REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1608 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS..... CLAIMANT

VERSUS

KENYA MEAT COMMISSION.....RESPONDENT

JUDGMENT

The claimant is a trade union registered in Kenya under the Labour Relations Act to represent employees in the commercial sector, as more specifically set out in the membership clause of its Constitution.

The respondent herein is a government state body established in 1950 through an Act of Parliament, Cap 363 laws of Kenya with the mandate to purchase cattle and small stocks, to acquire, estimate and operate abattoirs, process meat and other meat foods for export and for consumption within Kenya and with some regulatory responsibilities for the meat industry.

The parties herein have a recognition agreement, pursuant to which, they have negotiated several CBAs. The last CBA came into effect on 1st July 2010, to cover the period of 2 years. The terms of the CBA have never been reviewed since then.

The claim herein was filed by the claimant citing the following issues in dispute –

(i) Lock out of sixty eighty (68) employees.

(ii) Improper show cause/interdiction letters targeting to dismiss the services of sixty eighty (68) employees.

(iii) Failure to impellent SRC gross model salary structure with effect from 1st July 2017.

(iv) Alleged periodic payment of gratuity to all unionisable employees of the respondent.

(v) Operationalization of a pension scheme without the involvement of employees.

In the claim, the claimant avers that the Salaries and Remuneration Commission developed a model gross salary structure for state corporations which was supposed to be implemented by the Respondent within a four-year cycle of 2017/2018 and 2021/2022 financial years, effective 1st July 2017.

It further avers that on 31st July 2018, the Respondent filed its report to the National Treasury which indicated that all unionisable employees had been paid periodic gratuity up to December 2016 and that it was in the process of operationalizing the pension scheme.

Further on the 15th October 2018, the Claimant wrote to the Salaries

Remuneration Commission (SRC) enquiring whether the proposed salary structure was applicable to unionisable employees as it had not been implemented by the Respondent. The Claimant also wrote to the National Treasury informing them that the Respondent's unionisable employees had not received gratuity as alleged by the Respondent.

That on 26th November 2018, the Respondent's unionisable employees approached the Acting Managing Commissioner to address them on

the above issues but he declined and sought police intervention to disperse them. Some of the employees were allowed back the next day but 68 were locked out and issued with show cause notices and interdiction letters despite there being an ongoing conciliation process.

In the memorandum of claim dated 14th December 2018, and filed on even date, the claimant seeks the following remedies –

a. *Declare the lock out unlawful and one of unfair labour practice.*

b. *Declare that the show cause letters and interdiction of 68 employees is unlawful, unfair and unwarranted.*

c. *Order the Respondent to withdraw the show cause/interdiction letters served upon 68 unionisable employees.*

d. *Order the Respondent to end the interdiction to allow the affected employees to resume their duties.*

e. *Order the Respondent to pay the balance of half salary withheld by the Respondent, all in arrears.*

f. *Order the Respondent to implement SRC Model gross salary structure for a four-year cycle with effect from 1st July 2017.*

g. *Order the Respondent to pay gratuity due to the remaining employees before operationalizing a pension scheme.*

h. *Order the Respondent to avail details of the impending pension scheme to employees.*

i. *Order the Respondent to pay maximum compensation for the unlawful and unfair interdictions.*

j. *Order the Respondent to pay costs of this claim to the Claimant.*

k. *Grant any other benefit the court finds fit and proper to meet the ends of justice.*

The Respondent avers that on 31st October 2018, the outgoing and acting Managing Commissioners, met with the Claimant's members, briefed them on the Respondent's financial constraints and urged them to be patient while the situation was being remedied.

The Respondent contends that the employees who sought the acting managing commissioner's audience on 26th November 2018, assembled at the notice board, prevented other employees from accessing the factory stating that they would only leave the premises once their issues were addressed.

The respondent contends that the Acting Managing Commissioner met and dialogued with the employees and requested them to go back to work but some of them declined. The same thing happened the next day and the Acting Managing Commissioner sought police intervention when things got out of hand. The Respondent avers that the 68 employees who insisted on assembling at the notice board and refused to work were issued with interdiction and show cause letters.

It is the Respondent's further contention that the Claimant's members were informed that the full gratuity had been paid to all contractual employees as per the terms of their contracts and the CBA in lump sum. The Respondent avers that full gratuity payments were made in 2009, 2014 and 2017.

The Respondent avers that it was advised by the SRC vide its letter of 20th November 2017, to retain its current salary structure until the next review cycle as the one proposed was above the recommended salary structure for job evaluation within the framework of affordability and fiscal sustainability. The Respondent avers that the process to establish a reliable pension scheme for the staff is still ongoing.

The Respondent further avers that the employees' strike amounted to gross misconduct and which action resulted in a loss as orders went unsupplied. It is the Respondent's position that it has authority to discipline its employees and has followed the correct process. Further, that this cause is premature as the grievants already subjected themselves to a disciplinary hearing and await a decision.

Claimant's Rejoinder

The Claimant filed a rejoinder on 15th July 2019 vide the Supplementary Affidavit of Rebecca Muthoki sworn on even date, in response to the Respondent's averments. The Affiant denies that there was a strike and reiterate that the grievants approached the Acting Managing Commissioner to address their issues. She avers that she visited the Respondent's premises to enquire why employees were locked out and to request for them to be allowed back to work.

It is the Affiant's averment that the Respondent's actions were prompted by a visit from the Senate Agriculture Committee to enquire on the unpaid salaries and claims of non-payment by farmers. It is also her averment that the Respondent did not report to the Ministry of Labour that there was a strike.

The claim was disposed of by way of written submissions. The Claimant filed its submissions on 10th September 2019 while the Respondent filed on 5th December 2019.

Claimant's Submissions

The Claimant submits that the Respondent failed to issue the striking employees with a warning requiring them to resume work and also failed to notify the local labour officer of the strike.

The Claimant submits that there were no employee's representatives in the committee that had been formed to investigate the circumstances surrounding the strike hence the result was biased against the employees.

The Claimant submits that there is no report to the State Department of Labour indicating that there was a strike. That on the contrary, the employees were forcefully locked out from the Respondent's premises to avoid addressing the issues raised by the employees.

Respondent's Submissions

The Respondent submits that the grievants' persistence in assembling at the notice board without authority did not constitute a protected strike as contemplated in section 79 of the Labour Relations Act.

It is their further submissions that the grievants' failure to work for two days and their interference with the Respondent's operations amounted to gross misconduct which compounded the Respondent's financial situation thus justifying the disciplinary action taken against them which was in accordance with the Employment Act and its Human Resource Manual. It is therefore their submission that this case is premature as the disciplinary proceedings have to be concluded and a decision made, before the

Court can interfere.

Analysis and Determination

It is not disputed that the respondent had been going through hard economic times. The parties CBA had not been revised from 2012 when it expired. Employees terms of service had thus not been reviewed since 2012.

Further, the employees had genuine grievances relating to –

(i) Allegations of periodic payment of gratuity which were never paid to all of them

(ii) Failure to implement SRC model gross salary structure,

(iii) Intended operationalisation of the Pension scheme without their involvement and;

(iv) Unrevised Collective Bargaining Agreement now for seven years, approached their Acting Managing Commissioner to get him to address them on above issues.

Although the evidence is conflicting as adduced by the claimant and the respondent, it is clear that the circumstances that gave rise to this suit commenced when the employees sought audience with the respondent's acting Managing Commissioner which did not go well. The reluctance of the employees to go back to work before their grievances were addressed and the subsequent reaction by the respondent in calling anti-riot police is what the claimant's term as a lockout while the respondent term the same as an unlawful strike.

It is evident that either party did not handle the situation well. The parties ought to have resolved the issue by reporting to the Ministry of Labour for a return to work formula to be negotiating and signed under the Chairmanship of the Labour Officer so that employees could resume duty. The subsequent disciplinary process was therefore also part of the poor management of the situation. The respondent having been the party at fault, should not have used the situation to discipline employees who had genuine and valid grievances.

In the report of the County Labour Officer, Machakos dated 29th November 2018, he observed as follows –

"The union informed me on 27th November 2018 of a dispute between its members and management. This necessitated my visit to the factory on the same day to try and arbitrate between the parties to the dispute.

My first step was to talk to the workers who were numbering about 100 to establish what their complaint was.

Workers explained to me that they had problems with their employer over various issues among them non-remittance of statutory deductions, salary scheme etc. They said that efforts to discuss with management their complaints fell on deaf ears leading to their being locked out of the factory. They further added that the police were called to throw them out of the factory. They insisted that they were ready to work as long as their complaints were addressed.

Management however insisted that the workers downed their tools on Monday 26th November 2018 after a consignment of animals had arrived for slaughter and processing. Efforts to advice those to continue working were fruitless because they insisted that their problems had to lie addressed first. For two days the workers completely refused to work and so the police had to be called to stop them from any disruption of work.

From the foregoing, it appears that what had started as picketing has turned as a lockout. In our joint meeting between the workers and management, the company categorically refused to allow the employees report back to work despite the workers having agreed to resume duties. The union made a spirited attempt to convince management to allow the employees go back to work through a

negotiated return to work formula. Management insisted that allowing the employees back would disrupt work and interfere with the other employees who had refused to participate in the industrial action.

Based on the above facts and particularly because both parties are unable to agree on an amicable way of settling this dispute so that normal work can resume, I am advising that the parties move to the next level of dispute resolution.

Meanwhile, it is my advice that the spirit of dialogue and conciliation be embraced in future whenever there are differences at the workplace to avoid issues of conflict in industry.

Yours faithfully,

SIGNED

C. I. GONDOSIO

COUNTY LABOUR OFFICER

MACHAKOS"

[Emphasis added]

Instead of heeding the Labour Officer's recommendation to move to the next level of dispute resolution the respondent instead commenced the disciplinary process which is the subject of this dispute. The matter having been referred to the Labour Office, the disciplinary process was unprocedural and in violation of the dispute resolution machinery under the Labour Relations Act which

provides for the dispute resolution machinery under Part VIII.

It is for these reasons that I find the outcome of the disciplinary process unlawful and declare the same null and void.

I am however cognisant of the fact that the cause of the whole situation was the financial circumstances of the respondent. To burden it by reinstatement of the employees would only compound the situation.

In view of the forgoing, I will order that each of the 68 grievants be deemed to have been terminated normally and be paid all terminal dues according to the parties CBA.

In addition, I order that each of the grievants be paid compensation equivalent to 10 months' consolidated salary. Any arrears of salary should also be paid together with salary withheld during the disciplinary process if any. Should parties disagree on computation, each party shall tabulate and file its tabulation in court.

Mention on 30th July 2020 for final orders or further directions.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JUNE 2020

MAUREEN ONYANGO

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 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