



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 63 OF 2015

- c. In alternative, the grievants be paid their terminal dues of kshs. 8,372,993.50/= for the 1st Grievant and Kshs. 11,145,622/= for the 2nd Grievant.
- d. General damages for violation of the Grievants' right to freedom of association and unfair labour practices.
- e. Costs of this cause
- f. Interest of the cause at court rates.
- g. Any other reliefs the honourable court may deem fit to grant.

Contemporaneous with the Claim the Claimant filed a notice of motion under certificate of urgency seeking the following orders-

1. That for the reasons of urgency to be recorded and as contained in the certificate of urgency the honourable court be pleased to certify this application urgent and service of the same be dispensed with in the first instance and be heard *ex parte*.
2. That pending hearing and determination of this application the honourable court be pleased to issue a mandatory injunction to compel the 1st and 2nd Respondents and or their agents and or servants to forthwith reinstate Gilbert Kaliboh Kongoti and Wilson Nalwenche Chitech who are members and branch officials of the claimant union into their respective posts they held of scheme managers prior to unlawful summary dismissal on 27th October, 2014, without any loss of benefits.
3. That pending the hearing and determination of this claim, the honourable court be pleased to issue a mandatory injunction to compel the 1st and 2nd Respondents and or their agents and or savants to forthwith reinstate Gilbert Kaliboh Kongoti and Wilson Nalwenche Chitech who are members and branch officials of the claimant union into their respective posts they held of scheme managers prior to unlawful summary dismissal on 27th October, 2014, without any loss of benefits.
4. That the Respondents be ordered to immediately/forthwith release salary, leave allowance yearly bonuses and loan default penalty for Gilbert Kaliboh Kongoti and Wilson Nalwenche Chitech amounting to a total of Kshs. 314,000/=
5. That the costs of the application be borne by the Respondents.

I heard the application *ex-parte* on 23rd February 2015 and issued orders that the application be heard *inter-partes* on 9th March 2015. When the parties came for hearing of the application on the said 9th March 2015, I ordered that the prayers in the application were substantive prayers which could not be heard without hearing the evidence. The issues in the application were consolidated with those in the Claim.

The Respondents filed a Replying affidavit of **Shadrack Juma** sworn on 7th March 2015 and a preliminary objection raising similar issues as in the affidavit in which Shadrack Juma avers that he is the Managing Director of the Respondent responsible for the day to day management of the affairs of the Respondent. He further avers that the application is misconceived, bad in law and incompetent as the affidavit in support was prepared by an unqualified person.

Further that there was another suit being Kisumu Industrial Court Case No. 296 of 2014 that was filed by the Board against the Claimant and touching on the same matters as those in the instant case. The memorandum of claim and strike notice in contention are annexed to the affidavit as **GK 1(a) and (b)**. It is further contended that the suit is bad in law having been filed by a person who lacks *locus standi*.

Furthermore that the Claimant seeks a mandatory injunction for the reinstatement of the terminated employees as an interim measure which orders can only be final orders after consideration of all the evidence.

He also depones that the Grievants were dismissed for gross misconduct as they have been a menace to the organisation due to their unruly behaviour, lack of professionalism, abdication of duties, insubordination, lack of decorum in relation to fellow employees, truancy and involvement in corruption related acts. The respondent relied on annexure **GK4**. It avers that the action of the grievant have stained the reputation of the organisation.

It is the deposition of Shadrack Ouma that the Grievants had on various occasions been warned against their unbecoming behaviour and acts to no avail. Several letters inviting them to show cause as to why disciplinary actions should not issue are annexed to the Affidavit as **GK (a-c)**.

Shadrack Ouma further deposes that on 13th and 14th October 2014, without leave or other lawful cause, the grievants absented themselves from the place appointed for the performance of their work contrary to the Employment Act and the terms of their contract. That they further used insulting language and employed insulting behaviour and other employees.

He avers that reinstatement is untenable due to the breakdown in relationship between the Grievants, the management and their immediate supervisors.

In response to the Replying Affidavit and Preliminary Objection the Claimant filed a reply stating that Cause 296 of 2014 which was filed by the Respondent is a totally different matter touching on an intended strike notice which is still pending for determination. Further that the Claimant has *locus standi* as there is a binding recognition agreement which is not disputed by the respondent.

The Response to the Memorandum of Claim was expunged from the record on 18th July 2016, after I noted that the same had been filed way out of time without leave of the Court. That notwithstanding the Respondent proceeded to call evidence in opposition to the Claim.

Evidence

CW1 Wilson Nalwenje Chitechi led evidence to the effect that he was employed by the Respondent on 21st November 2006, as a driver. That he went through various trainings and by the time he was leaving employment he was a scheme manager on permanent and pensionable terms. In addition to being an employee he stated that he was also the Branch Chairman of the Claimant Union.

Mr. Nalwenje stated that he together with the 2nd Claimant were dismissed for the reason that they were absent from duty, they forced themselves into a meeting of the board and for insubordination.

He explained the events of the day. The acts complained of occurred, 14th October 2014, there were disciplinary hearings for some of their members going on at the Respondent Company and the Claimant's General Secretary appointed them to represent the members at the hearings.

Mr. Nalwenje stated that on arrival at the meeting the Managing Director and the Human Resource Manager refused to allow them into the meeting stating that they were not invited and were not recognised as union officials. They pleaded to be allowed into the meeting in order to safeguard the affected employees' right to be represented but it was all in vain. He stated that he was dismissed shortly thereafter.

He further stated that upon dismissal he reported the matter to the Union who immediately came in and asked the Respondent to reinstate the grievants but the respondent refused. The matter was reported to the Ministry of Labour at Kakamega County Labour Offices and the Minister appointed a Conciliator. That the parties were invited to the County Labour offices for conciliation meetings but the Respondent failed to avail a representative nor did they make any submissions in relation to the matter.

The Claimant stated that before dismissal he was not issued with any warning, was never given a hearing and that this was the first disciplinary action against him. He prayed for reinstatement without any loss of benefits and for damages as a result of the unlawful dismissal.

CW2 Gilbert Kongoti Kaliboh, the Branch Secretary stated that he was employed in December 2006, and the circumstances leading to his dismissal were similar to those of CW1 above. He added that on the day the hearings were to come up he as an official of the Claimant in his capacity as Branch Secretary of the claimant union sought permission from his immediate supervisor to attend the hearings and he was allowed to.

Mr. Kaliboh stated that the dismissal was unlawful and unfair as there was no reason for termination and neither was procedure followed. He prayed for the Claim to be allowed in terms of the Memorandum of Claim.

The Respondents put up one witness, one **Linnet Wasaba** the Respondent's Human Resource Officer at the material time. A witness statement had been filed on her behalf which was adopted in examination in chief. In the written statement she stated that the Claimants were dismissed on account of gross misconduct as envisaged under Section 44 of the Employment Act, 2007 and not for participating in union activities as alleged by the Claimants also for absenting themselves from work contrary to clause 2(e) of the Recognition Agreement and are as such estopped from pleading unfair dismissal.

She stated that the particulars of misconduct on the part of the grievants were:

- a. Absenting themselves from their place of work without leave of the employer or any other lawful cause on many occasions and in particular on 13th and 14th October 2014;
- b. Behaving in a manner insulting to the employer by uttering words abusive to the Managing Director;
- c. Wilful and intentional disobedience of lawful authority or instruction by failing to return to their work place upon being instructed to do so by the Managing Director; and
- d. Engaging in acts of insubordination by forcing themselves into a core management team meeting and causing fracas which then disrupted the meeting.

She further stated that due process was followed in dismissing the Grievants and that the respondent did not submit itself to the conciliation meeting as in the Respondent's view it would amount to *sub judice* as the matter had already been referred to the court in Kisumu ELRC case No. 296 of 2014.

It was also her evidence that the Grievants were a menace to the organisation for a long time due to their unruly behaviour and the Respondent had received numerous complaints from immediate supervisors. That they were warned severally of their conduct but they failed to make amends.

In cross-examination, she admitted that the case was filed in accordance with the law and that a recognition agreement existed between them and the Claimant union. She also admitted that the Grievants were officials of the Claimant Union and that she was not at the meeting which gave rise to the alleged circumstances leading to their dismissal. She however denied knowledge of a letter authorising the Grievants to attend a meeting.

Submissions for the Claimant

Mr. Awach submitted that the Respondents violated Article 41 of the Constitution as read together with sections 45, 51, 36 and 40 of the Employment Act. That the Grievants were denied a fair hearing involving the Union in settling the dispute before reaching the harsh decision to dismiss the long serving employees as well as denying them their terminal benefits and certificate of service to enable the Grievants acquire employment elsewhere. He prayed for the Claim to be allowed as drawn.

Respondent's Submissions

The respondent did not file written submissions even after being granted several opportunities to do so.

Determination

The issue for determination is whether dismissal of the claimant was fair and if they are entitled to the prayers sought.

Fair Dismissal

Section 41 requires that employees be given a fair hearing while Section 43 requires the employer to prove the reasons for dismissal. Section 45(2) provides that where either or both Sections 41 and 43 are not complied with the dismissal or termination of employment is unfair.

In the present case the claimant is a registered trade union. It has a recognition agreement with the respondent. At the time material to this suit there was a valid Recognition Agreement between the claimant and respondent. RW1 who was a Human Resource Officer for the respondent at the material time testified that she was not at the meeting in which the grievants are alleged to have committed the acts for which they were summarily dismissed.

It is not denied that the grievants were not taken through any disciplinary process. They were not even asked to respond to the many charges against them as stated in the letters of dismissal which are identical and is reproduced below –

“LAKE VICTORIA NORTH WATER SERVICES BOARD

KAKAMEGA BUSIA WATER SUPPLY

P.O. BOX 1189 – 50100

KAKAMEGA

TEL: 056-30355, FAX: 056-30366

E-mail: lvnwsb.kkb@gmail.com

Ref No: LVNWSB/KBWS/HR/STAFF ADMIN/VOL 1/191

DATE: 27/10/2014

MR. GILBERT KALIBO KONGOTI/WILSON NALWENJE CHITECHI

SCHEME MANAGER

P/NO. 06081

Dear Sir

RE: SUMMARY DISMISSAL

It has been noted by this office that your general conduct and work performance as deployed in Busia/Mumias Water Supply (Assistant Revenue Accountant, Debt Collection) has been found wanting and the following acts of gross misconduct warranting summary dismissal have been noted against you:

- 1. Without leave or other lawful cause, you absented yourself from the place appointed for the performance of your work. On the 13th and 14th of October 2014 you were sent from your work station in Busia Water Supply as reported by our supervisor as outline in Section 44 (4) (a) of the Employment Act 2007 and Clause 5.14.1 (i) of the terms and conditions of service.*
- 2. You behaved in a manner insulting to your employer or to a person placed in authority over you by the employer. You uttered the words to the effect that the Managing Director does not understand what he is doing as outlined in Section 44 (4) (d) of the Employment Act, 2007.*

3. You knowingly failed or refused to obey a lawful and proper command which it was within the scope of your duty to obey, issued by the employer or a person placed in authority over you by the employer. You refused to return to your place of work on those aforementioned dates despite the order from the Managing Director as outlined in Section 44 (4) (e) of the Employment Act, 2007.
4. You engaged several acts of gross misconduct contrary to provisions of Clause 5.16.5 (v) of the terms and conditions of service;
 - a. Gross insubordination you created disturbance by entering the boardroom and disrupting a core management team meeting.
 - b. Public outrageous behaviour in the company premises by forcing your entry into the boardroom during a Core Management Team meeting with full knowledge that you are neither a member of the team nor were you invited for the meeting by management.
 - c. You brought the Core Management Team into disrepute by alleging/lying to your Area Manager that you had an appointment with Managing Director and the Human Resource and Administration Manager which information was wrong and misleading as you were well aware that no such appointment existed.
5. Your performance has been found to be wanting and below expectation.
6. You contravened Clause 2 (e) of the Recognition Agreement between NUWASE and the management.

In view of the above you are hereby summarily dismissed from the service of Lake Victoria North Water Services Board/Kakamega-Busia Water Supply with effect from the date of this letter on account of gross misconduct.

Meanwhile you are directed to hand over any company tool, equipment, revenue and/or any company property in your possession to the Area Manager with immediate effect.

Yours Faithfully

For: Kakamega-Busia Water Supply

SIGNED

SHADRACK JUMA

MANAGING DIRECTOR

The Chief Executive Officer

Lake Victoria North Water Services Board

Human Resource & Administration Manager (Note)”

There having been no opportunity for the grievants to respond to the many charges which are framed in general terms, all the charges against the grievants were not proved.

In their evidence, both grievants testified that they had permission from their respective supervisors and were therefore not absent without permissions. They further demonstrated that they were registered branch officials of the union’s Kakamega–Busia Branch as Branch Chairman and Branch Secretary respectively and were attending the respondent’s Board meetings of 13th and 14th October 2014 in their capacity as union officials to represent the union members whose disciplinary cases were set for hearing by the Board on the two days. The accusations on performance are not supported by any evidence and there is no evidence that the same had been brought to the attention of the grievant before being raised in the letters of dismissal.

It is noted that the respondent did not file any defence or submissions. The replying affidavit of SHADRACK JUMA, the respondent’s Managing Director has been considered as the defence by the respondent. It is noted that Mr. Juma attached several letters of discipline against the grievants dated September 2010 against Wilson Chitechi and letters dated 15th July 2011, 25th November 2011 and 20th February 2013 against Gilbert Kongoti. This could not be used as valid grounds for purposes of the summary dismissals of 27th October 2014.

Under Rule 16 of the Regulation of Wages and Conditions of Employment (General) Order, warning letters lapse after 12 months and an employee must have two (2) valid warnings to be liable for dismissal after being subjected to

a disciplinary hearing envisaged under Section 41 of the Employment Act.

I find that the summary dismissal of the grievants was unfair both substantively and procedurally. The claimants having been union officials and their dismissals having arisen from undertaking union activities, the dismissals also violated their freedom of association and right to participate in union activities under Article 36 and 41(2)(c) and further contravened Section 46(e) of the Employment Act and Section 4 and 5 of the Labour Relations Act and I find accordingly.

Remedies

The claimant prayed for reinstatement. Taking into account the circumstances of the grievants being union officials dismissed without valid reason or fair procedure, I would have granted their prayer for reinstatement. However due to lapse of time the remedy of reinstatement is no longer available to them.

The claimant prayed for terminal dues in the alternative. The claimants are entitled to terminal dues including pay in lieu of notice as provided under Section 49(1) of the Employment Act having been unfairly terminated.

The respondent did not deny that the grievants are entitled for yearly bonus and leave allowance for 2014 which I award them as prayed.

The claimant further prayed for maximum compensation. Taking into account the general conduct of the respondent including its refusal to avail itself for mandatory statutory conciliation under Part VIII of the Labour Relations Act, the manner in which the grievants lost employment, their length of service and all other relevant factors under Section 49 (4) of the Employment Act, I award each of the grievants maximum compensation equivalent to 12 months' gross salary.

The grievants prayed for salary, yearly bonus and leave allowance for the remainder of their working life to 60 years being 11 and 15 years respectively. This is not payable as there is no guarantee of employment to date of retirement and also because the law provides for the right to terminate employment contracts and for compensation where the termination is unfair. **(D. K. Njagi Marete -V- Teachers Service Commission [2013] eKLR, Eng. Francis N. Gachuri -V- Energy Regulatory Commission [2013] eKLR, Menginya Salim Murgani -V- Kenya Revenue Authority [2010] eKLR)**

The claimants further prayed for general damages. I have considered the fact that apart from losing their jobs unfairly and unlawfully, the claimants were punished for exercising their constitutional freedoms of association and fair labour practice. I consider an award of Kshs. 2 million each to be reasonable in the circumstances of this case and award the grievant the same.

In summary I award the grievants the following –

WILSON CHITECHI

(i)... One month's salary in lieu of notice.....	Kshs.55,097.00
(ii).. Yearly bonuses for 2014.....	Kshs.19,195.50
(iii). Leave allowance.....	Kshs.12,799.00
(iv). Compensation	Kshs.661,164.00
(v).. General damages.....	Kshs.2,000,000.00
Total	Kshs.2,748,255.50

GILBERT K. KALIBOH

(i)... One month's salary in lieu of notice.....	Kshs.55,097.00
(ii).. Yearly bonuses for 2014.....	Kshs.19,195.50
(iii). Leave allowance.....	Kshs.12,799.00
(iv). Compensation	Kshs.661,164.00
(v).. General damages.....	Kshs.2,000,000.00
Total	Kshs.2,748,255.50

Items (i) to (iii) shall attract interest from date of filing suit while items (iv) and (v) shall attract interest at court rates from date of judgment.

I further assess costs to the claimant union at Kshs.150,000 to cover reasonable costs and disbursements including witness expenses.

DATED AND SIGNED AT NAIROBI ON THIS 5TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 19TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE