



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 284 OF 2015**

JOSEPH SIALO MAKERO.....1<sup>ST</sup> CLAIMANT  
MARTIN MLONGO.....2<sup>ND</sup> CLAIMANT  
FRANCIS KIPNGÉTICH.....3<sup>RD</sup> CLAIMANT  
MAURICE OTIENO AMOKO.....4<sup>TH</sup> CLAIMANT  
PETER M. KINIU.....5<sup>TH</sup> CLAIMANT  
JOHN KILONZI NZELU.....6<sup>TH</sup> CLAIMANT  
FERGUSON SAMUEL MULI.....7<sup>TH</sup> CLAIMANT  
SAMUEL OLUM ONYANGO.....8<sup>TH</sup> CLAIMANT

**VERSUS**

**KENYA PORTS AUTHORITY.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 10<sup>th</sup> December, 2021)

**JUDGMENT**

The claimants filed the memorandum of claim on 05.05.2015 through M/S Tindika & Company Advocates. They filed the amended memorandum of claim on 26.01.2016. The claimants were at all material times in the respondent's employment. They were employed on diverse dates, with diverse assignments, and deployed accordingly. The respondent preferred disciplinary proceedings against each of the claimants culminating in their respective dismissal. The claimants invoked the internal appeals procedures. The Appeals Committee found each of them innocent and recommended that the respective dismissal letters be set aside and each of the claimants be reinstated back to their employment but which recommendation was not communicated to the claimants. Instead each claimant received the letter dated 26.09.2008 signed by S.J Chingabwi, the respondent's Human Resource & Administration Manager conveying that their appeal lacked merit and had been declined. Through their union, the Dock Workers Union, the claimants appealed to the Joint Industrial Council (JIC), which appeal was duly heard and the claimants were found innocent and it was recommended by the JIC as follows:

- a) The 1<sup>st</sup> claimant was not guilty and the dismissal order be set aside and he be reinstated to service ad the period of absence be treated as unpaid leave.
- b) The 2<sup>nd</sup> claimant be reinstated back to his former duties and the absence period be treated as unpaid leave.
- c) The 3<sup>rd</sup> claimant there was insufficient evidence to warrant his dismissal which was set aside and to be reinstated to service and the period of absence be treated as unpaid leave.
- d) The 4<sup>th</sup> claimant was not guilty and the dismissal order be set aside and he be reinstated to service and the period of absence be treated as unpaid leave.
- e) The 5<sup>th</sup> claimant's dismissal be lifted and he be reinstated on duty and the period of absence be treated as unpaid leave.

- f) The 6<sup>th</sup> claimant be reinstated to his former duties like his colleagues and the period of absence be treated as unpaid leave.
- g) The 7<sup>th</sup> claimant's dismissal be lifted and he be reinstated and the absence period be treated as unpaid leave.
- h) The 8<sup>th</sup> claimant was not guilty of the offence he was accused of and he be granted normal retirement taking into account his age and he should also be paid three months' salary in lieu of notice.

The decisions by way of the recommendations of the JIC was made on 01.05.2013 but was not communicated until 06.05.2014 when the claimants were actually reinstated back into the service. It is the claimants' case that the respondent acted unlawfully, in violation of claimants' constitutional rights and was actuated with ill-will. It is their case that they continue suffering loss and damage. They each claim payment being the allowances, emoluments and salaries they were entitled to had their services not been illegally, unconstitutionally, maliciously, unlawfully and wrongfully terminated, as pleaded. Their claims are for periods they were out on dismissal pending JIC decision on reinstatement and for 8<sup>th</sup> claimant, retirement. They claim upon headings of salary, monthly house allowance, annual leave, motor transport allowance, average overtime, annual bonus, uniform, safety boots, detergent or soap, respondent's pension contribution, leave days, and out-patient payment. Each claims sums of money as follows:

- a) 1<sup>st</sup> claimant Kshs. 20, 293, 691.00.
- b) 2<sup>nd</sup> claimant Kshs. 12, 701, 061.00
- c) 3<sup>rd</sup> claimant Kshs.12, 701, 016.00.
- d) 4<sup>th</sup> claimant Kshs. 17, 392, 479.75.
- e) 5<sup>th</sup> claimant Kshs.18, 751, 040.00.
- f) 6<sup>th</sup> claimant Kshs. 24, 315, 556.00.
- g) 7<sup>th</sup> claimant Kshs. 12, 766, 970.00.
- h) 8<sup>th</sup> claimant Kshs. 13, 305, 515.00.
- i) Total claim a sum of Kshs. 136, 236, 724.00.

The claimants plead that they lost promotional opportunities and they should be promoted (except 8<sup>th</sup> claimant who retired) thus, HG1-HM3; HG3 – HG1; HG3 – HG1; HG2 – HM4; HG2 – HM4; HG3 – HM4; and HG3 – HG1 respectively - and their salaries and allowances adjusted accordingly. The claimants alleged the respondent caused them great suffering, inhuman treatment, breakdown of families, mental anguish, torture, loss of income and social status and that they are entitled to full compensation for the loss and damage incurred and suffered together with full restoration of all that they have lost. They prayed for judgment against the respondent for:

- a) Kshs. 136, 236, 724.00.
- b) General damages plus exemplary and punitive damages.
- c) Costs and incidentals.
- d) Interest at Court rates.

The respondent filed the response to the memorandum of claim on 24.07.2015 through M/S Munyao, Muthama & Kashindi Advocates. The amended response to the memorandum of claim was filed on 19.02.2016. The respondent's case was as follows:

- a) The claimants were its employees at all material time but they were not illegally, maliciously, unlawfully and wrongfully dismissed from the respondent's employment.
- b) The JIC is not recognised in law as tribunal in charge of employment dispute resolution. There is no known law establishing it. Even if JIC had the authority, the decision was a recommendation (which was not legally binding and creating no obligations) and not an order as alleged for the claimants.
- c) The respondent reinstated the claimants purely on humanitarian grounds and not because it was legally bound to do so. The reinstatement did not absolve the claimants of the levelled allegations or offences committed.
- d) The claimants suffered no loss or damage as alleged.
- e) The appeals committee recommended nullification of the dismissal of the claimants in 2008. Time started running the moment the appeals committee found them innocent. Seven years elapsed before the suit was filed and it is time barred. The six years of

limitation for a cause of action based on contract had lapsed.

f) The claim for promotion and attached salaries and allowances is mere speculation without factual basis.

g) For the time the claimants were out of employment they did not work for the respondent and they cannot be paid salaries and other benefits as claimed because salary is a recompense or reward for services performed per **Black's Law Dictionary**. The claim is misconceived, void and unmeritorious.

The claimants filed on 21.04.2016 a reply to the amended respondent's response to the memorandum of claim. The claimants pleaded as follows:

a) They repeated the pleadings in the memorandum of claim.

b) The respondent acted unconstitutionally, illegally, maliciously, unlawfully and wrongfully and the JIC cleared the claimants.

c) The appeals process was duly approved by the respondent's management and reinstatement was not on humanitarian grounds but the JIC had exculpated the claimants.

d) The claims and prayers were justified. The defence be struck out and prayers in amended claim be granted.

The claimants testified to support their case and final submissions were filed for the claimants. Despite an opportunity, the respondent failed to call a witness and failed to file final submissions. The Court has considered all the material on record and finds as follows.

**First**, there is no dispute that parties were in respective contracts of service at all material times.

**Second**, the evidence is that the parties invoked their internal disciplinary procedures culminating in the decisions by the JIC. The JIC Report was forwarded to the respondent's Managing Director by the letter dated 02.05.2013 by Abdirashid Salat, Chairman, JIC Appeal Cases Committee. The report of the JIC in the introduction states that during the JIC meeting held on 28<sup>th</sup> to 30<sup>th</sup> October 2009, the respondent's management and the Dock Workers Union agreed to jointly constitute an Appeals Committee to look into the appeals made by unionisable staff who were either dismissed or terminated from service for various reasons. Further, the mandate of the Committee was to review all appeals lodged by the Union on behalf of the former employees, including fresh ones that would be lodged from time to time. Further the Committee was to give its report on the findings and recommendations to management for consideration and further action. The Court finds that the evidence was that the claimants were members of the Union and the Court further returns that the JIC and its findings were binding upon the parties. In particular, the JIC constituted the binding arrangement between the parties for resolving disciplinary cases like had been levelled against the claimants by the respondent.

**Third**, while a reinstatement order or decision will usually come with full pay back as submitted for the claimants, in the instant case the JIC recommended reinstatement upon condition that the period of absence would be treated as unpaid leave. That recommendation is found to be a decision binding upon the parties and unless it is set aside in a lawful process, it remains binding upon the parties. The claimants resumed duty upon that JIC decision and as conveyed to them by the respondent's management and they cannot turn around to disown that decision by the JIC and as adopted and conveyed by the respondent. The parties, and in particular the claimants, have not disclosed the agreed administrative process for challenging the JIC decision. The Court finds that in so far as the JIC decision was conveyed and implemented by the respondent, the claimants have not established a basis for the Court's intervention in the manner it has been claimed and alleged for the claimants. The parties being bound by the terms of the JIC decision as implemented by the respondent, the Court returns that the claimants are not entitled to pay for the period they had been dismissed and not at work and as claimed for. The claim and prayers will collapse as unjustified because parties must be bound by decisions made in their agreed dispute resolution processes and unless such decisions have been set aside lawfully, they must remain binding. In the instant case, while relying on the JIC recommendation and as adopted and conveyed by the respondent to the claimants, without seeking to dispute or set aside the decision in any material respect, the claimants are making claims and prayers clearly antagonistic to the decision. It was and it is trite that they cannot credit and discredit the decision at ago. Their claim and prayer will fail as unjustified.

**Forth**, the claimants' case is that they had initially been reinstated by the Appeals Committee but the Committee's decision was disregarded and instead, by the letter dated 26.09.2008 by S.J. Chingabwi, Human Resource & Administration Manager, it was erroneously conveyed that the appeals lacked merits and had been declined. The present suit was filed on 05.05.2015. As far as the declining of the appeals by the letter dated 26.09.2008 is concerned, the Court finds that the cause of action about the dismissals leading to the appeals therein and the subsequent declining of the appeals were decisions constituting dismissals or injury which were time barred causes of action because the three years of limitation had lapsed as at the time the present suit was filed as per section 90 of the Employment Act, 2007. The Court therefore returns that an award of 12 months' compensation under section 49 of the Employment Act, 2007 as submitted for the claimants does not arise because with respect to those dismissals, the claim was time barred as urged in the instant case. In any event, the claimants appear to have pursued the internal disciplinary mechanisms resulting in the JIC decision and the JIC recommendation set aside the dismissals and the respondent adopted the setting aside recommendation which was conveyed to the claimants accordingly. Thus, the claimants have failed to establish a case for award of compensation under section 49 of the Act. No submissions were made for the claimants on the annexed prayer for exemplary and punitive damages which is found abandoned and unjustified in the circumstances of the case.

**Sixth**, the evidence was that JIC recommendation was forwarded to the respondent by the letter dated 02.05.2013 and the respondent's decision adopting the recommendation was conveyed to the claimants about 06.05.2014. It is clear that the respondent took considerable time of about one year prior to adopting and conveying the decision but in absence of evidence on the agreed time lines or procedural requirements for adopting and conveying JIC recommendations to affected employees, the Court is reluctant to find actionable procedural malady against the respondent in that regard. In any event as a continuing injury of failure to adopt and convey the JIC recommendation promptly, the same ceased on 06.05.2014 and the claim was introduced in the amended memorandum of claim filed on 26.01.2016 being

more than the time of limitation of 12 months for such continuing injuries as prescribed in section 90 of the Employment Act, 2007.

**Seventh**, the respondent failed to file submissions as had been directed by the Court and each party to bear own costs of the suit. While making that finding, the Court has as well considered the continuing employment relationship between the respondent and the 1<sup>st</sup> to 7<sup>th</sup> claimants and the order on costs should serve to foster harmony between the employees and the employer.

In conclusion judgment is hereby entered for the respondent against the claimants for:

- 1) Dismissal of the memorandum of claim as amended.
- 2) Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 10TH DECEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**