



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 222 'B' OF 2013

BETWEEN

**KENYA UNION OF COMMERCIAL,
FOOD,**

**AND ALLIED WORKERS [KUCFAW].....
CLAIMANT**

VERSUS

1. MOMBASA WATER SUPPLY & SANITATION COMPANY

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

Rika J

Court Assistant: Benjamin Kombe

Mr. Dickens Atela, Assistant Secretary General for the Claimant Union

Mr. Okeyo Advocate instructed by Otieno Okeyo & Company Advocates for the 1st Respondent

Munyithya, Mutugi, Umara & Muzna Advocates for the 2nd Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL DISMISSAL OF-

1. ABEID ALI

2. MWIDANI KOMBO

AWARD

[Rule 27 [1] [a] of the Industrial Court Procedure Rules 2010]

1. This Claim is brought by the Claimant Union on behalf of its 2 Members [Grievants], alleged to have been former Employees of the Respondents. The Pleadings are quite jumbled up. Initially, the Claim was filed as Cause Number 254 of 2013, involving the 2 Grievants and 3 Other Grievants. The original Claim was filed in Nairobi. It was transferred to the Court in Mombasa on 24th June 2013, and registered as Cause Number 222 of 2013. The Court in Mombasa advised the Claim be split into two, with the 2 Grievants herein heard in one file, and the other 3 in a separate file designated as 222 'A'.

2. It was explained that this was necessary because the Grievants, though dismissed on the same day, were dismissed for different reasons. The Claimant did not amend anything even on the splitting of the files. It just plucked the Memoranda of Claim filed in Nairobi, under Cause 254 of 2013, and placed them on the new separate files. The Pleadings continued to refer to Cause Number 254 of 2013. There was no form of amendment under the new files, which brings to question the intention of the order for separation. Further confusion in the papers filed is seen in the Closing Submissions. The title is altered from 'In the Industrial Court of Kenya' to 'In the Employment and Labour Relations Court.' The name of the Court only changed in November 2014, while the Claims herein were registered in 2013. The 1st Respondent filed its Statement of Response on 8th April 2013. It holds that the Claimant has no *locus standi* to bring the 2 Claims. It concedes having attended conciliation, and disagrees with the findings and recommendations of the Conciliator, urging the Court to make its own investigations and not to rely on the Conciliator's findings. The law did not require the 1st Respondent to give reasons for its rejection of the Conciliator's report. The 1st Respondent states it investigated the allegations against the Grievants, heard them, made a decision and allowed them to appeal. Their appeals were heard and the initial decision confirmed. The 1st Respondent argues that its decision in all cases was justified under Section 44 [4] of the Employment Act 2007. It is not clear from the record if the 2nd Respondent filed any Pleadings. It only seems to have filed the Closing Submissions and a Statement from its CEO.

3. The hearing opened before Hon. Justice Radido on 23rd June 2014 when 1st Grievant in the Cause 222 'A,' Dennis Juma testified. The Witness was cross-examined on 7th November 2014 with the undersigned Judge now presiding. The Parties agreed other Grievants file their Witness Statements, and were heard briefly on the 13th March 2015. The mode of hearing again casts doubt on the necessity of splitting the original file. The bottom line is that the Pleadings are messy, and prosecution of the Claims similarly untidy, which makes the work of the Court unnecessarily laborious.

4. The Claimant closed its case on 13th March 2015. The Respondents were not in attendance, and the Court ordered proceedings closed, and the Closing Submissions be filed. The Claimant filed its Submissions on 20th March 2015. The 2nd Respondent filed its Closing Submissions on the 14th May 2015. The Court has not been able to trace in the record, any Closing Submissions filed on the part of the 1st Respondent.

5. The Court thinks there are findings and orders that, given the common background to the 2 disputes, should be adopted in this file from the outset. The reasons for these findings and orders are explained in the succeeding paragraphs. These are:-

- a. ***The 2nd Respondent is improperly joined to the Claim, and the Claim against the 2nd Respondent is hereby dismissed, with no order on the costs.***
- b. ***The Grievants' prayers for medical benefits; special damages and costs of the conciliation meetings are refused.***

1st Grievant herein, ABEID ALI

6. Ali stated he was employed by the Mombasa Municipal Council as a Labourer, on 12th August 1997. He was deployed to the 1st Respondent, holding the position of Senior Technician. He was dismissed by the 1st Respondent on the 12th March 2012. He was alleged to have forged the signature of a Senior Officer in order to receive a salary advance. He earned a monthly Kshs. 64,107 at the time of dismissal.

7. The 1st Respondent wrote to Ali on the 10th November 2011 alleging that Ali had applied for salary advance of Kshs. 6,500 on 1st November 2011, using the signature purported to be that of the authorized signatory of the Company to the Bank. He was asked to show cause why disciplinary action should not issue. He wrote back on 16th November 2011, denying the accusations. He stated he knew the procedure in applying for salary advance; he had followed this procedure; he took the form to the designated officer in the human resource department; and left the form in that office. He went to the Bank the next day, but was shocked his account had not been credited. He was informed his form had been forwarded to the Bank, but had a forged signature, and therefore he could not receive his salary advance.

8. Ali wondered how he could forge a document to receive advance of his salary yet he knew he was qualified for such a facility without having to use a forged document; and secondly, why would he engage in forgery to have a salary advance which would naturally be deducted from his end month salary? He was suspended and placed on half-salary.

9. Ali appeared before the SAC for a disciplinary hearing on 9th March 2012. He was unrepresented. He was summarily dismissed on 12th March 2012. He lodged an appeal on 27th March 2012. The appeal was heard by the Board of Directors Human Resource Committee and unfairly rejected.

2nd Grievant Mwidani Kombo

10. Mwidani was employed by the Municipal Council of Mombasa on 12th August 1997 as a Labourer. He was dismissed on 12th March 2012. The accusation against him was the same as made against Ali. He was called upon to show cause in a letter from the Managing Director, on 10th November 2011. His explanation again mirrors that of Ali. He followed the laid down procedure in applying for his salary advance.

11. He appeared before the SAC on 9th March 2012. He was dismissed on 12th March 2012. He appealed the decision on 1st April 2012. He was heard on the 17th April 2012, and appeal rejected by the Company Board of Directors' Committee on Human Resources.

Submissions

12. The Claimant urges the Court to find in favour of the 2 Grievants, and reinstate. It cites the following decisions where the respective Grievants were reinstated upon the Courts finding termination to have been unfair:-

- ***Industrial Relations Court of Australia in Party v. Commonwealth Bank [2002] IRCA 1 [19th February 2002] appendix A.*** The Court emphasized the element of good faith in the process of employment termination.
- ***Industrial Court of Kenya at Nairobi in Cause Number 802 of 2011 between KUCFAW v. National Water Conservation and Pipeline Corporation.*** The Court directed the Respondent to reinstate the Grievant, having found the procedure adopted in dismissing the Grievant to have been flawed.
- ***Industrial Court at Nairobi in Cause Number 1547 of 2011 between Francis Mwelemi Simeon v. English Press.*** The Court found monetary compensation insufficient in redressing unfair termination, and granted reinstatement.

13. The record does not contain any Closing Submissions from the 1st Respondent.

14. The 2nd Respondent filed its Closing Submissions on 14th May 2015. Its position as explained in the Statement of its Chief Executive Officer James Wasi Thubu is that 2nd Respondent has no direct control over the staff employed by the 1st Respondent. The 2nd Respondent's role over the 1st, is supervisory, as stipulated in the Memorandum of Association of the 1st Respondent. The 1st Respondent deals with all its

Employees, in accordance with the Human Resource Policy, developed in consultation with the 2nd Respondent. The 1st Respondent did not consult the 2nd Respondent in dismissing the Grievants. The 2nd Respondent only became aware of the dismissal decision, upon receipt of the Court Summonses. The 2nd Respondent submits it is wrongly joined to the Claim, and should not be called to account for the actions of the 1st Respondent.

15. The Court understands this dispute to raise the following questions:

- *Is the 2nd Respondent properly joined to this Claim?*
- *Were the 2 Grievants dismissed for valid reason?*
- *Was the procedure fair?*
- *Are they entitled to the remedies sought?*

The Court Finds:-

16. The 2nd Respondent is improperly joined to the Claim. It does not have a relationship with the Claimant Union. According to the Statement of Claim at paragraph 1.04, the Claimant has a Recognition Agreement with the 1st Respondent. The 2 Parties are involved in collective bargaining and negotiation. Disputes involving the Claimant's Members would have to be resolved through the Labour Contracts in the workplace. Such contracts are between the Claimant and the 1st Respondent.

17. The 1st Respondent is a Water Licensee of the 2nd Respondent. The relationship between the 2 Respondents is governed by their Water Provision Agreement, which *inter alia*, states the 1st Respondent shall employ staff; possess and retain all the human resource necessary; and maintain human resources costs. The Agreement states it does not create joint liability of the Parties. Each Party shall be separately liable for its own acts of omission or commission. The 2nd Respondent's role over the 1st Respondent is supervisory. In the view of the Court the Parties did not intend that the Grievants would become dual Employees, answering to 2 Employers; they were completely offloaded to the 1st Respondent.

18. They were controlled fully by the 1st Respondent. They received their salaries from the 1st Respondent. They were instructed on their daily discharge of duties by the 1st Respondent. They were provided with the tools of their work by the 1st Respondent. Eventually, they were subjected to a disciplinary process and sanctions which they are questioning in these proceedings, by the 1st Respondent. The 2nd Respondent was not involved by the 1st Respondent and the Claimant, with the disciplinary process. It only learnt of the disputes when the Court Summonses issued. The pre-Industrial Court process did not involve the 2nd Respondent; conciliation was between the 1st Respondent and the Claimant.

19. It is therefore improper for the Claimant to join the 2nd Respondent to this Claim. If the Claimant felt the 2nd Respondent should have exercised a role, supervisory or otherwise, in the dismissal of the Grievants, it was open to the Claimant to bring to attention of the 2nd Respondent the existence of the disputes and perceived violations by the 1st Respondent, of the protections due to the Grievants, in the process of dismissal. It is improper to just bring the 2nd Respondent here, alleging the 2nd Respondent failed in exercise of its supervisory role. The matters, over which the Claimant complains about, were not shown to have been placed within the knowledge of the 2nd Respondent.

20. The Court is of the view that the 1st Respondent was the sole Employer of the Grievants; it was not intended in the instruments defining the relationship between the Respondents that the Respondents were dual Employers; and even if there was a probability of such joint –employer status, the 2nd Respondent would in all fairness be entitled to have notice of the complaints raised by the Grievants at the time of the investigations and the disciplinary hearing, to be considered as liable to any extent.

21. ***The 2nd Respondent, as stated at the beginning of this Award, is improperly joined to the Claim. The Court orders the Claim against the 2nd Respondent is dismissed, with no order on the costs.***

22. Were the 2 Grievants dismissed on valid reason or reasons, as required under Section 43 and 45 of the Employment Act 2007? In all cases, the Grievants were alleged to have forged the signatures of the 1st Respondent's Bank Signatories, to enable them access salary advances. They both explained their position, in their respective replies to the letters to show cause.

23. The Court is not satisfied that the 1st Respondent proved the reason for termination, and demonstrated the validity of the accusations against the 2 Grievants. There was no evidence brought before the Court showing the Grievants forged the documents as alleged. There was no evidence given by the Officers whose signatures were allegedly forged. The 1st Respondent gave no plausible reason why the Grievants, would forge documents to have salary advance, while the facility was accessible without such criminal activity, and while the sum advanced was deductible from the Grievants' monthly salary. These allegations were not substantiated. It was for the 1st Respondent to establish the reason for termination and show the reason or reasons were valid. ***The Court is satisfied there was no valid ground in terminating the Grievants' contracts of employment.***

24. The procedure adopted does not appear to have been in significant departure, from the procedure created under Section 41 of the Employment Act. The Grievants were informed about the allegations against them; they were called upon to show cause why action should not be taken against them; they gave reasons in writing, explaining their dealings with the Bank; they were heard; decision was made; they appealed and were heard, and appeals rejected.

25. By and large, fair procedure was observed, as required under the Employment Act, the Guidelines from the Office of the President, and Guidelines provided by the Water Services Regulatory Board. The minimum statutory threshold for fair procedure was met.

Remedies

26. The 2 Grievants make a curious prayer for payment of medical bills. This strange prayer was not supported in evidence or given elucidation in the submissions of the Claimant. It is rejected.

27. The Grievants pray for 'special general damages for unlawful loss of employment.' These are pleaded figures ranging from Kshs. 1,500,000 to Kshs. 2,300,000. Again the items are without any legal or factual foundation. There are no special general damages in law. The monetary claims under this head were not explained at all in the evidence and submissions of the Grievants. The prayers are rejected.

28. The Court does not normally grant Parties costs for attending conciliation. There is no legal framework under the conciliation process, for claiming costs. The intention of Parliament in the Acts governing conciliation, that is to say the Labour Relations Act and the Employment Act, seems to be that conciliation is held in atmosphere of freedom from the fear of being required to shoulder the costs of the exercise. The Court would be going against this principle if it was to impose an order for costs on conciliation. The Grievants were suspended on half pay. They claim they should have the half of their pay that was withheld during the period.

29. The Court does not see why this should not be granted. Section 18[4] of the Employment Act states that where an Employee is summarily dismissed, for lawful cause, the Employee shall on dismissal be paid all moneys, allowances and benefits due to him ***up to the date of the dismissal. The 1st Respondent shall pay to the Grievants their salaries with-held during suspension.***

30. Should the Grievants be reinstated? This is their preferred remedy. The Court has considered that it is now slightly more than 3 years from the time the Grievants were dismissed. The Industrial Court Act which was already in force at the time, allows this Court to grant reinstatement within 3 years of the date of dismissal. It is doubtful that an order for reinstatement would have legal validity. ***The Grievants shall***

have 10 months' gross salary each, as compensation for unfair termination.

31. The Court finally is of the view that the 1st Respondent should have considered settlement based on the views of the Conciliator. It could be true as argued by the 1st Respondent that it was not bound by the findings and recommendations of the Conciliator. The Court is not bound by such findings and recommendations. To depart from such findings and recommendations, the Court would however be entitled to have sound reasons, why it should not be bound. The conciliation process is a legitimate dispute resolution mechanism, supported by the Constitution of Kenya, and which this Court has an obligation to protect and promote. There was no reason given why the findings and recommendations of the Conciliator were unacceptable to the 1st Respondent. There was certainly no evidence given here in Court, to fault those findings. With a better appreciation of the conciliation role, the 1st Respondent could have saved the Parties and the Court resources. ***The 1st Respondent shall meet the Claimant's costs of the Claim.***

IN SUM, IT IS ORDERED:

- a. ***The 2nd Respondent is improperly joined to the Claim, and the Claim against the 2nd Respondent is hereby dismissed with no order on the costs.***
- b. ***There was no valid ground in terminating the Grievants' contracts of employment.***
- c. ***Fair procedure was observed.***
- d. ***The 1st Respondent shall pay to the 2 Grievants through the Claimant Union 10 months' gross salary in compensation for unfair termination, and salaries withheld during the period of the Grievants' suspension.***
- e. ***The 1st Respondent to meet the Claimant's costs of the Claim.***
- f. ***The Award shall be satisfied in full within 30 days of its delivery.***

Dated and delivered at Mombasa this 31st day of July 2015

James Rika

Judge