



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 222 'A' 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. DENNIS S. JUMA

2. AMOS NGOKA

3. THOMAS ONGORO

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 3 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 3 Grievants and 2 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 3 Grievants herein heard in one file, and the other 2 in a separate file designated as 222 'B.'

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 Grievant 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 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.

1ST Grievant Denis Juma Sibiyu

5. In main the first Grievant Denis Juma Sibiyu testified he was employed by the National Water Conservation and Pipeline Corporation as an Accountant, on 14th May 1998. There were water reforms in the Country, changing the structures and management of the resource. The Grievant was deployed by the Government to the 2nd Respondent, Coast Water Services Board. The 2nd Respondent, in turn, deployed the Grievant to the 1st Respondent, Mombasa Water Supply and Sanitation Company. The Grievant's relationship with the 2nd Respondent remained. The Claimant Union was part of a Task Force appointed by the relevant Minister, to manage the human resource transition process.

6. Mr. Sibiyu was on leave in September 2011. He was summoned to the Office of the Managing Director [MD] of the 1st Respondent. He was read by the MD a letter from one of the water consumers Mr. John Wekesa. The consumer complained that water supply had been disconnected from his Water Kiosk. This was despite having paid the water bills through the Grievant. Wekesa complained in his letter that he paid the money through M-pesa to the Grievant, to pay on his behalf.

7. The MD asked Sibiyu to write an explanation of his relationship with Wekesa. He explained he had known Wekesa and the two had been involved in Luhya Community activities. Wekesa had sent the Grievant some money through M-pesa for harambee, for Mirembe Groups. The consumer had never sent money to the Grievant to pay water bills.

8. On 27th October 2011, the Grievant was suspended. It was explained he was suspended on the allegation that he solicited for, and unlawfully received, money from John Wekesa. The letter did not give

him an opportunity to respond to the allegations formally.

9. On 22nd December 2011, he was called to a Disciplinary Hearing. He appeared before the Staff Advisory Committee [SAC]. Members of the SAC included Mr. Barak Juma as Chairman; Maalim Mohammed as his Assistant; Amos Galole as Secretary; and Members Engineer Mugo, Betty Nyamwamu, Jamal Ahmed, Caroline Kaniya and another Person the Grievant could not recall. The Grievant objected to the composition of the Committee. Jamal Ahmed had met the Grievant's accuser. Maalim Mohammed was part of the investigating team.

10. The report of the SAC did not reflect in full, what happened at the hearing. The Grievant demanded a Trade Union Representative be present at the hearing; this demand is not captured in the report. Mr. Ahmed and Mr. Mohammed sat through the proceedings despite the protestations of the Grievant. This is not captured in the report. The hearing took place on 12th March 2012. The Grievant had written a letter to the Chairman on 6th February 2012, raising a number of issues with regard to the hearing. On 12th March 2012, he was handed the letter of summary dismissal by the Respondent.

11. The Grievant wrote an appeal which was heard on the 17th May 2012. The Appeal Committee comprised the Directors. Mr. Atela and Mr. Baya from the Claimant Union accompanied the Grievant. The Grievant presented his appeal. He was never shown a record of the appeal hearing. The Parties subsequently went for conciliation before the Labour Office. The Labour Officer recommended the Grievant be reinstated. The Grievant's accuser, Mr. Wekesa did not appear before the Disciplinary Committee. The letter of dismissal did not say how much the Grievant was paid by Wekesa. The Grievant emphasized that Wekesa belonged to the same Welfare Group, and Community as the Grievant.

12. The Grievant testified his case was not handled by the Employer in accordance with Guidelines issued by the Office of the President, on handling complaints against Public Officers. He had not been made aware, that he was no longer linked to the National Water Conservation and Pipeline Corporation. He should have been deployed back to the 2nd Respondent. He was earning monthly salary of Kshs. 81,690 as of the date of dismissal. He prays for:-

- a. A declaration that termination was un-procedural, unjustified and illegal.
- b. The Grievant be unconditionally reinstated either to the 1st Respondent or the 2nd Respondent's premises.
- c. Compensation of half salary lost when under suspension.
- d. Costs of medical expenses incurred when out of employment.
- e. Special damages for unlawful loss of employment at Kshs. 2,000,000.
- f. Costs of attending conciliation meetings.
- g. Costs of the Claim

13. Cross-examined by Mr. Okeyo for the 1st Respondent, the Grievant told the Court the 1st Respondent never employed him; he was seconded to the 1st Respondent.

14. He was called by the 1st Respondent while on annual leave. This was in September 2011. He was read the letter written by Wekesa alleging Wekesa had sent money to the Grievant to pay Wekesa's water bills, money which the Grievant did not pay. The Grievant responded in his letter dated 25th October 2011. The Grievant knew Wekesa as a member of the Grievant's community. Wekesa was a customer of the 1st Respondent. The Grievant knew Wekesa. It was Wekesa who sent the Grievant money through M-pesa. The Grievant was not availed Wekesa's letter on being called upon to show cause why disciplinary action should not issue. Omission was deliberate. The Grievant appealed against the decision to the Appeal Committee. He challenged both the process and the outcome.

15. Jamal and Mohammed should not have sat in the Committee. Jamal owned the investigations. He was Management Accountant. Mohammed was the Operations Manager. The latter had differed with the Grievant on staff issues. The Grievant was not given the opportunity to have Trade Union Representatives

at the Disciplinary hearing. His Union was not invited. The Grievant consulted his Union. Its Officials told him they could not accompany him because they would be locked out by the 1st Respondent. The Appeal Committee upheld the dismissal decision. The 1st Respondent was not the Grievant's Employer. The Grievant brought the 1st Respondent to Court because it issued the letter of dismissal.

16. Redirected, the Grievant testified Jamal was Management Accountant, while Maalim disconnected Customers' water supply on non-payment of bills. He was involved in the investigations. The Disciplinary Report was not backed up by minutes signed either by the Grievant or the Claimant. The 2nd Respondent was not involved in the process. It was the 2nd Respondent who deployed the Grievant. The Grievant disputed the outcome of the Appeal.

2nd Grievant Mr. Amos Ngoka

17. His position is that he was employed by the National Water Conservation and Pipeline Corporation on 15th October 2001, as Artisan 111. He was deployed to the Respondents in the same position. He was summarily dismissed on 12th March 2012, on the allegations that he had unlawfully solicited for money from a Customer Joyce. K. Mulengwa. He was said to have received the money from Mulengwa. He earned a gross monthly salary of Kshs. 51,079 as of the date of dismissal.

18. Mulengwa as in the case of Wekesa, alleged she paid the 2nd Grievant money through his M-pesa account, to facilitate the reconnection of water supply to Mulengwa. She wrote a complaint to the 1st Respondent's Managing Director dated 12th October 2011.

19. The 2nd Grievant was asked to respond. He wrote on 25th October 2011, denying the allegations. He stated Mulengwa had visited him at the Office, complaining her water bill was too high. He investigated and found her account needed to be adjusted. He adjusted the account. There was still a balance remaining to be paid. She told the 2nd Grievant she still needed his assistance. He advised her, the only assistance she could get was from the 1st Respondent's Head Office, in form of a payment arrangement. He did not receive Kshs. 3,500 from the lady.

20. The 2nd Grievant was issued a letter to show cause why disciplinary action should not issue against him on 25th October 2011. He was suspended through a letter dated 27th October 2012. He appeared before the SAC on 9th March 2012. He appealed the decision of SAC in the Appeal Committee. He faults the process and the outcome, pointing out that the mode of payment of water bills was clearly set out, and he did not engage in any fraudulent activities as alleged. He prays for the same assistance as is sought from the Court by the 1st Grievant, detailed in paragraph 12 above, excluding the prayer for special damages. At the time the 2nd Grievant testified on 13th March 2015, the Representatives for the Respondents were absent, and no cross-examination took place.

3rd Grievant Mr. Thomas Ongoro

21. Thomas was employed by the National Water Conservation and Pipeline Corporation on 16th November 1999, as an Accounts Assistant 111. He was deployed to the Respondents. He held the position of Accountant, as of the date he was summarily dismissed, the 12th March 2012. He earned a monthly salary of Kshs. 74,018. It was alleged against him by 1st Respondent's Customer, one Rashid Salim that, the 3rd Grievant solicited for money from Salim, with regard to payment of various water bills.

22. He was taken through similar disciplinary steps as obtained in the case of the Co-Grievants. The allegations were never interrogated. Thomas felt he was victimized, after he had tabled documents which implicated the Managing Director for receiving double payment in allowances for a foreign trip to Stockholm, Sweden. The 3rd Grievant had been summoned severally by the Managing Director to countersign documents validating such payment. The decision to summarily dismiss the 3rd Grievant was

predetermined.

23. During the hearing, only one of the water accounts featured, yet the 3rd Grievant had been told Salim complained of various accounts. Thomas was asked to ignore the other accounts. He prays for the same orders sought by his Co-Grievants, with special damages pleaded at Kshs. 2,300,000. His evidence was similarly not challenged through cross-examination. The Respondents' Representatives were not in Court on the hearing date.

Submissions

24. The Claimant urges the Court to find in favour of the 3 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.

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

26. 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.

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

- *Is the 2nd Respondent properly joined to this Claim?*
- *Were the 3 Grievants dismissed for valid reason?*
- *Was the procedure fair?*
- *Are they entitled to the remedies sought?*

The Court Finds:-

28. 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.

29. 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.

29. 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.

30. 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.

31. 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.

32. *The 2nd Respondent is improperly joined to the Claim. The Court orders the Claim against the 2nd Respondent is dismissed, with no order on the costs.*

33. Were the 3 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 solicited, and received, money from Customers of the 1st Respondent, ostensibly to aid the said Customers, in overcoming the burden of the high water bills. Money was sent to the Grievants through M-pesa accounts. The Customers wrote letters of complaint to the Managing Director of the 1st Respondent. The Grievants were called upon to explain themselves. They gave their explanations which were, in the eyes of the Managing Director, unsatisfactory. They were suspended and heard. A decision to summarily dismiss them was made. They appealed and the decision sustained.

34. The Court is not satisfied that the 1st Respondent proved the reason for termination, and demonstrated the validity of the accusations against the 3 Grievants. There was in fact no evidence adduced in Court by the 1st Respondent in supporting these allegations against the Grievants. The 3 Customers who lodged the complaints against the Grievants did not appear before the Disciplinary Committee. They were not brought before this Court. The allegations against the Grievants appear not to have been reported to the Police. These were serious criminal and employment offences, raised against Officers rendering public service. There was no record the Customers who made the allegations against the Grievants were, availed to the Conciliator.

35. The allegations that money was sent to the Grievants' M-pesa accounts were left dangling in the wind. They were not substantiated by the complainant Customers. The allegations were not brought before the

Court, tested or their truthfulness established. The 1st Respondent failed completely to show validity of reason. There were allegations of witch-hunt by some of the Grievants which the 1st Respondent did not discount. ***The Court is satisfied there was no valid ground in terminating the Grievants' contracts of employment.***

36. 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 complainant Customers; they were heard; decision was made; they appealed and were heard, and appeals rejected.

37. The failure of the Trade Union Representative to be present at the initial hearing cannot be attributed to the 1st Respondent. The 1st Grievant testified he informed his Trade Union of the disciplinary hearing. The Union Officials told him they apprehended they would be locked out and therefore stayed away. At the appeal hearing, the Trade Union was represented by Mr. Atela and Mr. Baya. The mere fact that Ahmed and Mohammed sat in the SAC, and were earlier in one way or the other, involved in the matters under investigation, was not shown to prejudice the Grievants. There were other independent Officers in the SAC. Employment places sometimes do not have a sufficient pool of Officers, to enable the Employer completely separate Officers investigating, from those presiding over the disciplinary hearing. A certain degree of flexibility in composition of Disciplinary Panels is permissible. 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

38. The 3 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.

39. The Grievants or at least 2 of them, pray for 'special general damages for unlawful loss of employment.' These are pleaded at 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.

40. 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.

41. 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.***

42. 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.***

43. 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 3 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