



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 298 OF 2011**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA UNION OF COMMERCIAL FOOD AND**

**ALLIED WORKERS.....CLAIMANT**

*VERSUS*

**TANATHI WATER SERVICES BOARD.....RESPONDENT**

*AND*

**NOL TURESH PIPELINE BULK WATER**

**SUPPLY COMPANY LIMITED.....INTERESTED PARTY**

**JUDGMENT**

The Claimant, Kenya Union of Commercial Food & Allied Workers (KUCFAW) instituted this claim by a Memorandum of Claim dated 1<sup>st</sup> March 2011 for the unfair or unlawful summary dismissal of the Grievant, Mr. Simon Muia (deceased) by the Respondent, Tanathi Water Services Board. Nol Turesh Pipeline Bulk Water Supply Company Ltd a company that operates its business within the Respondent's jurisdiction was admitted to the suit as an Interested Party.

The Claimant union avers that the grievant was an employee of National Water Conservation and Pipeline Corporation first employed on 2<sup>nd</sup> November 1992 as subordinate staff. That when he was dismissed on 21<sup>st</sup> July 2009, he was stationed at the interested party's institution as a Plumber. That on 23<sup>rd</sup> July 2009, the grievant was served with two disciplinary letters being a show cause letter dated 15<sup>th</sup> July 2009 and a dismissal letter dated 21<sup>st</sup> July 2009. The grievant appealed to the Respondent on 18<sup>th</sup> August 2009 and served the same upon the Interested Party on 20<sup>th</sup> August 2009 on behalf of the Respondent. The Claimant union then reported a dispute to the Minister for Labour on 26<sup>th</sup> October 2009 as per the law and a conciliator was appointed on 23<sup>rd</sup> April 2010. That after two meetings had failed to take off due to the Respondent's failure to appear, parties were invited for a final meeting on 11<sup>th</sup> August 2010. The conciliator then issued to the parties his report and referral certificate on 30<sup>th</sup> December 2010.

The Claimant avers that it has a valid recognition agreement with the grievant's principal employer National Water Conservation and Pipeline Corporation and is therefore allowed to represent the grievant herein. That since the grievant was deployed to the Respondent's jurisdiction, the Respondent was required to abide by his principal employer's disciplinary procedure prior to taking any disciplinary action against the grievant. That the disciplinary procedures were however not adhered to at the time of the grievant's dismissal as provided for in law and that the grievant was condemned unheard. It contends that the Respondent and the interested party had predetermined to dismiss the grievant at all costs since they dismissed him before expiry of the period in the show cause letter lapsed. That they acted in bad faith and contrary to the spirit of labour laws, the Constitution and the ILO Conventions.

The Claimant union further avers that the grievant's wages were harmonized prior to the issue in dispute and that the contractual cost lost during the time he was out of employment is pegged on the harmonized wages/salaries annexed as **Appendix TN 10**. Its prayers are as follows:

1. That the Court to reinstate the grievant unconditionally.
2. That the Court do order the Respondent to pay loan interest accrued during the period the grievant was out of employment.
3. That the Respondent be condemned to pay the cost of this suit to the claimant.

4. That this Court to award any relief it deems fit to meet cause of justice.

The Respondent filed Response dated 6<sup>th</sup> June 2011 admitting that the grievant was its employee and that he was summarily dismissed for gross misconduct after defrauding a client at Kshs. 7,500 in the cause of duty. That the grievant had owned up and promised to refund the said money to the client but failed to do so. That his summary dismissal was pursuant to **Section 44(1) of the Employment Act** and the letter of employment. It avers that prior to the dismissal, the grievant had previously been warned for misconduct which comprised lateness, defrauding clients, misrepresenting to clients, giving false information, insubordination, absenteeism, gross dereliction of duty, bribing and embezzlement.

That the grievant failed to show cause after receiving the letter and that the Respondent is not bound by **Section 69 of the Labour Relations Act** as it did not sign any agreement with the Claimant Union. It contends that the grievant's actions were a violation of ethics and the penal code and further ruined the reputation of the Respondent. That it had a valid and justified reason to terminate the grievant's employment. Further, that it acted in good faith and without malice given the grievant's behaviour and previous warnings. It prays for the claim to be dismissed with costs.

The Respondent filed a Witness Statement made by an employee of the Respondent, Jane Sein who states that the deceased grievant was an employee of the Interested Party who was an agent of the Respondent as a Water Service Provider under the Water Act 2002. That the grievant had several disciplinary cases against him within the Ministry of Water in which he had worked under various state agencies. She invited this court to look at **documents marked 2 to 15 in the Respondent's bundle**. That after the last show cause letter was issued to the grievant, it was informed he had in a meeting on the 11<sup>th</sup> July 2009, admitted to having defrauded the company yet again and a decision to summarily dismiss him had been reached by the Board of Directors of the Interested Party. She states that due process was followed before, during and after the summary dismissal of the grievant.

### **Evidence**

CW1, MONICA MUSYOKI testified after being granted letters of administration to prosecute this case on behalf of her deceased husband, the grievant. She presented the documents filed by the Claimant union for adoption by this court as the grievant's evidence in this case. During cross-examination, she stated she was not aware of the issues before court and that she only knew her deceased husband had filed a case before this court. She further identified the grievant's signatures in the various documents that were shown to her but stated that she did not know why he had signed the said documents or what they related to.

RW1, JANE SEIN testified and explained the relationship between National Water, Athi Water Services Board, AWASU Water Company and Tanathi Water Services Board: that the Water Act 2002 brought reforms that necessitated the formation of water companies within different regions and which is how the grievant ended up working at EMASU after being seconded by the Water Services Board. She adopted her filed statement and documents as her evidence in this case. During cross-examination, she agreed that while the grievant had been given 7 days to respond and which days were to expire on 22<sup>nd</sup> July 2009, the dismissal letter is dated 21<sup>st</sup> July 2009. That the grievant received both the show cause and dismissal letters on 3<sup>rd</sup> August 2009. She also conceded that the grievant was never taken through any disciplinary hearing by Tanathi. She stated she was not aware if Nol-Turesh took the grievant through any disciplinary hearing or even invited him for one. Under re-examination, she stated that she interacted with the grievant through the Principal Agency Agreement between Tanathi and Nol-Turesh through the Managing Director.

### **Claimant's Submissions**

The Claimants submit that neither the Respondent nor the Interest Party dislodged the grievant's grounds of appeal conclusively and that the only action the Interested Party took was to redirect the appeal to the Respondent who was the author of the dismissal letter. That since the Respondent was senior in position/authority to the Interested Party, it was the right institution to review interested Party's position/action as under Sections 53 and 55 of Water Act 2002 (repealed). That the Respondent's supervisory role is further echoed in the Ministry of Water and Irrigation letter/circular dated 27<sup>th</sup> July, 2007.

It submits that the Respondent's witness confirmed during cross-examination that the grievant received both the show cause and dismissal letters on the same day demonstrating he was condemned unheard contrary to Section 41 of the Employment Act. That in the dismissal letter, the Respondent referred to a meeting of 11<sup>th</sup> July 2009 but failed to produce evidence in court to confirm that such a meeting took place. That not even an invitation letter, attendance register and minutes to confirm existence of such a meeting were availed and that in the absence of the said documents duly signed by the grievant or his representative, the allegations must fail. The Claimant further submits that the letter dated 5<sup>th</sup> July 2009 referred to by the Respondent in the dismissal letter was not availed in court for interrogation within the provisions of the Evidence Act and that in the absence of credible evidence, the allegations must fail. It further contends that the disciplinary letter relied upon by the Respondent had outlived their usefulness by virtue of the Regulation of Wages and Conditions of Employment Act Cap 229 (repealed and saved within the provisions of Section 63 of Labour Institutions Act 2007). It cites the case *Antony Mkala Chitavi v Malindi Water and Sewerage Co. Ltd* [2013] eKLR where the court held:

"The ingredients of procedural fairness as I understand it within the Kenya situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee."

Secondly, it would follow naturally that an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."

It further submits that the Respondent failed to observe the provisions of Section 41(2) of the Employment Act before terminating the employment of the grievant under section 44(4) of the Act. The Respondent did not also discharge its burden of proof that its reasons for dismissing the grievant were valid within the provisions of Sections 45(2) and 47(5) of the Act.

On the claim for maximum compensation, the Claimant union relies on the holding of the court in Paul Mumo Kitavi vs. ACME Containers Ltd (2019) eKLR and invites the Court to further consider that the grievant served from 1992 to 2009. It submits that the remedial powers of the court are anchored in Section 12 of the Employment and Labour Relations Court Act and urges the court to make orders for several prayers it makes in its submissions including compensation of the grievant.

#### Respondent's Submissions

The Respondent submits that **section 54(1) of the Labour Relations Act** provides for recognition of a trade union by an employer while **Section 59 of the Labour Relations Act** defines the effect of collective bargaining agreements as creating a nexus between the employee and the employer. The Respondent submits that the Claimant union has not established it has a valid Recognition Agreement which would otherwise create a contractual agreement as between the union and the Respondent herein and that to this end, this suit as against the Respondent is defective and ought to be struck out.

It submits that it had valid and fair reason for terminating the grievant's employment as under **Section 45(2) of the Employment Act** given his persistent conduct as an employee of different organizations within the Ministry of Water. That the grievant did not refute in his letter of appeal that a disciplinary meeting took place and only raised a concern that his shop steward was not present at the said meeting.

On the reliefs sought by the Claimant union, the Respondent submits that the Claimant did not specifically plead for compensation in its pleadings and it urges this court to disregard in total the prayer for monetary compensation brought up in the Claimant's submissions because parties are bound by their pleadings. It relies on the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR** where the court held that:

*“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”*

That on the prayer for reinstatement, the said orders cannot issue because unfortunately the grievant is deceased. On the prayer for loan interest, it submits that the same was not substantiated in evidence and that it should therefore fail. The Respondent finally submits that since the Claimant union did not prove its case to the required standard, the court should condemn them to pay costs of this suit.

#### Analysis and Determination

The issues for determination are whether the Claimant union had the locus standi to represent the grievant in this suit, whether the Claimant was wrongfully and unfairly dismissed from employment by the Respondent, and lastly whether the Claimant union is entitled to the remedies sought.

The Claimant union submitted that it was properly before this court as it had a recognition agreement with the grievant's principal employer, National Water Conservation and Pipeline Corporation while it was the Respondent's case that this suit should fail as it had not signed any Collective Bargaining Agreement with the claimant herein that would bind them. RW1 confirmed in her testimony that the Water Act 2002 brought with it reforms that allowed employees in the water sector to be seconded to various water boards in the region. I find that the recognition agreement signed between the Claimant union and the National Water Conservation and Pipeline Corporation who first employed the grievant suffices to create a nexus between the Respondent and the union, as the Respondent had a supervisory role over the grievant. Further, this court is mandated to hear the suit between the parties herein under **Section 12 (1)(b) of the Labour Relations Court Act**.

In the case of **Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR** the court stated:

*“Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union.*

*After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decisions whether or not to dismiss or terminate the services of the employee.”*

The Respondent did not tender any evidence to prove that the grievant was taken through a disciplinary process satisfying the minimum standards of fairness under **Section 41 and 45 of the Employment Act**. Its averment that the grievant was heard fails for lack of evidence. Under cross examination, RW1 admitted that the claimant was not given a hearing and was dismissed on 21<sup>st</sup> July 2009 while the period in the show cause letter was expiring on 22<sup>nd</sup> July 2009. Further, that he received both the show cause and dismissal letter on 3<sup>rd</sup> August 2009. In the case of **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR** as quoted in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR**, the Court stated:

*“...Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence...The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”*

RW1 also confirmed during her cross-examination that the Respondent did not afford the grievant a proper hearing or a chance to defend himself before a disciplinary committee. It is therefore my finding that due process was not adhered to in dismissing the Grievant. As was expounded in the case of *Antony Mkala Chitavi* case above, the grievant’s summary dismissal lacked procedural fairness. For that reason, the grievant was unlawfully and unfairly dismissed from employment by the Respondent.

It is true that the remedial powers of the court are anchored in **Section 12(3) of the Employment and Labour Relations Court Act**. The Claimant Union prayed that this court exercises its power in awarding the grievant herein compensation. I agree with the Respondent that the Claimant union cannot purport to raise other prayers for compensation in its submissions that were not pleaded in the claim as was held in the *Daniel Otieno Migore* case above.

The Claimant specifically pleaded for the reinstatement of the grievant but since he is deceased, the prayer is not capable of being granted. The court will in place thereof grant compensation. Taking into account the very long service of the claimant which spanned 17 years, the fact that the claimant was never given a hearing and all other circumstances of his case, **the dismissal is reduced to a normal termination of employment and the respondent directed to pay the grievant normal terminal dues together with compensation equivalent to 10 months’ salary as compensation.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JULY 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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**