REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 193 OF 2015

(*Before Hon. Lady Justice Maureen Onyango****)***

KENYA UNION OF SUGAR PLANTATION AND

ALLIED WORKERS.....CLAIMANT

VERSUS

SONY SUGAR COMPANY LIMITED.....RESPONDENT

JUDGEMENT

Background

The claim herein is filed by Kenya Union of Sugar Plantation and Allied Workers, a trade union registered in Kenya to represent workers in the sugar sector. The claimant has a recognition agreement with the respondent, Sony Sugar Company Limited who is a member of the Sugar Employers Group of FKE. The membership of the group is drawn from Sony Sugar Company Limited, Muhoroni Sugar Company Limited (in receivership) and Chemilil Sugar Company Limited.

The group and the union have negotiated many collective agreements and as at May 2012, the time material to this suit, the relevant collective agreement in force was the one covering the period 2009 – 2011. They were in the process of negotiating the Collective Bargaining Agreement for the period 2011 – 2013. The negotiations had taken a long time and workers were getting restive.

On 24th May 2012, the respondent's factory siren was switched on during a non- regulated time at around 9.00 am. Several employees responded to the siren and gathered at the cane yard. They were demanding implementation of a 20% salary increase that they had apparently been promised by the respondent's Managing Director during on the Team Briefing Session that were regularly held between the Managing Director and the workers.

On that day, the respondent was also holding a board meeting. The workers were addressed by the respondent's Industrial Relations Manager who had been sent by the Managing Director in the company of the Security Manager and later by the Union Branch officials after which the workers dispersed at about 2 pm.

Following the incident, several employees among them the grievants were issued with show cause notice/interdiction letters on 28th May 2012 which they responded to between 30th May and 4th June

2012. They were thereafter taken through a disciplinary hearing. After the disciplinary hearings, three of them were summarily dismissed while five were issued with letters of termination.

The issue in dispute according to the memorandum of claim filed on 15th June 2015 is stated as the summary dismissal of

1. Johnson Otieno 1st claimant

2. Ezekiel Olande 2nd claimant

3. Zablon Otina 3rd claimant

And termination of employment contract of

1. Michael Onduru

2. Nyangena Mochama

3. Milton Obote

4. Joshua Opiyo Rae

5. Silvans Nyambasa

The claimant prays for the following remedies –

1. That the Court to overturn the decision to dismiss/terminate the claimants and reinstate them back to their employment positions without loss of benefits.

2. If reinstatement may not be considered for whatever reason, then the dismissal of the employment contracts should be changed to normal termination of employment contracts to enable the dismissed claimants be paid their terminal benefits.

3. That the claimants be paid their monthly payments from the date of termination to the date of determination of the matter in court because the termination of their employment contracts was occasioned by the respondent's own fault.

4. That the claimants be paid full compensation for wrongful and unfair dismissal and termination of their employment contracts.

5. The respondent to pay costs of the cause.

The respondent filed a defence denying that the summary dismissal/termination of the grievants were unfair. According to the respondent, the grounds of dismissal/termination were valid and the grievants were taken through a fair procedure. The respondent prays that the claim be dismissed with costs.

At the hearing, the claimant called one witness EZEKIEL OLANDE OKEYO, the 2nd grievant who testified on behalf of all the grievants. The respondent called JACK OPIYO, the Industrial Relations Manager. Thereafter parties filed and exchanged submissions, which they later highlighted in court.

Claimant's Case

CW1 EZEKIEL OLANDE OKEYO testified that he was employed by the

respondent on 1st March 1994 as a stores clerk. On 25th May 2012, he reported to work in the main stores

at 7.00 a.m. At around 9.00 am he sought permission from his immediate supervisor to go and register his newborn baby and also visit the dispensary. He proceeded to Human Resource office and then the dispensary.

While walking back to his workstation, he saw employees being addressed by the Industrial Relations Manager who was in the company of the Security Manager and joined them. The employees were demanding salary increase promised by the Managing Director. After about 30 minutes, the Industrial Relations Manager asked them to go back to work as he took their plea to the Managing Director. He then went back to work. He denied that there was a strike or sit-in by the workers.

CW1 testified that alt the time cane crushing had stopped and workers were engaged in light duty. He testified that the workers had been promised salary increases by the Managing Director at two previous team brief meetings, which he had attended.

CW1 testified that the following week on 28th May 2012, they were interdicted and given show cause letters, which they were to respond to within a specified period. He responded to the show cause letter, was invited to a disciplinary hearing on 11th and 12th June 2012 and after 2 days, he received a letter of summary dismissal. He testified that he was not represented at the disciplinary hearing by a union official. The panel was composed of three management representatives.

CW1 testified that he appealed against the dismissal seeking for a review. He got a response from the Managing Director advising him that he had found no new grounds to warrant the review of the summary dismissal.

Under cross-examination, CW1 testified that he was a union member but not a shop floor officer. He reiterated that there was a promise of salary increase at two team briefs, which he attended. He testified that union members were unhappy as the Collective Bargaining Agreement had lapsed and negotiations for the next Collective Bargaining Agreement had taken over one year. He testified that the meeting of 25th May was attended by all employees numbering around 900. He testified that he was not aware of any other function taking place on that day or that there was a trade dispute that had been reported by the union.

CW1 testified that prior to hearing the siren he was not aware of the meeting nor was he aware about who switched on the siren. He testified that Esther Auma Miguse, the Union Branch Treasurer also attended the meeting but was not issued with a show cause letter or terminated. He testified that the workers were addressed by the union on that day after meeting with management and assured them that no one would be victimised for attending the meeting. He was therefore surprised when disciplinary action was taken against him two weeks later.

Respondent's Case

JACK OPIYO, RW1, testified that he was the Industrial Relations Manager of the respondent where he had worked for more than 15 years. He testified that at the time material to this case, there were ongoing negotiations of a Collective Bargaining Agreement to succeed the one for the period 2009 to 2011. He was not aware of any promise of salary increase by the Managing Director that he was aware of. In his opinion, no salary increase could be given outside the negotiations.

RW1 testified that on 5th May 2012, there was an Annual General meeting and Board Members were in attendance. Employees had reported to work as usual. Around mid-morning, he heard the siren ringing at a non-designated time. It was long and sounded like an ambulance. Most employees were taken by surprise as such a siren could have been an indication of imminent danger. There was a commotion everywhere. He came out of his office and met with the Managing Director who was heading to the office of the Human Resource Manager next to his office. The Managing Director then directed him to go with the Security Manager to the factory to establish the reason why the siren was on.

When they reached the cane yard, they found a group of about 88 employees gathered there. RW1 addressed the employees who insisted on being paid the Collective Bargaining Agreement salary increases on that day failing which they would not work. He informed them that the Collective Bargaining Agreement was still under negotiation.

RW1 testified that cane crushing and normal operations were disrupted by the commotion. He testified that the workers remained in the yard while he and the Security Manager went to report back to the Managing Director in the office. They only dispersed at 2 pm when their shift ended.

He testified that the matter was investigated by the Security Officer and the persons involved interdicted by their respective line managers. After they responded to show cause letters, they were taken through disciplinary hearing and those found culpable dismissed summarily or terminated.

RW1 testified that he was aware about team briefs when the management briefed and gave feedback to employees on various issues on operations and business. He stated that he attended all of the team briefs and there is no time that the Managing Director promised to pay salary increase to the workers.

Under cross-examination, RW1 testified that the respondent did not involve the union on that day as the union officials were not available. He testified that the Head of Human Resource did not address workers because she was involved in the Board meeting and that he addressed the workers because as Industrial Relations Manager the issue was in his docket. He testified that the Security Manager did not address the workers and denied that the workers were agitated because of the Security Manager's presence.

RW1 testified that the union officials met in the Human Resource Office on that day and he was in attendance. It was agreed that the union addresses the workers and that no one would be victimised. He testified that he was not aware that there was no cane crushing on that day as the case was being accumulated for crushing at night due to cane shortage.

He testified that on that day, there as an annual general meeting but the workers were not notified, as they were not involved.

He testified that at the disciplinary hearing the employees were not accompanied by the union out of choice as the letters inviting them informed them of the right to be accompanied.

Claimant's Submissions

The claimant filed submission, which were highlighted, in court by Mr. Ogutu was represented the claimant. In the submissions it is contended that the respondent provoked the workers by promising them a salary increase of 20% at teams briefs which were not attended by the union. Mr. Ogutu submitted that it is the union which persuaded the workers to go back to work after the respondent's representatives vanished. He submitted that the grievants were victimised out of no fault of their own and should be reinstated back to work.

Mr. Ogutu submitted that the 20% salary increase that was promised by the Managing Director was intended to incite the workers against the union by depicting that the union did into adequately represent the workers at the Collective Bargaining Agreement negotiations. He submitted that all employees assembled at the cane yard on 25th May 2012 but the respondent picked out only eight employees for punishment and that this was discrimination.

Respondent's Submissions

The respondents also filed written submissions, which were highlighted by Mr. Muthanga.

It was submitted that the grievants were properly terminated for gross misconduct, indiscipline and failure to adhere to laid down procedure for dispute resolution. It was submitted that there was no notice for the protest staged by the workers, that the union confirmed it was not aware of the protests until it was staged

thus the industrial action was without justification and amounted to unlawful withdrawal of labour.

It was submitted that the claimant failed to prove that the Managing Director had promised the workers a 20% salary increase and there was no proof that the respondent was undermining the authority of the union as alleged by the claimant.

It is submitted that investigations revealed that the grievant were actively involved in disruption of work on 25th May 2012 by switching on the siren, engaging in unruly behaviour and convening an unlawful assembly. It is submitted that this amounted to gross misconduct for which they were justifiably dismissed or terminated. It is further submitted that the respondent complied with the procedure in the Collective Bargaining Agreement by convening an *ad hoc* disciplinary committee which gave the grievants a hearing. It is submitted that some of the grievants appealed and were afforded a further hearing.

On the prayers by the claimant, it is submitted that reinstatement is not tenable, as the respondent has lost faith in the grievants.

Determination

I have carefully considered the pleadings and the evidence on record as well as the submissions made on behalf of each party. The issues for determination are whether there was valid reason for termination or summary dismissal of the grievants, whether they were subjected to fair procedure and if they are entitled to the remedies sought.

Validity of Reason

In the letters of interdiction and show cause issued to all the grievants, the charges are uniform and are framed as follows –

> *"Dear Sir*
>
> *RE: SHOW CAUSE NOTICE/INTERDICTION*
>
> *Management's attention has been drawn to your misconduct in that on 25th May 2012 having reported on duty at 7.00 am.*
>
> *i) You knowingly, wilfully and without lawful cause disappeared from the place appointed for the performance of your work between 9.00 am and 2.00 pm or thereabouts contrary to Company Rules and Regulations.*
>
> *ii) You engaged in unlawful assembly within the employer's premises during the said period thereby displaying defiance or disobedience to lawful authority contrary to the provisions of Industrial Relations Charter and punishable by the Employment Act 2007 currently in force.*
>
> *iii) You encouraged breach of peace and/or caused work disruption by sounding the siren and exhibiting militant behaviour thereby intimidating your peers and superiors and/or causing uncalled for antagonism/despondence in the company despite management's advice to resume work/duties.*
>
> *iv) Your display of incurable negligence of duty is highly regrettable and most unfortunate causing loss of time and opportunity to the company and bringing the name of the company into disrepute.*
>
> *v) Your resultant behaviour is a manifestation of gross indiscipline and wanting integrity with impunity ostensibly destined to seek/achieve personal aggrandizement contrary to Code of Conduct and Ethics clause 4.0.*

Please note that these are serious allegations that reflect negatively on you as an employee which management cannot condone at all costs.

You are therefore interdicted with immediate effect and required to show cause within 48 working hours of receipt of this letter why a severe disciplinary action cannot be taken against you for wanting integrity and gross misconduct.

It will be assumed that you do not have any explanation if no reply is received within the specified period therefore management will proceed to take any action deemed appropriate in light of the available evidence and within the provisions of Company's Rules and Regulations.

During the period of itnerdiciton, you will be prohibited to access your office/work station unless permission is obtained from your Head of Department and/or the undersigned.You will able be entitled to receive half of your basic salary or otherwise advised until a final decision on the matter is communicated to you.

Yours Faithfully

For: SOUTH NYANZA SUGAR COMPANY LIMITED

SIGNED

HEAD OF DEPARTMENT

Copy: HHR/HOA – for information

HOF – to effect half basic pay

Personal File"

Each of the grievants responded giving their individual accounts.

Johnson Otieno, the 1st grievant stated that he reported to work at 7 am as usual, that at 9.00 am be heard some noise and decided to inquire about the cause. When he reached where the voice was coming from at the pre-mill area, he found a number of employees talking to the Industrial Relations Manager about rise in the cost of living and management promise of 20% and 25% salary increase. He stated that he developed interest given his financial situation then and little did he know that there was a problem.

Zablon Otina, the 3rd grievant in his response to the show cause/interdiction letter stated that on the material day he reported to work at 7 am as always and worked until around 10 am when he heard dissenting voices emanating from the factory's main gate and thereafter abnormal sounding of the siren. A crowd demanded that all workshop staff join the staff at the cane yard for a meeting with Industrial Relations Manager.

He stated that as shop steward of the workshop, he had no knowledge about prior arrangement for the meeting and opted not to let all workshop staff attend the meeting. He stated that this caused the workers in the workshop to become volatile thereby prompting him to go ahead to find out the cause of the urgent meeting. It is then he learnt the Industrial Relations Manager had been there earlier and promised the workers a 20% salary increase. He stated that just when he had started celebrating the Industrial Relations Manager arrived to address the gathering. After that, he returned to the workshop and continued with his work as usual.

All the other grievants gave similar accounts. They all stated that they were at work when they heard either the noise or siren and went to find out what was happening, joined their colleagues, were addressed by Industrial Relations Manager, then went back to work and worked until their respective shifts ended.

The minutes of the disciplinary hearing does not give any clear picture of what transpired at the hearing. There are no proceedings and what is attached is the decision of the committee after hearing the grievants. It also contains decision in respect of only Michael Onduru 3rd grievant and Milton Obote, 6th grievant. There is therefore no evidence that any of the other grievants were taken through a hearing.

The investigations report of the Security Manager, which is undated, relates to Sylvans Nyambasa, the 8th grievant and Johnson Otieno, the 1st grievant. Neither the minutes of the disciplinary hearing nor the investigation report prove that the grievants were guilty of any of the charges against them. The evidence of RW1 did not pin point any of the grievants as having done anything wrong. On the contrary, he confirmed that the sounding of the siren on 25th May 2012 was at an unusual time and the sound uncharacteristic, signifying imminent danger. The employees and the grievants specifically could therefore not be accused of having left their duty stations to investigate the cause of the commotion and the sounding of the siren which attracted everyone's attention.

Section 43 of the Employment Act is explicit and couched in mandatory terms that

43. Proof of reason for termination

> **(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**
>
> **(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

The letters of termination/summary dismissal do not state the grounds for termination/summary dismissal. The letters which are similar for both the terminations and dismissal state as follows:

> "*Ref: Emp. No. 4810*
>
> *Friday 15th June 2012*
>
> *Zablon O. Otina*
>
> *Mechanic*
>
> *Thro' Head of Agriculture*
>
> *SONYSUGAR*
>
> *Dear Sir*
>
> *RE: SUMMARY DISMISSAL*
>
> *Reference is made to our Show Cause Notice/interdiction letter dated 28th May 2012, your reply of 30th May 2012 and your subsequent appearance in person before the Ad Hoc disciplinary hearing Committee meeting on 13th June 2012.*
>
> *We wish to inform you that your explanation is not acceptable and therefore inadmissible as justification for your misconduct and therefore guilty of the charges already brought to your attention.*
>
> *Without prejudice, we wish to inform you that management carefully considered your case in the light of the available evidence and obtaining circumstances decided that your services with South*

Nyanza Sugar Company limited be summarily dismissed for loss of faith, trust and gross miscodncut as per the provisions of the Employment Act, 2007, Collective Bargaining Agreement and the Staff Administrative Code (SAC), 2007 with effect from the date of this letter.

Consequently, you will paid the following dues less any debt owed to the company.

1) Salary earned up to and including 15th June 2012.

2) Thirty five (35) days leave balance for 2012, calendar year.

Please arrange therefore to hand over any company property that may be in possession before you are cleared to receive your final dues.

Yours Faithfully

For: SOUTH NYANZA SUGAR COMPANY LIMITED

Janet Opita – Odingo (Mrs)

HEAD OF HUMAN RESOURCE

Copy: HOF/HOA/MO/SEM/SWM/AP – for information and necessary action

Person File"

The only difference between the letters is the word "*summary dismissed*" and "*terminated*". The letters do not state what changes the grievants were found guilty of or those for which they were terminated.

I find that the respondent fell far short of meeting its burden under Section 43 of proving the grounds of termination/summary dismissal.

Fair Procedure

Section 41 provides for the procedure for hearing before termination/dismissal in the following terms.

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

In this case, as I have already pointed out above there are no minutes of proceedings. What has been attached by the respondents are the decision of the *ad hoc* committee in respect of only two of the grievants.

As stated by CW1, none of them was represented by either the shop floor union official or a fellow employee of his choice or at all. The letters summoning them for disciplinary hearing were not produced. Evidence of RW1 that the grievants appeared alone by choice was not supported by any evidence to

controvert the testimony of CW1.

The Collective Bargaining Agreement applicable to the grievant provides for discipline as follows –

> "*DISCIPLINE*
>
> *(i) Warning*
>
> *a) Without derogation of an employers' right to summarily terminate employment for lawful cause, an employee may be warned. The warning shall be confirmed in writing. If the employee so warned disputes the warning, the union will take up the issue with management in accordance with existing grievance handling procedures agreed between the parties. Warning may be issued in circumstances where the employer considers the employee's misconduct to be of an insufficient degree to warrant summary dismissal.*
>
> *b) An employee who has been warned three times and who commits further misconduct shall either have his/her services terminated or summarily dismissed at the discretion of management.*
>
> *c) Provided that an employee who completes a period of twelve months service without further fault after being warned shall have all or any warning letters expunged form his record and shall not be used for reference in disciplinary decisions.*
>
> *d) All warning letters shall be copied to the union branch secretary.*
>
> *(ii) Suspension*
>
> *a) Where misconduct by an employee requires investigations, the employee may be suspended from duty with half pay for a period not exceeding 21 days whilst an inquiry is being carried out.*
>
> *b) Depending on the circumstances, all suspension letter will be accompanied by show cause letter within seven days.*
>
> *c) All suspension/show cause letters shall be copied to the union Brach Secretary and Human Resources Manager within seven days. Where such letters may not be copied for whatever reason as provided, the union shall take up the matter in accordance with the grievance handling procedures.*
>
> *d) No suspension period shall exceed 21 consecutive days. If exceeded the employee shall be reinstated except where the union and management have both agreed that more time is required to complete the investigation or where the investigation is done by the police or the case is pending before a court of law, when the employees will continue to receive half pay.*
>
> *e) If it is proved that the employee has committed an offence he/she shall be dismissed or temrianted as from the date of determination.*
>
> *f) If the offence does not warrant dismissal or termination of service, the employee shall be served with a written warning letter copied to the Union Branch Secretary.*
>
> *g) If the offence is not proven the employee shall be reinstated in his/her job, with full pay and benenfits form the date of suspension.*
>
> *h) An employee on suspension shall be subjected to daily reporting unless required.*
>
> *g) Security investigations reports touching on suspended employee shall be availed to the union on request.*

The clause does not provide for interdiction but suspension. Further, the clause provides for proof of the offence at (ii) (e). I find that the respondent failed to comply with its own procedure as set out in the Collective Bargaining Agreement as well as Section 41 of the Employment Act.

Section 45 (2) provides that failure to comply with the procedure set out in the Act and/or prove grounds for termination or summary dismissal amounts to unfair termination of employment. Having failed on both scores, I find and declare the termination of employment of the grievants unfair.

Remedies

The claimant prayed for the following remedies on behalf of the grievants –

1) The claimant would wish to urge the court to overturn the decision to dismiss/terminate the claimants and reinstate them back to their employment positions without loss of benefits.

2) If reinstatement may not be considered for whatever reason then the dismissal of the employment contracts should be changed to normal termination of employment contracts to enable the dismissed claimants be paid their terminal benefits.

3) That the claimants be paid their monthly payments from the date of termination to the date of determination of the matter in court because the termination of their employment contracts was occasioned by the respondent's own fault.

4) That the claimants be paid full compensation for wrongful and unfair dismissal and termination of their employment contracts

5) The respondent to pay costs of the cause.

The remedy of reinstatement is not available to the grievants as the termination of their employment occurred more than the three years ago and is locked out as provided under the Employment and Labour Relations Court Act. I however find that but for the provisions of the Act, they deserved reinstatement taking into account all the circumstances of their case including being singled out from more than the 100 employees the respondent admits took part in the alleged sit in, the fact that none of them was identified as having done anything wrong, the fact that they were not subjected to a fair hearing and were obviously discriminated.

It is also my opinion that due to the lapse of time since the termination of their employment which is about 6 years, the remedy of re-engagement which is the nearest alternative to reinstatement will also not be appropriate. For these reasons and taking into account the length of service of each grievant which range between 10 and 33 years, I make the following orders –

1. The summary dismissal of Johnson Otieno, Ezekiel Olande and Zablon Otina are declared null and void and substituted by an order of normal termination.

2. All the grievants shall be paid normal terminal dues as provided under the Collective Bargaining Agreement including notice, gratuity and any leave due and not taken as at the time of termination of employment.

3. In addition, each grievant shall be paid 12 months gross salary as compensation for unfair termination.

4. The decretal sum shall attract interest at court rates as follows.

(i) Payments under (2) above shall attract interest from the date of filing suit.

(ii) Compensation shall attract interest from the date of judgment.

5. The respondent shall pay costs to the claimant in the sum of Kshs.100,000 as reasonable expenses to include disbursements and court fees.

DATED AND SIGNED AT NAIROBI ON THIS 20TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 3RD DAY OF MAY 2018

MATHEWS NDERI NDUMA

JUDGE