



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAKURU**  
**CAUSE NO. 164 OF 2013**  
**(Originally Nairobi Cause No. 1160 of 2010)**  
**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL**  
**INSTITUTIONS, HOSPITALS AND ALLIED WORKERS....CLAIMANT**  
**v**  
**RIFT VALLEY SPORTS CLUB.....RESPONDENT**

**JUDGMENT**

1. The Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers (Union) filed a claim against Rift Valley Sports Club (Respondent) in Nairobi stating the issue in dispute as unfair dismissal of Mr. John Kariuki Gachagua (Grievant).
2. The Respondent filed a Memorandum of Response on 5 November 2010 and the Cause was heard *ex parte* and an award was pronounced on 13 July 2011. The award was later set aside and the Cause transferred to Nakuru for hearing and determination.
3. The Cause was heard on 16 February 2015 and 17 February 2015. None of the parties filed submissions as directed.
4. The Court has considered the pleadings, evidence and documents tendered and identified the issues for determination as, *how long the Claimant served the Respondent, whether the dismissal of the Claimant was unfair and appropriate remedies.*

**Period of service**

5. The Grievant's case was that he was employed by the Respondent in 1980 and he served the Respondent until dismissal on 29 October 2008, a period of some 28 years.
6. The Respondent's case on the other hand was that the Grievant served for only 4 years, there having been a break (suspension for 10 years), after which the Grievant was reinstated on 1 April 2004.
7. It is not disputed that the Grievant was employed in 1980, and was suspended in 1994, and was charged before the Nakuru Principal Magistrates Court Criminal Case No. 701 of 1994.
8. The Union challenged the suspension in Nairobi Cause No. 43 of 2003, KUDHEIHA v Rift Valley

Sports Club.

9. An award was made on 17 February 2004 as follows

(a) suspension without pay of the grievant be lifted as from the date of ruling in Nakuru Principal Magistrates Criminal Case No. 701 of 1994 that is 12<sup>th</sup> July 1996.

(b) The Respondents should pay the grievant full pay from 12<sup>th</sup> July 1996.

(c) The period between 18<sup>th</sup> March 1994 to July 1996 should be treated as leave without pay.

(d) In the event that the Respondent feels that they would like to dispense with the services of the grievant, this should be done in accordance with the relevant clause in the parties C.B.A.

10. According to the Respondent, the suspension in 1994 upto award in 2004, a period of 10 years marked a break of employment.

11. The Industrial Court (then) in its award lifted the suspension of the Grievant.

12. In my view, the effect of the lifting of the suspension is that the Grievant remained an employee of the Respondent until the lifting of the suspension. He was still susceptible to the control of the Respondent during the suspension period.

13. The Court therefore finds that there was continuous service until the Grievant's employment was terminated in 2008.

### **Whether dismissal was unfair**

#### ***Procedural fairness***

14. The Respondent wrote a show cause letter to the Grievant on 29 October 2008. The show cause letter requested the Grievant to show cause why disciplinary action not be taken against him. The letter outlined the allegations the Grievant was expected to respond to.

15. The Grievant responded to the show cause letter on the same day in writing and later the same day he was dismissed.

16. The Grievant testified that he was not called to a hearing nor was the shop steward involved in the process.

17. Although an oral hearing was not conducted, the Court is satisfied that the Grievant was informed of the allegations to confront and that disciplinary action was contemplated and that he responded to the allegations, and therefore the Respondent was substantially in compliance with the requirements of procedural fairness.

18. The Union did not prove that an oral hearing was mandatory or that the Grievant suffered prejudice/injustice because of the process.

#### ***Substantive fairness***

19. Under section 43 of the Employment Act, 2007, an employer is required to prove the reasons for terminating the employment of an employee and further under section 45 of the Act to prove that the reasons are valid and fair.

20. The reason(s) given for the summary dismissal of the Grievant were that he *willfully and knowingly*

took an empty jerrican from the squash Court and threw it away outside the Club fence where the bicycle repair mechanics operate and that he had admitted previously throwing other items outside the fence severally.

21. The Grievant did not deny throwing the garbage outside the fence. His justification was that a Manager called Macharia had instructed that such debris should not be burnt but should be thrown outside the fence.

22. The parties went through conciliation under L.K. Karanja. The Conciliator heard submissions from both parties and made certain findings and recommendations.

23. The Concilator found that the conduct of the Grievant could be remedied and that the Respondent did not involve the Works Committee/shop stewards in the process.

24. In my view, the sanction of summarily dismissing the Grievant was too excessive. It did not fit in with the offence and therefore the Court finds that the dismissal did not accord with justice and equity thus offending section 45(4)(b) of the Employment Act, 2007.

### **Appropriate remedies**

#### ***Pending Annual Leave***

25. The Grievant sought Kshs 8,290/- on account of leave for 2007. The Respondent did not produce any records on leave as required by statute.

26. The Grievant succeeds on this head of claim.

#### ***6 Public holidays***

27. Under this head, the Grievant sought Kshs 3,316/- . Again because no records were produced, the Court finds for the Grievant.

#### ***Notice pay***

28. The Grievant served for more than 5 years and is entitled to 3 months pay in lieu of notice pursuant to clause 10(b) of the Collective Bargaining Agreement.

29. He quantified the same as Kshs 24,870/- and the Court awards him the same.

#### ***Service gratuity***

30. Clause 22 of the Collective Bargaining Agreement provided for gratuity. The Respondent did not challenge the calculations by the Grievant of gratuity of Kshs 146,766/-.

31. The Court awards him the same.

#### ***Compensation***

32. The Court has reached the conclusion that the summary dismissal of the Grievant was not in accord with equity and justice. Because of the length of service, the Court awards him the maximum compensation as quantified in the sum of Kshs 99,480/-.

### **Conclusion and Orders**

33. The Court finds and holds that the summary dismissal of the Claimant did not accord with equity and justice and awards him and orders the Respondent to pay him

a. Leave	Kshs 8,290/-
b. 6 public holidays	Kshs 3,316/-
c. 3 months pay in lieu of notice	Kshs 24,870/-
d. Gratuity	Kshs 146,766/-
e. 12 months gross wages compensation	Kshs 99,480/-
<b>TOTAL</b>	<b>Kshs 282,722/-</b>

34. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 24<sup>th</sup> day of April 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Onwonga, Industrial Relations Officer, KUDHEIHA

For Respondent Mr. Nyamwange instructed by Wamaasa & Co. Advocates

Court Assistant Nixon