



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2180 OF 2016

KENYA NATIONAL PRIVATE SECURITY

WORKERS UNION.....CLAIMANT

v

LAVINGTON SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. The Kenya National Private Security Workers Union (the Union) instituted these proceedings against Lavington Security Ltd (Respondent) on 25 October 2016 alleging that the termination of the contracts of some 12 Grievants Yegon Hillary, Samuel Momanyi, Rina Masinde, Adonijah Rabach, Edwin Edeke, Kizito Onyang, David Obiero, David Chacha, Sarah Sitati, Alfred Bosire, Thomas Osako and Fredrick Ouma (Grievants) on or around 6 September 2016.

2. Filed at the same time was a motion under a certificate of urgency seeking certain interim interdicts but the application was declined on 17 February 2017.

3. The Respondent filed a *Response* on 27 September 2018, and the Cause was heard on 24 February 2020.

4. Yegon Hillary testified on behalf of all the Grievants while a Zonal Officer with the Respondent testified on its behalf. The witnesses adopted their witness statements and also produced exhibits.

5. The Union filed its submissions through email on 5 May 2020 (should have been filed and served before 20 March 2020) on while the Respondent's submissions were not on file by this morning.

6. The Court has considered the pleadings, evidence and the submissions, and condensed the Issues for determination as examined hereinafter.

Competence of the Claims

7. One of the Grievants, Alfred Bosire filed a Notice of Withdrawal of his claim on 29 August 2018. The Court marks his claims as withdrawn.

8. The Respondent challenged the competency of the claims on behalf of Edwin Edeke, David Chacha and Fredrick Ouma by asserting that these Grievants were still in employment as of 27 September 2018 while the cause of action was pleaded to have arisen around 6 September 2016.

9. In respect to Thomas Osako, the Respondent contended that he was dismissed on 28 September 2016 for absenteeism and negligence.

10. Since the Union did not join Issue or traverse the pleas by the Respondent in respect to these 5 Grievants and/or demonstrate that their contracts had been terminated on 6 September 2016, the Court finds their respective claims not only incompetent but an abuse of the court process.

11. The respective claims are dismissed with costs to the Respondent.

12. The substance of this judgment will in effect be addressing the claims by the remaining 7 Grievants, namely, Yegon Hillary, Rina Masinde, Adonijah Rabach, Kizito Onyang, David Obiero, Sarah Sitati and Samuel Momanyi.

Unfair termination of employment

Procedural fairness

13. Section 35(1)(c) of the Employment Act, 2007 envisages a *written notice of termination of employment* of at least 28 days if the employee is paid by the month (unless it is a case of summary dismissal).
14. On its part, section 41 of the Act requires the employer to afford the employee an opportunity to make representations before making a decision on termination, and if it is a case of summary dismissal, an oral hearing is mandatory.
15. The Respondent's case was that the Grievants abandoned work and/or participated in an unsanctioned protest on 5 September 2016; were issued with ultimatums to resume duty but did not; were issued with show-cause notices which they declined to receive and thus got summarily dismissed through letters dated 6 September 2016.
16. The Grievant who testified on behalf of all the Grievants denied that they participated in an unsanctioned protest on 5 September 2016 or that they received the ultimatums to resume duty or show-cause notices.
17. According to the witness, the Grievants were instructed through their supervisors to report to head office on 6 September 2016 whereupon they were given dismissal letters.
18. Among the documents produced by the Union was a *show-cause* dated 5 September 2016 addressed to and acknowledged by Edwin Odeke.
19. The Respondent on its part produced copies of the ultimatums and *show-cause* notices.
20. On the basis of the documents produced by both parties and totality of the oral testimony, the Court is of the opinion that the Grievants were afforded an opportunity to return to work and/or explain the failure but they declined to cooperate with the Respondent.
21. The Grievants snubbed the opportunity afforded by the Respondent, and the Court finds that the Respondent was in substantial compliance with the statutory requirements of procedural fairness.

Substantive fairness

22. The Grievants challenged the validity and fairness of their dismissals on two fronts, one that they had demanded delayed August 2016 wages and two, on the basis that there was in existence a Court order restraining the Respondent from dismissing them.
23. Under sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of proving the reasons for terminating the contracts of the Grievants and that the reasons were valid and fair.
24. The reason given by the Respondent in the dismissal letters was *refusal to resume duties as advised*.
25. To demonstrate that the dismissals were not valid or fair, the Union produced copies of previous Court orders given on (17 November 2015), and 15 April 2016 and issued on 26 April 2016 in Nairobi Cause No. 2045 of 2015, *Kenya National Private Security Workers Union v Lavington Security Ltd*, and an investigation report by the Ministry of Labour pursuant to one of the orders were produced.
26. The order of 15 April 2016 provided
 1. **THAT** pending the hearing and determination of this motion inter-partes, an interim preservative order be and is hereby issued stopping the Respondent from victimising, harassing or coercing, intimidating or otherwise dismissing or terminating and transferring any of the Union members whose names appear in the check-off system.
 2.
27. There was no rebuttal from the Respondent of the Union's contention that the protective order of 15 April 2016 had not been varied or clarified by 6 September 2016 when it terminated the Grievants contracts.
28. Although generously worded and being at large, there was an in-place, an order interdicting the Respondent from dismissing the Grievants. It was up to the Respondent to seek to have the order clarified and/or review or have the order set aside.
29. Apart from the Court orders, the Grievant who testified stated that the real reason for their dismissal(s) was the demand for delayed August 2016 wages and complaints against the Respondent for unfair labour practices.
30. In the course of the agitation, the Union secured protective orders which the Respondent ignored. The termination of the Grievants' employment, therefore, flew in the face of the Court order.
31. In this connection, a report from the Ministry of Labour and dated 13 October 2016, about a week after the dismissal of the Grievants and also produced in Court established as valid the allegations of unfair labour practices on the part of the Respondent including payment of

wages below the prescribed minimums.

32. The Respondent did not deny that the Grievants had joined the Union and therefore covered by the terms of the Court order.

33. In the same vein on the challenge of the fairness of the decision by the Respondent, the Union caused to be produced in Court a Checklist for 5 September 2017 serial number 51375 and a Duty Roster OB extract for July to October 2016 was produced.

34. The Checklist indicates that Rina Masunde was on duty from 0545 and signed out at 1800hours

35. The Duty Roster also show that Sarah Sitati was off duty from 3 September 2016 to 7 September 2016.

36. It cannot be that these 2 Grievants abandoned their work stations during the designated working hours.

37. Further, although the Union and the Respondent did not have a recognition agreement in place, the Union had already recruited some of the employees of the Respondent and they were involved in active litigation.

38. It was, therefore, perturbing that the Respondent did not involve the Union in the process leading to the termination of the Grievants' contracts.

39. Considering the totality of the evidence and more so the court orders, report from the Ministry of Labour and the extract from the duty roster, the Court is of the view that the real reason for the dismissal of the Grievants was their agitation for better labour practices.

40. The Court finds that the reasons for the termination of the 7 Grievants contracts were not valid nor fair.

Appropriate remedies

Reinstatement or compensation

41. The Grievants sought to be reinstated without loss of benefits. Over 3 years have elapsed since the separations and the Grievants and the Respondent did not lead any evidence on the practicality of reinstatement.

42. Instead of reinstatement, the Court is of the view that compensation would be appropriate and fair.

43. The Court, in the event awards each of the 7 Grievants the equivalent of 6 months gross wages as compensation (based on the wages in the payslips or pay advice schedule produced in Court).

Conclusion and Orders

44. The Court finds and declares that the termination of the Grievants employment was unfair and awards them compensation

(i) Yegon Hillary	Kshs 52,200/-
(ii) Rina Masinde	Kshs 69,000/-
(iii) Adonijah Rabach	Kshs 63,756/-
(iv) Kizito Onyango	Kshs 63,000/-
(v) David Obiero	Kshs 63,000/-
(vi) Sarah Sitati	Kshs 74,466/-

45. There was no disclosure either by way of pay slip or pay advice schedule as to the salary of Samuel Momanyi by the time of separation.

46. The Respondent is ordered to compute his compensation using his salary for August 2016.

47. The Claimant is denied costs for late filing of submissions.

Delivered through video, dated and signed in Nairobi on this 15th day of May 2020.

Radido Stephen

Judge

Appearances

For Union

Ms. Onyancha, Legal Officer

For Respondent

Ms. Nyabenge instructed by Kale Maina & Bundotich Advocates

Court Assistant

Judy Maina