

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1555 OF 2011

UNIVERSITIES ACADEMIC STAFF UNION.....CLAIMANT

VERSUS

EGERTON UNIVERSITY COUNCIL.....RESPONDENT

JUDGMENT?

1. The Claimant filed suit seeking the determination of an issue framed as the withholding of the lawful dues of the claimants. The Memorandum of Claim was filed on 13th September 2011 and the putative claimants were Dr. Robert Shivaro, Fred Mwangangi and Muga Kolale. The grievants were lecturers of the Respondent and were officials of the Egerton chapter of the Claimant union. The three were suspended and asked to show cause for having participated in a strike that was declared illegal by the Court. The grievants were dismissed from service after disciplinary hearings and each was subsequently reinstated in employment. The grievants aver that the Respondent has withheld their dues and that the Respondent has withheld their dues and yet they had done nothing wrong to warrant such drastic measures by the Respondent. The grievants averred further that they had not violated any terms of the collective bargaining agreement between the union and the Respondent and that they were being punished for choosing to lead an active membership of the Claimant union. The Claimant thus sought the payment of the grievants' dues without loss of benefits and without any conditionality, costs of the suit and any other relief the Court may deem fit to grant.

2. The Respondent filed a defence on 7th May 2012 and in the response the Respondent averred that following a Council meeting held on 28th November 2006, the grievants were summarily dismissed from their employment with effect from 25th October 2006 after they were found guilty of organizing and participating in a strike declared illegal by the Honourable Court and for being absent from duty without lawful authority. The Respondent averred that the grievants appealed their dismissals and a special meeting held to consider their appeals convened and reinstatement was the outcome with effect from the date of the tender of apology and report to duty. The Respondent averred that the grievants sought payment of their salaries and allowances for the period they were dismissed and did not work. The Respondent averred that the grievants sought payment of the dues and this was rejected after a Council meeting held on 23rd July 2010 and this was communicated to the grievants on 26th July 2010. The Respondent pleaded that the grievants are not entitled to be paid salaries for the period between 25th October 2006 to May 2007 and sought that the suit be dismissed with costs.

3. Parties proposed to proceed by way of written submissions and the Claimant filed submissions on 31st March 2015 while the Respondent filed submissions on 11th May 2015. The Claimant submitted that the grievants had been summarily dismissed by the Respondent and were reinstated. The Claimant submitted that the grievants were entitled to back pay with Robert Shivairo seeking payment from 26th October 2006 to 10th May 2007, Fred Mwangangi from 26th October 2006 to 21st May 2007 and Muga Kolale from 25th October 2006 to 21st May 2006. The Claimant relied on the cases of **KUDHEIHA v Nairobi Club [2013] eKLR**, **Fredrick Odongo Owegi v CFC Life Assurance Ltd [2014] eKLR** and **Mary W. Ndirangu v NSSF Cause No. 1652 of 2011** (unreported). The Claimant also relied on cases of other employees in Universities who had been reinstated with back pay. These were **UASU v Kenyatta University Cause No. 160 of 2009** (unreported), **Republic v Maseno University Disciplinary**

Committee & Another HC. Misc Appl. No. 963 of 2007 (unreported), **Dr. Billy George Ng'ong'ah v Maseno University HC. Misc. Appl. No. 527 of 2007** (unreported) and **UASU v Maseno [2014] eKLR**. The Claimant thus urged the Court to grant the prayers sought as back pay always follows reinstatement and is a legal consequence thereof.

4. The Respondent submitted that the grievants were absent from work as a consequence of participating in an illegal strike. The grievants sought after reinstatement payment of their salaries and allowances for the period they were dismissed and the Respondent found no merit in the demand and declined to pay precipitating the suit. The Respondent submitted that the issues for determination were whether the offer for reinstatement was unconditional and whether the grievants are entitled to an order for back pay. The Respondent submitted that the grievants were absent from work without authority contrary to the Trade Disputes Act Section 36 and their dismissal was justified under Section 17(a) of the Employment Act cap 226 now repealed. The Respondent submitted that it was justified in taking disciplinary action against the grievants for their illegal activities. The Respondent submitted that the offer for reinstatement did not include back pay and was express that the reinstatement would be effective from date of receipt of apology and reporting to duty. The Respondent submitted that acceding to the demand for back pay would be rewarding the grievants for their misconduct. The Respondent relied on the case of **KUDHEIHA v Nairobi Club [2013] eKLR** for the proposition that the Claimant had to succeed in showing that the dismissal was unlawful in order for back pay to be payable. The Respondent thus sought the dismissal of the claim with costs.

5. The facts are not in dispute. The Claimant's members were dismissed by the Respondent for having participated and organizing an illegal strike. The Respondent received appeals from the grievants regarding the dismissals and after considering the appeals reinstated the grievants. The dispute is on the interpretation of the reinstatement. The Claimant asserts that the reinstatement was granted unconditionally and the Respondent asserts that the reinstatement was conditional.

6. The grievants were at the material time employees of the Respondent and were dismissed for participation in what was declared to be an unlawful strike. The authorities cited by the Claimants had a common thread. The grievants in those cases were reinstated with back pay. In all of them however, the dismissals were found to have been unfair and unlawful in the case of **UASU v Kenyatta University** the judge held the dismissal of the employee for failing to set and mark an examination in a course was unfair as the employee had not taught the subject. In the case of **Republic v Maseno University & Another ex parte Mary Goretti Kariaga** the decision was based on termination for unlawful cause as the *ex parte* applicant had been dismissed for alleged scandalous conduct and was dismissed for an offence for which she was not given any notice or chance to defend herself. The case of **Dr. Billy George Ng'ong'ah v Maseno University** was that there was no evidence the University Council met to discuss the dismissal nor was there delegation to the single member to sit alone and make the decision to dismiss the applicant. In the case of **Fredrick Odongo Owegi v CFC Life Assurance Ltd** the Court held that reinstatement may be ordered from a date later than the date for dismissal and thus may be of limited retrospectivity. The Respondent and Claimant cited the case of **KUDHEIHA v Nairobi Club** where my sister Mbaru J. has discussed the issue of back pay. The learned judge held as follows:-

In labour relations the concept of 'back wages' has a long history and it is important to identify some of the antecedents to how this concept found its way into the labour regime before Kenya attained independence and even to this date where the Industrial Court has made orders, directions and continued to apply this concept in resolving labour disputes. The term 'back wages' has been interchangeably been used with the terms 'back pay' which involves a process designed to prevent as well as remedy the commission of unfair labour practices especially where an employer makes an unfair labour practice determination and issues an order that may mean a layoff, demotion, transfers, pay reductions, or other changes in employment status involving financial loss. A back-pay order generally provides that employees shall be made whole for any loss of pay resulting from the unlawful action of the employer, who is required to pay each individual a sum of money equal to the amount which that individual would normally have earned between the date of the discrimination or that unlawful and unfair practice and, in an appropriate case, to the date of the employer's offer of reinstatement, less the individual earnings during that period.

7. I am in total agreement with the holding of the learned judge. The remedy of back-pay is available for instances where the employee has suffered an injustice arising out of the employers unfair labour practice. The facts in this case are that the dismissals were effected pursuant to an illegal action by the employees. The dismissals were later recanted after successful appeals by each of the grievants. To my mind the dismissals were not unlawful and in the absence of illegality in the termination, this would disentitle the grievants from recovering for the period they were out of work. The fact that the strike was declared illegal means these employees were not protected within the meaning of the Trade Dispute Act and the action taken by the Respondent was justified. To boot, the letters of reinstatement were conditional. The only conclusion the Court can reach is for the dismissal of the suit but with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of July 2015

Nzioki wa Makau

JUDGE