



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 32 OF 2016

KENYA UNION OF DOMESTIC, HOSPITAL,

EDUCATIONAL INSTITUTIONS, HOTELS

& ALLIED WORKERS.....CLAIMANT

VERSUS

B.O.M MURANG'A HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered within the provisions of the Labour Relations Act, No. 14 of 2007 to represent the interests and rights of non-teaching staff in secondary schools, colleges and universities among its scope of representation. The Respondent is described as a public secondary school under a board of management which operates through delegated authority from the Cabinet Secretary for the time being dealing with educational matters. In the suit before the Court, the parties are said to have a recognition agreement and a valid CBA. The suit relates to 20 Grievants. It was averred by the Claimant that before June 2015, it had in its membership from the Respondent's non-teaching staff a total of thirteen employees and by July 2015 recruited a further eight members. The Claimant averred that by September 2015 it recruited a further thirteen and a further eighteen employees though some of them had signed the check off form afresh. The dispute revolves around the representation by the Claimant and the actions of the Respondent which were all said to have occurred in January and February 2016. The Claimant averred that after training in November 2015 the members of the Claimant employed at the Respondent elected their representatives. It was averred that on 6th January 2016 one of the non-teaching staff a store keeper verbally asked all the 20 Grievants to re-apply for the jobs they were holding. The Claimant averred that it wrote a letter on 7th January 2016 enquiring about the communication from Mr. Maina the store-keeper. The Claimant averred that the Respondent never replied to this letter among other issues. The Claimant's representative visited the Respondent's principal where three pertinent issues were discussed being the assignment of duties to the chief shop steward, implementation of DPM circulars and terms and conditions of some employees. The Claimant averred that on 2nd January 2016 when all the non-teaching staff went to withdraw their salaries from the bank, the Grievants herein were involved by the bank that their salaries had not been delivered. It was averred that on the next day 3rd February 2016, the Grievants enquired further from the Respondent's principal about the issue but he refused to meet them and no response was afforded them. It is presumed that the date referenced above being the date when the staff went to the bank to withdraw salaries - 2nd January 2016 was actually meant to be 2nd February 2016. The Claimant averred that the Grievants requested the shop stewards to intervene and on 4th February 2016 they wrote to the School principal as an intervention mechanism and yet again he did not respond. The Claimant averred that on 4th February 2016 an unexpected thing happened – the school bursar and three strangers asked the Grievants to assemble in the car park and prepare to receive their salaries. The Claimant averred that the Grievants called the Claimant for direction and the Claimant advised that they were employees of Murang'a High School and therefore it was only the Respondent that had the legitimate authority to discharge their wages. The Claimant averred that it wrote on 5th February 2016 to the School principal after union officials were denied audience. The Claimant averred that on 8th February 2016 the Claimant union visited the County Director of Education for intervention and that it sought the same to safeguard the Grievants and their families the agony of hunger, dignity and shame. The Claimant averred that it tried all avenues to have the Grievants' salaries paid and that it had no choice except to report the matter in accordance with the provisions of the Labour Relations Act 2007. The Claimant averred that since the non-teaching staff joined the union, the shop stewards have been receiving threats and intimidation including phone calls from some teachers to scare them into abandoning their representation duties and that further, the shop stewards' respective duties were being put to question on flimsy grounds to cow them into abandoning union activities. The Claimant averred by way of example that one such is the chief shop steward Joel Nyaga Waweru a librarian who was transferred to the farm on flimsy grounds. The Claimant averred that the chief shop steward is a professional librarian who found his job advertised in the Daily Nation newspaper that the Respondent needed to recruit a librarian. The Claimant averred that the Grievant applied and was successful but however, he was not issued with an appointment letter in line with the Employment Act. The Claimant averred that the Respondent has been trying to transfer him to the farm as a disciplinary measure to cow him to abandon his role as the chief shop steward. The Claimant averred that the Respondent's reasons for seeking to recruit a librarian competitively was because they needed professionalism in the way they used to run the library which is what the Grievant Mr. Waweru brought to the school. The Claimant submitted that the Respondent was in breach of provisions of the CBA relating to appointments and the issuance of appointment letters, confirmation upon probation and the reduction of contracts of service in writing in terms of Section

9(2) of the Employment Act. The Claimant averred that there was willful failure to tender wages at the end of January 2016 and the Respondent forcing the Grievants out of employment by bringing in strangers with money to pay the Grievants in the name of outsourced company. The Claimant averred that there was intimidation and unfair labour practices. The Claimant averred that it served the Respondent with the Form S but the Respondent has adamantly refused to remit the Grievants' union dues. The Claimant averred that the Respondent had interfered with the Grievant's principal right of association donated by Section 4 of the Labour Relations Act and ILO Convention 87 – Freedom of Association and Protection of the Right to Organise Convention. The Claimant averred that the Respondent was discriminating and intimidating the chief shop steward by transferring him from the library to the school farm. The Claimant thus sought the Court to compel the Respondent to release the January 2016 salary to the Grievants and continue to pay them; an order to restrain the Respondent or their agents from forcing the Grievants out of Murang'a High School employment; an order to compel the Respondent to deduct and remit trade union dues from the Grievants salaries and wages based on their acknowledgement of union membership and an order restraining the Respondent from victimizing the chief shop steward, transferring him or any other shop steward for that matter.

2. The Respondent in its statement of response averred that of the 20 Grievants, 9 had resumed employment on mutually agreed terms and abandoned their claims thus leaving only 11 Grievants in the suit. The Respondent averred that all employees lawfully entitled to payment of salaries or wages for work done and services rendered were, have been and continue to be paid on monthly basis in full compliance with Section 17 of the Employment Act. The Respondent averred that in respect of each of its employees who is a member of the Claimant union it deducts and remits statutory union dues to the Claimant in compliance with Section 19(1)(f) of the Employment Act read together with Sections 48 and 50 of the Labour Relations Act. The Respondent averred that a store keeper is not and cannot be an authorized spokesperson of the Respondent and that neither the BOM nor the Principal of Murang'a High School could respond to the communication dated 7th January 2016 flowing from the unknown instructions allegedly given to the Grievants by a store-keeper who is not their employer. The Respondent averred that it was a stranger to the averments relating to the County Director of Education as it was not privy to a meeting between the Claimant, its representatives and the County Director of Education and thus incapacitated from responding to averments in that regard. The Respondent averred that in order to streamline the financial and administrative management of the School, the Respondent resolved to outsource the provision of security services to a qualified company duly registered to render such services and that the rationale for the said decision was that the School was previously hiring untrained persons as security guards and it did not have the capacity and resources to train, supervise and manage the security guards since it is not the core mandate of the School. The Respondent averred that a specialized security company would provide well supervised security services as well as permit the School's teaching staff to focus on academic matters and other matters critical to the development of the students instead of supervising untrained guards. The Respondent averred that it resolved to formalize the employment of non-teaching staff compliment categorized as general workers or labourers who had been initially recruited as casuals by previous administrations without subsequent formalization of their employment. The Respondent averred that the Claimant violently opposed the implementation of the above and the Grievants consciously made a deliberate effort to refuse, neglect and or fail to resume duty. The Respondent averred that it later learnt that this was on the advice of the Claimant union and that the Grievants individually and collectively absconded employment thereby terminating the same voluntarily effective from 18th February 2016. The Respondent averred that despite court orders issued on 17th February 2016 the employee-employer relationship between it and the 11 Grievants had irretrievably broken and that down by their conduct and would not have continued without full time court supervision and that this was an additional reason the said Grievants made a conscious decision not to resume duty notwithstanding the issuance of court orders. The Respondent averred that it was incapacitated from responding to allegations of intimidation of shop stewards in the absence of particulars of each shop steward allegedly threatened and intimidated, particulars of each teacher(s) who allegedly threatened and intimidated such shop stewards, particulars of the phone numbers of each shop steward(s) allegedly called to threaten and intimidate such shop stewards, particulars of the exact threats and intimidation allegedly uttered or made during such telephone calls, particulars of the specific date(s) and time(s) when each and every such alleged phone call was made and threats and intimidation uttered or made. The Respondent averred that the pleadings by the Claimant in that regard constituted scandalous, frivolous and vexatious averments deliberately pleaded to malign the Respondent and the teaching staff of Murang'a High School and is calculated to prejudice the Respondent in the eyes of the court. The Respondent averred that it was instructive that none of the shop stewards allegedly threatened or intimidated as pleaded had sworn a statement to particularize the alleged threats and intimidation or made any complaint to appropriate law enforcement agencies for investigations and institution of appropriate criminal charges against the alleged perpetrators. The Respondent further averred that allegations against Agnes Wangari Kamau and James Thuku, both shop stewards were after investigations and disciplinary hearings conducted by the Respondent in the presence of the Claimant's representatives Benson Maina and Francis Ngirigacha, were found not proven and dismissed and the two were recalled to resume duty without any further disciplinary action taken against them; the allegation made against Paul Ndung'u Nderitu also a shop steward was after investigation and a disciplinary hearing in the presence of the Claimant's representatives Benson Maina and Francis Ngirigacha, were found sufficiently proven to warrant the issuance of a warning letter which was issued to him; the allegations against Joel Nyaga Waweru the chief shop steward, after investigations and a disciplinary hearing conducted by the Respondent in the presence of the Claimant's representatives Benson Maina and Francis Ngirigacha, were found sufficiently proven to warrant termination of his employment on grounds of gross misconduct, which was done and there is no claim pending in any competent court filed by him as a result of the termination of his employment for gross misconduct. The Respondent averred that it resolved to redeploy Paul Ndung'u Nderitu from his position as a lab assistant as he lacked the prescribed qualifications as he was initially employed as a cleaner on 1st March 1994 in the laboratories before being deployed as a lab assistant without requisite qualifications. The Respondent averred that to date he has declined to report back to duty despite the court orders issued herein and continues alleging he is being victimized for being a shop steward by being redeployed. The Respondent denied in toto the allegations of discrimination and unfair labour practices. The Respondent averred the Grievants herein are not entitled to issuance of letters of appointment having rejected the Respondent's efforts to formalize their employment and terminated their employment by abandonment after deliberately refusing, neglecting and/or failing to resume duty from 17th February 2016.

3. The Claimant availed Benson Mugo Maina, senior industrial relations officer of the Claimant to testify. The Respondent called Paul Ndung'u Nderitu and Joel Nyaga Waweru both Grievants not called by the Claimant to testify as well as Willy Mwangi Kuria the Principal Murang'a High School at the material time. The Claimant's witness testified as to how the dispute begun as he was the point man for the Union in its dealings with the Respondent. He stated that the Union represented the Grievants in the dispute before Court. He said that what happened is that in July 2015 the Union recruited some employees at the Respondent some of whom were deemed to be casuals and the Union demanded their terms and conditions be made the same as those of the non-teaching staff. He testified that was the genesis of the problem as when the Union demanded they be treated better they were asked to reapply for their jobs afresh. He said some had stayed for over 4 months and it was unfair to apply for jobs they had held some for up to 9 years. Their jobs were outsourced and another company in the name of Internal Security. He stated that the company asked that their salary be paid by the company and those employees who refused to collect their salary from Internal Security were denied access. He stated that the Union was not informed of the changes and only became aware when the members called to receive salary from Internal Security. He testified that they advised them not to deal with the company till

there was a constructive understanding of the role of the company. He testified that is when the Union came to court to compel the employer to continue paying salary and not intimidate the staff. He stated that they got orders from court but up to date the orders were never respected and workers representatives were suspended for alleged incitement of non-teaching staff. He said all the Respondent had done was to refuse to comply with orders. He testified that during the course of the matter the parties advocates were ordered to go and witness the visible resumption of duties and all workers were present but both parties were informed that the BOM was yet to meet. He stated that the Respondent adamantly refused to deduct union dues after they were served with Form S per Section 48 of the Labour Relations Act. He stated that the claim for the Grievants was as per the amended memorandum of claim. He stated that the counterclaim by the Respondent was unfair and unjust as the Grievants were issued with orders for payment of salary and they were to be paid salary till the case is heard and determined. He stated that this cannot be said to be through fraud and deception as the order was not challenged, vacated or appealed against. He testified that the prayer for refund is not just and that it was an obligation for an employer to pay salary. In cross-examination he stated that the Form S presented had members and some had repetitions. He admitted that the Respondent did not interfere with the registration and joining of the union. He was referred to various forms submitted into evidence and indicated that the forms were served afresh at the end of September and there were no union dues received in October or November. He stated that there was no letter complaining of non-remittance. He indicated that in respect of the 13 Grievants they had not received any deductions of union dues. He testified that in the Form S of 12th January 2016 there are 11 names that are repeated and that it made sense to repeat the names as the forms are check off forms and some members signed more than once. On being asked whether he could agree the repetitions were forgeries he stated that no member had complained that their signatures were forged. While stating he was not a handwriting expert, he testified that the name Benson Macharia appeared on two of the forms and that the signatures were not the same. He stated that he was not in a position to say the signature against Benson Kamau's name was for the member or not. He stated that one cannot be a member if you are not the one who had registered. He said one cannot be a member except by acknowledgement to be an employee of the establishment. He stated that when the Form S for December 2015 was served on 8th January 2016 the deductions were received effective January 2016. He testified the employer has to remit the union dues. He stated that he did not remember the names of the teachers who had been threatening workers. He stated that Joel Waweru a shop steward was threatened and that Joel was the one who informed him of the threats. He stated that this was due to the demand for payments and conceded that he did not report the threats to law enforcement. He testified that he visited the County Director and reported several times on the issues the workers faced. He stated that he did not keep a record of the meetings and that the office had been occupied by 5 different officials and he could not name all of them. He stated that they sought intervention from the County Director and the Union did not get any communication from the County Director. He said that he attended the discipline meeting before the Board for Paul Ndung'u and that he reported the issue of the threat to the Board. He testified that the emissaries sent to the union members appeared to be teachers as per the letters on record. He stated that the letter was written to the principal and he did not reply. He denied that the letter was deceitful or that it included unsubstantiated claims for justifying a false claim. He stated that the shop stewards were targeted for action for being shop stewards. He referred to the order issued by this court and stated that the order provided that there should be no intimidation or harassment of employees on account of the case before court. He said that the Respondent had tried to separate the Grievants into two – those who resumed and those who did not. He stated that those who resumed were employed by the new entity. He testified that their rights did not cease. He stated some of the staff resumed and others did not. In re-examination he stated that the issue of intimidation of shop stewards was raised but the Respondent did not respond to it. He testified that payment was made after the Court order and that the Union did not make any misrepresentation of the matter. He stated that the Union did not act deceitfully and that the workers had a right to earn their salaries. That marked the end of the Claimant's case.

4. The Respondent called Willie Mwangi Kuria the principal of the Respondent as its principal witness. The Respondent also called 2 Grievants who had not been called by the Claimant and whose testimony the Respondent had successfully applied to have included in relation to certain aspects of the claim herein. The Grievant Paul Ndung'u Nderitu was called first and he testified that he was not part of those who attempted to storm the school on 6th February 2016. He stated that he heard of it and that he was about 10km from the school. He testified that he got information from the shopsteward Joel Nyaga Waweru and that they tried to get in touch with management as they were alarmed by the attempt to storm the school. He stated that the Board declined to allow them back. He testified that he recalled a letter from the employer accusing him of incitement and that he was sent on compulsory leave. He stated that he was represented by Mr. Maina at the first Board meeting but at the second one he was not represented. He stated that he received a letter requesting him to take documents for him to continue working as a lab assistant. He stated that his qualifications were an A level certificate and that was what had got him employed. He could not recall signing the letter of employment though he identified his signature on the document. He testified that the letter redeploying him did not dismiss him but that he did not return as there were issues. He stated that the employer gave the union permission to recruit and he was trained and selected as a workers' representative and that James Ndung'u was chair, he was vice and Joel Nyaga Waweru was the chief shopsteward and Agnes Mburu was a shopsteward. He stated that all of them were issued with show cause letters. He stated that Joel Waweru did not get a show cause. He stated he was intimidated and that he informed Hon. Sabina Chege after the incident. He testified that he sought dues and that he did not dismiss himself as there are issues to be resolved and that is why the matter was in court. He stated he could not go back to be a gardener and that he sought to be declared redundant. He testified that he had worked as a lab technician for a long time and that it was only when he ascended to a position in the trade union that the Respondent decided to reassign him as a worker. He was cross-examined by the advocate for the Claimant and stated that he supported the evidence adduced on their behalf by the Claimant. He stated that it was when there was a problem of non-payment that they went to the administration and the administration did not respond that he reached out to the MP to have the issue resolved amicably. He stated that he was aware that the court gave an order for reinstatement and the Respondent did not comply with the order to date. He testified that the genesis of the matter was the non-payment of salary and that is why there was strife. He stated that the staff were discriminated against and the casuals were not given tea. He stated that he was employed on the strength of his papers and that he worked as a lab assistant in both chemistry and biology and the issue of his qualifications came up only after the union issues. He testified that the school never complained and that a letter was written asking that he be declared redundant then he could consider going to the farm. In re-examination he stated that he never incited staff and that when he was summoned he was told to go and report to the person in charge of the farm. He testified that the staff who were casuals received lower pay as they were doing similar work but some were enumerated differently. He confirmed that there was a court order that they go back to work. He stated that he did not refuse to go back to work though he confirmed he was not at work. He testified that the court had stated that the employees were not to be disciplined. He said he was told to go for deployment. The second Grievant presented was Joel Nyaga Waweru who testified that he had previously worked for the Respondent and was the chief shopsteward. He stated that he was aware the Union had come to court but that he was not called as a witness. He testified that he was not aware whether the Union had closed its case. He stated that he was aware of the intimidation by teachers. He said it was not a criminal issue but a labour issue. He stated that no report was made to the Police or the Teachers Service Commission. He stated that he was dismissed by the Respondent. In cross-examination he stated that he was one of the Grievants in the matter being presented by the Union. He stated that he used to work as a librarian and that he had a Diploma in Information Studies and that after interview he was picked for the job. He stated that he was warned to stop union activities or face consequences. He testified that he was deployed to the school farm and he wrote back. He stated he did not go to the school farm and they did not reply to his letter saying he could not work in the farm. He said that he got so many letters as whenever he appeared he was given a

letter with different allegations. He stated that he was accused of not refusing to report to the farm. He testified that he received a letter dated 6th July 2016 and was accused of keeping a phone for a student. He was to defend himself on 8th July 2016 and that he received the letter that morning on 8th July. He stated that he recalled a time they met with union officials at the beginning of the year and was shown the order of the court. He recalled being given an explanation by the union officials as to what the order meant. He stated the problem was as a result of them agitating for better pay for casuals. He testified that they never incited anyone and he stated the cause of his dismissal was union activities. In re-exam he stated that he was not working under library sub-committee. He said that in 2016 he was informed that he would be supervised by Kato Njeri, Wachira, Kogi and another lady. He stated that there was nowhere he had said he would not cooperate with the said committee. He testified that the committee had come to do stock taking. He stated that the student whose phone he was accused of keeping was the assistant library captain. He said that he knew the consequences of having a student keeping a phone in school as it could lead to results cancellation and that was why he would not dare to do so. He testified that when he received the letter the first thing he did was meet the union officials. The Respondent's principal testified as the chief witness of the Respondent. He stated that at no time did the Respondent frustrate or seek to interfere with the Claimant's matters relating to the unionisable employees. He stated that the workers were all paid their wages and that there was no complaint of employees not being paid. He testified that there were people who failed to report to work after coming to court. He stated that the ones who came back to work were Joseph Irungu Muchoki a cook, Patrick Mbaya a guard, Josephine Nduta a guard, Simon Irungu a guard, Patrick Thuo, Francis Muiruri, Samuel Ngamau a groundsman, and Dennis Mwangi a security guard. He stated that the others did not report back. He stated that they were not chased away and that for the workers who joined KUDHEIHA the Respondent has been deducting and forwarding their dues to the union from then till now. He testified that there was no authority received against which the Respondent declined to deduct. He stated that the Union never went to the Respondent with a complaint of refusal to deduct and remit dues. He stated that they never intimidated any shopsteward. He stated that Ndung'u was heard and given a warning and deployed to the farm as Ministry of Education guidelines do not permit unqualified persons to act as lab assistants. He said that the Respondent had not written to the Grievant dismissing him. He testified that Agnes Nderitu had been sent on compulsory leave and she appeared before the Board and was found not guilty and told to resume. He said she was still working and that he was not aware if she was called to testify about intimidation. He said that James Thuku had also been sent on compulsory leave, was called for hearing before the Board and was found not guilty and asked to resume work. He testified that Joel Waweru was a shop steward and was a librarian at the school. He said he did not think James was intimidated by anyone as it was not within his knowledge. He stated that he made enquiries and found that it was the normal friction at work especially between himself and the library committee. He testified that the library committee was objected to by the Grievant who held that it was infringing on his work. He stated that the Grievant was being sent to the farm to work there as he was a big hindrance to the committee which was due to take stock at the Library. He said that the committee was mandated to deploy non-teaching staff where necessary. He stated that the Grievant upon receiving the letter in July did not object to hearing on 8th July and proceeded with the hearing. He testified that the workers who did not resume negotiated and received their terminal dues. He stated there were bank statements showing payments to the workers and that there were no salary arrears. He testified that there was no basis to claim salary as they did not work and sought the order on the counterclaim. He was cross-examined and stated that he was the principal at the material time conversant with the matters. He testified that the Union was the proper representative of the Grievants. He stated that the genesis of the problems faced was the plan to outsource security services to Internal Security Systems Limited. He said that the effect of that would be that the employees would cease being employees of the Board and become employees of the company. He stated that the employees had been employed at different times as casuals and they wanted to formalize the employment. He testified that they had divided the Grievants into 2 groups – those who agreed to come back and those who refused. He stated that only 12 did not come back as 9 came back the majority of whom came back under the security company. He testified that they got contracts which were renewable for either 1 year or 2 years. He stated that he was aware of the court order which was to effect that the employees were to resume work and be paid and there was to be no disciplinary action in respect of the court case. He testified that the Respondent did not pay salary to those who did not return back to work. He stated that they were not terminated and that they were passed on to Internal Security. He stated that his understanding was that Internal Security would take on the staff and train them and there would be no loss of benefits. He testified that in relation to the disciplinary action taken it was not in respect to the court case. He said that the librarian was being sent to the farm to keep records there as he could keep records anywhere. He testified that the Grievant did not come to work and that the lab assistant was also not dismissed but was redeployed. He stated that they had been asked to come back to school for redeployment. He stated that the complaints made by the Grievants were not valid and that the decision of the Board was communicated after the disciplinary hearing. He testified that there was an agreement with KUDHEIHA on the final dues and that he was aware of the Court order. He stated that they were to continue paying those who were working at the School and they were not paying those who were staying at home. He stated that they assigned work for those who were there. On re-exam he stated that he did not deny some of the workers were transferred to the security company. He stated that it was not true that the Board was paying as was ordered by the court. He testified that they continued to pay those who reported for duty but those who did not were not paid. He stated that the Respondent had allowed the Union to operate and that there were other shop stewards. He said there was no restriction on the Union meeting staff. He testified that no employee was victimized for being a union member. He stated that the terminal dues paid for the staff were what the Union called salary payments. That marked the end of the oral testimony and parties were to file written submissions which was duly done.

5. The Claimant submitted that the issues for determination were

- i. Whether the Grievants were properly joined in this cause
- ii. Whether the Respondent is guilty of willful failure to render wages to the Grievants
- iii. Whether the Respondent is guilty of failure to deduct and remit union dues to the Claimant
- iv. Whether the Respondent is guilty of intimidating, harassing and threatening shopstewards
- v. Whether the Respondent is guilty of failure to pay salaries, underpayment of salaries and failure to assign work to the Grievants
- vi. Whether the Respondent terminated the Grievants' employment unfairly
- vii. Whether the payments made to the Grievants by the Respondent were obtained through deceit and misrepresentation
- viii. What are the appropriate orders in the circumstances?

The Claimant submitted that the dispute arose after the Respondent decided to unilaterally outsource the Grievants' employment. The Claimant submitted that the Respondent asserts that some of the Grievants went back to work and therefore were not Grievants in the case to which the Claimant countered that even if they went back their services were outsourced to Internal Security Services Limited and that their claims for unlawful termination of employment remained intact. The Claimant submitted that the Grievants were therefore properly enjoined in the suit. The Claimant submitted that from the evidence adduced, the Respondent was underpaying the Grievants with a general wage of Kshs. 8,000/- being paid with a few exceptions. The Claimant submitted that this was contrary to the minimum wages guidelines applying at the material time and attached as a guide the Regulations of Wages Orders for 2015 and 2017. The Claimant submitted that the Respondent persisted in its refusal to deduct and remit union dues. The Claimant urged the Court to find the Respondent liable. In respect to the issue as to whether the Respondent is guilty of intimidating, harassing and threatening shop stewards, the Claimant submitted that it was noteworthy in the letters to the shop stewards were dated 8th July 2016 which was evidence of mass action against the shop stewards. It was submitted that there was no evidence of previous misconduct on the part of the shop stewards. The Claimant submitted that sending a lab assistant and a librarian to the farm was itself evidence of malice and intimidation. The Claimant submitted that this was meant to silence them by shaming them for engaging in Union activities. The Claimant submitted that the Respondent despite being aware of the Court order went ahead to undertake disciplinary proceedings for among other things, inciting other employees, and that also asking the shop stewards to carry their credentials to a disciplinary hearing was amounting to considering irrelevant matters as testimonials had nothing to do with the issue allegedly facing the shop stewards. The Claimant urged the court to find the action of the Respondent against the shop stewards was meant to intimidate and harass them because of their union activities. The Claimant submitted that even before the suit was filed, the Respondent had stopped paying the Grievants their salaries and that the court ordered their re-admission to work and payment of salary till further orders. The Claimant submitted that the Respondent never complied but however, on 15th December 2016 and 31st January 2017 the Respondent partly complied by paying the amount that it was now seeking by way of counterclaim. The Claimant submitted that the effect of outsourcing was to terminate the employment of the employees which was contrary to the Collective Bargaining Agreement between the parties which required the employment of the Grievants should be automatically converted to permanent and pensionable employment upon expiry of 4 months of continuous service. The Claimant submitted that the loss of employment occasioned upon the Grievants was as a result of the unfair labour practices of the Respondent. The Claimant submitted that termination should be undertaken in a humane manner and in compliance with the law in order to avoid hardship on the employee. The Claimant cited the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** cited with approval in the case of **Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR**. The Claimant submitted that the Respondent was aware of the Court order dated 17th February 2016 and that the order directed the Respondent to continue paying the Grievants. The Claimant submitted that at a meeting attended by the Claimant's representatives and the Respondent's representatives as well as counsel, the Respondent resolved to pay Kshs. 973,626/- to the Grievants and that there was no complaint or demand letter on the sum. The Claimant urged the court to find that there was no deceit and that the money was paid in compliance with a court order. The Claimant submitted that the counterclaim was an afterthought and it should be treated as such and dismissed with costs.

6. The Respondent submitted that the Claimant had failed to prove the claim as there was no evidence led on the differentials in wages as alleged in the claim. The Respondent submitted that the alleged failure to deduct and remit union dues was not proved as the Respondent through the Principal permitted the recruitment, meetings and training undertaken by the Union. The Respondent submitted that this was proof that it was ready to comply with the law governing labour relations and that the totality of this confirmed that the Respondent facilitated its workers right to join and participate in the affairs of a trade union of their choice. The Respondent submitted that it did not remit dues in respect of the erroneous Form S with duplication of entries. The Respondent submitted that the Employment Act under Section 19 frowned upon unauthorized deductions of an employee's wages. The Respondent submitted that where it was served with a valid Form S it complied fully with the provisions of section 48 of the Labour Relations Act. The Respondent submitted that there was no specificity on non-deduction and non-remittance. The Respondent submitted that there was no proof that there was any intimidation and victimization of the shop stewards. It submitted that if there were teachers involved in intimidation of the shop stewards the teachers would be liable to prosecution, conviction and imprisonment for several offences including under the Penal Code, improper use of a telecommunication system contrary to Section 29 of the Kenya Information and Communications Act and possible interdiction and even deregistration by Teachers Service Commission for breach of the Code of Regulation for Teachers and the Code of Ethics and Conduct for Teachers. The Respondent submitted that it did not terminate the services of the employees and that the Grievants not in its service had opted not to resume work. The Respondent submitted that there was no evidence that it locked out employees from the workplace or that the employees deserted work. The Respondent cited the case of **Moses Gachuhi Gateru v Njuca Consolidated Company Limited [2019] eKLR** and submitted that the Claimant was not entitled to the relief sought and that it was entitled to recover the salaries paid through deceit.

7. The dispute between the Claimant and Respondent seems to have been exacerbated by the poor industrial relations between the Claimant Union and the Principal of the School. Whereas there was a CBA in place, it seems the relationship between the parties was fractious at best. The Claimant wrote a series of letters in a few days not letting the ink even dry with letter after letter issuing. It was clear the parties were not *ad idem* in regard to the decision by the School to outsource the provision of security services to a security firm Internal Security Services Systems as well as re-designate some staff members. The Respondent it would seem had deliberated that in order to streamline the financial and administrative management of the School, it was resolved to outsource the provision of security services to a qualified company duly registered to render such services. The clear rationale for the said decision was that the School had previously hired untrained persons as security guards. It is not in doubt that the School being a learning institution did not have the capacity and resources to train, supervise and manage the security guards. This aspect is not the core mandate of any school. The specialized security company was to provide well supervised security services so as to permit the School's teaching staff to focus on academic matters and other issues critical to the development of the students instead of supervising untrained guards. The second significant thing that the Respondent did was that it resolved to formalize the employment of its non-teaching staff compliment who had hitherto been categorized as general workers or labourers. These staff had been initially recruited as casuals by previous administrations without subsequent formalization of their employment and the Respondent made an effort to formalize their employment by asking them to apply for their jobs and get recruited formally. In my view, this was something the Claimant should have embraced and not resisted as there was nothing on paper supporting the Grievants position that they were entitled to hold the positions they claimed. For instance, the lab assistant Mr. Paul Ndung'u Nderitu was deployed from his position as a lab assistant since he clearly lacked the prescribed qualifications to work as a lab assistant. He was initially employed as a cleaner on 1st March 1994 and worked in the laboratories before being deployed as a lab assistant by effluxion of time. He clearly had gathered skills and could set up a chemical experiment but that did not detract that he had no qualifications. The Claimant insists there was a deliberate effort to intimidate, harass and threaten the shop stewards. However, there were no particulars of each shop steward allegedly threatened and intimidated, no particulars of any or each teacher or teachers who allegedly threatened and intimidated such shop stewards, particulars of the phone numbers of each shop steward or the shop stewards allegedly called, threatened and intimidated, no particulars of the exact threats and intimidation allegedly uttered or made during such telephone calls, particulars of the specific dates and

times when each and every such alleged phone call was made and threats and intimidation uttered or made to the specific shop stewards. Indeed, from the evidence adduced the threats alleged were mere sweeping statements made with no evidence to back it up. The cases of alleged intimidation and unfair targeting of hop stewards were demonstrated to be false. In the case of Agnes Wangari Kamau and James Thuku who were both shop stewards, after investigations and disciplinary hearings conducted by the Respondent in the presence of the Claimant's representatives Benson Maina and Francis Ngirigacha, the allegations were found not proven and dismissed and the two were recalled to resume duty without any further disciplinary action taken against them. In relation to Paul Ndung'u Nderitu another shop steward, after investigation and a disciplinary hearing as before were found sufficiently proven to warrant the issuance of a warning letter. The Respondent accordingly issued a warning letter. In relation to the allegations against Joel Nyaga Waweru the chief shop steward, after investigations and a disciplinary hearing conducted by the Respondent in the presence of the Claimant's representatives Benson Maina and Francis Ngirigacha, the allegations were found sufficiently proven to warrant termination of his employment on grounds of gross misconduct. This was done as exhibited in court and the result of the process undertaken which was in consonance with Section 41 of the Employment Act and the CBA between the parties led to the termination Joel Nyaga Waweru's employment for gross misconduct. Contrary to his assertions before court, he is not an employee of the Respondent. Sadly, the Grievants before the Court withdrew labour despite there being a Court Order in their favour they declined to resume work. This was folly and it is the fault of the Claimant that misadvised them not to resume work. A court order does not confer employment where an employee declines to resume work. It cannot be raised as a shield against the requirement to report to work and undertake tasks as assigned by the employer. In their folly the Grievants negotiated themselves out of employment and cannot claim any remedies from the Respondent. In regard to deduction and remittance of union dues, I find that the numerous Form S filled had not only errors but a deliberate effort to mislead. There are names repeated on the Forms and there are even discrepancies in member numbers, signatures appearing on the Forms and it is amply clear there was mischief afoot. When an employee joins a union, he does not need to join it over and over again as these Forms suggest. They were constantly 'refreshed' perhaps in an effort to show the members were increasing in number. I do not doubt there was payment of union dues as the Claimant did not tabulate the dues that were unpaid in respect of the members it allegedly recruited. Even where it is alleged there was underpayment the allegations are blanket and there is no link between the Wages Orders belatedly introduced and the claim before the Court. In regard to the counterclaim by the Respondent, the Respondent sought refunds of salaries paid as the Claimant's members were accused of taking pay for no service rendered. Whereas the employees were paid various sums under the court order herein, the Respondent is not merited in seeking the refund on grounds of acquiescence. The Respondent chose not to challenge the orders or seek a variation and in the premises we will let the losses lie where they may. It was not demonstrated in respect of each Grievant the sums due to each and for what period. From the foregoing analysis, it is abundantly clear the suit by the Claimant is unmerited and in the premises this suit is only fit for dismissal. I hereby dismiss it with costs to the Respondent.

8. This decision was rendered online with the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2020

Nzioki wa Makau

JUDGE