



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**

**CAUSE NUMBER 185 OF 2013**

**BETWEEN**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED**

**WORKERS UNION ..... CLAIMANT**

**VERSUS**

**1. TAVEVO WATER AND SEWERAGE COMPANY LIMITED**

**2. COAST WATER SERVICES BOARD ..... RESPONDENTS**

*Rika J*

**Court Assistant: Benjamin Kombe**

*Mr. Dickson Atela Industrial Relations Officers for the Claimant Union*

*Kioko, Munyithya, Ngugi & Company Advocates for the 1<sup>st</sup> Respondent*

*Munyithya, Mutugi, Umara & Muzna Advocates for the 2<sup>nd</sup> Respondent*

**JUDGMENT**

1. This Claim was initiated by the Claimant Union, through a Memorandum of Claim, received at the Court’s depository, on 28<sup>th</sup> June 2013. The Memorandum, and other Pleadings filed by the Claimant, mention that the Claim is brought on behalf of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Grievants. There are however, only 2 Grievants disclosed in the record: Elizabeth Wanjiku and Christopher Bundotich. The Claimant Union, as was observed in Industrial Court of *Kenya at Mombasa, Cause Number 222 ‘A’ and ‘B’ of 2013, between the Claimant v. Mombasa Water Supply & Sanitation Company & Another*, needs to present to the Court tidier Pleadings. A Party is better understood by the Court where Pleadings are clear. Who is the 3<sup>rd</sup> Grievant in this Claim?

2. The known Grievants were employed initially by the National Water Conservation & Pipeline Corporation. Wanjiku was employed as a Water Meter Reader effective 15<sup>th</sup> October 2001 [15<sup>th</sup> 2001 in the Memorandum of Claim]. Bundotich was employed on 29<sup>th</sup> July 1996 as a Clerical Officer. They were transferred to the Respondents, after restructuring of the water sector through the Water Act 2002.

3. The 1<sup>st</sup> Respondent is a Water Service Provider and an agent of the 2<sup>nd</sup> Respondent. The 2 Respondents have a Service Provision Agreement.
4. The Grievants worked for the 1<sup>st</sup> Respondent at the time the dispute arose. They were alleged to have been responsible for various revenue anomalies at their Voi Station. They were asked to show cause why disciplinary action should not be taken against them, in July 2010.
5. The 2 Grievants made a joint reply showing cause why they should not be disciplined, through a letter dated 18<sup>th</sup> July 2010. They explained there was variance between revised cashbook and Revenue Clerks' Cashbook, because some collections had mistakenly been omitted by the Revenue Clerks from the Cashbook. Borrowings summary by Finance and Administration Manager was incorrect.
6. Wanjiku was suspended for 90 days, through a letter from the 1<sup>st</sup> Respondent's Managing Director Peter Shwashwa dated 8<sup>th</sup> August 2010. Suspension was effective from 10<sup>th</sup> August 2010. She would be on half salary for the period of suspension.
7. Bundotich was suspended on 9<sup>th</sup> July 2010. This was before the 2 Grievants had written their joint reply to the letter to show cause why disciplinary action should not be taken, which is dated 18<sup>th</sup> July 2010.
8. Suspension letters explained a decision had been taken by the 1<sup>st</sup> Respondent's Board, through a resolution made in a meeting held on 2<sup>nd</sup> July 2010 that disciplinary action be taken against the Grievants. This resolution predated the letters to show cause why disciplinary action should not be taken. Both Grievants were placed on 90 days' suspension, on half salary.
9. On 25<sup>th</sup> November 2010, the 1<sup>st</sup> Respondent wrote to the Grievants a letter titled 'Transfer of Services.' The Grievants were informed their services with the 1<sup>st</sup> Respondent had been terminated, following a special sitting of the 1<sup>st</sup> Respondent's Board held on 16<sup>th</sup> November 2010. They were advised by the 1<sup>st</sup> Respondent to report to the 2<sup>nd</sup> Respondent for further instructions.
10. The 2<sup>nd</sup> Respondent wrote back to the 1<sup>st</sup> Respondent on 9<sup>th</sup> December 2010, advising there were no vacancies at the 2<sup>nd</sup> Respondent, and the 1<sup>st</sup> Respondent should retain the Grievants, until the matter was considered and resolved through the 2<sup>nd</sup> Respondent's Human Resource Committee. The 1<sup>st</sup> Respondent responded in a letter dated 28<sup>th</sup> December 2010, stating the Grievants were involved in malpractices, and would not be accepted back at the 1<sup>st</sup> Respondent. 'The decision to terminate their services is final,' TAVEVO informed its principal, the Coast Water Services Board
11. The intransigent position adopted by the 1<sup>st</sup> Respondent necessitated the filing of this Claim, in which the Claimant seeks the following orders against the Respondents:-
  - a) *The Court upholds 2<sup>nd</sup> Respondent's decision to reinstate the Grievants.*
  - b) *The 1<sup>st</sup> Respondent pays to the Grievants their arrears of salary, up to the date of Judgment.*
  - c) *Costs to the Claimant.*
12. The 1<sup>st</sup> Respondent filed a Statement of Response on 30<sup>th</sup> July 2013. There were also 2 Affidavits filed with the Response, sworn by 1<sup>st</sup> Respondent's Managing Director Peter Shwashwa. 1<sup>st</sup> Respondent holds its decision against the Grievants was lawful and justified. The orders sought against the 1<sup>st</sup> Respondent should be directed elsewhere. The 1<sup>st</sup> Respondent states it did not terminate Grievants' contracts, but transferred their services to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent acted fairly, and within its mandate. The Claim should be dismissed with costs to the 1<sup>st</sup> Respondent.

13. The 2<sup>nd</sup> Respondent relies on the Witness Statement of Chief Executive Officer Engineer James Thubu, dated 23<sup>rd</sup> April 2014. The 2<sup>nd</sup> Respondent also filed Memorandum of Association and Articles of Association of the 1<sup>st</sup> Respondent, and extracts of the Service Provision Agreement regulating the relationship between the Respondents.

14. Engineer Thubu explains the 2<sup>nd</sup> Respondent wrote to the 1<sup>st</sup> Respondent on 13<sup>th</sup> July 2010, communicating guidelines from the Head of Public Service on how the Water Service Providers under the 2<sup>nd</sup> Respondent, were to deal with cases of staff corruption and discipline among staff. On 15<sup>th</sup> September 2010, the 2<sup>nd</sup> Respondent wrote again to the 1<sup>st</sup> Respondent expressing its concern about unbanked revenue, and suspension of junior staff. The 2<sup>nd</sup> Respondent established suspension of staff by the 1<sup>st</sup> Respondent was flawed, evidence against the suspended staff scanty, and noted senior officers were not held accountable. The 1<sup>st</sup> Respondent wrote to the 2<sup>nd</sup> Respondent purporting to terminate Grievants' contracts and transfer their services to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent did not sanction termination of Grievants' services, and directed the Grievants are retained by the 1<sup>st</sup> Respondent. Engineer Thubu laments the 1<sup>st</sup> Respondent sadly, did not follow the advice of the principal, the 2<sup>nd</sup> Respondent herein, resulting in this dispute.

#### **Hearing:** -

15. The 2<sup>nd</sup> Grievant, Bundotich, partly gave evidence before the initial trial Judge Hon. Stephen Radido, on 8<sup>th</sup> July 2014. Parties agreed upon transfer of Judge Radido, that the incoming Judge, the undersigned, proceeds with the hearing from where the outgoing Judge signed off. It is important to state here that the undersigned has taken over several matters which were pending before the previous Judge. It was very disheartening to read in ***CA at Malindi Comarco Properties [EPZ] Limited v. Transport & Allied Workers Union [2016] e-KLR***, that by continuing with proceedings pending before the outgoing Judge, the undersigned had taken over, and run away with the file. How does completing the work left pending by a transferred Judge amount to running away with a file? What interest, rather than expeditious disposal of a pending dispute as mandated by the Constitution, would a Judge have, so as to run away with a file? The Parties in the above Appeal had not even suggested that the undersigned Judge took over proceedings, and ran away with the file.

16. The 2<sup>nd</sup> Grievant completed giving his evidence before the incoming Judge, on 25<sup>th</sup> February 2015. The 1<sup>st</sup> Grievant, Wanjiku, also gave evidence on this date, closing the case for the Claimant.

17. The Respondents did not call Witnesses, leaving it to the Court to rely on the record.

18. The Grievants restated the contents of their Pleadings in their evidence. It is not necessary to regurgitate these contents here, save to state that the 1<sup>st</sup> Grievant earned a monthly gross salary of Kshs. 15, 618 and the 2<sup>nd</sup> Grievant Kshs. 16,068 as of the time of termination.

#### **The Court Finds:-**

19. The employment history of the Grievants; their terms and conditions of services; and the fact of termination/ transfer by the 1<sup>st</sup> Respondent, are not contested.

20. The issues as understood by the Court are whether 1<sup>st</sup> Respondent's decision was based valid reason or reasons; whether it was carried out fairly; and whether the Grievants are entitled to the orders sought.

21. The letter of termination / transfer of services dated 25<sup>th</sup> November 2010, did not disclose any reason or reasons for the decision. The 1<sup>st</sup> Respondent did not disclose, in the letter, what the Grievants had done, to justify termination-cum-transfer of services.

22. The assumption would be that the Grievants were, as suggested in the earlier letters of suspension,

been involved in financial impropriety at their Voi Station.

23. The 1<sup>st</sup> Respondent did not establish these allegations before making its decision. Managing Director Peter Shwashwa appointed an Internal Committee through a Memo dated 8<sup>th</sup> August 2010. Its mandate was to review evidence against suspended Officers, and give an independent opinion to the Managing Director within a month.

24. The Committee concluded that the suspended Officers were not given adequate time to account for the financial gaps within their dockets. Some accounting documents were missing or misplaced. Some vouchers were pending and would have cleared the unaccounted for funds. In summary the Independent Committee appointed by the 1<sup>st</sup> Respondent's Managing Director, concluded the charge of financial impropriety was premature and not established. Where did the 1<sup>st</sup> Respondent find evidence after this report, to conclude the Grievants were engaged in financial impropriety?

25. The 2<sup>nd</sup> Respondent initiated its own audit of the 1<sup>st</sup> Respondent. In its report dated 15<sup>th</sup> September 2010, the 2<sup>nd</sup> Respondent concluded the whole matter on unbanked revenue was flawed, and the 1<sup>st</sup> Respondent's decision to suspend staff on scanty information, unjustified. The audit report suggests that if the suspended staff moved to Court, the 1<sup>st</sup> Respondent would lose dearly.

26. Reports from both Respondents concluded the 1<sup>st</sup> Respondent acted on scanty information. It is clear from these reports that the 1<sup>st</sup> Respondent did not have a valid reason or reasons, to justify termination / transfer. The 1<sup>st</sup> Respondent did not satisfy the requirement of Section 43 and 45 of the Employment Act 2007.

27. Was the process fair? As discussed above, the letter of suspension in the case of Bundotich, is dated 9<sup>th</sup> July 2010. This was before the 1<sup>st</sup> Respondent had put in place any investigatory process. The letter informed the Claimant that a resolution had been made by the Board that disciplinary action is taken against the 2<sup>nd</sup> Grievant.

28. The letter of suspension to the 1<sup>st</sup> Grievant is dated 8<sup>th</sup> August 2010. It was also based on the resolution of the Board of 2<sup>nd</sup> July 2010. The Grievants wrote their joint answer to the letter to show cause, on 18<sup>th</sup> July 2010. Why would the Board pass a resolution to take disciplinary action against the Grievants before investigation had been carried out, and even before the Grievants had shown cause? What was the purpose in calling on them to show cause, when a resolution to discipline them had already been made?

29. This procedural flaw was highlighted in the report of the Independent Committee established by Shwashwa. The Committee held it should have been constituted, before the matter was referred to the Board.

30. There is no record of the Grievants being heard personally, in the company of their Trade Union Shop-floor Representatives, or Workmates of their choice, as contemplated under Section 41 of the Employment Act 2007.

31. The Independent Committee appointed by 1<sup>st</sup> Respondent's Managing Director, recommended the Grievants are recalled to work without any conditions. The 1<sup>st</sup> Respondent did not recall the Grievants.

32. The Court has seen nothing in the Memorandum and Articles of Association of the 1<sup>ST</sup> Respondent, or in the Service Provision Agreement, or in the Guidelines on Staff Deployment to the Water Service Boards issued by the Ministry of Water Irrigation, or the Water Act, 2002, which enabled an agent to transfer Employees to the principal. The purported transfer of the Grievants by the 1<sup>st</sup> Respondent, back to the Coast Water Services Board was completely beyond the mandate of the 1<sup>st</sup> Respondent.

33. The Memorandum and Articles of Association of the 1<sup>st</sup> Respondent is clear the 1<sup>st</sup> Respondent is an agent of the 2<sup>nd</sup> Respondent, as intended under the Water Act 2002. The 1<sup>st</sup> Respondent can only deal with its Employees according to the human resources policy developed with the consultation and approval of the 2<sup>nd</sup> Respondent. The Independent Committee of the 1<sup>st</sup> Respondent suggested in its findings that there was no human resources policy at the time, as envisaged under the Memorandum and Articles of Association, and the 1<sup>st</sup> Respondent should have acted under the Public Service Code. The Guidelines from the parent Ministry did not suggest anywhere that water agents could transfer Employees to the Water Boards who grant them the mandate to operate water services.

34. The advice given by the 1<sup>st</sup> Respondent's Independent Committee, that the 1<sup>st</sup> Respondent retains the Grievants, was the same advice given by the 2<sup>nd</sup> Respondent on receiving the letter of termination/ transfer from the 1<sup>st</sup> Respondent. This was the advice of a principal to an agent. It was as well the advice of an internal organ of the agent, to the agent. The advice was not acted upon, the 1<sup>st</sup> Respondent Board defying counsel of its own principal and its own internal counsel.

35. The Court is satisfied the Claimant has shown the Grievants' contracts were unfairly terminated, and there was recommendation by 1<sup>st</sup> Respondent's Independent Committee and from the 2<sup>nd</sup> Respondent, that the Grievants are retained.

36. An order of reinstatement would be merited.

37. However, it is 7 years since the Grievants worked for the 1<sup>st</sup> Respondent. The law allows the Court to reinstate if 3 years from the date of termination have not lapsed. 7 years have lapsed. The workplace has changed. The structures are in a state of constant change. The Grievants have moved on. It would not be reasonable or practicable to compel Parties to recreate that which was lost, through the caprice of the 1<sup>st</sup> Respondent, 7 years back.

38. The remedies which commend themselves, though not pleaded, which are in the discretion of the Court to give, under Sections 3, 12 of the Industrial Court Act 2011 and Sections 36, 49 and 50 of the Employment Act 2007, are notice pay and compensation. The Employment and Labour Relations Court is not restricted to considering remedies as expressly pleaded. The guiding principle is to dispense industrial justice fairly, ensuring there is equilibrium between capital and labour, and that the minimum labour standards under Section 26 of the Employment Act 2007, are enforced. Lastly the Grievants were on half salary for the period of suspension. The 1<sup>st</sup> Respondent ought to have paid them the other half, at the time of termination/ transfer. The 1<sup>st</sup> Respondent shall pay the Grievants their withheld half salary for the period under suspension. The 1<sup>st</sup> Grievant is granted half salary for 4 months [August, September, October and November 2010], and the 2<sup>nd</sup> Grievant, half salary for 5 months [July, August, September, October, and November 2010]. IT IS ORDERED:-

***a) Termination / transfer of services was unfair and unlawful.***

***b) The 1<sup>st</sup> Respondent shall pay to the Grievants through the Claimant:***

***[i] 1<sup>st</sup> Grievant Elizabeth Wanjiku- equivalent of 12 months' gross salary in compensation for unfair termination at Kshs. 187,416; 1 month salary in lieu of notice at Kshs. 15,618; and half salary for 4 months at Kshs. 31,236 – total Kshs. 234,270***

***[ii] 2<sup>nd</sup> Grievant Christopher Bundotich- equivalent of 12 months' gross salary in compensation for unfair termination at Kshs. 192,816; 1 month salary in lieu of notice at Kshs. 16,068; and half salary for 5 months at Kshs. 40,170- total Kshs. 249,054.***

***c) Costs against the 1<sup>st</sup> Respondent, to the Claimant and the 2<sup>nd</sup> Respondent.***

***d) Interest allowed on the above amounts of Kshs. 234,270 and 249,054, from the date of termination/transfer, at 14% per annum, till Judgment is satisfied in full.***

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

James Rika

Judge