

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 343 OF 2017

KENYA UNION OF DOMESTIC, HOTELS EDUCATIONAL

INSTITUTIONS, HOSPITALS & ALLIED WORKERS.....CLAIMANT

VERSUS

TECHNICAL UNIVERSITY OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimant union sued the Respondent seeking relief for 5 Grievants namely Clement Odia Agwingi, Harrison Kinywa Mugambi, Queen Mbaika Mwikali, Richard Ng'eno and Peter Chege. It was averred that they were all former employees of the University which had changed from Kenya Polytechnic upon grant of a Charter in 2009. The 1st Grievant Clement Odia was employed on 1st October 1990 as a caretaker assistant earning a basic of Kshs. 930/- plus house allowance of Kshs. 240/- a month. He was issued a show cause letter on 1st October 2014 and on 10th October he was interdicted. His services were terminated on 16th January 2016. He appealed the decision through a letter dated 17th February 2016 and his appeal was rejected on 22nd April 2016. At the time of termination he was earning Kshs. 16,632/-, a house allowance of 10,371/- and a commuter allowance of Kshs. 4,200/-. The 2nd Grievant at the time of filing suit was deceased. The 3rd Grievant was employed as a caretaker in 1st July 2009 earning a basic salary of Kshs. 9,389/- and a house allowance of Kshs. 5,380/- per month along other allowances. Her services were terminated on 26th January 2015 on allegations of participating in an illegal strike, creating a disturbance and interfering with the operations of the University and engaging in activities that brought the name of the University into disrepute. She was served with a show cause letter dated 1st October 2014 and was interdicted on 10th October 2014 and dismissed on 26th January 2015. She appealed her dismissal on 17th February 2015. The 4th Grievant was served with an interdiction on 10th October 2014 for participating in an illegal strike. He was invited to a disciplinary panel hearing on 2nd December 2014 and he was dismissed on 26th January 2015. The 5th Grievant was dismissed on 26th January 2015 for participating in an unprotected strike in total disregard to a court order. He appealed the termination on 17th February 2015 and was informed on 22nd April 2016 that his appeal against dismissal was unsuccessful. The Claimant reported a dispute to the Minister of Labour, Social Security and Services on 30th January 2015. The conciliator Mrs. A. O. Tabu sought the proposals of the parties on 11th February 2015 and the matter went to rest. The Claimant sought the reappointment of another conciliator as the one appointed had retired. This did not happen and the Claimant filed the suit seeking the reinstatement of the claim.

2. The Respondent's defence was to the effect that the Grievants were involved in an illegal strike, were issued with show cause letters, interdicted, invited to disciplinary hearings and subsequently dismissed after the hearings conducted. The Respondent averred that the dismissal of the Grievants was in accordance with fair procedure and that the Grievants were paid their terminal dues.

3. The parties consented to have the matter determined in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Claimant filed submissions on 18th December 2018 and the Respondent filed submissions on 16th January 2019. In their submissions, the Claimant submitted that whatever the Grievants did in relation to the strike was what everybody else did and there was nothing they did that any other staff did not do. The Claimant submitted that the fact the letters inviting them indicated they were free to bring a witness, it did not give them an opportunity to be represented. The Claimant submitted that under the CBA they were to be copied in when there is an interdiction. The Claimant thus submitted that any action taken was contrary to the law and the Grievants were not represented and therefore the dismissal by the Respondent was unfair and unlawful.

4. The Respondent submitted that the Grievants expected the union officials to be present at the disciplinary hearings but they did not show up. It was submitted that the Grievants were given an opportunity to be heard. The Respondent relied on the case of **Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union [2017] eKLR** where the court held that the reinstatement could not be ordered where 3 years had lapsed. The Respondent thus submitted that the reliefs sought by the Claimant on behalf of the Grievants cannot be granted. The Respondent urged the dismissal of the Claimant's suit with costs.

5. The grouse the Claimant has is the dismissal of the Grievants. They were dismissed after the illegal strike which they conceded was not kosher. They stated in letters appealing their dismissal that they were misled by the officials of the Claimant. Their appeals were unsuccessful precipitating the reporting of a trade dispute. There was no referral certificate to this court in terms of Section 73 of the Labour Relations Court as read with Section 69(a) and Rule 5(1)(b) of the Employment and Labour Relations Court (Procedure) Rules 2016. The dispute before the court therefore is a non-starter.

6. The claim was not proved to the required standard as there is no evidence that the Claimant was entitled to the remedies sought for the Grievants. One of them was even deceased and therefore there was no way he could have instructed the Claimant to initiate the suit. The suit is fit only for dismissal albeit with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 21st day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar