



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 430 OF 2015**

**BETWEEN**

**KENYA PLANTATION AND AGRICULTURAL WORKERS UNION .....CLAIMANT**

**VERSUS**

**REA VIPINGO PLANTATIONS ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Dalphine Muunde Branch Secretary Mombasa, for the Claimant*

*Beatrice Opolo Advocate instructed by Federation of Kenya Employers [FKE] for the Respondent*

---

**JUDGMENT**

1. This Claim was filed by the Claimant Union on behalf its 2 Members, Kahindi Unda Kombe and Shadrack Amani Ngumbao, on 1<sup>st</sup> July 2015. The 2 Members [Grievants] were employed on various dates by the Respondent Plantation Company, as Security Guards. Both were dismissed by the Respondent on 5<sup>th</sup> May 2014, on allegations that they assaulted and injured a fellow Employee, Geoffrey Ogembo.

2. Kahindi Unda Kombe was employed on 27<sup>th</sup> October 1997, and left employment on 5<sup>th</sup> May 2014. He was Security Headman, earning a monthly salary of Kshs. 10,000, and performance bonus of Kshs. 2,000. He served the Respondent for 17 years and 7 months. He had, at the time of filing the Claim, 3 Wives and 15 Children. He was at the time, 39 years old.

3. Shadrack Amani Ngumbao was employed on 18<sup>th</sup> November 2004 as a Security Guard. He left in the same position on dismissal, on 5<sup>th</sup> May 2014. His last salary was Kshs. 7,507 per month. He had served for 9 years and 7 months. As of the date of filing Claim, he had 1 Wife and 2 young Children.

**Claimant's position**

4. The Claimant states on the night of 22<sup>nd</sup> March 2014, there was an attempted rape at Respondent's

Plantation. Geoffrey Ogembo attempted to rape his Neighbour's Wife Mary Akinyi.

5. The Grievants were called in. They rushed to Akinyi's house. They found Ogembo in the house. They asked Ogembo to get out of his Neighbour's house. A crowd had gathered and had threatened to attack Ogembo. The Grievants asked him to come out, and accompany the Grievants to the Security Office.

6. Ogembo had a panga around his waist. He became violent, abusing the Grievants and kicking everyone and everything on sight.

7. The Grievants were able to remove Ogembo from Akinyi's house. They took him to the Security Store where they locked him up momentarily, to allow him some time to cool down. He remained violent kicking at the door. He injured himself. Eventually the Grievants forwarded Ogembo to Kijipwa Police Post. He was charged with creating disturbance and attempted rape.

8. Rather than receive accolades from the Respondent for a job well done, the Grievants were surprised to receive letters to show cause why disciplinary action should not be taken against them. The letters came on 25<sup>th</sup> April 2014, a period of over 1 month since the attempted rape.

9. It was alleged they had assaulted Ogembo and injured him on 22<sup>nd</sup> March 2014. They were summarily dismissed on 5<sup>th</sup> May 2014 for causing grievous harm to Ogembo.

10. They disputed dismissal, and reported the existence of a Trade Dispute to the relevant Cabinet Secretary, through the Claimant Union. The report was made on 2<sup>nd</sup> August 2014. A Conciliator was appointed.

11. Taken by the Claimant. He recommended the summary dismissal decision is commuted to regular termination, and the Grievants paid-

- a. Notice as per the CBA.
- b. Annual leave pay.
- c. Public Holidays worked but not properly compensated.
- d. Salaries/ wages up to the date of dismissal.
- e. Service for the years worked.
- f. 12 months' salary in compensation for unfair termination.

12. The recommendations were not acceptable to the Respondent, leading to the escalation of the conciliation process to adjudication by the Court.

13. The Claimant prays for Judgment against the Respondent, in favour of the Grievants in the following terms:-

- a. Unconditional reinstatement without loss of benefits.

*Alternatively-*

- b. Salary up to and including 5<sup>th</sup> May 2014.
- c. 18 days' salary for each completed year of service as gratuity.
- d. 3 months' salary in lieu on notice.

- e. Fares.
- f. 12 months' gross salary in compensation for unfair termination.
- g. Any other suitable relief.
- h. Costs.
- i. Interest from the date of Judgment till payment is made in full.

### **Respondent's Position**

14. The Respondent filed its Statement of Response on 22<sup>nd</sup> July 2015. It is accepted the Grievants were Employees of the Respondent, recruited and dismissed on the dates stated in the Claim, and serving in the positions stated in the Claim. The Respondent clarifies that as per Grievants' last pay slips, Kombe earned a monthly salary of Kshs. 10,283, while Ngumbao earned Kshs. 9,349.

15. There was no attempted rape incident on the night of 22<sup>nd</sup> March 2014. What happened was that there was a dispute between Ogembo and Akinyi. Akinyi is Wife to Jared Otieno, also an Employee of the Respondent. Akinyi had set up her clothe drying lines between her kitchen and Ogembo's house. Ogembo was unhappy that she used his house as support for the drying lines. He pulled the lines down, leading to the altercation between Ogembo and Akinyi.

16. Akinyi called her Father, himself an Employee of the Respondent, to assist in dealing with Ogembo. Akinyi's Father contacted the Grievants.

17. The Grievants proceeded to Ogembo's house. They asked him to accompany them, to their Security Office. While there, they assaulted Ogembo injuring him. The incident was witnessed by another Employee Harun Afsula.

18. On 26<sup>th</sup> March 2014, Claimant Union's Chief Shop-steward Joseph Ouma wrote to Respondent's Human Resource Manager, saying that Ogembo was thoroughly beaten by the Grievants. He stated Ogembo was beaten by the Grievants at around 9.30 p.m. The Chief Shop-steward wanted Management to intervene, explaining this was necessary because Ogembo was injured and unable to work and sustain himself. The Respondent wondered why the Claimant Union turned around to defend the Grievants, deny their wrongdoing, while Claimant's Chief Shop Steward had laid the blame entirely on the Grievants.

19. The Respondent carried out internal investigations. The process confirmed the Grievants were responsible for Ogembo's injuries.

20. They were asked to show cause why disciplinary action should not issue. They were heard in the presence of Union Shop-steward Jackson Kona as captured in the minutes of the disciplinary meeting, of 5<sup>th</sup> May 2014.

21. They were summarily dismissed and paid salary for days worked and accrued annual leave, less money owed to the Respondent. Their dues were deposited with the County Labour Office Kilifi.

22. The Respondent submits its decision was founded on valid ground and carried out fairly, in accordance with Section 45 of the Employment Act 2007.

### **Mode of hearing and disposal**

23. Parties agreed in Court on 26<sup>th</sup> September 2016, that the dispute is considered and determined, on the strength of the record. The contents of the record are as captured in the preceding paragraphs.

## Issues

24. These as understood by the Court are whether the Respondent had valid ground in summarily dismissing the Grievants; whether procedure was fair; and whether the remedies sought are merited.

## The Court Finds

25. There is no material dispute on the history of the Grievants' employment with the Respondent; their terms and conditions of employment; the dates of employment and termination; and the fact of termination at the instance of the Respondent.

26. The Respondent's decision was based on its finding that the Grievants had accosted Co-Employee Ogembo and seriously injured him. It was against the Company Policy and the Law for the Grievants to take the law into their own hands, and physically injure a fellow Employee. It would not matter that they claimed they acted in prevention of a felony.

27. The Grievants' position is that they answered a call to aid a victim of attempted rape, Mary Akinyi. They found Ogembo armed, in Akinyi's house attempting to rape her. They requested him to move out, and accompany them to the Security Office. He resisted, became violent and abused the Grievants. A crowd had formed, and intended to beat up Ogembo. The Grievants managed to remove Ogembo and took him to their Security Office. He was locked up in the store to calm down. He kept kicking at everything and everyone. He kicked at the store door, injuring himself. Injuries on Ogembo were self-inflicted. He had a history of violence, and was eventually charged through Kijipwa Police Post, with creating disturbance and attempted rape.

28. The Court is not persuaded by the account of the happenings of 22<sup>nd</sup> March 2014, given by the Grievants. There was no attempted rape incident.

29. The most truthful account is recorded in the statement of Harun Afsula, appendix 1a of the Respondent's documents.

30. Ogembo quarreled with Akinyi about the drying lines. Afsula found the 2 quarreling. He and his friend Ogembo were inside Ogembo's house when the Grievants came to the scene. The Grievants asked Ogembo to accompany them to their Security Office. He obliged, closing the door to his house behind him. On reaching the factory gate, the Grievants directed other Employees who had gathered to disperse. They took Ogembo to their offices within the factory and physically assaulted him.

31. The statements recorded by the Grievants under investigation, were not truthful. Ngumbao attributed Ogembo's injury to a vehicle which was reversing. He states in Kiswahili "*gari iliyokuwa ikirudi nyuma, ndipo alirusha teke, ikakosa yeyote, ikapiga gari kwa nyuma.*" Loosely translated, Ngumbao states Ogembo was kicking, missed the target, and kicked a reversing vehicle. This lie ties up with the assertion by the Grievants that Ogembo was kicking at everything and everyone. Kombe on the other hand stated Ogembo "*was hitting himself with the store's door made of iron.*" The Claimant's account while making representation before the Conciliator, was that "*while that was happening, he beats himself with an iron.*" Obviously these were cock and bull stories, told by the Grievants to cover up their torture of Ogembo, and justify their position on the dispute.

32. The letter by Chief Shop-steward Ouma, to Management, dated 26<sup>th</sup> March 2014, was categorical that Ogembo was beaten by Respondent's Security Guards, on 22<sup>nd</sup> March 2014, at around 9.30 p.m. Why would the Chief Shop- Steward, the eyes, ears and limbs of the Claimant Union at the shop-floor, indict the Grievants? Why would the Claimant, and its Chief Shop-steward, be at cross-purposes? The Chief Shop-steward and Afsula were truthful in their recreation of the incident of 22<sup>nd</sup> March 2014.

33. The Respondent had valid ground in summarily dismissing the Grievants. Employers have the obligation to ensure the security and safety of their Employees. No-one has a license to torture other

persons, even where those other persons may be vagabonds and felons. The role of Security Guards, as is the role of the Police Service, is to enforce law and order within their respective mandates. The Constitution and the Law does not mandate them, to discharge their mandates through assault of suspects. Even if Ogembo was caught *in flagrante delicto* with his Neighbour's Wife, there was no justification to physically assault and injure him. The Grievants should have subdued him in a civil way, assuming he had resisted their orders, and handed him to Management. Instead, they went at Ogembo with axes and gibbets.

34. Was the procedure fair? The Grievants were issued letters to show cause why disciplinary action should not be taken against them. They were called before a Disciplinary Committee on 5<sup>th</sup> May 2014, chaired by Vincent Akullo, Respondent's Human Resource Manager. The Grievants were accompanied by Shop- steward Jackson Kona. On the face of it, procedure was fair.

35. A scrutiny of the minutes of the disciplinary sitting, dated 22<sup>nd</sup> March 2014, nonetheless, reveals certain defects. Akullo just informed the Grievants that they had been called to the meeting, because they assaulted Ogembo, and Management was not happy with their actions. The Chairman told the Grievants Management had decided to take appropriate disciplinary action against the Grievants. The Grievants were prejudged. There was no objectivity in the process. Disciplinary processes are not mere formalities. They must always be carried out objectively, fair-mindedly, without predetermined outcomes. What would be the purpose of a hearing, if a decision has already been made to summarily dismiss the Employee?

36. Termination was based on valid ground, but flawed on fair procedure. ***The Respondent shall pay each Grievant the equivalent of 5 months' gross salary, in compensation for unfair termination.***

37. The remedy of reinstatement is not reasonable. The Grievants left employment over 3 years ago. The remedy becomes stale under the law, if not granted within 3 years from the date of termination. The Grievants left employment under a dark cloud of violence against a fellow Employee. It is unlikely that they would be able to repair their relationship with their former Employer, and Co-Employees. Their presence at the workplace would likely open old wounds. The prayer for reinstatement is neither practicable nor reasonable.

38. The prayer for 3 months' notice pay is undeserved. The Respondent had valid ground in summarily dismissing the Grievants. Notice pay is declined.

39. There is no clause in the CBA, provision in the Law, or other instrument which granted the Grievants fares. The Claimant argues it was the practice of the Respondent to give fares to Employees on termination. There was no evidence establishing such practice, brought before the Court. The item is rejected.

40. Salary for days worked in May 2014 and accrued leave pay were offered by the Respondent to the Grievants before the Claim was filed. The Respondent states it deposited salary for days worked and accrued annual leave pay at the Labour Office Kilifi. The Grievants are granted salary for days worked and annual leave pay as offered by the Respondent. They shall collect the deposit made by the Respondent from the Labour Office. In event that deposit has reverted to the Respondent, the Respondent shall pay the items to the Grievants alongside other sums granted under this Judgment.

41. Clause 22 of the CBA provides for gratuity at the rate of 18 days' salary for each year completed in service. It is restrictive in its application. It only applies to Employees whose contracts are terminated for reasons other than gross misconduct.

42. The Respondent denied the Grievants gratuity, because they left employment on acts of gross misconduct.

43. The Court's view is that clause 22 of the CBA is inconsistent with Section 18(4) of the Employment Act, which stipulates that an Employee, who is summarily dismissed for lawful cause, shall be paid all

moneys, allowances and benefits due to him up to the date of dismissal.

44. Gratuity accrues to an Employee through his long years of service. It is intended under most CBAs, to recognize and reward long and loyal service.

45. The Grievants invested their labour in the Respondent enterprise for very long years. Kombe worked for 17 years and 7 months. Ngumbao served for 9 years and 6 months. Their investment contributed to the growth of the Respondent Company. Should they be denied their dividend cheques in the end, for the simple reason that they were engaged in ill-advised conduct in the sunset years? How is it possible that after 17 years of service, a man with 3 Wives and 15 Children, leaves employment unrecognized and unrewarded, with only Kshs. 19,632 in salary for 5 days worked and accrued annual leave? The Court does not think it is proper to exclude the Grievants from the benefit conferred under clause 22 of the CBA. The clause appears inconsistent with Section 18 [4] of the Employment Act, and certainly has the effect of subjecting the Grievants to unfair labour practices. It goes against the spirit and the letter of the Constitution of Kenya and the Employment Act 2007.

**46. *The Respondent shall pay to the Grievants 18 days' salary for each completed year of service as gratuity.***

47. No order on the costs.

**48. *Interest allowed at 14% per annum from the date of Judgment.***

IN SUM, IT IS ORDERED:-

***a. Termination was based on valid ground, but flawed on fair procedure.***

***b. The Respondent shall pay to the Grievants: the equivalent of 5 months' gross salary in compensation for unfair termination; salary for 5 days worked in May 2014 and annual leave pay as offered by the Respondent before the institution of the Claim; and gratuity at 18 days' salary for each complete year of service.***

***c. Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

***d. No order on the costs.***

**Dated and delivered at Mombasa this 12<sup>th</sup> day of June 2017.**

**James Rika**

**Judge**