REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 803 OF 2013

(Formerly Nairobi HCCC 398 of 2003)

Before Hon. Lady Justice Maureen Onyango

THOMAS M. NGUTI AND 196 OTHERS.....CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

JUDGMENT

The Claimants herein were employed by the Respondent as locomotive drivers. They aver that their union was involved in a trade dispute with the Respondent in **Industrial Court of Kenya at Nairobi Cause 72 of 1995 Railways Workers Union (K) v Kenya Railways Corporation**. They aver that in a Ruling dated 4th May 1998, the Court delivered an award in their favour in which it Ordered that the Claimants be paid a salary increase of 25% by the Respondent and the introduction of a separate scheme of service for locomotive drivers.

The Claimants aver that Court published the award vide Gazette Notice No. 4570 of 1998. They aver that the Respondent has been under a legal duty to implement the award but has refused, neglected or failed to implement the award in clear violation and disregard of the provisions of the Trade Dispute Act (now repealed).

They seek the following reliefs in their Amended Plaint filed on 7th December 2011; -

1. A mandatory injunction to implement the Industrial Court Award in Cause No. 72 of 1995 dated 4th May 1998.

2. Payment of the Plaintiffs' salary arrears under the respective contracts of employment as modified by the Industrial Court award with effect from 1st January 1996 amounting to a sum of Kshs.429,599,897.80.

a) The Court be pleased to determine and grant the Plaintiffs the sum due for the period between 31st May 2009 and up to date of judgment in this case.

3. A permanent injunction to restrain the defendant by itself, its servants or agents from intimidating, harassing or interfering in any manner whatsoever with the Plaintiffs' employment and residences pending hearing and determination of this suit.

4. A declaration be issued to declare that the Defendants' letters of forfeiture of the Plaintiffs' respective appointment dated 30th April 2003 are null and void *ab initio*.

a) A declaration be issued to declare that the Defendant had no power under section 17 of the Employment Act Cap 229 to dismiss and/or terminate the Plaintiffs employment on account of a strike action not adjudged unlawful.

b) An order to quash the Defendants letters dated 30th April 2003 or forfeiture of the Plaintiffs appointments.

5. A declaration be issued to declare that the defendant has deliberately, wilfully and contemptuously disobeyed the lawful orders of the Industrial Court of Kenya in Cause No. 72 of 1995.

a) A declaration be issued to declare that the Plaintiffs are employees of the defendant unless and until their employment is

lawfully terminated.

6. Interest on (2) above at commercial rates of 25% from 1st January 996 till payment in full.

7. Costs of this suit.

8. Any other or further relief that this Court deems fit and just to grant.

The Defendant filed a Defence on 12th November 2003. It avers that the award in the Ruling delivered by Chemmuttut J. on 4th May 1998 was in favour of the Railways Workers Union and not the Plaintiffs. It avers that it was under a duty to implement the award and that it embarked on a program to implement the award. It avers that it implemented the award beyond its scope in that the locomotive drivers were paid aggregation allowance, messing allowance, stabling allowance, under rest and over rest, overtime allowance and medical allowance.

It further avers that each of the Plaintiffs had a distinct and separate contract of employment. It maintains that it fully implemented the award of the Industrial Court.

Claimants' Case

FREDRICK OCHIENG OPONDO, testified as CW1. He testified that the issues in Cause 72 of 1995 were on mileage allowance, salary, housing and disturbance allowance. He testified that after the gazettement of the award, the separate scheme was not put in place and the 25% salary increase was not paid.

He testified that he received an annual salary increment and was informed of the increase through written communication. He testified that he never received any communication on the award and he did not have any payslip showing the increase. He further testified that the Respondent has not produced any communication on the increment.

He testified that he is aware that he was terminated on accusations that he absconded duty and had given up his appointment. He testified that from its Press Release, the Respondent knew where they were.

He testified that the High Court had restrained the Respondent from interfering with their employment and that the matter proceeded on Appeal as Appeal 210 of 2004. He testified that the changes in his salary until the date he left employment was as a result of yearly increments and Collective Bargaining Agreements and that these increments were to all workers.

In cross-examination, he testified that some of the Claimants herein are deceased including the 1st Claimant and that he has not been instructed by their legal representatives. He testified that the 25% increment was to be factored into each locomotive driver's salary. He testified that their 1st letter to the Minister of Transport was not signed and had been written by locomotive drivers though there was no association known as locomotive drivers. He testified that the letter implored on the Minister to act failure to which they were to resort to industrial action.

He testified that in their 2nd letter they asked the Respondent to resolve their grievances but they did not notify their employer directly and that this letter served as notification to their employer. He further testified that on the day of the strike, the locomotive drivers reported to work but they did not drive the trains. He testified that in their pleadings, they did not indicate the amount they were each earning to enable them arrive at the sums prayed for.

JULIUS NGUGI MAINGI testified as CW2. He testified that after going on strike the claimants were dismissed from employment and evicted from their residences. He testified that their calculation is based on their respective salaries including the 25% increase.

In cross-examination, he testified that Kenya Railways knew that they were on strike. He testified that the strike notice to Kenya Railways was addressed to the Minister for Transport and that the Respondent's Managing Director was copied in the letter. He testified that there was no strike notice addressed to the Kenya Railways. He further testified that they had indicated their individual salaries.

Respondent's Case

NEMWEL ATEMBA the Respondent's Human Resource Officer testified as RW1. He relied on his Witness Statement dated 27th January 2015 as his evidence in chief.

In cross-examination, he testified he was aware that the award issued by the Court became part of the contract for locomotive drivers.

It was his testimony that the increment was staggered, renegotiated and implemented over time. He maintained that after the gazettement of the award salaries were increased but not by 25%. He further testified that there were various notices on salary increase.

He testified that the CBA effective 1st January 1996 to 31st December 1997 could have possibly implemented the Court award because the parties kept on renegotiating. He testified that the Respondent's position is that it was implementing the award that was yet to be delivered. He further testified that the salary reviews from 1995 to 2001 were implementing the CBA.

He testified that the increments surpassed the Court's award. He testified that the Claimants absconded duty for more than 7 days and were therefore dismissed. He testified that the Managing Director in a press statement indicated that he was aware that the employees were on

strike but nobody knew where they were.

Claimant's Submissions

The claimants submitted that although the award becomr an implied term of their contracts of employment, it was neither implemented nor varied by a subsequent award or by an agreement as envisaged by Section 16(6) of the Trade Disputes Act, now repealed.

The claimants submitted that Special Notice 1 and 2 of May 1999 and Special Notice 1 and 2 of 2000 related to salary review of all unionisable and non-unionisable employees. They argued that none of these notices implemented the Award.

The claimants submitted that though the Respondent argues that it implemented the award, it resisted the award together with the Kenya Railways Workers Union. They submitted that there is no factual or evidential basis for the Respondent's contention that it implemented the award.

They submitted that the Respondent has not pleaded any grounds or reasons to justify the termination of the employment of the Claimants as provided under Sections 41 and 43 of the Employment Act. They submitted that the letters on forfeiture dated 30th April 2003 did not refer to the strike action that the Managing Director addressed in the Press Release on 28th April 2003.

It is their submission that no fair action was taken in accordance with the provisions and regulations of the relevant legal instruments. They argued that section 17 of Cap 226, now repealed, provided that absconding duty was one of the grounds for dismissal. It is their submission that in the circumstance where their participation in an industrial action had not been declared illegal it could not constitute absconding duty. Further the strike action did not constitute violation of Section G13(e) of Kenya Railways Personnel; Regulations, 1988.

The claimants relied on the case of **Kenya Pipeline Company Limited v Glencore Energy (U.K.) Limited [2015] eKLR** where the Court cited the decision in **Standard Chartered Bank v Intercom Services Ltd & 4 Others** to the effect that where an issue of breach of statute is brought to the Court's attention the Court must investigate it because its fundamental role is to uphold the law. They urged the Court to grant the reliefs sought in the Amended Plaint.

Respondent's submissions

The Respondents submitted that the laws applicable to this case are the repealed Employment Act Cap 226 and the Trade Disputes Act. In support of this submission, they relied on the case of **Mary Wakhubi Wafula v British Airways PLC [2015] eKLR**.

It submitted that the Claimants absented themselves from work on 22nd April 2003 which led to the forfeiture of their appointments in line with Regulation G 13 (e) of the Personnel Regulation 1988. They relied on the case of **Gibson Namasake v Linksoft Group Ltd [2018] eKLR** where the Court held that desertion in employment law is a repudiation of the contract of employment and an employer is entitled to dismiss an employee on grounds of the repudiation of contract.

It submitted that the Claimants participated in an unlawful strike. It submitted that section 34 of the Trade Disputes Act provides that anyone who declares or instigates or incites others to take part in an unlawful strike is guilty of an offence and that any person who ceases work or refuses to continue work in furtherance of an unlawful strike breaches the contracts of employment.

It submitted that the strike notice being anonymous and not having been signed, was not the notice contemplated under Section 4 of the Trade Disputes Act. It relied on the case of **County Government of Uasin Gishu v Kenya National Union of Nurses [2014]** where the Court held that the right to strike is not absolute and can be limited under the Constitution.

It submitted that the Claimants' dismissal was lawful and they are not entitled to the prayers sought. They relied on section 5 of the Employment Act and the decision in **Robert Kazungu Kaingu & 139 Others v Cook 'N' Lite Limited [2019] eKLR** where the Court held that employees who reject the advice of their Union and engage in prohibited outlawed strikes expose themselves to claims for losses suffered by their employer as a result of illegal industrial actions.

It submitted that it paid the Claimants the wages due to them after serving the forfeiture of appointment letters. It submitted that should this Court find that the dismissal of the claimants was wrongful, the compensation they are entitled to is the amount that the employer would have been obliged to pay in accordance with the terms of the contract being one month's salary in lieu of notice.

In conclusion, the respondent urged the Court to find that the Claimants absconded duty which led to them being summarily dismissed and that they left on their own volition.

Analysis and Determination

The issues for determination are:

1. Whether the termination of the employment of the claimants was unlawful.

2. Whether the Respondent implemented the Industrial Court award in Gazette Notice No. 4570 of 1998.

Termination

The Claimants aver that they had a right to secure the enforcement of the Industrial Court award through strike action. They do submit that they resorted to strike action on 22nd April 2003. The Respondent on the other hand submitted that the Claimants absented themselves from work on 22nd April 2003 without justifiable cause.

Section 26 of the Trade Disputes Act (repealed) provided that:

> ***"A strike or lock-out shall be unlawful –***
>
> ***(a) unless a report in writing of a trade dispute has been made to the Minister and twenty-one days have elapsed since the date on which the dispute was so reported, and the period of notice specified in any recognition or registered collective agreement relevant to that trade dispute has expired; or***
>
> ***(b) if the Minister has within the period of twenty-one days refused to accept the report under section 5 (1) (b), unless the Minister or the Industrial Court has revoked that refusal."***

From the evidence on record, it is common ground that the claimants went on strike on 22nd April 2003. Before the strike a notice had been sent to the Minister for Transport. The first notice giving 21 days' notice is dated 12th March 2003. Refer to Exhibit "TMN5" in the affidavit of Thomas Mutuku Nguti sworn on 30th April 2003. A second 7 days' notice was issued in similar manner on 8th April 2003. The notices are copied to Permanent Secretary Ministry of Transport, Managing Director Kenya Railways, Secretary General COTU, Secretary General RAWU and Justice Minister. The claimants went on strike from 22nd April 2003 and were dismissed from service by letters dated 30th April 2003. The letters state as follows –

> *"FORFEITURE OF APPOINTMENT*
>
> *It is noted from the records maintained at the Depot Superintendent's office that you have not reported on duty since 22/04/03. You are therefore, deemed to have forfeited you appointment with the Corporation effective 22/04/03 in terms of Section 17 of the Employment Act, Cap 226, Kenya Railways Corporation Act, Cap 397 and Kenya Railways Personnel Regulation 1988, Section G.13 (e). In the circumstances, you will not be eligible for payments of terminal benefits.*
>
> *Subsequently, you are hereby given twenty-four hours' notice to vacate the Railway Quarter if in occupation of one and return any tools and plants in your possession to the Corporation.*
>
> *G. N. M'KWENDA*
>
> *LOCO MAINTENANCE ENGINEER"*

Upon receiving the letters of dismissal, the claimants went to court seeking conservatory orders and were granted orders as follows –

> *1. The Respondent be and is hereby ordered to implement the industrial court award in cause No. 72 of 1995 dated 4th May 1998.*
>
> *2. The Respondent be and is hereby ordered to pay the Plaintiffs salary arrears under the respective contracts of employment as modified by the Industrial Court, award with effect from 1st January 1996.*
>
> *3. The Respondent be and is hereby restrained by itself its servants or agents from intimidating, harassing or interfering in any manner, whatsoever with the Plaintiffs employment and residence pending hearing and determination of this suit.*
>
> *4. The Respondent be and is hereby restrained from any future re-engagement not past ones.*
>
> *5. The Respondent's letter dated 30th April 2003 addressed to the Applicants be and is hereby nullified.*
>
> *6. Interest on (2) above at commercial rates of 25% percent from 1st January 1996 till payment in full.*
>
> *7. The Applicant be paid costs of this application."*

The orders were however reviewed by the Court of Appeal following an appeal by the respondents as follows –

> *"... In the result we allow the appeal to the extent that the orders for mandatory injunction numbers 1, 2 and 6 in the order of the superior court given on 26th September 2003 and issued on 23rd October 2003 are set aside. In respect of order No. 5 nullifying the letter of 30th April 2003, we set aside the-order of nullification and substitute it therefore an order suspending the letter dated 30th April 2003. We have no reason to interfere with the orders 3 and 4 for prohibitory injunction and we dismiss the appeal in respect thereof. However, in the interests of justice and in order to ensure that this old matter is expeditiously resolved, we limit the life of orders 3, 4 and 5 (suspension) to 12 months from the date of this judgment unless it is extended by the superior court for good reasons."* [Emphasis added]

It is from this perspective that I have to determine the issue of termination of the employment of the claimants.

The Court of Appeal in its Judgment delivered on 8th May 2009, suspended the letters of forfeiture dated 30th April 2003. However, the suspension was valid for 12 months only from the date of the Court of Appeal Judgement. With this in mind, this implies that the employment of the claimants remained in force until 12 months from the date of the judgment of Court of Appeal or any other date to which the orders of forfeiture were extended. None of the parties has mentioned the issue of extension of the orders. My perusal of the record does not disclose any extension of the orders. This being the case, the logical conclusion is that the claimants were in employment and therefore entitled to payment of salary and other benefits up to 8th May 2010, the orders having been made on 8th May 2009.

The next issue is whether the dismissal was unlawful.

In this regard, the parties have referred the Court to the provisions of the Employment Act, 1977 (now repealed), the Trade Disputes Act (now repealed) as the relevant documents that govern the terms and conditions of service of the employees. No mention is made of the Kenya Railways Corporation Act (Cap 397) of the laws of Kenya which at Section 79 provides for appointment of staff as follows –

> **79. Appointment of staff**
>
> **(1) Subject to the provisions this Act, the Board may appoint such employees as may be necessary for its efficient working under such terms and conditions, including conditions relating to discipline and dismissal, as it may think fit.**
>
> **(2) The Managing Director may, by notice in writing, authorize any employee appointed under this section to maintain order upon any premises occupied by the Corporation or in any inland waterways port, train, vessel or vehicle of the Corporation and any employee so authorized shall, in the performance of such duty, have all the powers, rights, privileges and protection of a police officer.**
>
> **(3) Every person who is employed in the undertaking of the East African Railways Corporation and who becomes an employee of the Corporation under section 95 shall be deemed to have been appointed to the service of the Corporation in accordance with this section.**

Further, although the claimants or some of them were unionisable, parties did to provide a copy of the complete CBA to enable the court consider the terms and conditions of service relating to discipline of employees as provided in the CBA. The letters issued to the claimants dated 30th April 2003 refer to Section 17 of the Employment Act, Kenya Railways Corporation Act and Kenya Railways Personnel Regulations 1988, Section G13e. The Personnel Regulations are necessary for the court to determine whether or not the termination of the employment of the claimants was unlawful.

For these reasons, I will defer the determination of this issue pending the parties' production of a copy of the relevant CBA with terms and conditions of service relevant to the termination of employment and a copy of the Kenya Railways Personnel Regulation 1988.

The final determination on the issue of the terminal benefits and implementation of the Court Award of 4th May 1998 will also await the submission of the said documents by the parties.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF AUGUST 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, 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