REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 11 OF 2015

(Previously Mombasa Industrial Court Petition No. 56 of 2014)

(Originally Mombasa High Court Petition No. 68 of 2012)

JOSEPH MAKAU MUNYAO.....1ST CLAIMANT

ELIUS NJOKA..... 2ND CLAIMANT

STEPHEN BAYA MWANYULE.....3RD CLAIMANT

MWINYI SULEIMAN SIBABU.....4TH CLAIMANT

BWANA MOHAMED BWANA.....5TH CLAIMANT

V

KENYA PORTS AUTHORITY.....1ST RESPONDENT

THE MANAGING DIRECTOR,

KENYA PORTS AUTHORITY.....2ND RESPONDENT

JUDGMENT

1. The Petitioners originally filed a Petition before the High Court in Mombasa on 20 June 2012 alleging contravention of various constitutional and employment (contractual) rights (the original Petition included the Ministry of Transport and the Attorney General as Respondents, but the claims against them were withdrawn).

2. Together with the Petition was a motion under certificate of urgency seeking orders restraining the Respondents from proceeding with disciplinary action against the Petitioners.

3. Tuiyott J certified the motion urgent and during an *inter partes* appearance on 6 July 2012, further restrained the Respondents from taking any further disciplinary action against the Petitioners pending hearing of the main Petition.

4. The parties agreed before the High Court that the Petition proceed on basis of record and submissions.

Directions were given on filing of submissions.

5. The Petition came up for hearing on 27 September 2012, but it did not proceed. The reasons are on record. The Attorney General had also filed a preliminary objection.

6. On 29 November 2012, interlocutory judgment was entered by the Deputy Registrar against the Respondents for failing to file responses to the Petition.

7. On 26 February 2013, the claims against the Ministry of Transport and the Attorney General were formally marked as withdrawn.

8. On 25 November 2013, the Petitioners sought to be allowed to proceed through *viva voce* evidence, but the Respondents opposed the application. Directions were therefore given on 10 January 2014.

9. When the parties appeared before the High Court on 14 February 2014, they agreed that because of jurisdiction, the Petition should be transferred to this Court. The Court conceded to the application and the parties appeared before me on 3 March 2014.

10. During the appearance, the Petitioners sought leave to amend the Petition and the Court allowed the application. The Respondents were given corresponding leave to amend the Response if necessary.

11. Consequently, the Petitioners filed an *Amended Plaint* on 11 March 2014.

12. On 11 April 2014, the Petitioners sought further leave to amend the *Amended Plaint* and the Court allowed the application as a result of which a *Re-Amended Plaint* was filed on 24 April 2014 (although titled Petition, the Claim herein is essentially now an ordinary Cause and the Court will refer to the Petitioners as the Claimants).

13. The Court will, in this respect determine the case as an ordinary Cause and not a constitutional Petition. Where necessary, the Court will examine whether any of the Claimants constitutional rights were violated by the Respondents.

14. On 29 May 2014, the Respondents filed a Memorandum of Defence.

15. On the same day, the Court gave directions that the Cause proceeds for hearing through oral evidence on 7 July 2014 and 8 July 2014.

16. The Cause proceeded as scheduled and was adjourned to 8 October 2014, but due to my transfer, the parties consented before Rika J to have the file transmitted to me in Nakuru to proceed with the hearing to conclusion.

17. In this regard, hearing continued on 18 March 2015, 19 March 2015, 21 April 2015 and 10 June 2015. Submissions were filed and highlighted on 22 October 2015.

18. The Court has considered the pleadings, tomes of documentation filed by the parties, the testimonies by witnesses and the submissions.

19. The Claimants identified in their submissions the issues for determination as

> i. were the warnings given to the Claimants by the warning letters of 29th, 30th and 31st March, 2011 unconstitutional, illegal, wrong and or unprocedural?
>
> ii. If yes, what effect in law do they have on the interdiction and lifting of interdiction and the stripping off of the posts of the Claimants.
>
> iii. Was the 2nd Respondent a proper party to these proceedings?

iv. Are the Claimants entitled to the reliefs sought? If yes, which ones?

v. Who is to bear the costs of this Claim?

20. The Respondents on the other hand identified the issues requiring determination as

i. Whether the case against the 2nd Respondent should be dismissed *ab initio*.
ii. Whether the action taken against the Petitioners was justified, lawful and procedural and
iii. Whether the Petitioners are entitled to the claims made.

21. Save for language, the issues identified though not concise to bring out the real issues in dispute, are more or generally the same.

22. Because of the voluminous nature of evidence tendered, the Court will not give a narration of the parties' respective testimonies except as is germane to the determination of the issues identified by the parties.

Cause of action against the 2nd Respondent *(Claimants' issue (iii) and Respondents issue (i))*

23. In the original Petition, the 2nd Respondent was described as *Managing Director of the 1st Respondent and is charged with the duty of Managing and running of the 1st Respondent including decisions making.*

24. The substance of the description of the 2nd Respondent did not change in the *Amended Plaint* and *Re-Amended Plaint*.

25. The body of the Claimants' pleading does not set out any facts forming a cause of action against the 2nd Respondent as an office within the Kenya Ports Authority.

26. There is no insinuation or allegations that the 2nd Respondent whilst executing the duties of his office or in the process of taking disciplinary action against the Claimants acted in bad faith or abused the powers of his office.

27. The Claimants did not directly address this issue in their written submissions. Although paragraph 36 of the submissions cite extensively the Respondents procedures for dealing with cases warranting dismissal, and the role of the 2nd Respondent, the Claimants did not demonstrate any nexus between the role of the 2nd Respondent and breaches of the disciplinary procedures which would lead to liability on his part.

28. The Respondents cited *Salomon & Co. Ltd v Salomon* (1897) AC 22 and *Victor Mabachi & Ar v Nuturn Bates Ltd (2013)* eKLR to advance the position that a company is a separate legal person from its shareholders and directors, and is liable for its conduct.

29. The legal position advanced by the Respondents in respect to the legal personality and liability of companies is generally true, but it is doubtful whether it is universally applicable in all employment/contractual relationships considering the statutory definition of *employer* in section 2 of the Employment Act, 2007.

30. In the view of the Court, despite and inspite of the wide definition given to an employer in section 2 of the Employment Act, 2007, it was not necessary to join the 2nd Respondent into the proceedings, when the employer (1st Respondent) was already cited without setting out any bad faith or abuse of office on his part.

31. Before examining the other issues framed by the parties, it is necessary to examine the question of a

go slow or strike.

32. A determination of this issue will unravel the other issues raised by the parties.

The go slow/strike

Was there a go slow/strike

33. The warning letters and interdiction letters issued to the Claimants referred to economic sabotage/failure to follow performance targets.

34. During testimony, and from the documents produced, it became apparent that there was a dip in meeting the performance targets from 29 to 30 March 2011. The Respondents' first witness produced copies of the performance records.

35. From the documentation produced by both sides, the Court is convinced that there was a slow down in meeting of targets set for the gantry operators, and that the drop was due to a go slow in the workplace.

36. From the documentation, it is also clear that trouble had been brewing in the gantry operations department because of several issues related to remuneration and terms of service.

Did Claimants participate in the go slow/strike?

37. The 1st Claimant stated in his testimony that the department had about 104 gantry operators who worked in 3 shifts and that on 29 March 2011 and 30 March 2011, he was on standby for the 3rd shift and not on active duty. He did not operate any equipment. The 3rd shift ran from 2300 hours to 0700 hours.

38. He produced the weekly roster for the period.

39. The Respondents' first witness also produced a duty roster for period 28 March 2011 to 30 March 2011. He disowned the one produced by the Claimants.

40. According to the roster, the 1st Claimant was on standby.

41. According to the witness, 1st Claimant was on standby on both 29th and 30th March 2011, and could be called to operate a machine, and that he was indeed called to operate a machine at around mid day on 30 March 2011, but he defied instructions. At the same time, he stated that the 1st Claimant was on standby for third shift which started at 2300 hours.

42. From the documents produced and testimonies by the Respondents witnesses, the Court can logically conclude that the 1st Claimant could not reasonably be accused of neglecting to meet performance targets on 29 March 2011 and 30 March 2011, when he was not on active duty. He did not operate any machine and could not have been on a go slow/strike.

43. Equally it is incomprehensible for the Respondents to suggest that the 1st Claimant failed to operate a machine around midday when the shift he was on call for operated from 2300 hours to 0700 hours.

44. There is no factual basis to the allegations that the 1st Claimant breached his contract during the period intimated.

45. The Respondents' second witness even admitted in cross examination that the interdiction of the 1st Claimant was based on incorrect facts based on the documents.

46. 2nd Claimant on his part stated during cross examination that he did not operate any machine or RTG

019Z though he was rostered. The 2nd Claimant was to operate RTG29 in the 1st shift.

47. The 3rd Claimant was to operate RMG 04 during the 3rd shift and the 4th Claimant was assigned to RTG24 first shift.

48. The Respondents' first witness confirmed that though he did not see the 3rd Claimant on duty, he was rostered and he even reported a problem with the equipment he was operating at about 0050 hours and that within less than an hour it had been repaired.

49. The 5th Claimant on his part testified that he was on dormant shift on 29 March 2011 and 30 March 2011, though he had gone to the terminal to collect his pay slip.

50. The Respondents' witness appeared to corroborate the testimony when he testified that he had seen the 5th Claimant in the work place at around 7.00am though he was not supposed to be at work.

51. This Claimant could not have been on a go slow when he was not on active duty. The 5th Claimant was on call/dormant duty.

52. The allegations against the 5th Claimant were anchored on allegations that he was seen around the work place when he ought not to have been there. He explained that he had gone to collect his pay slip, a logical explanation.

53. In the Court's view, the mere presence of the 5th Claimant at the workplace cannot demonstrate he had ulterior motives. There was no suggestion that he was heard inciting his colleagues or that he took part in an illegal strike/go slow.

54. As regards the role of the 2nd to 4th Claimants, the Court will interrogate the fairness of the process culminating in the interdictions and lifting of the interdictions on conditions/sanctions.

Fairness/lawfulness of the action against the Claimants *(Claimants' issues (i) & (ii) and Respondents issue (ii).*

Warnings of 30 March 2011

55. A warning is a sanction or penalty which comes at the end of a disciplinary process within the employment relationship.

56. The Respondents' procedures envisage the giving of warnings as part of the disciplinary process and elaborate processes have been outlined before the sanction of warning is issued, but where the offence does not amounting to gross misconduct.

57. Section K.4(a)(i) and (xvii) of the Disciplinary Handbook provide for what amounts to gross misconduct justifying summary dismissal, and authorise the 1st Respondent to commence disciplinary action against an employee where there is failure to comply with lawful commands or for use of abusive language.

58. Under Section K.4(c) of the Disciplinary Handbook, the 1st Respondent was required to carry out investigations.

59. However, the section must be read together with Section K.8 of the Handbook which provides for procedures for dealing with cases warranting dismissal. Preliminary investigations ought to have been carried out and charges framed against the employee(s).

60. It is only after going through the procedures under section K.8 that the Respondents would issue a

sanction (warning).

61. There is no evidence that the Respondents carried out any of the procedures outlined in section K.8 before issuing the sanctions of warning. Either the Managing Director or Human Resources and Administration Manager should have caused preliminary investigations to be carried out, had charges framed and given the employees 72 hours to show cause.

62. In so far as the warnings of 30 March 2011 were not preceded by preliminary investigations, framing of charges and affording the Claimants an opportunity to be heard on the allegations, the warnings were unfair, because the Respondents had not complied with the 1st Respondent's own internal procedures.

The interdictions

63. The 1st Claimant received on 31 March 2011, a warning letter dated 30 March 2011. The reason given for the warning was economic sabotage contrary to Section K.4(a)(i) and (xvii) of the Disciplinary Handbook. The particulars appear to be that he had neglected and or refused to meet laid down performance targets.

64. On 31 March 2011, the 1st Respondent interdicted the 1st Claimant from duty allegedly because he had not heeded the warning dated 30 March 2011. The interdiction was anchored on Section K. 7(b) of the Disciplinary Handbook, and was to facilitate investigations.

65. The interdiction letter requested the 1st Claimant to respond within 72 hours and he did respond in writing on 1 April 2011, explaining that he was on standby and he also requested a personal hearing.

66. On 30 January 2012 (about 1 year later), the Respondents informed the 1st Claimant that after consideration of the circumstances by the Investigations Committee, the interdiction would be lifted with conditions (warning; redeployment, surcharge of 3 months basic salary, 24 months' probation among others).

67. The 1st Claimant was not happy with the conditions, and on 15 February 2012, he appealed against the redeployment and surcharge. He sent a reminder on 19 March 2012 when there was no response forthcoming.

68. The 2nd Claimant also received on 30 March 2011, a warning letter dated 29 March 2011 in similar terms to those of the 1st Claimant. That very same day he also received an interdiction letter.

69. The interdiction was lifted through a letter dated 30 January 2012. The conditions attached to the lifting of the interdiction were similar.

70. 3rd and 4th Claimants also received warning letters dated 30 March 2011 and interdiction letters dated 31 March 2011. Letters lifting the interdictions were issued on 30 January 2012.

71. These Claimants received invitations to attend oral hearings dated 1 July 2011.

72. The 1st Respondent's Acting Head of Human Resources thereafter issued a memo dated 9 February 2012 advising on the Claimants redeployment.

73. The case of the 5th Claimant was slightly different. On 14 April 2011, the Respondents through a show cause notice alleged that on 31 March 2011 despite being on call, he was seen at the container terminal purportedly to incite other employees to continue with a go slow. The letter also alleged he was involved in an altercation with a senior employee.

74. The 5th Claimant was called upon to show cause within 72 hours. He received the letter on 26 April

2011, and he responded the same day.

75. On 29 April 2011, the 5th Claimant was interdicted from duty and the offence was stated as gross misconduct. The particulars were, directly taking part in an illegal strike on 29th/30th March 2011, manhandling an in charge Francis Wanguba and not following performance targets.

76. The 1st Respondent lifted the interdiction through a letter dated 30 January 2012, on conditions similar to the other Claimants.

77. It is the conditions attached to the lifting of the interdictions which aggrieved the Claimants hence the present proceedings.

78. The 1st to 4th Claimants were interdicted through letters dated 31 March 2011. The interdictions were to facilitate investigations. The interdictions were on certain conditions.

79. Section K. 7 of the Handbook allowed for interdictions and suspensions. The interdiction letters informed the Claimants of the allegations of misconduct and that investigations would be carried out.

80. They were called upon to make explanations/show cause. This was in terms of the provision which required the Respondents to obtain written statements from the concerned employees.

81. After the written explanations were obtained, the Claimants were invited to a personal hearing.

82. The 5th Claimant underwent a similar process as the other Claimants.

83. In my view, the 1st Respondent had contractual authority to interdict the Claimants on the basis of carrying out investigations arising out of the allegations, and it exercised that authority lawfully and fairly.

Lifting of interdictions on conditions/sanctions where employee guilty of disciplinary offences

84. After investigations and hearings, the interdiction of the Claimants were lifted but on certain conditions.

85. The real dispute or gravamen of the Claimants cases as I understand, is on the *justifiability, fairness, lawfulness* of conditions (sanctions) attached to the lifting of the interdictions.

86. The Respondents contended that the action it took was justified because the Claimants had fundamentally breached their contracts of service by going on a go slow generally, and the attendant consequences on performances.

87. The Respondents made reference to several authorities from our domestic jurisdiction and others from comparative jurisdictions. Reference was also made to section 80 of the Labour Relations Act.

88. In my view, the real issue is an examination of whether the conditions/sanctions attached to the lifting of the interdictions had support either in contract, statute or common law. The constitutional right to fair labour practices is also directly implicated.

89. I will examine each of the conditions/sanctions and also make some general observations.

Warning(s) post interdiction

90. The first condition was a warning(s). Section K.6 (a) of the Disciplinary Handbook provided warning as a sanction in cases not amounting to gross misconduct.

91. In my view, the Respondent was perfectly entitled to issue warning(s) to the Claimants after complying with all the due process steps provided for in the Disciplinary Handbook, and finding them culpable of the allegations. The Claimants were afforded an opportunity to be heard through correspondence and orally. Further, issuance of warning letters has universally been accepted as a disciplinary action all over the world.

92. Whether the Respondents have proved the allegations before Court has been dealt with earlier examination of whether the Claimants participated in the go slow.

Redeployment(s) as disciplinary sanction

93. The second condition was that the Claimants were to be redeployed. They were redeployed through a memo dated 9 February 2012.

94. The departments the Claimants were redeployed to appear not to have been as lucrative as the former department of gantry operations. Gantry operators were entitled to allowances which were not available to employees in other departments. This was due to the nature and scope of duties of gantry operators.

95. The redeployments were the outcome of a disciplinary process and not the normal exercise of an employer's managerial prerogative.

96. The fairness or lawfulness of the redeployment is therefore not a simple issue within the employment relationship. The parties did not address the legal issues adequately.

97. Ordinarily, an employer is free to allocate/organise work as it deems prudent to achieve optimum results.

98. This principle should be seen within the context where under the common law, the responsibility/obligation of an employer is to pay wages and not allocate work. This common law position now has statutory underpinning in sections 10(2)(h), 17 and 18 of the Employment Act, 2007.

99. To put it more graphically, an employee has a common law and statutory cause of action when an employer fails or neglects to pay wages as they fall due while it is doubtful whether an employee has a cause of action when the employer pays wages but does not allocate duties.

100. However, where such redeployments constitute a variation of the *essentiala* of the contract of employment as part of disciplinary process, legal difficulties arise because it is an action done without consultations with and/or the consent of the employee.

101. There are terms which are fundamental or essential in the employment contract. These include wages/remuneration, term or duration of the contract, hours of work and duties or responsibilities. Place of performance of contract may also form an *essentiala* of the contract.

102. The Claimants put a lot of emphasis on the remunerative aspect and the duties/responsibilities.

103. There is a causal link in the instant case between the redeployments and the alleged misconduct the Claimants were allegedly involved in.

104. Nevertheless, I need to state that my attention was not drawn to any direct contractual provision which permitted the Respondents to deploy the Claimants or any of its employees as a disciplinary action or sanction for misconduct, poor performance or breach of the terms of the contract of service.

105. Equally, my attention was not drawn to any statutory provision which allows an employer to deploy an employee as a penalty for breach of the terms of contract of service.

106. The Respondents submitted that the redeployments were occasioned by mistrust that had developed

as a result of the Claimants breaches of contract and further that the redeployments were at 1st Respondents discretion.

107. The Claimants lamented that they had been redeployed to work in departments where they had no skills or knowledge. One testified that he was more or less wasting in the archives and that he was not getting assigned duties on a daily basis.

108. Section K.9 of the Disciplinary Handbook has provided for the sanctions/penalties where an employee is found guilty of the disciplinary offences mentioned therein. Therefore, when the Respondents are contemplating imposing a sanction or penalty pursuant to section K.8 (v) of the Disciplinary Handbook, they must choose from the provided punishments.

109. Redeployment is not one of the provided sanctions.

110. In my view, an employer has general prerogative to redeploy employees but where such redeployment is a sanction arising from a disciplinary process, without contractual or statutory basis, the redeployment would amount to an unfair labour practice which would attract the Court's intervention.

111. For the record, the Court states that the Respondent did not prove that the Claimants were culpable amongst the over 90 gantry operators.

112. However, there is still the remuneration bit to grapple with.

113. The Respondents' second witness testified that the Claimants grades and salaries did not change on redeployment and that they were not entitled to the allowances (fixed, bonus, detergent) they were seeking because they no longer carried out gantry operations.

114. In my view, lose of these allowances apart from the basic salary and house allowance has not been proved as entitling the Claimants to a relief in the instant case.

The surcharge as a disciplinary sanction

115. The Claimants were also surcharged the equivalent of 3 months basic wage each.

116. Section K.11 of the Disciplinary Handbook provides for surcharge where an employee is found personally culpable for a liability.

117. The surcharges were therefore based on contractual agreement, but the Court will examine under remedies whether the Respondent has proved that the Claimants were personally culpable for the losses.

Probation

118. The Claimants were all placed on fresh probations of 24 months.

119. The Respondents did not lead any evidence as to the contractual or statutory basis for placing the Claimants on fresh probation. The Respondents' second witness therefore in a candid disclosure admitted that fresh probation was not one of the punishments/sanctions provided for in terms of the contractual agreements.

120. Probation in employment has universally accepted purposes and objectives. One of those purposes or objectives is not to serve as a penalty or sanction for misconduct or poor performance.

121. In the circumstances of the present case, there was no legal or contractual basis for placing the Claimants on a new round of probation after they had served for several years. It was an also unfair labour practice.

Proof of the reasons for the warnings, redeployments and the Oyaro report

122. Before the lifting of the Claimants interdictions and imposition of the sanctions, the Respondents caused an investigation to be conducted by a Committee led by a Mr. Oyaro.

123. On 3 April 2014, the Claimants filed and served upon the Respondents a Notice to Produce some 5 documents. These were

1. Oyaro lead Committee of Inquiry Report on Gantry Crane Operators.

2. Nyarandi Lead Committee of Inquiry Report on Gantry Crane Operators.

3. K.P.M.G Report.

4. Ernst & Young Report.

5. Subcommittee Report set up by the Managing Director chaired by the Personnel Manager Mrs. Jane Kamau for recommendation on the performance based target incentives for gantry operators.

113. The reports were never produced. The Respondents filed a Notice of Non Production/Admission of the Documents on 15 October 2014.

114. The Claimants insisted on the production of the report even during testimony.

115. It has disturbed the Court in no short measure that the Respondents were not willing to produce the report of the Oyaro Committee. This lends doubt as to whether the Committee found the Claimants culpable for the breaches they were accused of and in respect of which the sanctions were imposed including redeployments and surcharge(s).

124. It even makes it difficult to confirm whether the sanctions were recommended by the Committee.

125. In this era of transparency and accountability, and more so within entities operating within the public sector, and putting into consideration Articles 35 and 236 of the Constitution, the Court is entitled to make an adverse inference against the Respondents.

126. This despite section K.8 (t) of the Handbook which disentitles an accused employee to such minutes, proceedings and/ or reports of the disciplinary process.

Appropriate remedies

Declaration warnings were unconstitutional and unlawful

127. The Court has reached a conclusion that although the warnings of 30 March 2011 had contractual foundation, the Respondents did not comply with its internal processes and the same were therefore unprocedural and unfair.

128. In lieu of granting the declaration sought, the Court would order that the warnings be expunged from the Claimants employment records. This is order is made being mindful to the 12 month validity period for warnings.

Declaration interdictions were illegal and unwarranted

129. The interdiction of the Claimants had contractual basis, and the Claimants were informed that the interdictions were to facilitate investigations. The interdictions were part of a process which could either find the allegations baseless or as founding grounds for disciplinary penalties. The relief is declined.

Declaration advertising of vacancies for gantry operators was unconstitutional

130. A Court of law may not interfere with an employer's prerogative to employ staff as it may deem fit to meet its business objectives.

131. The primary concern of the Court would be to preserve the contracts and rights of employees where there are unfair practices adversely affecting those rights and contracts.

132. The advertisements did not prejudice, and the Claimants have not demonstrated they were prejudiced.

133. The declaration is not warranted.

Declaration lifting of interdictions null and void, and illegal and unconstitutional

134. After a disciplinary process, an employer is at liberty to take action in consonance with the terms of the contract, but within the bounds of the right to fair labour practices.

135. Where an employer after due process finds an employee guilty of misconduct or breach of contract, it has the option of bringing the contract to an end, issuing a warning or not taking action prejudicial to the employee.

136. Apart from bringing the contract to an end, issuing a warning, or not taking any action, it is not open to an employer to give a penalty which is not supported by contract or the law.

137. The employment relationship has long evolved from the era of master/servant relationship. The evolution has been as a result of constitutional and statutory intervention.

138. In the view of the Court, some of the conditions/sanctions attached to the lifting of the interdictions had no contractual/statutory underpinning, and therefore the Court finds the conditions/sanctions amounted to an unfair labour practice.

Violation of constitutional rights

139. The action herein started its life as a Constitutional Petition. Articles 25, 27, 29,36,37,41, 47 and 50 were allegedly violated. The Petition then mutated/changed character to an ordinary Cause and in the circumstances the Court finds it is not necessary to examine whether any of the cited rights were violated, except as may be found under the several heads of relief alluded to herein.

Refund of surcharge

140. The Disciplinary Handbook envisage surcharge of upto a maximum of 3 months basic salary where an employee is found personally culpable for loss or damage.

141. In my humble view, the surcharge should be in the form of a special damage and the loss or damage should be quantified and be proved.

142. Although, the Respondents called one of its Accountants, no serious attempt was made to compute the exact loss/damage attributable to the Claimants.

143. The Claimants sought Kshs 245,580/- each being the amounts surcharged from their wages for 3 months.

144. The Court finds that the surcharges were arbitrary and should be refunded to the Claimants.

Restoration to gantry operations

145. Having reached the conclusion that the Respondent had no factual basis to take disciplinary action against the 1st and 5th Claimants, the Court finds that redeployment as a sanction and or penalty was unfair, it would be logical to order that the 2 Claimants be restored to their previous jobs before the interdictions.

146. As regards the 2nd to 4th Claimants, it is the view of the Court that an order restoring them to gantry operations would not be an appropriate remedy.

General damages

147. In the view of the Court, and considering the finding that the redeployment(s) and fresh probation amounted to an unfair labour practice as the same were not supported by contract or law, this would be a suitable case to award damages for unfair labour practices.

148. The Court assesses such damages as Kshs 800,000/- to each Claimant.

Special damages

149. The claim for special damages as advanced, in the view of the Court must fail because of remoteness.

Conclusion and orders

150. Arising from the above the Court orders that

a. 1st and 2nd Claimants be restored to their positions/responsibilities as gantry operators with immediate effect.
b. Each Claimant to be paid Kshs 800,000/- as general damages for unfair labour practice(s).
c. Claimants surcharged should be refunded the amounts surcharged (Kshs 245,580/- each) forthwith.

151. The Claimants to have costs of the Cause.

152. This being essentially a Mombasa Cause, it should be transmitted back to the Employment and Labour Relations Court, Mombasa immediately after delivery of this judgment for any further processes as may be necessary.

Delivered, dated and signed in Nakuru on this 19th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimants Mr. Olaba/Mr. Aboubakar instructed by Aboubakar, Mwanakitina & Co. Advocates

For Respondents Ms. Wetende instructed by Kaplan & Stratton Advocates

Court Assistants Midian, Mwangi and Nixon