



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 468 OF 2013

(Before Hon. Justice Mathews N. Nduma)

JOHN ELEGO & 103 OTHERS.....CLAIMANTS

VERSUS

PRESSMASTER LIMITED.....RESPONDENT

J U D G E M E N T

1. The suit was brought vide a Memorandum of Claim dated 2nd April, 2013 and filed on 4th April, 2013.

2. The Claimant prays for the following reliefs:-

(a) An account for ALL payment due to the Claimants as at the date of termination pursuant to Statute and the Collective Bargaining Agreement in force as follows-

i. Two months notice pay.

ii. Full service pay for every year worked at 15 days' salary.

iii. Twelve months compensation for unfair termination.

iv. Difference between the wages and allowances paid and the Minimum Government Wages directives and the allowance amounts agreed upon between the Union and the Respondent.

v. Unpaid allowances, Shift allowance, overtime allowance, bus fare, night-shift allowance, leave allowance and travelling allowance.

b. Compensation pursuant to the Accounts taken as follows-

i. Two months notice pay.

ii. Full service pay for every year worked at 15 days' salary.

iii. Twelve months compensation for unfair termination.

iv. Difference between the wages and allowances paid and the Minimum Government Wages directives and the allowance amounts agreed upon between the Union and the Respondent.

v. Unpaid allowances, shift allowance, overtime allowance, bus fare, night-shift allowance, leave allowance and travelling allowance.

vi. Interest on the aforesaid sums at court rates from the date of termination.

vii. General and aggravated damages, including exemplary damages for libel and malice.

viii. General and aggravated damages for violation of Fundamental Rights and Freedoms enshrined in the Constitution, including Articles 27, 28, 41 and 47.

c. Costs of the suit, and interest thereon at court rates.

Facts of the Claimant's Case

3. The Claimants were employed in various capacities by the Respondent initially as casual labourers, some were however later retained as contract workers. The Claimants appointment letters set out job description, terms of reference and also made reference to and incorporated the CBA Agreement that was signed by the Respondent and the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied workers (KUPRIPUPA). The Claimants' remuneration package included consolidated salary, thirty leave days, house allowance, overtime payment, shift allowance, bus fare, night shift allowance, leave allowance and travelling allowance.

4. The Respondent did not accord appropriate working environment to the Claimants which led to several industrial actions. The first industrial action took place in January 2003, this was after the Respondent failed to incorporate a return to work formula that had been entered into between the Respondent and the Claimants. This was on transport allowance of Kshs.250 that was to be paid to the Claimants on a month basis. Another industrial action took place in September of 2003 on the same issue of transport allowance. A return to work formula was signed between the Claimants and the Respondent however the Respondent went ahead and summarily dismissed 42 employees from its employment. What followed was a series of industrial actions as the Claimants sought to air their grievances to their employer.

5. The Claimants sought to resolve their issues amicably with the Respondent severally but the Respondent always resulted to victimization of the employees that spoke up for their rights, the Respondent eventually summarily terminated the employment of the Claimants on 3rd October 2012 which led to the institution of this Claim on **(See Claim dated 2nd of April 2013 and filed in court on 4th April 2013).**

6. The Claimants are relying on the following in support of their case;

i. Claim dated 2nd April 2013

ii. Witness statements dated 5th November 2013 by John Elego Navade, Paul Njoroge Mungai, Christopher Alumasa Vivuya, Paul Musembi Kinyumu and Rose Chepkemoi Komosi which were filed in court on 9th December 2013

iii. Claimants' List of documents dated 26th February 2014

iv. Claimants' Supplementary list of witness statements dated 22nd September, 2014.

v. Onyonyi Nyamongo Further Supplementary List of Witnesses dated 16th October 2014.

7. The Claimants called six witnesses in support of their case. CW1 was John Elego Navade. He adopted his witness statement dated 5th November, 2013. CW1 testified that he was employed by the Respondent as a casual worker in the Lamination Department in November, 2005. He worked continuously in that capacity until August 2008 when he was converted to a contract worker. On 1st September, 2008, he signed another contract of two years after the first contract came to an end.

8. In April 2011, he joined KUPRIPUPA Union together with several of his colleagues a move which angered the Respondent. The Respondent wrote a letter dated 22nd August, 2011 to the Secretary General of the Union seeking to have John with his colleagues be withdrawn from the Union. CW1 narrated the various grievances the workers faced at work including non-payment for injuries sustained in course of work; police arrests while at work on unfounded basis; documentation and monitoring on every visit to the washroom among others.

9. The workers reached out to Human Resources department to have these grievances addressed in vain.

10. On 11th May, 2012 CW1 was elected Chief Shop Steward. The Respondent promptly terminated his employment on 14th May, 2012 without notice and was paid Kshs.18,000 terminal dues. No reasons were given for the termination. CW1 reported the matter to the Union. Union's demand for reinstatement was ignored. CW1 continued to serve as the workers representative. CW1 explained that any employee who raised grievance was promptly dismissed.

11. On 2nd October, 2012 the workers went on strike as a result of failure by Respondent to address their issues. The employees were dismissed from work. On 4th October 2012, a meeting between the Union, Federation of Kenya Employers (FKE) and the Respondent was held. CW1 was not allowed to attend the meeting.

12. A conciliation report recommended reinstatement of all workers within 14 days. The Respondent however asked the dismissed employees to apply for employment afresh.

13. CW2, Onyonyi Nyamongo testified that he is a former employee of the Respondent. That two days before the Union elections conducted

on 11th May 2012, the former shop steward Benson Mule approached him and told him to inform John Elego (CW1) and his followers' not to participate in the elections failing which they would all be dismissed. CW1 was immediately dismissed from work upon being elected Chief Shop Steward. CW2 was dismissed from employment on 17th May 2012, on false allegations that he made a personal call while at the company premises. CW2 believes that he was dismissed for supporting CW1 in the elections.

14. CW3 Rose Komosi told the court that she worked for the Respondent from 1st June, 2011 in the Human Resource Department for 7 and a half months. During that period, some employees were registered as members of the Claimant union. That Mr. Singh the Director and owner of the company asked the Human Resource Department to ask those employees to leave the union.

15. In August 2011, Mr. Singh asked the HR Department to write to the employees to leave the Union. The Respondent disallowed effecting of the Check-off system for union members. The system applied to old members only. CW3 stated that most employees were employed as casuals though they worked for periods longer than three months. Some had served for over 5 years. CW3 told the court that this practice was contrary to law since casuals should be made permanent upon completion of three months service. The Respondent put others on short term contracts notwithstanding the provisions of the CBA which applied to employees who had served for over 3 months.

16. CW1 further stated that the Respondent failed to implement the minimum wage template given to the company by the Ministry of Labour. CW3 explained that many employees were dismissed for no good reason and in violation of the Employment Act and the Collective Bargaining Agreement.

17. Regarding the mass dismissal on 2nd October, 2012 following the strike action, CW2 explained that a Return to Work formula was signed on 1st October, 2012. The Claimants were asked to collect their pay and return to work the following day on 2nd October, 2012. However, on 2nd October 2012 the Respondent hindered the workers from resuming duty until late in the day at 2.30 pm. The workers were informed by Mr. Theophilus Mutume of HR Department that they were to collect their monthly salary, go home and report back on 3rd October, 2012.

18. On 3rd October 2012, when the workers reported in the morning, the gates were locked and they were not allowed to enter the Respondent's premises.

19. The Respondent hand-picked the 'favoured' workers who were then allowed access to the company premises and resumed their duties. The rest of the workers were dismissed forthwith.

20. CW4 Paul Musembi testified that he was employed by the Respondent in August 1989 in the Lamination Department. He worked as a casual for four years until 1993 when he was converted to a permanent worker. In 2003, the company relocated to Industrial Area. Concerns were raised on how employees would report to work and the Respondent agreed to provide transportation to take employees to work. In the alternative transport allowance or bus fare would be paid to the employees.

21. The Respondent however did not honour the promise, despite numerous reminders. CW4 told the court majority of the casual workers served as casual for many years and were neither converted to contract or permanent workers. That the Claimants were not paid minimum wage and the Respondent did not honour terms and conditions of service set out in the CBA.

22. CW4 collaborated evidence by CW1, CW2, and CW3 that all the Claimants except a few who had left the employment of the Respondent were dismissed on 3rd October, 2012 following the strike action notwithstanding the Return to Work Formula signed by the Union, FKE and the Respondent.

23. CW5, Christopher Alumasa Vivuya also testified in support of the Claim by the 104 workers. He worked for the Respondent as a casual from 1982 until 1987, he was paid according to the work he did per day. From December 1987, he was made a normal casual with a fixed pay. In 1990, after 8 years of service he was converted to a permanent worker. This situation applied to the Claimants herein. That the first strike was in 1996. The workers demanded implementation of salaries demanded by the union. In 2003, there was another strike after the Respondent failed to implement the agreed transport pay at Kshs.250 per month.

24. That in 2012, the Union announced an increase in salaries to the employees but the Respondent did not implement the increase. Employees were subsequently paid in piece meal. This culminated in the October 2012 strike. CW5 corroborated CW3 on the events of 1st, 2nd and 3rd October 2012. That the Respondent failed to honour the Return to Work formula and locked out the Claimants unlawfully.

25. The Claimants pray that the suit be allowed as prayed and in terms of filed computation.

Response

26. The Respondent filed statement of defence and counter claim on 28th May, 2013 denying the allegations set out in the statement of claim. The Respondent states that the strike action on 1st October, 2012 which led to the termination of employment of the Claimants was unlawful. That some of the Claimants absented themselves and deserted their work despite of the Return to Work Formula and notice pinned on the notice board for them to return to work.

27. That some of the Claimants had their employment terminated before the main termination following the strike action. That in particular, the first claimant John Elego in whose name the suit is brought together with 19 other Claimants were not employees of the Respondent as at 1st October 2012 when the strike took place leading to the termination of employment of the Claimants.

28. That John Alego and 19 others cannot therefore purport to bring this suit on behalf of the other Claimants. They lack Locus Standi to do so. The suit is thus defective and should be struck off.

29. The Respondent called two witnesses Mr. Harjinder Singh Paneser (RW1) and Mr. Peter Mutua Munyoki (RW2) in support of the response and counter claim. RW1 adopted his witness statement. He was a Director of the Company for 37 years. He stated that the company was making profit and had grown over the years to employ about four thousand (4,000) workers. RW1 admitted that to remain competitive, it could not employ all its workers on permanent basis. That some were casuals, others were on varying contract terms and periods and others were on permanent terms. That he would not keep track of the status of all employees, since they were many to establish how long they had remained as casual. He stated this was the function of Human Resource Department who he expected to follow the law with regard to casual employment. RW1 admitted that he had agreed to pay employees transport allowance of Kshs.250 and that the same was not paid immediately. RW1 told the court that, the employees had called a strike to demand payment of the transport allowance. That the Respondent agreed to pay the allowance immediately and the employees returned to work. RW1 also admitted that he wrote to the union to withdraw the casuals and employees on fixed term contracts from the union. According to him only permanent employees were unionsable.

30. RW1 told the court it was necessary to limit use of telephone at work, and visits to the washrooms as these provisions were abused by some employees. Those who failed to comply were dismissed. RW1 stated that the employees were paid favourable and competitive salaries and not necessarily in terms of the minimum wage order.

31. RW1 admitted that the Claimants had not been paid their September salaries by 2nd October, 2012 and that the salaries were remitted to the Labour Office.

32. RW1 confirmed that a Return to Work Formula was concluded on 2nd October, 2012 but stated that the employees did not return to work.

33. RW2, Peter Mutua Munyoki adopted his witness statement and told the court that he was initially employed as a general worker. That he was a trained accountant and was employed as such later by the Respondent. That his role was to prepare accounts for the Respondent and the payroll in conjunction with the Human Resource department.

34. RW2 told the court that only permanent employees were entitled to house allowance and other allowances provided in the Collective Bargaining Agreement. RW2 said he received General Wage Orders from time to time but the employees were paid salaries not necessarily as provided in the orders. RW2 told the court that September 2012 salaries were remitted to the labour office.

35. The Respondent prays that the entire suit be dismissed with costs.

Determination

36. The issues that emerge in determination in this matter are:-

- (i) Whether the suit was properly filed on behalf of all the claimants.
- (ii) Whether the Claimants' employment was lawfully and fairly terminated.
- (iii) Whether the Claimants are entitled to the reliefs sought.

Issue 1

37. Rule (4) of the Employment and Labour Relations Court (procedure) Rules provide:-

“(1) A suit may be instituted by one party on behalf of other parties with a similar cause of action.

(2) Where a suit is instituted by one person, that person shall in addition to the statement of claim, file a letter of authority signed by all the other parties provided that in appropriate circumstances, the court may dispense with the requirement.

(3) The statement of claim shall be accompanied by a schedule of the names of the other Claimants in the suit, their address, description, and details of wages due or the particulars of any other breaches and reliefs sought by each Claimant”

38. The counsel for the Claimants Muma & Kanjama Advocates filed this suit on behalf of John Elego & 103 employees in terms of order 1 Rule 8 of the Civil Procedure Rules 2010.

39. The Authority as filed contains the names of the 103 Claimants and the positions they held at the Respondent's employ as at the time of employment. Verifying Affidavit sworn by John Elego Navade sworn on 2nd April, 2013 was also filed together with the Memorandum of Claim. A Supporting Affidavit by one of the Claimants Mr. Paul Musembi Kinyumu sworn on 2nd April, 2013 was also filed. Witness statements were filed on behalf of CW1 to CW5 Documents with full particulars of the various claims by the 104 Claimants were subsequently filed with leave of court.

40. The court is satisfied that all procedural requirements were followed in filing this suit. The Claimants are properly before court and the objection raised by the Respondent on Locus Standi is not well founded and is dismissed.

Issue ii

41. The next issue for determination is whether the collective dismissal of the Claimants from the employment of the Respondent on 31st October, 2012 was lawful, and fair.

42. It is not in dispute that the Claimants, except the 19 who had prior been terminated from employment were dismissed from work on 3rd October, 2012 following a strike action that took place on 1st October, 2012.

43. It is also not in dispute that the Union, FKE and the Respondent held a meeting on 1st October, 2012 with a view to resolving the strike action and a Return to Work Formula was drawn and signed by the parties.

44. The Return to Work Formula was produced before court and same is reproduced in full as follows:-

“During a joint conciliation meeting held in the company premises, the following issues were agreed amicably:-

1. That the workers go back to work immediately.

2. That there will be no victimization.

3. None of the parties will lose.

4. That the next meeting will be held on 4th October, 2012 at the District Labour Offices Industrial Area Nairobi under the Chairmanship of the District Labour Officer at 2.20 pm.”

45. The Return to Work Formula is signed by the Deputy General Secretary of the Union, Mr. Isaac Wambugu; Mr. Rashid O. Khwahe; Mr. Paneser, the Director of the Respondent, Mr. Theopole Mutune, the Human Resource Manager and Mr. R. M. Kilonzo district Labour Officer.

46. What is in dispute is what transpired after the signing of the Return to Work Formula, the Claimants stating that they were invited to receive their salaries on 2nd October, 2012 and return to work on 3rd October, 2012 but were locked out and dismissed on 3rd October, 2012 whereas the Respondent states that the Claimants refused to return to work immediately as directed. That notices were pinned on the company notice board warning the employees that if they did not report to work immediately, they would be dismissed from work. That the Claimants failed to heed the notices and were dismissed.

47. From the records before court, the union reported to the Ministry of Labour a dispute regarding *“Lock out of one hundred and sixty employees after the parties had agreed to return to work agreement on 1st October, 2012”* refused to go back to work. The Respondent relied on exhibits “A6”, a notice dated 2nd October, 2012 addressed to the striking staff by the Managing Director of the Respondent at page 193 of the defence. The notice reads –

“Having failed to honour the return to work formula signed by both parties yesterday on 1st October, 2012, you are once again requested to go back to your work station in the next one hour from 10.45 am to 11.45 am.

Failure of which you will have summarily dismissed yourself from work.”

48. The notice does not disclose the name of the person who purportedly signed it on behalf of the Managing Director and although it purports to have been copied to the District Labour Officer Industrial Area, FKE, the Union and Kenya Association of Manufacturers (non have signed it to acknowledge receipt). The Claimants deny any such notice was issued.

49. This notice had been preceded by an earlier one dated 1st October, 2012 at page 194 of the Statement of Defence which reads:-

The notice is from management to striking staff. It is dated 1st October, 2012. It does not disclose the name of its author and bears a signature above Human Resource Department. It purports to be copied to Labour Office and the FKE, Nairobi. Non of the two offices have acknowledged receipt.

The notice reads –

“This is to notify you that the strike is illegal and you are called upon to go back to your work station within the next thirty minutes from now (11.15 am) to (11.45am) otherwise in the lapse of the said time you will have summarily dismissed yourself from work.”

50. This document appears to have been written before the Return to Work formula was entered into.

51. The two documents in the court’s view do not have any substance of genuineness or authority since names of the persons who issued them is not disclosed on the face of the documents. The person to whom they purport to have been copied have not acknowledged receipt. Such serious notice as one dated 1st October, 2012 cannot simply purport to be written by an unnamed person in Human Resource Department whereas the one dated 2nd October, 2012 purports to be signed by undisclosed person from Managing Director Press Master Limited.

52. It is the court's considered view and finding that the two notices are not credible and the court cannot rely on them on the matters they purport to convey to the "striking staff."

53. The court has considered the testimony by CW1, CW2, CW3 CW4 and CW5 on the events of 1st to 3rd October 2012 and is satisfied that their testimony is a true account of what actually happened. The workers went on strike on 1st October, 2012. A Return to Work Formula was entered into on 2nd October, 2012. The employees were called by Human Resource Department to receive their unpaid salaries in the afternoon of 2nd October, 2012 and were asked to report to work in the morning of 3rd October, 2012. That upon their arrival on 3rd October, 2012 they were locked out. The Respondent called names of these employees it wished to retain and all the others were summarily dismissed from employment. Their salary to September 2012 was sent to the Ministry of Labour since it was not paid out as promised on 2nd October, 2012.

54. This summary dismissal was in violation of the Return to Work Formula.

55. This court has held that Return to Work formula is a sacred document that has endured the test of time in ensuring resolution of strikes and lock-outs in the country for many years and is well respected by the court as a workable tool without which many hours of work would have been lost once grievances escalate to the level of strikes and lock outs.

56. A Return to Work formula as the one before court is a binding document on all the parties involved in its conclusion. Neither of the parties in this suit have challenged the contents, the meaning and the authenticity of the Return to Work Formula before court.

57. The Return to work formula are often consummated in tense environment and are hardly well drafted. That notwithstanding the document bound the Respondent to allow all the workers on strike on 1st October, 2012 to return to work without being victimized. The language used in the return to work formula is well known in Labour Relations in this county. Its meaning and intent is clear to the parties even though to a stranger it may appear vague.

58. The court further relies on the case of **Mohammed Yakub Athman & 29 others v Kenya Ports Authority** in which the court held that an employee participating in a strike is entitled to be subjected to the disciplinary process provided for in section 41 of the Employment Act and section 80 of the Labour Relations Act.

59. In **ELRC at Kisumu, Mumias Sugar Co. Limited v Kenya Union Plantation Workers Petition No. 24 of 2016 [2017] eKLR**, Maureen Onyango J found in a case where employees had been summarily dismissed following a strike action, as follows –

“Termination of the Services of the grievants was unfair for reasons that they were not taken through the disciplinary process set out in section 41.....

...I further find that there was a Return to Work Formula which the company disregarded in terminating the employment of the grievants and, the company's action was intolerant and constituted very poor industrial relations.”

60. The court fully embraces this reasoning in this matter which has similar facts as the present case. The court therefore finds that the summary dismissal of the Claimants was unlawful, unfair and in violation of the law and Return to Work Formula.

Issue iii

61. Are the remedies claimed by the Claimants and by the Respondents in the Counter Claim available to them?

62. Having found that the summary dismissal of the Claimants, except the 19, who had since left the company was unlawful and unfair the Claimants are in terms of section 49(1)(c) as read with subsection 49(4) entitled to compensation.

63. The employees here were dismissed in similar circumstances. The mistreatment met on the employees over prolonged period led to the strike. One cannot say that the employees contributed to the dismissal. The “Respondent simply disregarded an amicable agreement reached and dismissed employees enmass. This conduct is to be discouraged especially in the Kenyan situation where the rate of unemployment is very high and it is difficult to get alternative employment.

64. The employees were not paid salary nor the terminal benefits they were agitating for at the time of dismissal. The Respondent had bashed union members consistently in violation of ILO convention 158; section 5 of the Labour Relations Act, 2007 and Article 36 and 41 of the Constitution of Kenya 2010. Freedom to join Union of choice must be respected by employers, at all times. Victimiting employees consistently by dismissing them for joining union and participating in union elections is conduct to be condemned.

65. To Respondent's credit, it is a large employer contributing greatly to the Kenyan economy and providing means of living to about 4,000 employees.

66. This however is no excuse to disregard rights of workers.

67. The court relies on the cases cited earlier in this judgment and awards the Claimants herein four (4) months salary in compensation for the unlawful and unfair termination of employment. For the avoidance of doubt this award relates to Claimants whose employment was terminated on 3rd October, 2012 following the strike action.

Other Claims by the Claimant

(1) Unpaid Bus Fair Allowance

68. It is the testimony by the Claimants and not disputed by the Respondent that the Union and the Respondent agreed to a payment of transport allowance to all employees calculated at Kshs.250 per month for January 2003. It has been proved that despite the workers going on strike over the matter and a Return to Work formula entered into regarding the same, it was not paid by the Respondent.

69. The court therefore awards all the Claimants Transport allowance calculated at Kshs.250 per month from January 2003 to the respective dates of termination for the 19 Claimants who had been dismissed prior to 3rd October, 2012. The rest of the Claimants will be paid up to 1st October, 2012 the date they went on strike. Claimant to compute the amounts, file and serve the Respondent for confirmation by the court.

Unpaid Salaries for days worked on 27th to 29th September, 2012

70. From the testimony before court, the salaries for the month of September in respect of all employees dismissed on 3rd October, 2012 was deposited with the Labour Office at Industrial Area. This being the case the Claimants are to collect their dues from the Labour Office if they had not done so to date. These claims are therefore disallowed.

Service Pay - Clause 12(b) CBA

71. The pay slips produced by the Claimant indicate that NSSF was contributed by the employer and remitted to the fund. However service pay calculated at 15 days salary for each completed year of service is payable to all Claimants who lost their jobs on 3rd October, 2012. The court orders accordingly.

Notice Pay – Clause 12 (a) CBA

72. All the employees who were summarily dismissed on 3rd October, 2012 were not given notice nor paid in lieu of notice. A Return to Work Formula was in place to have all the employees on strike return to work. The court has found that the Respondent prevented the Claimants from returning to work on 3rd October 2012. The Respondent did not pay the Claimants in lieu of notice upon dismissal.

73. Employees with less than 5 years' service to get one month pay. Employees with more than five (5) year service regardless of their category are entitled to two months salary in lieu of notice. The court so awards.

Under Payments

74. These claims have not been sufficiently proved in respect of each Claimant. The court is left to speculate when, how and in respect of whom, the minimum wage orders were not implemented. The onus is on the Claimants to prove the underpayments in terms of section 107 & 108 of the Evidence Act, Cap 80 Laws of Kenya. This was not done and these claims are dismissed in respect of all the Claimants.

Collective Bargaining Agreement Terms of 10% Increment of September 2011.

75. All the Claimants who were in the employ of the Respondent up to 3rd October, 2012 are entitled to this increment. It is the court's finding that all the Claimants were unionsable whether or not they were members of the union; had ceased to be members of the union or had not joined the union at all. The fact is that all the cadre of employee, comprising the Claimants were unionsable and were entitled to benefit from the negotiated CBA terms. It was unfair labour practice and exercise in futility for the Respondent to fight the union and victimize continuously any employee, except those it termed permanent employees for joining the union. The Law allows employees who have worked for over three months being casuals to be converted to permanent and pensionable terms. Nothing disallows casual employees, so called, from joining the union. They remain unionsable and eligible to enjoy CBA terms. The court awards all the Claimants who were dismissed on 3rd October, 2012 the CBA increment from September, 2011. The amounts to be computed accordingly for confirmation by the court.

House allowance; Night shift Allowance, Leave Travelling Allowance. 10% Increment 1996

76. All these Claims have not been sufficiently proved and are dismissed for want of proof. However any increment in the CBA of September, 2011 in respect of any of these items, was due and payable and will form part of the computation under the September 2011 CBA increment.

77. The court notes that each of the Claimants filed their detailed particulars and claims in their respective witness statements. The court looked into each of these statements in arriving at the aforesaid findings in respect of terminal benefits owed to the Claimants.

Counter Claim

78. The Respondent counter claims two (2) months salary in lieu of notice as per the CBA agreement because the Claimants stopped work and went on strike without notice. The Respondent states that an employee who has served for more than five (5) years is bound to give the two months notice which they did not give. The Respondent states that the company lost business during the strike and orders were cancelled by clients to the Respondent loss. The Respondent states that the company lost Kshs.65,493,868 in over all sales during the strike period as per the letter written by the company dated 21st May, 2013 and marked 'A13'. The Respondent therefore prays for two months pay

for all permanent and contract staff that participated in the illegal strike on 1st October, 2012. The Respondent also seeks general damages for loss and cancellation of business contract with various companies' costs of the suit and interest.

79. The onus of proving the counter claim on a balance of probabilities in terms of sections 107 and 108 of the Evidence Act, lies on the Respondent. It is not in dispute that the Claimants went on strike on 1st October 2012. It is also not in dispute that parties held conciliation meeting under the auspice of the labour office, FKE, and the union and a settlement was reached and reduced into the Return to Work formula before court.

80. All the terms of settlement are contained in the written Agreement aforesaid. It therefore follows that the Respondent cannot go outside the four corners of that document to penalize the Claimants for participating in the strike. The court has not been moved to declare the strike unlawful and no such determination has been made by the court.

81. On the above basis alone, the claim by the Respondent fails.

82. Furthermore, the losses alleged by the Claimant have not been sufficiently proved and linked to the action by the Claimants.

83. Accordingly, the counter claim is dismissed.

84. In the final analysis judgment is entered in favour of the Claimants as against the Respondent as follows:-

- a) Four (4) months salary in compensation for the unlawful and unfair termination of employment.
- b) Unpaid Bus Fair allowance at Kshs.250 per month from January 2003 to September 2012.
- c) Gratuity at 15 days basic salary completed year of service.
- d) The court awards payment in lieu of notice to the claims in terms of the CBA as follows:-
 - (i) Those with service below five (5) years, one month salary in lieu of notice.
 - (ii) Those with service of five (5) years and above, two (2) months salary in lieu of notice.
- e) The Claimants are awarded CBA increment of salary at 10% from September 2011 to date of dismissal. Any increment of allowances in the said CBA that remains unpaid to be included in the computation of gross salary increment from September 2011 to date of dismissal.
- f) The awards in (a), (b), (c), (d) and (e) above to be computed by the Claimant, filed and served on the Respondent within 30 days of this judgment. Same to be confirmed by the court on a date to be fixed subsequently.
- g) The awards to be paid with interest at court rates from date of judgment till payment in full.
- h) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 20th day of July, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 10th day of August, 2018

Maureen Onyango

Judge

Appearances

Mr. Kanjama & Co. for Claimant

Oyatta for Respondent

Anne Njung'e – Court Clerk