



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 510 OF 2018

DOCK WORKERS UNION (K).....CLAIMANT

VERSUS

KENYA FERRY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Dock Workers Union (K) a trade union registered in Kenya, on behalf of its members; Salim Juma Mwabaka, Bwana Idi Komora Garise, Hadidi Zuberi Baro and Mwinga Chizungu (the Grievants) against the Grievants' former employer, Kenya Ferry Services Limited. The claim is documented by Statement of Claim dated 20th December 2018.

2. In spite of due service, Kenya Ferry Services Limited did not respond to the claim. When the matter came up for trial, the Grievants testified on their own behalf.

The Claimant's Case

3. The Claimant states that sometime in the year 2015, it issued a strike notice to the Respondent's management, as a protest against enhanced National Hospital Insurance Fund (NHIF) contributions.

4. The strike took place between 1st and 2nd July 2015 with all the Claimant's members being involved.

5. Immediately after the strike, the Respondent interdicted eight (8) unionisable employees, including the following Ferry Branch officials:

- a) Salim Juma Mwabaka – Chairman
- b) Bwana Idi Komora Garise – Secretary
- c) Hadidi Zuberi Baro – Treasurer
- d) Mwinga Gonzi Chizungu – Shop Steward

6. The Respondent also issued show cause letters to twenty-six (26) employees, to which the employees duly responded. The interdicted employees also responded to the allegations levelled against them.

7. The Claimant states that the charges against the 26 employees were dropped but the 8 interdicted employees were summoned to appear before a Disciplinary Panel on 24th November 2015.

8. On 29th January 2016 the Respondent returned a verdict to dismiss the Grievants.

9. The Claimant gives the Grievants' employment history as follows:

- a) Salim Juma Mwabaka was appointed as a Ramp Controller on 1st November 1989 and was promoted to the position of Senior Ramp Controller on 2nd September 2016;

b) Bwana Idi Komora Garise was appointed as a Deckhand on 28th March 1991;

c) Hadidi Zuberi Baro was appointed as a Deckhand on 1st October 1990 and was confirmed in the same position on 11th May 1992;

d) Mwinga Gonzi Chizungu was appointed as a Messenger on 7th September 1992.

10. The reason given for the Grievants' dismissal was that they had incited the Respondent's unionisable staff to participate in an unlawful strike, which was called by the Claimant on 1st and 2nd July 2015.

11. Hadidi Zuberi Baro contends that on 1st and 2nd July 2015, he was on authorised annual leave. On the material day, he went to the Respondent's premises and found the unionisable staff already on strike.

12. Mwinga Gonzi Chizungu states that by an interdiction letter dated 8th July 2015, he was accused of being absent from his place of work, without leave of absence. He responded to the allegation on 9th July 2015 but when he was invited to appear before the Disciplinary Committee vide letter dated 24th August 2015, the charges were altered or other charges were introduced, which were diametrically opposed to those in the interdiction letter.

13. The Grievants' case is that their dismissal had nothing to do with the strike that took place between 1st and 2nd July 2015. They claim that they were victimised on account of their being Branch Officials of the Claimant Union. They contend that the decision to dismiss them was selective, discriminative and biased which amounts to bad labour practice.

14. The Claimant states that it lodged a dispute with the Cabinet Secretary responsible for labour vide letter dated 4th December 2015 upon which the County Labour Officer, Mombasa was appointed as Conciliator.

15. The Grievants claim that during the proceedings before the Conciliator, they were confronted with written statements by some employees of the Respondent, implicating the Grievants in instigation of the strike. The Grievants contend that they were not made aware of these adverse statements during the internal disciplinary proceedings nor did the makers of the statements appear before the Disciplinary Panel.

16. The Grievants further contend that there was a predetermined decision to dismiss them and the disciplinary process was a sham. They allege that the procedure adopted by the Respondent was in breach of their right to a fair hearing.

17. The Grievants further allege that by placing them on interdiction for a period in excess of two (2) months, the Respondent violated its own Human Resource Policy Manual, a finding made by the Conciliator.

18. The Grievants now seek the following remedies:

a) A declaration that the procedure adopted by the Respondent in dismissing the Grievants was in violation of the right to a fair hearing;

b) A declaration that the purported demand or directive by the Respondent's Acting Managing Director to the Grievants to stop or call off the strike was untenable and *ultra vires* the powers of the Grievants;

c) An order of reinstatement or in the alternative an order for:

i) Two months' gross pay in lieu of notice;

ii) Twelve months' gross pay in compensation;

iii) Costs

Findings and Determination

19. There are two (2) issues for determination in this case:

a) Whether the Grievants' dismissal was lawful and fair;

b) Whether the Grievants are entitled to the remedies sought.

The Dismissal

20. The Grievants were dismissed by similar letters dated 29th January 2016 stating as follows:

“RE: DISMISSAL REFERENCE TO HR POLICY MANUAL, THE

DISCIPLINARY HANDBOOK AND THE EMPLOYMENT ACT, 2007

This is to convey to you the decision that you be dismissed from the employment of Kenya Ferry Services Limited and you are hereby dismissed from employment as a [position] with immediate effect. This action has been taken as stipulated by the Human Resource Policy Manual Clauses 11.14 (3), 11.14 (18) and 11.15.1 (viii) as read with the Disciplinary Handbook Clauses 4 (a) (i) and 4 (a) (x) and the Employment Act (2007) Sections 44(4) (e) and 44 (4) (g).

We would like to inform you that after hearing your presentations and those of your representative we were satisfied that the following allegations are true in that on 1st and 2nd July, 2015 you incited other employees of Kenya Ferry Services Limited to go on an illegal industrial strike which resulted in stoppage of work while being aware that the services provided by this Company are essential to the economy of the Country and beyond; and that on 1st July, 2015 when the Acting Managing Director called you to a meeting in which a notice was read to you to the effect that that industrial strike was illegal and that all employees should report back to their work stations, you knowingly failed to obey that lawful and proper command.

The above offences, as you were informed in our letter dated 8th July, 2015, and during the Staff Disciplinary Committee meeting of 24th November, 2015, are gross and can lead to dismissal among other disciplinary action. It is on the basis of this that, after due consideration, it has been decided that the Kenya Ferry Services Limited dismisses you from your appointment as [position].

Please note that you will be entitled to all monies, allowances and benefits due to you up to the date of your dismissal as per section 18 (4) of the Employment Act, 2007 and subject to clearance with all Departments and Sections in the Company as per Clause 2.23 of the Human Resource Policy Manual.

You have seven (7) days within which to appeal against the decision of your dismissal as per Annexure "E" II (e) of the Memorandum of Understanding between Dock Workers Union and Kenya Ferry Services Limited on Recognition of Trade Dispute. The appeal should be addressed to:

The Managing Director,

Kenya Ferry Services Limited,

P.O. Box 96242-80110 MOMBASA.

Yours faithfully,

(signed)

Thomas Tuva Kenga

Human Resource and Administration Manager

For MANAGING DIRECTOR

21. This letter accuses the Grievants of inciting fellow employees to go on an illegal strike and failure to resume work as directed by the Acting Managing Director. It would appear that following appeals by the Grievants, the dismissal was commuted to normal termination, which the Grievants, through their Union, now contest.

22. Prior to the dismissal, the Grievants had been placed on interdiction on half pay effective 8th July 2015

23. The Claimant Union states that the Grievants who were officials of its Ferry Branch, had no role in calling the strike nor did they have the mandate to call it off. The Claimant filed a strike notice dated 8th May 2015 and a circular to its members dated 22nd June 2015, both issued under the hand of the Claimant's General Secretary, Simon K. Sang.

24. In its Response to the Memorandum of Trade Dispute, the Respondent states that there was a strike on 1st and 2nd July 2015 and that the Grievants were summoned to a meeting by the Acting Managing Director and instructed to call off the strike.

25. The Respondent did not respond to the Grievants' assertion that they had no power to call the strike or to call it off. This was an important issue that the Respondent ought to have responded to. In the absence of any evidence to the contrary, the Court has no basis to fault the position taken by the Claimant that the Grievants had no role in summoning or disbanding the strike.

26. In light of this, I find and hold that the Respondent had no valid reason for terminating the Grievant's employment as required under Section 43 of the Employment Act.

27. The Grievants also took issue with the procedure adopted by the Respondent in bringing their employment to an end. They do so on two scores; first that they were not allowed an opportunity to respond to accusations allegedly made against them by their fellow employees and second, that they were kept on interdiction beyond the period prescribed by the Respondent's Human Resource Policy Manual. Again, the Respondent did not countermand this assertion.

28. As held by this Court in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR* an employee facing disciplinary action is entitled to clear information as to the charges against them as well as access to information in the employer's possession that would assist the employee in preparing their defence.

29. From the evidence on record, in reaching the decision to dismiss the Grievants, the Respondent relied on statements taken from employees. These statements were however not availed to the Grievants in the course of the internal disciplinary proceedings nor were the employees called as witnesses either in the disciplinary hearing or in these proceedings. It seems to me therefore that the Grievants were not accorded a fair hearing as contemplated under Section 41 of the Employment Act.

30. Further, the Grievants were evidently kept on interdiction for a period in excess of the two months specified in Clause 11.23.2 (iii) of the Respondent's Human Resource Policy Manual. As held by my brother, **Radido J** in *Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR* one of the key ingredients of procedural fairness under Section 41 of the Employment Act is compliance with the employer's internal disciplinary rules made under Section 12 of the Act.

31. In the absence of an explanation from the Respondent as to why it flouted its own internal disciplinary rules, the only finding to make is that the Respondent again failed the procedural fairness test set by Section 41 of the Employment Act.

32. Cumulatively, I find and hold that the termination of the Grievant's employment was substantively and procedurally unfair.

Remedies

33. The Claimant seeks reinstatement of the Grievants as a primary remedy. However, in light of the time lapse from the time of termination, the Court does not consider this to be an appropriate remedy.

34. Instead, I will make a compensatory award of twelve (12) months' salary in favour of each Grievant. In arriving at this award, I have considered the Grievants' long service with the Respondent as well as the Respondent's violation of the law in the termination transaction.

35. No basis was established for the claim for two (2) months' notice pay. At any rate, it would appear that upon commutation of the dismissal to normal termination, the Grievants were paid notice pay based on their basic pay. Consequently, the only order I will make on this limb is that the Grievants be paid the balance in notice pay made up of house allowance and commuter allowance.

36. In the end, I enter judgment in favour of the Grievants as follows:

1st Grievant: Salim Juma Mwabaka

a) 12 months' salary in compensation.....	915,312
b) Balance of notice pay.....	<u>26,000</u>
Total.....	941,312

2nd Grievant: Bwana Idi Komora Garise

c) 12 months' salary in compensation.....	931,704
d) Balance of notice pay.....	<u>23,500</u>
Total.....	955,204

3rd Grievant: Hadidi Zuberi Baro

e) 12 months' salary in compensation.....	931,704
f) Balance of notice pay.....	<u>23,500</u>
Total.....	955,204

4th Grievant: Mwinga Gonzi Chizungu

g) 12 months' salary in compensation.....	840,600
h) Balance of notice pay.....	<u>21,000</u>
Total.....	861,600

37. These amounts will attract interest at court rates from the date of judgment until payment in full.

38. The Claimant will have the costs of the case.

39. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF MAY 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE

Appearance:

Mr. Rufus Ochieng (Union Representative) for the Claimant

No appearance for the Respondent