



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

PETITION NUMBER 13 OF 2017

IN THE MATTER OF: ARTICLE 10,19,22,23,25,27,28,35,41,47 AND 50, OF THE CONSTITUTION OF KENYA;

-AND-

IN THE MATTER OF: ARTICLE 14 AND 15 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS;

-AND-

IN THE MATTER OF: CONTRAVENTION OF SECTION 41, 43, 44 AND 45 OF THE EMPLOYMENT ACT CAP 226 THE LAWS OF KENYA AND ALL OTHER ENABLING

PROVISIONS OF THE LAW;

-BETWEEN-

- 1. DOMINIC MONGARE**
- 2. JOHN ONGURU**
- 3. LUCAS NAMAI**
- 4. JOHN WAINAINA**
- 5. LIVINGSTONE NYARIBO.....PETITIONERS**

- VERSUS-

- 1. KENYA PORTS AUTHORITY**
- 2. DOCK WORKERS' UNION.....RESPONDENTS**

Rika J

Court Assistant: Benjamin Kombe

Gikandi & Company, Advocates for the Petitioners

Legal Department KPA, Advocates for the 1st Respondent

No appearance for the 2nd Respondent

JUDGMENT

1. The Petition herein was brought before the Court, on 19th July 2017. The 5 Petitioners are former Employees of the 1st Respondent, and Members of the 2nd Respondent. The 2nd Respondent represents Unionisable Employees of the 1st Respondent.

2. The Petitioners were employed by the 1st Respondent in diverse positions such as Clerks, Dockers and Drivers. They were employed on various dates in the years 1988, 1991, 1995 and 1998. They were summarily dismissed by the 1st Respondent for employment offences ranging from theft of containers, irregular alteration of overtime forms, to causing accident while in the course of duty. The dates of dismissal were in the years 2004, 2005 and 2007.

3. They were taken through internal investigations and disciplinary processes of the 1st Respondent. These included interdiction; notice to show cause, why disciplinary action should be taken; and hearing before 1st Respondent's Committees of Inquiry. Dissatisfied, they lodged Appeals against the decision to summarily dismiss them, as they were entitled to do, under the internal dispute resolution mechanisms available to them. Some of the Appeals seem to have been considered and dismissed by a Committee of Appeals, as shown in the letter dated 8th December 2008 addressed to the 2nd Petitioner, by 1st Respondent's Personnel Manager J.W.Kamau.

4. The 2nd Respondent then sought to have a total of 62 Appeals filed by various Employees including the 5 Petitioners, reviewed. A Joint Industrial Council Appeals Committee, which is a different organ from the Committee of Appeals which dealt with the Appeals initially, was constituted. Chaired by Abdirashid Salat, this Committee comprised Representatives from the 1st Respondent and the 2nd Respondent. The 1st Respondent was represented by Head of Human Resources Amani Yuda Komora, Principal Industrial Relations Officer Richard Kenduiwo, Deputy Principal Bandari College Charles Nyamora, Senior Human Resources Officer Irene Mbogho and Human Resources Officer Marco Ngolia. The Dock Workers' Union General Secretary Simon Sang, led the team of Union Officials who included Vice-Chairman Michael Kituka, Assistant Treasurer Judith Abuka, Assistant Organizing Secretary Maurice Munyao, Executive Officer Caroline Mutui and Trustee Moses Sirgoi.

5. The JIC Appeals Committee's terms of reference were:-

i. To hear all Appeal Cases involving Union Members.

ii. To review all Cases brought to the attention of Management from May 2006 and any other fresh Appeals, except for Cases being heard in Courts.

iii. To forward all decisions of the Appeals Committee to Joint Industrial Council, which after deliberations, will forward the same to Management.

iv. Where Committee would not get sufficient information in a given case, the Committee may decide to hear the Case afresh.

6. The Committee employed the following tools in discharging its mandate:-

a. Human Resource Manual 2008.

b. Labour Laws.

c. Industrial Relations Machinery 1986.

d. Disciplinary Handbook 2008.

7. Methodology used included use of proceedings recorded by the Committees of Inquiry, reports prepared for each Case, and where necessary, interviews with affected Staff. The Committee adopted consensus building approach.

8. In the end the JIC Appeals Committee upheld summary dismissal of 31 Employees who included the Petitioners herein; 15 Employees were recommended for reinstatement; 3 were to leave service on normal retirement; 2 were to receive 6 months' salary in compensation on compassionate grounds; 3 Cases were found to be pending before the Courts and were therefore not discussed; and 4 Cases were found to have been brought before the JIC Appeals Committee prematurely, as the Internal Disciplinary Mechanisms had not been exhausted.

9. The Petitioners argue that they were condemned unheard. 15 Co-Appellants were heard. No reasons were given why the Petitioners were discriminated against by being denied a hearing. Of 15 who were heard, 11 were reinstated, and 3 chose to retire. The Petitioners state had they been given a hearing like 15 of their Colleagues, they would have probably succeeded in their pursuit of reinstatement.

10. They only came to learn sometime in 2016, that their Appeals were not successful. No communication was made to them formally by the JIC Appeals Committee about rejection of their Appeals. The JIC Appeals Committee was partisan, unfair and discriminative. It violated Rules of Natural Justice, the Constitution of Kenya and the Employment Act 2007. The Petitioners rely on their respective Affidavits in support of their Petition. They pray for Judgment against the Respondents on the following terms:-

a) A finding that the Respondents have violated the above-stated Articles of the Constitution, and the Employment Act 2007.

b) An order quashing Respondents' JIC Appeals Committee decision dismissing the Petitioners' Appeals.

c) The 1st Respondent to reinstate the Petitioners.

d) Compensation for unfair termination.

e) An order compelling the Respondents to form a new JIC Appeals Committee to hear and determine the Petitioners' Appeals, and thereafter submit their decision before the Court within 90 days.

f) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

11. The 1st Respondent filed its Reply to the Petition, and Replying Affidavit sworn by Human Resources Officer Marco Ngolia, on 23rd August 2017. It is conceded the Petitioners were employed by the 1st Respondent, and summarily dismissed as stated in their Petition. The history of the dispute and the various dispute resolution mechanisms invoked, culminating in the JIC Appeals Committee, are not contested. The 1st Respondent states this Committee was made up of 1st Respondent's and 2nd Respondent's Representatives. It undertook comprehensive review of all Appeals presented before it, in accordance with its terms of reference. Petitioners were not discriminated against. There was no ground to give them fresh hearing under the Committee's terms of reference. The 1st Respondent denies it violated Petitioners' Constitutional Rights, Rules of Natural Justice or the Employment Act 2007. Orders of reinstatement cannot issue as the Court has no powers to do so, in excess of 3 years after termination. The 1st Respondent prays the Court to dismiss the Petition with costs to the 1st Respondent.

12. The 2nd Respondent did not file any Reply to the Petition, and did not participate in the proceedings. The 2nd Respondent however, prepared a document at page 81 of Petitioners' Bundle of Documents, arguing Petitioners' respective Cases. The document suggests the Petitioners have the backing of their Union in presenting this Petition. It is not clear why the Union has been brought in as a Co-Respondent, while appearing to back Petitioners by supplying Petitioners' Advocates with a document described as '*foot notes of the following former Members of the Dock Workers' Union: to Sylvia Suke of Gikandi Advocates Co.*' One may be forgiven for characterizing the Petition as being brought by the Petitioners, in collusion with the 2nd Respondent. Why in any case did not the 2nd Respondent appear in Court and explain its role in the JIC Appeals Committee?

13. The Parties were heard through oral Submissions made by respective Counsel in Court on 1st March 2018.

The Court Finds:-

14. This Court has had the advantage of reviewing the Report of the JIC Appeals Committee under reference, in a dispute presented before the Court by one of the 62 Employees mentioned in the Report, Salome Lilian Etenyi. The dispute is ***Cause Number 402 of 2015, Salome Lilian Etenyi v. Kenya Ports Authority [2017] e-KLR.***

15. Etenyi was among 15 Employees who were given a hearing. She was recommended for reinstatement. Management however did not abide by the recommendation of the JIC Appeals Committee. The Court ordered the recommendation is implemented by reinstatement of Etenyi. An Appeal was lodged against this Judgment, and is pending at the Court of Appeal.

16. Of importance here is that the Court concluded in the case of ***Etenyi***, that the JIC Appeals Committee comprised top Representatives of the Respondents. This Committee discharged its mandate professionally. Its report cannot be faulted. The Committee reviewed the Appeals in accordance with its terms of reference. The Court held in reinstating Etenyi, that recommendations of the Committee ought to have been implemented by Management, unless there was shown strong reason, not to implement.

17. The Committee recommended upholding of summary dismissal decisions against the Petitioners. There is no reason why the Court should change its position, and fault this recommendation. The JIC Appeals Committee acted in accordance with its terms of reference outlined at paragraph 5 of this Judgment. In particular, the JIC Appeals Committee relied on proceedings of Committees of Inquiry, and other records relating to the disciplinary proceedings, leading to summary dismissal. The Committee could decide to hear cases afresh in event the records available did not have full information. There was no requirement that the Petitioners are given a personal hearing by the JIC Appeals Committee. The exercise by this Committee was in the nature of reviewing concluded processes and outcomes, in the spirit of good industrial relations.

18. The Petitioners' interests were adequately taken care of by the Union Officials, who included General Secretary Sang', in the JIC Appeals Committee. The Petitioners seem to misapprehend the work of this Committee, equating it to a Disciplinary Hearing Committee. In the understanding of the Court, the JIC Appeals Committee provided a special mechanism, negotiated between the Respondents, for reviewing cases which were to all intents and purposes closed. The Petitioners had been investigated and heard under the Human Resources Manual. The JIC mechanism revived and reviewed closed cases in the spirit of good industrial relations. It was a collective industrial relations exercise, which enabled Employees with Appeals which had been done and dusted, to have a second chance. It was not *stricto sensu*, a legal process that took place before the JIC Appeals Committee, but a negotiated industrial relations process. The 2nd Petitioner had as mentioned above, received a letter dated 8th December 2008, from Personnel Manager Kamau, advising him his Appeal before Committee of Appeal [not to be confused with the JIC Appeals Committee], had been rejected, file closed, and no further correspondence would be entertained. The JIC held a meeting between 28th and 30th October 2009, and decided to constitute the JIC Appeals Committee. Dead Appeals, including that of the 2nd Petitioner, were revived and reviewed this way.

19. The Petition is based on a misapprehension of the terms of reference of the JIC Appeals Committee, and the nature of industrial relations, underlying this process. This was not a legal process calling on the Committee to observe the requirements of substantive and procedural justice associated with the provisions of the Employment Act 2007, and the Constitution cited by the Petitioners. There was no requirement for instance, for the Petitioners to appear before the Committee accompanied by Trade Union Representatives, as provided for, under

Section 41 of the Employment Act 2007. The JIC Committee, as observed elsewhere, included the top echelons of the Petitioners' Trade Union. The Court cannot apply legal standards to a non-legal exercise. This was a negotiated, industrial relations exercise, coming after the legal requirements had been exhausted, and outcomes recorded. Procedural and substantive justice, as a legal requirement had already been served to the Petitioners in large measure, and files closed, before they found some revival at the JIC. Where Employees had not been taken through the disciplinary processes required under the law and internal mechanisms, JIC Appeals Committee was quick to decline to intervene, and direct exhaustion. The documents filed by the Parties show Petitioners were taken through a fair procedure and decisions on summary dismissal validly made. What followed at the JIC was an extra-judicial, rather than a quasi-judicial process. It was a negotiated process and a pure industrial relations exercise. It enabled the KPA to reconsider summary decisions made against former Employees and even to reinstate some of them, many years after termination, and notwithstanding that the law would not allow reinstatement 3 years after termination. It allowed the Parties to review their positions, unencumbered by the strictures of the law. Courts must not rush to apply legal standards, to non-legal alternative dispute resolution mechanisms. The Court would only intervene if JIC Appeals Committee failed to act in accordance with its terms of reference, or if the 1st Respondent failed without adequate reason, to act on the recommendation of the JIC. The Petition lacks merit. The 2nd Respondent ought to have explained the nature of the JIC Appeals Committee process to its Members, rather than egg them on, while keeping away from the Petition herein. ***The Petition is dismissed, with no order on the costs.***

Dated and delivered at Mombasa this 8th day of June 2018.

James Rika

Judge