa Makau J was faced with a similar situation and proceeded to hold that;

> " An employee who fails to attend a disciplinary meeting called cannot turn around and claim he was not heard or that he was not afforded an opportunity to defend himself ..."

86. Again in the case of *Gideon Akwera v Board Of Governors Church On The Rock Academy* [2015] eKLR Nzioka Wa Makau J held that;

> " ... the Claimant was reluctant and obstinate in his refusal to either give explanation or attend his place of work. He makes an allegation that he was told not to attend the premises of the Respondent but has not shown any letter that he wrote seeking either audience with the administrator or the directors of the Respondent."

87. I entirely agree with the above decisions and which underscore that any employee who alleges, in any legal proceedings, that he was prevented from delivering his written defence or attending disciplinary hearing by an agent of the employer, must demonstrate by evidence that he made effort to the same bring to the employer's attention. In default, such allegation cannot hold any water and the court will make a finding that the employee turned down an opportunity to defend himself like in this case.

Constitutional violations

88. Having arrived at the conclusion that the termination of the grievants was justified by valid and fair reason and that they were afforded a fair opportunity to defend themselves before the dismissal, I will not take much time belaboring the allegation that their constitutional rights to hearing, fair labour practices and fair administrative action were violated by the respondent. Such allegation lacks merits in the face the said findings and it is dismissed.

Reliefs

89. The respondent has convinced court by evidence that the dismissal of the grievants herein was substantively and procedurally fair. Therefore I decline to make any declaration that the termination was unlawful or that their fundamental rights and freedoms enshrined under Article 41, 47 and 50 of *the Constitution* were violated.

90. I also decline to grant the prayer for reinstatement or compensation for unfair termination because the claimant has fallen short of meeting the legal threshold set out under section 49 of the *Employment Act*, namely, prove that the dismissal was unfair.

91. However, the grievants shall be paid their salaries for the month of September, 2021 together with days worked in October, 2021. The employer will also issue them with certificate of service as required under section 51 of the *Employment Act*. The claim for the unspecified allowances accruing from the date of their appointment has not been particularized and substantiated by evidence and consequently I decline to award them.

92. Save for the alternative claim for unpaid salary and certificate of service the suit stands dismissed. Since no party has entirely succeeded in its case, I award none costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF OCTOBER, 2022.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE