REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 976 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

MIGOTIYO PLANTATIONS LIMITED.....RESPONDENT

JUDGMENT

1. The claim herein was instituted by the Kenya Plantation and Agricultural Workers Union alleging wrongful dismissal of over 300 employees.

2. It is the Claimant's averment that the Respondent issued an internal memo to all business owners directing them to close down businesses which closure led to the grievants being denied essential services like water, electricity, medical treatment and housing.

3. It is further the Claimant's averment that the Respondent's employees were never served with either a warning letter, show cause letter, hearing notice, dismissal or termination letters.

4. In the memorandum of claim dated 28th May 2016 the Claimant seeks;

a) That The Honourable court do issue a declaration that

i) The termination of the employees is un procedural, unfair therefore wrongful

ii) The employees be and are hereby reinstated to employment without loss of privileges from the date of the judgment

b) THAT in the alternative if reinstatement is not applicable

i) The Respondents do pay all employees full terminal benefits calculated in accordance with the collective bargain Agreement tabulated and attached as appendix TK3

ii) The Respondents pay 12 months' gross salary as compensation to each of the employees for wrongful loss of employment

iii) The principle amount in (i) and (ii) be paid within 14 days in default to attract interest at courts rate and execution to issue

iv) Respondents to issue a certificate of service to all

employees

v) Costs of the suit be provided for

7. Together with the Memorandum of Claim, the Claimant filed a notice of motion under certificate of urgency seeking the following orders: –

*(i) **THAT** this application be certified urgent and be heard ex-parte in the first instant.*

(ii) ***THAT*** *an order be and is hereby issued to the Respondent, its agents, assigns, servants and or representatives are hereby restrained and prohibited from terminating, dismissing, evicting and denying essential services and or shopping facilities to any employee until final hearing and determination of the application inter-partes*

(iii) ***THAT*** *cost of this application be provided for.*

8. The application is supported by the affidavit of **THOMAS KIPKEMBIO**, the Deputy General Secretary of the Claimant and the grounds on the face thereof which are a reiteration of the facts pleaded in the Memorandum of claim.

Respondent's Case

9. In response to the statement of claim the Respondent filed a response dated 27th June 2016.

10. In its response the Respondent avers that the termination of employment of the grievants was done procedurally and lawfully.

11. It states that the grievants were served with warning letters, letters to show cause, hearing notices, letters of for dismissal and letters of termination which the grievants did not respond to.

12. The Respondent avers that that the employees had been dismissed summarily and their dues were to be paid accordance with the employment act and the collective bargaining agreement between the sisal growers and employers association and the Kenya Plantation and Agricultural Workers Union.

13. The Respondent contends that the court lacks jurisdiction to hear and determine the matter therefore incapable of granting the prayers sought.

Evidence

14. A total of six (6) witnesses testified in Court and all adopted their written statements.

15. **CW1, Michael Ochieng,** testified that he was a shop steward and employee of the Respondent having been engaged in 1986. That on 18th May 2016 he reported to work (workshop) but found some employees outside while others were inside the factory premises. That he was summoned from the workshop to the gate where he was informed that the employees wanted him to enquire about some employees who had been dismissed earlier. He testified that he went to the Office of the Human Resource (HR) Manager but the Secretary informed him that the Manager wood not grant him audience unless he requested employees to move out of the gate.

16. That the employees yearned for information from the Human Resource Manager but within minutes police officers from a nearby police post entered the Human Resource Manager's office and left but subsequently came in full uniform and armed. That they went to where the employees were and ordered them to leave and after some hesitation, they shot in the air. That all employees left and the gate was closed. He testified that he notified the Union on phone and that after consultation, the union would send a delegation on 19th May 2016 for consultations with management.

17. That in reporting to work on 19th May 2016, the gate was locked but the employees stayed at the gate until union officials came. That when the officials and shop stewards walked to the gate, the security guard informed them that no one would be allowed in but later informed them that they would proceed to the office but getting to the office, policemen enquired about who they wanted to see. That the group was unable to consult the Human Resource Manager on 19th May 2021.

18. That he learnt of the dismissal on 21st May 2016 after a memo with 324 names was circulated. That he and other employees rectified neither a notice to show cause nor termination letter and they were not taken through any disciplinary hearing.

19. He testified that although the memo indicated the termination letters were available, the guards were intimidating. The letters were dispatched to the Union offices. That he received his in 2017 since he needed it to claim NSSF benefits.

20. On cross examination, the witness confirmed that although he was confirmed in his position in 2005, he had not filed the letter in Court. That on 18th May 2016, the gate to the factory was open and those at the gate had not reported to work and did not work on that day as well as on 19th May 2016. That they were complaining about 20 employees who had been terminated earlier on 17th May 2016. That none of the employees had notified the employer that they would not report to work on those days. That the Union had not been notified of the grievances. He denied that there was a strike but admitted that the employees did not work on these days. That he called the Union when management frustrated him.

21. That neither the Union nor the Respondent had been informed of the grievances. He confirmed that he had no business at the premises and none of the Claimant had a shop within the estate and that those whose businesses were demolished did not sue for damages or compensation.

22. That they were not invited to defend themselves and no memo had been given them to report to work on 18th May 2016. He also confirmed that he was aware of the consequences of absence from the workplace after three warnings. Finally, that he was not at the workplace from 18th – 21st May 2021.

23. **CW2, Samson Cherono** testified that he learnt of the dismissal on 21st May 2016. That he received neither a show cause no termination letter and did not attend any disciplinary hearing and had not reported to work on 18th, 19th and 20th May 2016 because he and others wanted to know why some employees had been dismissed.

24. On cross examination, the witness confirmed that he was dismissed on 21st May 2016. There was a notice in the estate pinned on a tree and he had not been at the work place from 18th – 21st May 2016. That on 18th May 2016, there was no one at the gate when he reported at 7.00 am and remained at his work station the entire day but was at the gate on 19th May 2016 and did not collect his letter because the office was locked and had not seen the termination letter.

25. That he proceeded on leave once since employment and had not applied for any leave. That he was aware of the consequences of not reporting to work for three days. He also confirmed that on 18th May 2016 there was no shooting in the air by police and was unaware that some people did not report to work on that day. That he was unaware of why he was dismissed.

26. **CW3, William Kibor,** testified that he was given an appointment letter but did not receive a termination letter though aware of its existence from the memo at the gate.

27. On cross examination he testified that he was engaged on 1st September 2008 but had no evidence to demonstrate that fact.

28. That he did not report to work on 18th May 2016 and was not on leave or had permission to be away. That there was a strike at the work place on 18th May 2016 and the reason was employees wanted to know why their colleagues had been dismissed and they we outside the gate discussing the issue at around 12.000 noon and later went home. That there were no policemen at the gate other than the Respondent's guards.

29. He confirmed that he did not report to work on 18th, 19th and 20th May 2016. That he saw the memo on letters on 21st May 2016 but did not collect this letter since the gate was closed. That his house was demolished and was dismissed for not reporting to work. That after dismissal and demolition of house, he resided at a local primary school and had not been paid for three 3 months before dismissal.

30. On re-examination, the witness confirmed that he was a member of NSSF, NHIF and the Union.

31. **CW4** testified that he was engaged by the Respondent in February 1993 as a casual employee and learnt of the dismissal from other employees. That he did not receive any notice for disciplinary hearing and had not been paid since the dismissal.

32. On cross examination he confirmed that on 18th May 2016 he reported to work at 7.00 am and found employees at the gate, that they could not access the premises because the gate was locked and one Michael Ochieng whom he knew was also at the gate, discussing the fate of our colleagues who had been terminated and management had refused to speak to them. That the notice board was inside the compound not outside.

33. That on 19th and 20th they could not access the premises as the gate was closed. That even the Union officials who came could not access the premises. That his house was demolished on or around 22nd May 2016. The witness further confirmed that the premises were inaccessible from 18th – 21st May 2016 but denied the existence of a strike, other than agitating for the rights of their colleagues.

34. That he was paid for the 15 days worked in May 2016 and was aware of the consequences of absence from the work place for 3 days.

35. **CW5 Richard Chelagat** testified that he was employed in 2004 as a contractor and worked until dismissal in May 2016 and learnt of the dismissal on 21st May 2016. That he did not report to work on 19th – 21st May 2016 because the main gate was locked. That he received neither a show cause letter not termination letter but his dues were paid.

36. On cross examination, he confirmed that he was diligent employee and was unaware of the reason(s) for dismissal. That on 18th May 2016, he reported to the workplace but no work was going on because they wanted to be informed why their colleagues had been dismissed and waiting at the gate but no strike at all. That all employee stood outside and did not report to work. On that day as well as 19th an 20th May 2016 and would only report to the gate for the management's response on the issue.

37. Finally, the witness confirmed that he heard about the dismissal from other employees and did to receive his termination letter of notice to show cause but testified that he would have defended himself if given the opportunity to. That he was paid for the 15 days of the month of May 2016.

38. RW1 Mr Peter Kamau testified that he was the Estate Manager of the Respondent since 2014. That the grievant stopped working on 18th May 2016 and their services were terminated on 25th May 2016 for failure to report to work without cause. That they had engaged in an unprotected strike. A total of 324 employees were involved. That they we championing the rights of 20 of the colleagues who had been dismissed earlier for beating other colleagues who had refused to join in a strike sometime in March 2016. That the 20 had been taken through a disciplinary process and were summarily dismissed.

39. That the strike from 18th – 20th May 2016 was in solidarity with the 20 former employees but was unprocedural since the Respondent had a dispute handling mechanism. The Claimant union did not communicate the grievance to the Respondent to invoke the dispute resolution process.

40. That on 18th May 2016 employees remained outside the gate and refused to go in and Mr Michael Ochieng, CW1 confirmed to management after inquiry that the employees were acting in solidarity with their colleagues and would not report to work unless informed of the fate of the 20 former employees.

41. He testified that at 10.40 am, management issued a memo was pinned on the notice board at the gate and on trees outside the gate. That although the gate was open, the memo was not honoured. This was followed by another memo at noon extending the reporting time to 2.00 pm but it was not honoured. A final memo extended the reporting time to 3.30 pm but to no avail. That on 19th May 2016 no employee reported to work and management issued a show cause letter.

42. The letters were made available at the gate for collection by employees. None responded nor reported to work on 20th May 2016. The witness admitted that he had no evidence of the memo inviting employees to collect their show cause letters. That on 20th May 2016 management issued another letter inviting the grievants for a disciplinary hearing. A memo to that effect was pained on the notice board and the Union was also notified. An official was stationed at the gate to issue the letters and copies were dispatched to the Union in Nakuru town.

43. Thereafter the Respondent issued summary dismissal letters through a memo requiring them to collect the letters from an officer stationed at the gate, one Violet Muganda. The letters explained the reason for dismissal. None of the grievants collected their letter.

44. That the Union Didi not engage the management on the issue. The witness further testified that as early as 26th January 2016, the public health office had documented and reported the unsanitary conditions of the residences of the employees because the shop owners had not complied with the public health requirements and the same had to be closed as recommended by the Public Health Office and the closure had no relationship with the termination of the grievants. However, the medical facility and wate points were not closed.

45. That the grievants were terminated for having absented themselves from duty without any lawful cause. He confirmed that on 18th May 2016, no police officers had been summoned to the premises except two officers whose residence is outside the camp. Police officers were summoned after dismissal of the grievants for fear of ugly incidents between employees. There was tension at the camp since not all employees had been dismissed.

46. On cross examination, the witness confirmed that the grievants had appointment letters but they had not been filed and the official communication was by letter to the individual or memo if the issue affected all persons. The witness explained the procedure applicable in the termination of an employee who is a member of the union.

47. He confirmed that the show cause letters were dispatched to the gate between 7.00 am – 8.00 am but the memo on the collection was not filed. That the grievants did not pick letters and had one day to respond. The witness was not sure when the letters were taken to the gate for collection and he had no evidence that the Union was served. That although the show cause letter was dated 18th May 2016, it was issued on 19th as this was a typing error.

48. That the grievants were invited for hearing on 20th May 2016 and service was through a memo on the notice board. The disciplinary meeting was scheduled to start at 7.15 am and 9.15 am on the same day, a total of 324 employees had to appear before the Committee between 7.15 am and 9.15 am and each had to appear individually. That it was possible to hear 300 employees in two hours but none presented him/herself for the hearing. That the Respondent had minutes for those who appeared and none of those who did not appear but not filed in Court.

49. That the Respondent did not issue another letter after the grievants failed to show up for the disciplinary hearing. That those who did not appear were summarily dismissed. That some had worked for over 20 years.

50. That the Respondent did not issue warning letters as provided by the CBA. That the Respondent does not owe the grievants anything. The witness also confirmed that Clause 23 of the CBA entitles the grievants to gratuity. He confirmed that the public health repots had not recommended demolition of the business resumes. That the memo on demolition was issued after dismissal.

51. On re-examination the witness testified that no employee had complained about the shortness of the duration to show cause and none sought extension of time.

52. It was also confirmed that employees camped at the gate for three days and the gate was closed on 23rd May 2016 and no employee sought an explanation about the notice to show cause.

Claimant's Submissions

53. The Claimant submits that the grievants were summarily dismissed on 21st May 2016 and a notice of demolition of their quarters issued on 24th May 2016.

54. The Claimant called five witnesses who were all former employees of the Respondent who gave evidence and were cross examined by the Respondent.

55. On whether the Union has locus standi to sue on behalf of its members, the Claimant relied on the decisions in **Kenya National Private Security Workers Union v Lavington Security Limited [2013] eKLR, Transport Workers Union v Crown Bus Service Limited [2017] eKLR** and **Modem Soap Factory v Kenya Shoe and Leather Workers Union [2020] eKLR**.

56. The Claimant submits that the grievants were not served with any show cause letter, nor invited to confront the allegations levelled against them nor issued with termination letters and were therefore unaware of the reason(s) for termination of employment and only learnt of their termination through a notice posted at company's notice board.

57. On the issue of procedural fairness, the Claimant submits that the grievants' termination contradicts the provisions of section 41 of the Employment Act. The Claimant relied in the holding in the case of **Zephania O. Nyambane & Another v Nakuru Water & Sanitation Services Company Limited (2013) eKLR,** Ongaya J**.** stated "*The court further holds that in case of alleged gross misconduct, notice and a hearing are mandatory as envisaged in Section 41 of the Act. The only reprieve the employer enjoys in such circumstances is to give a shorter notice than was otherwise agreed in view of the alleged gross misconduct."*

58. Reliance was also made on the decisions in **Patrick Abuya v Institute of Certified Public Accountants Kenya (ICPAK) & Another [2015] eKLR** and **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR** on the import of Sections 45 and 41 of the Employment Act.

59. The Claimant submits that much as the Respondent states that they served the grievants with show cause letters no evidence was led in court to prove service of the said letters.

60. The Claimant further submits that the Respondent averred that they issued the grievants with notice to show cause inviting them for disciplinary on 20th May 2016 the day after issuance at 7:00 am which time was not sufficient for them to prepare for their defence. The decision in **Michael Odhiambo Opiyo v Bidco Africa Limited [2021] eKLR** was relied upon where Onyango J. held

> *" ……The employee must be given adequate time to prepare for his defence, gather his evidence, consult with colleagues or union official whom he chooses to accompany him during the disciplinary hearing"*

61. The decision in **Bottomley Musamali Jumba v Defence Forces Canteen Organization [2014] eKLR** was also used to reinforce the argument.

62. The Claimant submits that the allegation that the grievants participated in illegal and unprotected strike and absconded duty is not true as the master register was not produced in Court to confirm absconding of duty.

63. The Claimant further submits that the Respondent did not have internal disciplinary rules as required under Section 12 of the Employment Act despite having over 400 employees.

64. On reliefs, the Claimant submitted that the grievants were not given any notice as required by Section 35 o the Employment Act.

65. The Claimant's submits that the grievants are entitled to payment of three months in lieu of notice, pro-rata leave, and gratuity as calculated in Exhibit TK3.

66. Claimant further prays for 12 months compensation for unfair termination and a certificate of service.

67. The Claimant further abandons the prayer for reinstatement as the same has been overtaken by events since 3 years have lapsed since the period of termination as provided in section 12 of the Employment and Labour Relations Court Act.

Respondent's Submissions

68. The Respondent submits that the grievants did not tender any evidence to prove wrongful, unfair and unprocedural dismissal as pleaded.

69. It submits that among the businesses marked for closure there was no medical facility, water point or electricity thus Claimant's averments that the grievants had been denied access to medical facilities water and electricity does not hold water as the closure of the businesses came after the employees had been terminated therefore the closure could not have occasioned unprocedural termination.

70. The Respondent submits that the Claimant's pleadings averred that the termination of the grievants' employment resulted from the closure of business while the evidence they led in Court stated that they were never served with show cause letters, nor invited to disciplinary hearings. The Respondent submits that parties should be bound by their pleadings relied in the holding in **Daniel Otieno Migore v South Nyanza Sugar Company Limited (2018)** and the case of **Raila Amolo Odinga & Another v IEBC & 2 Others (2017).**

71. The Respondent submits that the grievants failure to report to work on the 18th May 2016 and ignorance of the internal memos put up instructing them to get back to work amounted to insubordination.

72. The Respondent relied in the holding of Mbaru J. in **Anthony Korir v Imarisha Sacco Society Limited (2020)** which cited the holding in **Labour Appeal Court of South Africa, TMT Services & Supplies (PTY) Ltd v Samwu Obo Felicia Lungile, Case No. JA32/2017** which held

> *"…therefore the defiance of authority can be proven by a single act of defiance. There is no necessity for high drama and physical posturing to be present. The employer prerogative to command its subordinates is the principle that is the principle that is protected by the class of misconduct labelled "insubordination" and addresses operational requirements of the organization that ensure that managerial paralysis does not occur."*

73. The Respondent submits that the grievants were involved in a strike that was illegal as they did not issue a strike notice nor have any conciliatory proceedings thus breached the employment contract as stipulated under Section 80(1) of the Labour Relations Act and were therefore liable for disciplinary action including summary dismissal.

74. The Respondent submits that in compliance with the provisions of Section 45 of the Employment Act it has discharged its burden on proving the reasons for termination. Its submits that the grievants absented themselves from work for three consecutive days without leave or permission, the grievants neglected the memos put up to return to work and they participated in illegal strike therefore the dismissal was fair and genuine.

75. The Respondent submit that show cause letters were sent to the grievants and they were granted an opportunity to defend themselves which they ignored. it further submits that no reasons were given as to why the grievants disobeyed the warnings issued as such they state that due process was followed and relied in the case of **Moses Ochieng v Unilever Kenya Limited (2018)** which cited the case of **Anthony Korir v Imarisha Sacco Society Limited (2020)** which held

> "*The due process required where there is alleged gross misconduct is that the employer must issue notice to the employee however short and allow the employee to give his defence pursuant to Section 41(2) of the Act"*

76. The Respondent submits that that the grievants have not proved any form of unfair and unlawful termination, therefore submits that they are not entitled to the remedies under Section 49 of the employment Act and urges the court to dismiss the claim.

77. The Respondent further submits that the grievants did not lead any evidence of existence of any pending or outstanding leave and gratuity and prays that the same be dismissed with costs to the Respondent.

Analysis and Determination

78. After careful consideration of the pleadings, evidenced on record and submissions, the issues for determination are: -

(i) Whether the grievants were involved in a strike on 18th May 2016;

(ii) Whether the summary dismissal of the grievants was lawful;

(iii) Whether the grievants are entitled to the reliefs sought.

79. Although the Claimant had identified the Union's *locus standi* (standing) to sue on behalf of its members as an issue and relied on several seminal decisions on that point of law, the same had not been contested by the Respondent and need not have arisen as an issue for determination. More importantly, the judicial authorities cited are spot on. The Court of Appeal was unequivocal in **Modern Soap Factory v Kenya Shoe and Leather Workers Union (supra)** where it expressed itself as follows –

> "*We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact."*

Reason for Termination

80. On termination, the Respondent submits that based on the principle of he who alleges must prove encapsulated by Section 107(1) of the Evidence Act, the grievants have not shown that their termination was unprocedural wrongful, unfair and unlawful, that no evidence has been tendered.

81. The Respondent's submissions is that the memorandum of claim dated 28th May 2016 states that the closure of the Claimant's businesses had the effect of terminating and or dismissing them or declaring them redundant since they had been drinking water, electricity and medical services and were forcefully evicted from their quarters. Reliance is also made on paragraph 11. It is submitted that parties are bound by their pleadings and must adduce evidence in support thereof.

82. On the issue of pleadings, the Court of Appeal in **David Gitonga Ole Tukai v Francis Arap Muge & 2 Others (supra)** expressed that as follows –

> "*In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."*

83. In **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR**, the Court of Appeal cited with approval the sentiments of Pius Aderemi J.S.C **Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002,** as follows;

> "*… it is now a very trite principle of 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."

84. Relatedly, Christopher Mitchell J.S.C. stated as follows: -

"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."

85. The centrality of pleadings in an adversarial system was also emphasized in **Raila Odinga & another v IEB and 2 others [2017] eKLR** as well as in **Elizabeth O. Odhiambo v South Nyanza Sugar Company Limited [2019] eKLR**. The Court is in agreement with the sentiments in these seminal judgments.

86. Applying these principles to the instant case, it is clear that paragraph 11 of the memorandum of claims states that –

"The closure of business by the Respondent amounts to unprocedural/y terminating the employees contract of employment contrary to Section 41 and 45 of the Employment 2007, Laws of Kenya."

87. It is also not in dispute that paragraphs 2, 3, 4 and 5 make reference to the Claimant's businesses.

88. Whereas the Court is in agreement with the Respondent's submission that parties are bound by their pleadings as the law ordains, it means all the pleadings or averments made as opposed to specific parts and as the decisions cited above demonstrate the purpose pleadings is to guarantee certainly and finality since each party is aware of the other case.

89. However, paragraph 7 of the memorandum of claim states that:

"The Respondent has not served the employees with either a warning letter, letter of show cause a hearing notice dismissal and or termination of employment letters."

90. The Court is persuaded that in the totality of the averments by the Claimant, the Respondent appreciated the Claimant's care, prepared accordingly and participated in the proceedings without any reservations. This is succinctly demonstrated by the evidence of RW1. Mr. Peter Kamau who testified exclusively on why and how the grievants we terminated on 21st May 2016 including what had transpired for 18th May 2016 to 21st May 2016.

91. Finally, the issue in dispute was wrongful dismissal of over 300 employees and the Claimant did to raise a different care. In addition, the Respondent did not protest or raise the issue of being ambushed by the Claimant at any other stage of the proceedings.

92. Needless to emphasize, the issue in dispute could have been framed more succinctly but the Court is unconvinced that its current form prejudiced the Respondent in any way. Put in the alternative, there were no surprises.

93. From the foregoing reasons, it is the finding of the Court that there was no variance between the averments made by the Claimant and the evidence adduced in Court by both parties.

94. Section 45(2)(a) and (b) of the Employment Act is clear on the reason(s) for termination of a contract of employment. The reason(s) must be valid and fair.

95. Copies of the summary dismissal letters dated 21st May 2016 prepared by the Respondent and on record state that the Grievants participated in an unlawful strike on 18th May 2016 from 7.00 am and had not resumed duty since and had therefore absented themselves from duty without emission or any lawful excuse.

96. That the strike was unprotected since it did not comply with Section 76 of the Labour Relations Act, Recognition Agreement another, CBA, between the Claimant and the Respondent and were therefore liable to disciplinary action under Section 80(1)(a) of the Labour Relations Act 2007. That Section 44(a) renders their conduct a gross misconduct warranting summary dismissal. Finally, the letter concludes as follows: -

"Following your participation in the unlawful unprotected and non-procedural strike and absenting yourself from the place appointed for appointed for the performance of your duty without a lawful cause and/or permission, the failure to heed the three ultimatums to report to work and your failure to show cause and/or attend the disciplinary hearing as scheduled, the company has decided to summarily dismiss you with effect from 21st May 2016. Your final dues that is days worked in May, prorate leave and salary arrears will be remitted to your account immediately. Organise to clear and vacate from the camping premises within 48 hours."

97. Paragraph 10(ii) of the Collective Bargaining Agreement between the parties effective 1st June 2015 to 31st May 2017 provides inter alia –

"... However in the event of an employee absenting himself/herself without permission for three continuous working days he/she

will be liable to summary dismissal without warning."

98. Relatedly, on 18th May 2016 the Respondent issued three memos at 10.40 am, 12.00 noon and 2.15 pm requesting the grievants to report to their respective places of work. The memos were not heeded to.

99. One of the critical issues for determination in this case is whether the grievants were involved or participated in an illegal strike and were consequently summarily dismissed.

100. It is not disputed that on 18th May 2016, the grievants congregated at the gate of their workplace in a bid to seek audience with the management of the Respondent on the fate of about 20 employees who had been dismissed by the Respondent a day or so earlier.

101. CW1 testified that he was requested by the employees to engage the management on the issue but did not succeed on 18th May 2016 or thereafter as the Human Resource Manager had indicated that she would only grant audience if the grievants moved out of the gate ostensibly to their workplaces, a request the grievants refused to honour.

102. In their words, the witnesses stated that they were agitating and championing the rights of their colleagues as well as expressing tier solidarity and would not relent unless addressed by management on the issue.

103. It is also common ground that the grievants did not report to work on 19th, 20th and 21st May 2016 allegedly because the main gate was locked. None of the witness, however, testified that he went to the gate and was denied entry on any of these days.

104. On 19th May 2015, the grievants congregated at the gate to await the arrival of union officials. CW1 testified that the shop stewards and Union officials were unable to consult the Human Resource Manager, but did not explain the reason why.

105. CW2 one Samson Cherono confirmed that he was at his place of work the entire day on 18th May but joined the rest at the gate on 19th and 20th. He was emphatic that they wanted to be told why their colleagues had been dismissed. He denied the presence of police or shooting in the air on 18th as alleged by CW1, one Michael Ochieng.

106. CW3 Mr. William Kibor stated that there was a strike on 18th May 2016 and at no time were policemen called to disperse them.

107. CW4 and 5 also confirmed that no work was going on confirmed 18th May 2016.

108. From the evidence on record, it is unclear who mobilised the employees at the gate as it was not coincidental. All witnesses were aware of the reason for congregating at the gate.

109. On its part, RW1, Mr. Peter Kamau confirmed that the grievants stopped working on 18th May 2016 and were terminate thereafter for having engaged in an unprotected strike. He testified that indeed there was a strike from 18th 20th May 2016, yet the grievants had neither engaged the management nor the Union on the issue they were complaining about. That the plea by management to resume duty on 18th May 2016 went unheeded. This is evidenced by the three (3) memos issued on that day.

110. Section 2 of the Labour Relations Act, 2007 defines strike as–

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

111. Since it is not disputed that the grievants refused to work on 18th May 2016 and were acting in combination in common or in concerted refusal to work and congregated at the gate demanding audience with the management on their colleagues, they participated in a strike as defined under Section 2 of the Labour Relations Act.

112. Although Article 41(2)(d) of the Constitution of Kenya, 2010 provides that ***"Every worker has the right to go on strike"*** the right to provides do so is circumscribed by the provisions of the Labour Relations Act specifically Sections 79 which addresses protected strikes. The right to go on strike must be executed in accordance with the law.

113. Section 76 of the Labour Relations Act provides that –

> **76. Protected strikes and lock-outs**
>
> **A person may participate in a strike or lock-out if—**
>
> **(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;**
>
> **(b) the trade dispute is unresolved after conciliation—**

(i) under this Act; or

(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and

(c) seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of—

(i) the trade union, in the case of a strike;

(ii) the employer, group of employers of employers' organisation, in the case of a lock-out.

114. As the Court of Appeal stated in **Lamathe Hygiene Food v Wesley Patrick Simasi Wafula & 8 others [2016] eKLR** *"As can be appreciated the above requirements (Section 76) are in three sequential stages, with the first being to ensure that the trade dispute concerns the terms and conditions of employment or recognition of a trade union (as the case may be). In this case, it is common ground that the root of the dispute was the respondents' working hours and remuneration. Thus it qualifies as a dispute concerning terms and conditions of employment. Having satisfied the first requirement, the second hurdle is whether there was a failed conciliation process. On the evidence on record, the parties never got past this stage as no conciliator was appointed whether under Section 65 of the Labour Relations Act or the collective bargaining agreement (if any). The last stage is the issuance of a strike notice in writing to the employer and or adverse party."*

115. In the instant case the gravamen of the was the dismissal of about 20 colleagues which is invariably a term and condition of employment. The first requirement was therefore met.

116. On conciliation, there is no evidence on record that the grievance had been brought to the attention of the Union prior to the cessation of work or was subjected to any conciliation process at all. The Claimant led no evidence to show whether it was are of the dispute and what action it took and when. The second requirement was not met.

117. As regards a written strike notice, neither party led evidence to that effect. RW1 testified that the 324 grievants withdrew their labour from 18th May 2016 without notice. They had not previously engaged the management on the issue. The Claimant too did not communicate with the Respondent on the issue, which would have triggered the dispute resolving mechanism as provided by the CBA. The third requirement was not met.

118. In a nutshell, the strike on 18th May 2016 did not meet the threshold to qualify as a protected strike. Section 80 of the Labour Relations Act prescribes the consequence of calling, instigating, inciting others to take part or taking part in an unprotected strike. It is deemed to be a breach of the employee's contract and the employee is liable to disciplinary action. As a consequence, the employer is entitled to dismiss an employee who participates in an unlawful strike and in the process absconds duty as provided by Section 44 of the Employment Act. See **Maseno University v Universities Academic Staff Union [2016] eKLR**.

119. In **Mohammed Yakub Athman & 18 Others V Kenya Ports Authority [2017] eKLR**, the Court of Appeal upheld the decision of the Trial Court on summary dismissal of the applicants who had participated in an illegal strike. The Court agreed with the Trial Court that the provisions of Section 41 of the Employment Act were applicable in cases of summary dismissal and had to be complied with.

120. For the foregoing reasons, the Court is satisfied that the Respondent has on a balance probability demonstrated that it had justifiable reasons to summarily dismiss the grievants on 21st May 2016.

121. I now proceed to determine whether the Respondent excised the right to dismiss the grievants fairly as required by law.

Procedure

122. On procedural fairness, Section 45(2) of the Employment Act is emphatic that: -

"…

(a) …;

(b) …

(c) that the employment was terminated in accordance with fair procedure.

123. Section 41 set out the mandatory requirements for a termination to pass the procedural fairness test as explained in **Alphonse Maghanga Mwanchanya v Operation 680 Limited (supra)** as well as in **Loice Atieno v Kenya Commercial Bank [2013] eKLR.**

124. In **Lamathe Hygiene Food v Wesley Patrick Simasi Wafula & 8 others (supra)** the Court of Appeal stated that

"According to Section 41 of the Employment Act 2007, even where an employer summarily dismisses an employee, there has to be notification of the reason and hearing before termination on grounds of misconduct."

125. In the instant case, there is no dispute that the Respondent issued a show cause letter on 19th May 2016 and a written response was required by 5.00 pm on the same day. It is unclear at what time that letter was supposed to be collected since there was no memo instructing the grievants to pick the same. RW1 confirmed that a copy of the memo was not filed. Unsurprisingly, the letters were not collected and no response was forthcoming.

126. Undeterred, on 20th May 2016 the Respondent issued an invitation for disciplinary hearing on the same day between 7.15 am and 9.15 am in the Human Resource Office. The right to be accompanied by a representative or shop steward was clearly spelt out.

127. RW1 confirmed that the Respondent had constituted a five-member committee to hear the grievants between 7.15 am and 9.15 am and could hear all of them in the two our slot, but none of the grievants appeared. He confirmed that the Committee did not have minutes for those who did not appear for the hearing but had for those who appeared but Didi not file any in Court for purposes of evidence.

128. Finally on 21st May 2016, the Respondent issued termination letters.

129. As Courts have variously held, the requirements of procedural fairness as ordained by the provisions of the Employment Act 2007 are mandatory and are not supposed to be followed mechanically. They are safeguards designed to ensure that the employee had an opportunity to state his/her case and the employer heard and considered the representations before termination.

130. Courts have refused to legitimise procedures that do not accord an employee a fair opportunity to state his/her case in the manner envisioned by the Employment Act. Requirement of service of notices is paramount.

131. In **Zephania O. Nyambane & Another v Nakuru Water & Sanitation Services Company Limited (supra)** the Court held that the grievants had not been served or did not receive the show cause letter. RW1 testified that the Respondent issued a memo informing the grievants to collect the letters to show cause, notice of hearing and termination letters. The memo was not filed in court. In addition, the Respondent led no evidence of how it effected service upon the grievants individually. The witness conceded that no grievant came to collect the letters or notices.

132. Similarly, the Respondent did not lead any evidence of who comprised the five member disciplinary committee and lastly, there was no evidence of what transpired at the hearing for those who did not appear since they were supposed to appear before the committee individually with their representatives. There ought to have been a record of how each grievant's case was disposed of. To allege that there are no minutes because the grievants did not present themselves for the hearing is undoubtedly not convincing. See **Patrick Abuya v**

ICPAK & another (supra).

133. Finally, although RW1 told the Court that the Committee would have dealt with all the grievants in two hours that is high improbable and its practicability is also doubtful. It would appear to render credence to the notion that the Respondent intended to go through the process in a cosmetic manner to satisfy the legal requirements only.

134. It is noteworthy that the grievants' residence was within the Respondent's compound and their residences were well known. For unexplained reasons, the Respondent employed to easiest and most ineffective approach to communicate with its employees to its detriment.

135. On sufficiency of the length of the notice to respond to notice to show case, the decision in **Michael Odhiambo Opiyo v Bidco Africa Limited (supra)** is instructive. In this case the Court was categorical that a 24 hours' notice period was insufficient and thus inconsistent with the precepts of natural justice in the words of Onyango J., -

> "… *Courts do not take away the right to terminate an employee who is found guilty of misconduct. However, the employer has to exercise a lot of caution during the steps that lead up to the said termination so that the process does not appear cosmetic. Specifically, an employer must not ambush the employee. The employee must be given adequate time prepare his defence, gather his evidence, and consult with the colleague or union official whom he chooses to accompany him during the disciplinary hearing.*

136. The Court associates itself with these sentiments. See also **Bottomley Musamali Jumba v Defence Forces Canteen Organization (supra)** on the duration accorded to an employee.

137. For the foregoing reason, the Court is not persuaded that the activities of the Respondent on 19th, 20th and 21st May 2016 met the procedural fairness test/standard prescribed by the Employment Act.

138. Consequently, the summary dismissal of the grievants on 21st May 2016 was procedurally unfair and unlawful.

139. On reliefs the Court proceeds as follows: -

(a) Declaration that termination of the grievants is unprocedural, unfair and therefore wrongful 140. Having found a termination of the grievants was procedurally unfair for noncompliance with the provisions of the Employment Act, **a declaration to that effect is hereby issued.**

(b) Reinstatement without loss of privileges till date of judgment

141. It is not in dispute that the grievants were dismissed on 21st May 2016 and have been pursuing this cause in Court till this judgment

today in December 2021 more than five years later. As submitted by the Claimant, the remedy of reinstatement to employment has been overtaken by events and is therefore **declined** in conformity with the provisions of Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011.

(c) Terminal dues to all employees calculated in accordance with the CBA in force in 2016

142. 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.**

(d) Compensation for wrongful loss of employment

143. In making a compensatory award under Section 49(1)(c) of the Employment Act, the Court is enjoined to take into account the parameters set forth in Section 49(4) of the Act. In the instant case the Court has taken into account the following: -

i) Length of service of the grievants an intention to continue evidenced by application for reinstatement;

ii) The grievants substantially contributed to their termination;

iii) Respondent's treatment of the grievants on 19th, 20th and 21st May 2016;

iv) Non-involvement of the Union by the grievants before the cessation of work;

v) Grievants failure, refusal or negligence to mitigate loss.

144. The equivalent of two (2) months' salary to all grievants is fair.

(e) Certificate of service

145. Respondent to issue Certificate of Service to all grievants within 60 days of this judgment.

146. The Claimant is awarded 50% of costs of this suit.

147. Accordingly, judgment is entered for the grievants on the foregoing terms.

148. Interest at court rates from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 2021

DR. JACOB GAKERI

JUDGE

ORDER

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

DR. JACOB GAKERI

JUDGE