



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1528 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS..... CLAIMANT

VERSUS

NOL TURESH LOITOKTOK WATER AND

SANITATION COMPANY LIMITED..... 1ST RESPONDENT

NATIONAL WATER CONSERVATION AND

PIPELINE CORPORATION..... 2ND RESPONDENT

JUDGMENT

The Claimant, Kenya Union of Commercial, Food and Allied Workers, filed this suit against Nol Turesh Loitoktok Water and Sanitation Company, the 1st respondent, and the National Water Conservation and Pipeline Corporation, the 2nd respondent, vide a Memorandum of Claim dated 15th November 2018, alleging unfair/unlawful summary dismissal of 48 employees.

Nol-Turesh Loitoktok Water and Sanitation Company Limited is registered under the Companies Act, as a limited liability Company, Limited by guarantee. Its main objective is the provision of water and sanitation services. It is fully owned by the County Governments of Kajiado, Makeni and Machakos. Although the company is registered as a private company, it is a public entity by virtue of its being owned wholly by public entities. Its operations are regulated and supervised by the Water Services Regulatory Board (WASREB) under the Water Act.

National Water Conservation and Pipeline Corporation is a state corporation under the Ministry of Water and Sanitation.

The claimant states that it has a valid recognition agreement with the 1st respondent and has concluded and signed several Collective Bargaining Agreement (CBA) with the 1st respondent covering terms and conditions of service for the 1st respondent's unionisable employees, the last one being for the period 24th May 2018 to 24th May 2020.

The claimant avers that in the months of January to March 2018 the 1st respondent did not pay salaries to its workers. On 11th April 2018, the workers assembled at the office premises and demanded to be addressed by the management of the 1st respondent over the delayed payment of their salaries. The 1st respondent had previously between March 2013 and January 2014 accumulated workers' salaries to the tune of Kshs.23,560,492 which had compelled the claimant to report a trade dispute.

The claimant further avers that pursuant to Section 47 Part (e) of the Water Act which mandates WASREB to conduct independent technical audits and inspections of licences, WASREB carried out an inspection of the 1st respondent and in the Inspection Report dated 4th July 2018, confirmed the grievances of employees including non-payment of salaries.

The claimant avers that following the workers' assembly on 11th April 2018, a return to work formula was negotiated and signed in the following terms –

- (i) The parties have agreed that the workers return to work unconditionally.*

(ii) That the company undertake to pay the two months' arrears of February and March 2018 salaries.

(iii) That the union be directly involved in the probe to establish what transpired in the months of January, February and March collections.

(iv) That the company undertakes to liaise with Ukulima Sacco not to recover all monies due but not paid on time due to management default.

(v) That the first payment for the month of February be done within one week effective 13.04.2018.

(vi) That the payment for March 2018 salaries be done not later than 14 days from 13.04.2018.

(vii) That in default of the above pay periods stated in clause 5 and 6 the union be at liberty to pursue the matter within the provisions of law.

(viii) That the review meeting will be at 27.4.2018 at Nol Turesh office.

The claimant avers that after the signing of the Return to Work Formula, the 1st respondent resorted to intimidating and victimising employees through rampant transfers and assignment of duties outside their job descriptions. That further, the respondent did not pay salaries and the arrears of salaries extended to April and May 2018.

The claimant avers that on 25th July, 2018, the 1st Respondent, at their Board meeting held on 16th July, 2018, resolved to release all employees posted to them from National Water Conservation and Pipeline Corporation during the Water sector reforms back to the corporation.

On 9th August, 2018, the 1st Respondent served its employees with show cause letters accusing them of absence from duty from 18th June 2018.

On 16th August, 2018, employees were sent notice inviting them to appear before a Staff Advisory Committee.

On 13th September, 2018, the employees found a notice posted at the 1st Respondent's Notice Board to the effect that forty eight (48) of them were dismissed from employment on grounds of gross misconduct.

The Claimant avers that its efforts to have the issue of dismissals resolved at the parties own level failed compelling it to report a Trade Dispute on "*Unfair/unlawful dismissal of fourth eight (48) employees*".

The claimant further avers that immediately after the alleged dismissals, the 1st Respondent went ahead to disconnect water and electricity supply and evict employees from company houses.

That on 24th September 2018, the 1st Respondent invited the claimant to a meeting at their board room on 2nd October 2018 to chart a way forward to normalize their service delivery to the citizens. The union accepted the invitation and attended the meeting.

No resolution was reached at the meeting and thus the claimant filed the instant suit.

In the memorandum of claim the claimant seeks the following orders –

(i) Declare that the 1st Respondent's failure to pay wages as provided for under Section **18(2)(c)** of the Employment Act, **2007** is unlawful and illegal.

(ii) Declare that employees whose salaries had not been paid from January 2018 – August 2018 had all the right to ask the 1st respondent to pay such wages and that such action cannot be construed to mean participating on illegal strike or go slow as alleged.

(iii) Declare that that 1st Respondent's decision to lock employees out of their working places from 11th – 13th April, 2018 and from 8th June, 2018 onwards was illegal and unlawful.

(iv) Order the 1st Respondent to seek other lawful means to address their Human Resource challenges touching on wage bill, workforce formation, ageing workforce and staff ratio by lawful and acceptable means and not through threats or dismissal.

(v) Order the 1st and 2nd Respondents to agree on modalities of transferring staff back to National Water Conservation and Pipeline Corporation and to address all the Human Resource Requirements for such transfers.

(vi) Order the 2nd Respondent to write to all the forty eighth (48) employees released back to them accepting them as employees and to assign them duties as appropriate.

(vii) Order the 1st Respondent to pay all outstanding wages, all statutory and authorized deductions made from employees' wages

and pay the same within fourteen (14) days of the Judgment date or in the alternative, such payment be made by the 2nd Respondent upon their acceptance to do so.

(viii) Order the 1st Respondent to pay costs of this claim to the Claimant.

(ix) Grant any other appropriate relief it deems fit and just to grant to meet the ends of justice.

In the alternative and should this Court find that service of the 48 employees ought to come to an end for reasons other than what the 1st Respondent is alleging, we pray that this Court do order the 1st Respondent to:

(i) Pay the affected employees the entire amount of their wages earned or payable to the employees and of all allowances due to them as have not been paid (calculation by the local labour officer to ensue should this prayer be granted) and adopted by this Court.

(ii) Pay the grievants all terminal benefits including Notice pay, staff pension scheme, leave due, service pay and other benefits due as shall be calculated and confirmed by the local labour officer and adopted by the Court.

(iii) Pay of the remaining salaries up to the age of retirement of each employee for interrupted service calculation to ensue carried out by the local labour officer and adopted by the Court.

(iv) Order payment of 12 months' gross wages being compensation for unfair/unlawful termination of employment.

(v) Any other appropriate relief the Court may deem fit and appropriate to grant to meet the ends of justice

Together with the memorandum of claim, the claimant filed a notice of motion in which it seeks the following orders:

1. Spent.

2. Spent.

3. That pending hearing and determination of this matter, this Court do and hereby restrains the 1st Respondent herein from evicting the forty eight (48) grievants herein from company houses.

4. That pending hearing and determination of this matter, this Court do and hereby restrains the 1st Respondent herein from disconnecting water and electricity supply from the company houses.

5. That pending hearing and determination of this matter, this Court do and hereby orders the 1st Respondent herein to pay all wages/salaries and allowances due to employees from January, 2018 - August 2018 without any further delay.

6. That this Court do direct Mr. Charles Gondosio, the appointed Conciliator, to expedite conciliation process and file a labour report within thirty (30) days of the date of this Order.

7. That this Court do and hereby orders their 2nd Respondent to enter appearance and confirm whether or not the release of employees back to them was discussed with them and whether or not they have taken over the services of employees on continuous terms and with their current terms and conditions of service or under what terms.

8. That this Court be pleased to grant any other appropriate relief to meet the ends of justice.

9. That costs of this application be provided for to the Applicant.

The Claimant filed a Witness Statement on 15th November 2018 made by the 3rd Grievant, Bresson Rakiro who states that he was first employed by the 2nd Respondent on 3rd March 2004. That his services were then transferred to Athi Water Board following water sector reforms which saw the creation of water service boards and water and sanitation companies. That on 9th February 2006, the said Water Board contracted the 1st Respondent who took over its services.

The claimant avers that when they sought audience with the Respondent's management, it misunderstood their request for audience to mean strike action, locked their working places and did not allow them to go back to work. That by 8th June 2018, salaries had not been paid as agreed in the return to work formula and when employees sought a further audience with the management, they were again locked out and accused of participating in an illegal strike or go slow.

The 2nd Respondent filed a Replying Affidavit dated 27th November 2018 sworn by its Acting CEO, Eng. Sammy Mburu in response to the claimant's application. In the affidavit he avers that the release of employees back to the 2nd Respondent was not discussed with the 2nd respondent. He denies that the 2nd Respondent has taken over the services of the employees of the 1st respondent on continuous terms. He deposes that since the 2nd Respondent handed over the pipeline together with the staff to the 1st Respondent the 2nd Respondent does not budget or pay emoluments for the staff working with the 1st Respondent. He deposes that the Ministry of Water and Sanitation vide a letter addressed to Tanathi Water Services Board *REF.NO: WD/3/3/1302Vol.VI (86)* dated 14th August 2018 guided the said Board that the 1st

Respondent's Board of Directors' decision to release the former staff of the 2nd Respondent was irregular. Further, vide a letter *Ref. TAWSB/WSP32/VOL.VII (18)* dated 16th August 2018, Tanathi Water Services Board advised the 1st Respondent that there was no relationship between the 1st Respondent and the 2nd Respondent.

The 1st Respondent filed a Replying Affidavit dated 7th December 2018 sworn by its Acting Managing Director, Gideon Ketente in which he avers that the Application dated 15th November 2018 is incompetent, fatally defective, bad in law and an abuse of court process. That the Claimant's claim that the employees were not paid their January-May 2018 salaries is false and untrue since they were paid their dues until they went on strike from June 2018. That the 1st Respondent tried to have the employees resume work but the same fell on deaf ears and that during the strike, the employees undertook illegal connections of water to construction sites and private residences and billed the water to themselves. That incitement notes were also circulated around the 1st Respondent's premises instructing customers not to pay their water bills and which crippled the 1st Respondent's operations. Further, seventeen chambers were vandalized and up to 13600 cubic meters of water was lost during the process. That the matter was reported to the police under *O.B NO. 27/29/6/2018*. That the striking employees demanded suspension of the management team and after their demands had been met, they refused to sign the return to work formula and continued with their strike.

Mr. Gideon continues to aver that the 1st Respondent instituted legal proceedings against the striking workers to wit ***Nairobi ELRC Cause No. 1239 of 2018*** which was certified urgent but the workers never entered appearance occasioning the same to be overtaken by events. That in the meantime the 1st respondent issued notices to show cause to the striking workers on grounds that they had absconded duty. None of them responded. They were thereafter invited to attend disciplinary hearing but they again failed to attend. They were thereafter dismissed from employment.

He avers that a few of the workers who attended the disciplinary hearing were let off with warnings. That the 1st Respondent followed due process when it summarily dismissed the workers. That it was in the process of paying their terminal dues. That it thus cannot be faulted for its actions. That this Court should further note that the 1st Respondent is a company on its knees as its operations were crippled by the strike and also has huge financial debts as a result of its previous management. He beseeched the Court to dismiss the Claimant's application and the entire suit and find in favour of the 1st Respondent.

Proceedings

When the application came up for hearing *ex parte* on 5th December 2018, this Court granted the Applicant temporary restraining orders. On 13th December 2018, the Court gave parties time to try and resolve the matter at their level and come back with a Consent and further extended the interim orders. However, no Consent was recorded. On 15th May 2019, the Claimant asked the court to grant prayers 4 and 5 of its Notice of Motion. The Court however directed parties to dispose of the entire suit by way of written submissions and to include issues raised in the Application in the submissions.

Claimant's Submissions

The Claimant submits that the employees who had worked for a long period without wages did not commit any misconduct when they asked the MD to address them over unpaid wages. That alluding to a strike is a ploy by the 1st respondent to run away from addressing non-payment of wages. That the 1st Respondent thus acted contrary to **Section 18(2)(a), (b) and (c) of the Employment Act** which provides:

(2) Subject to subsection (1), wages or salaries shall be deemed to be due—

(a) in the case of a casual employee, at the end of the day;

(b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;

(c) in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;

That the 1st Respondent acted outside **Section 76** of the **Labour Relations Act** when it locked out employees without notifying the Ministry of Labour of such action. Further, that the 1st Respondent did not withdraw its letter to the 2nd Respondent even after being addressed by the 2nd Respondent on the two companies being delinked. It submits that financial constraint is not a reason for dismissal of employees and can only lead to redundancy under Section 40 of the Employment Act. That termination of employment can only be in respect of an individual employee and cannot be done collectively. That the collective dismissal letter dated 13th September 2018 was not served on individual employees but posted on the notice board. That this was a mockery of **Section 44(1)** of the **Act** which provides for summary dismissal of an individual employee who has committed an offence on his/her own.

It further submits that no employee was individually served with a show cause letter and neither did they receive individual invitations to the disciplinary hearing. That **Exhibits 19 and 20 attached to the claim** are copies that were transmitted to the union long after the disciplinary hearing. That **Sections 41 and 45 of the Employment Act** which set out the necessary procedural fairness when intending to terminate the services of an employee were clearly violated by the Respondent.

It is submitted by the Claimant that the Conciliator erred by concluding in his finding that employees grievances were addressed yet salaries continued to be unpaid from January 2018 onwards. Further, all other previous outstanding wages have not been paid and are indicated as unpaid in the WASREB report as per **Exhibit 17 attached to the claim**. That the Conciliator does not make any finding that employees were served with show cause letters and invitations to the disciplinary hearing and further does not state whether the stoppage of work was a result

of a strike or lockout. That the claimant rejected the conciliator's report because it is biased and did not deal with the root cause of this dispute which is unpaid wages.

The Claimant also submits that the prayers in the Application and the Memorandum of Claim are almost similar and that this Court has already granted Prayers 1-3 in the Notice of Motion while Prayer 6 is already satisfied as the labour report is before this Court. That the 2nd Respondent distanced itself from the claim and left the 1st Respondent with responsibility. Further that the 2nd respondent addressed the 1st Respondent through their letter dated 16th August 2018 written through Tanathi Water Services Board as shown in **Exhibit SM2 attached to their replying affidavit**. For this reason, Prayer 7 is therefore spent. The Claimant submits that it releases the 2nd Respondent from these proceedings and that prayers (v), (vi), (vii) and prayer C of the Memorandum of Claim against the 2nd Respondent are withdrawn and substituted as follows:-

(v) *Order the 1st Respondent to end the lock out and reinstate all affected employees as if their services had not been dismissed and services be deemed to be continuous.*

(vi) *Order the 1st Respondent to withdraw the dismissal and show cause letters purportedly served on the grievants.*

(vii) *Order the 1st Respondent to pay all outstanding wages, all statutory and authorized deductions made from employees' wages and pay the same within fourteen (14) days of the Judgment date.*

1st Respondent's Submissions

The 1st Respondent submits that **Section 41(1) of the Employment Act** states that subject to Section 42(1), an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. **Section 41(2)** states that notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4), hear and consider any representations which the employee may on the grounds of misconduct or poor performance. That **Section 43 of the Act** further provides that in a claim of termination of contract, the employer is required to prove the reason(s) for the termination and where such employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45(2).

It submits that reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. That **Section 80 of the Labour Relations Act** deems persons who participate in strikes contrary to the provisions of the Act, to have acted in breach of their contracts of employment, and liable to disciplinary action. That such persons are thus not entitled to any protection under the Employment Act for the period of the strike and that it was justified to summarily dismiss the grievant under **Section 80 of the Labour Relations Act as read with Section 44(3) of the Employment Act**. With regard to procedural fairness, it submits it invited the striking workers for a disciplinary hearing but a majority of them failed to show up and continued to absent themselves from their work stations. That the return to work formula is in itself an acknowledgment of withdrawal of labour and an admission that there was a strike and that it is unlikely there would be a return to work formula without a preceding strike.

That the Grievants' participation in the illegal strike, incitement of locals and destruction of the Respondent's equipment constituted gross misconduct and that as evidenced from the letters of summary dismissal served on each of them, they were all dismissed for gross misconduct which is a ground for summary dismissal. That on 14th August 2018, it wrote to each Claimant to show cause why disciplinary action should not be taken against them for absconding duty but they failed to show cause and were thus issued with letters to appear for a disciplinary committee as provided for in its policy document. That during negotiations it stated it was willing to engage in a payment plan for the unpaid wages of March 2013 to January 2014 as well as pay the statutory deductions but the Claimant rejected that proposal.

The 1st Respondent submits that **Section 2 of the Labour Relations Act** defines a strike as:

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' organization of which their employer is a member to accede to any demand in respect of a trade dispute.

That given this definition there is no doubt that the concerned Claimant's members ceased working from 8th June 2018 in a deliberate go slow and illegal strike and that the Claimant has also not disputed that its members vandalized its property leading to losses, considering that it is a criminal offence to vandalise property. That it was therefore justified to dismiss them.

The 1st respondent further submits that the right to strike under **Article 41 of the Constitution**, and other associational rights under **Articles 36 and 37** are not absolute and that even if the said strike had conformed to the law, the conduct of the Grievants would still justify their dismissal under Section 44(4) and 45 of the Employment Act. It further submits that it has taken all measures to settle the large salary arrears despite the time constraints involved. That it wholly relies on the Labour Report dated 20th December 2018 which found that the process of dismissing the Claimant's members was procedural and which decision the union has not appealed against.

It is submitted by the 1st Respondent that the ingredients of unfair termination are not present in this case relying on the decision of Rika J in **Industrial Court Cause No. 719 of 2010: Jane Florence Otieno v The Insurance Regulatory Authority**. That it has demonstrated why the Grievants do not merit having their termination treated as unfair. That should this Court however find otherwise, it has the discretion in computing the award for compensation. It urges this Court to adopt the reasoning in the case of **Elizabeth Washeke & 62 others v Airtel**

Networks (K) Ltd & another [2013] eKLR where the court awarded one month pay for the one year worked as reasonable compensation. The 1st Respondent prays that the claim is dismissed. It submits that in its view, the Grievants would only be entitled to the contractual terminal benefits but to no more as **Section 49 of the Employment Act** stipulates the remedies for unfair termination. That the Grievants cannot be entitled to anything outside the provided remedies.

It further submits that the Grievants are not eligible for service pay because they were members of NSSF and that the law does not provide that NSSF dues must be up to date but provides that service is not payable if an employee is a member of NSSF. That in *Samson Buluma Mumia –v- DPL Festive Limited [2012] eKLR*, Radido J. declined to award service pay in the absence of any practice or contractual agreement on service pay and observed that:

“Calculation of service pay can be based on two grounds, the first ground is contractual and this could be embodied in the contract of employment or a collective agreement...The second ground for calculation would have a statutory underpinning.”

The 1st Respondent submits that it is entitled to costs of the Application and of the whole suit because it has ably exposed the Claimant’s malicious intents of maligning, embarrassing and disparaging the 1st Respondent.

The 2nd respondent did not participate in the proceedings after 13th December 2919.

Determination

I have considered the pleadings, affidavits and documents filed herein. I have further considered the written submissions and the authorities referred to by the parties. In my view there are three issues for determination being: -

- i) Who was responsible for the situation that led to the dismissal of the employees.
- ii) Whether the dismissals are valid and
- iii) Whether the claimant is entitled to the reliefs sought in both claim and the application.

From the evidence on record, it is clear that the genesis of this dispute was the non-payment of wages of the grievants by the 1st respondent. In the replying affidavit of GIDEON K. KETENTE, the respondent’s Acting Managing Director, he states at paragraphs 5 and 6 as follows –

“5. That the claim by the claimant that the employees were not paid their January-May 2018 Salaries is totally false and untrue as they were paid their dues until the month they went on strike that is from June 2018.

6. That the reason for non-payment of dues was because the employees started by going on a go slow and which eventually culminated into a strike from 8th June, 2018 and despite several efforts by the 1st respondent to have them resume work, the same fell on deaf ears.”

[Emphasis added]

The averments in these two paragraphs are obviously contradictory. Paragraph 6 is an admission of unpaid wages.

In the letter dated 4th July 2018 addressed to the claimant’s Secretary General and the attached draft Return to Work Formula, the 1st respondent does not confirm payment of April and May 2018 salaries. The letter and draft return to work formula are reproduced below –

“NLWSC/HQ/EMP/001/VOL II/167

4th July 2018

The Secretary General

Kenya Union of Commercial Food and Allied Workers

P. O Box 46818

Nairobi, Kenya

Dear Sir/Madam

RE: INTERVENTION FOR STAFF RETURN TO WORK

There has been a go slow by our staff and absence from work since the 8th of June 2018. Refer Memo NLWSC/HQ/ADM/026B/VOL.1/235 which we informed you. They had grievances which they held against their employer that is the company. Their complains included –

- 1) Unpaid salaries for the months of April 2018 and May 2018.
- 2) *Removal of the company's top management from office.*
- 3) *Unremitted statutory deductions.*
- 4) Unpaid eight months' arrears for the month of June 2013 to January 2014.

There was an intervention by the involved county Governments (i.e. Kajiado, Makueni and Machakos) and these grievances have been handled as follows;

1) The Management team was suspended and a new one was put in place; that is the Managing Director, the Finance and Administration Manager and the Technical Services Manager.

2) The Counties pledged to pay the two months' salaries for 2018 arrears.

3) A Collective Bargaining Agreement was signed on 24th of May 2018 which you were witnesses on the employment terms improvement by the employer.

Since the workers went on the go slow "strike", a lot of vandalism has been carried out on the water pipeline leading to loss off millions of litres of water. Many citizens have gone without water that is including families, hospitals and schools. The company has also lost revenue in millions of shillings due to the vandalism and water loss.

I am therefore requesting to have a meeting with you and the company employees on Thursday the 5th of July 2018, to discuss on the following agendas;

1. *To settle on an appropriate return to work formula.*
2. *To end the ongoing illegal strike and the consequences it's bearing on the citizens as well as the damages being done on the pipeline.*
3. *To start revenue collection which is the life stream of all the company's operations including the staff salaries.*

I am committed as the Managing Director to see to it that their pleas will be worked upon fully.

Yours sincerely,

SIGNED

Gedion K. Ketemo

Ag. Managing Director

Nolturesh Loitokitok Water and Sanitation Company Limited"

[Emphasis added]

The draft return to work formula is reproduced below –

“RE: RETURN TO WORK FORMULA AGREEMENT BETWEEN NOLWASCO UNION MEMBERS, NOLWASCO MANAGEMENT TEAM AND KUCFAW

1. *The parties have agreed that workers to return to work immediately*
2. *That the company undertake to pay the two month arrears May and April 2018.*
3. *All staff members especially union members must adhere to the Code of Ethics at all times.*
4. *The union staff MUST strictly follow the law in pursuant of their rights.*
5. *Union officials and their members MUST desist from having unauthorized meeting reference to the CBA*
6. *All members of staff MUST drive performance to ensure billing and collections in' achieved every month without delay to ensure smooth running of the institution.*

7. The union *MUST* engage management in a professional and respectful manner.

8. Any illegal strike or go slow should be completely avoided.

Signature of management

Signature of shop steward”

[Emphasis added]

From the letter and Return to Work Formula, it is evident that the salaries for April and May 2018 had not been paid by 4th July 2018. There is no confirmation by the 1st respondent that the salaries for the months of January to March 2018 had been paid.

From the foregoing it would be valid to conclude that the grievants did not report to work because the respondent had defaulted in payment of their salaries for the months of April and May 2018 (if not for January to May 2018).

Put another way, what options are available for an employee whose employer has not paid his salary in circumstances such as the grievant.

Section 44(3) of the Employment Act provides for fundamental breach of contract by an employer in the following terms –

(3 Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

The corollary would be true where it is the employer in breach thus entitling an employee to similar relief. Where an employee is the one who has been wronged by the employer, the employer cannot turn around to accuse the employees of breach and dismiss the employee. The employer would in such a case be deemed to have constructively dismissed the employee.

In case like this one, it would be unreasonable for an employer who has not paid wages for several months to expect employees to report to work as if everything was fine. I think the 1st respondent would only have had a legitimate cause to discipline the employees if they still failed to report to work after it had paid their outstanding wages.

I thus find that the action taken by the 1st respondent to subject the employees to disciplinary action without first settling their wages or discussing a way forward for the settlement of the outstanding wages with the claimant was unreasonable and amounted to constructive dismissal.

The foregoing notwithstanding, I also find that the disciplinary process of the 1st respondent was flawed as it did not comply with the disciplinary procedure set out in Article 22 of the CBA.

For the foregoing reasons I find the dismissal of the grievants was unfair.

Remedies

The claimant prayed for unconditional reinstatement of the grievants. Taking into account the numbers involved, the time that has lapsed and the circumstances leading to the termination of their employment which was financial challenges of the 1st respondent, reinstatement would be inappropriate in the present case.

I will thus award the alternative prayers. I thus award as follows:-

That the 1st respondent –

(i) Pays the affected employees the entire amount of their wages earned or payable to the employees and of all allowances due to them as have not been paid (calculation to be with assistance of the local Labour Officer) and adopted by this Court at a later date.

(ii) Pays the grievants all terminal benefits including Notice pay, staff pension scheme, leave due, service pay and other benefits due as per CBA as shall be calculated by the parties and confirmed by the County Labour Officer.

(iii) In addition, I award each grievant 12 months’ salary as compensation. In awarding maximum compensation, I have taken into account the fact that it is the 1st respondent who caused the circumstances leading to the dismissals and further that most of the grievants had worked for long periods of time, some of them having been transferred from National Water Conservation and Pipeline Corporation.

(iv) The 1st respondent shall pay claimant’s costs in the sum of Kshs.100,000/=.

No orders are made against the 2nd respondent who was released from liability by the claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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.

MAUREEN ONYANGO

JUDGE