



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 1270 OF 2010**  
**KUDHEIHA WORKERS.....CLAIMANT**  
**VS**  
**MUTHAIGA COUNTRY CLUB.....RESPONDENT**  
**AWARD**

**Introduction**

1. The Claimant's claim is brought on behalf of the following 19 Grievants:

- a. Rose Omole
- b. Dickson Ayuya Bukasa
- c. Joseph Ndichu Wangui
  
- d. Nashon Musee Thuo
- e. Robert Masai Nzue
- f. Bernard Mailu
- g. Boniface Ndungu
- h. Newton Ondieki
- i. Stephen Muriithi Ndwiga
- j. Christopher Juma Kona
- k. Stanley Muinde Munguti
- l. Joseck Josiah Opunga
- m. Peter Ngigi Kamau
- n. Jared Makori
- o. Joseph Muinde Makau
- p. Evanson Mwangi Mbora
- q. Alfred Matisha
- r. Anthony Koyaa
- s. Josephat Mose Nyancheka

2. The Respondent filed a Statement of Response on 1<sup>st</sup> November 2010 and the matter was heard between 19<sup>th</sup> June 2013 and 6<sup>th</sup> March 2014. Joseck Josiah Opunga the 12<sup>th</sup> Grievant, testified on behalf of the 1st-17th Grievants while Josephat Mose Nyancheka, the 19th Grievant testified on his own behalf. The Respondent called its former Chief Executive Officer, Stewart Donald Granville Vetch and Human Resource Officer, Joshua Wambua.

**The Claimant's Case**

3. By a Memorandum of Claim filed in Court on 15<sup>th</sup> October 2010, the Claimant states that the 1<sup>st</sup>-17<sup>th</sup> Grievants who were all employees of the Respondent, were dismissed for allegedly taking part in a strike on 5<sup>th</sup> December 2009. According to the Claimant, there was no such strike since on that day, the Respondent was hosting an important members' event, known as Christmas Draw, which went on without any interruption.
4. The Claimant therefore contends that the Respondent had made up its mind to terminate the Grievants' employment and the issue of the strike was therefore a cover up.
5. With regard, to the 18<sup>th</sup> and 19<sup>th</sup> Grievants who were dismissed for other offences not related to the alleged strike, the Claimant states that their cases were not handled fairly.
6. The Claimant claims the following:
  - a. That the Grievants be reinstated or
  - b. That their dismissal be reduced to normal termination with at least 12 months' salary compensation
  - c. Costs

### **The Respondent's Case**

7. In its Statement of Response, the Respondent states that the 1<sup>st</sup> -17<sup>th</sup> Grievants participated in an illegal strike on 5<sup>th</sup> December 2009 which disrupted the Respondent's operations as it was holding a club function known as the Christmas Draw.
8. According to the Respondent, the Grievants were severally requested by their superiors to resume work but they declined and became rowdy and abusive towards their superiors. The Respondent states that the Grievants' conduct amounted to absenting themselves from the appointed place of work without leave and failing to obey a lawful command constituting gross misconduct warranting summary dismissal under Section 44(4) of the Employment Act, 2007.
9. The Respondent suspended the Grievants with pay on 9<sup>th</sup> December 2009 pending investigations into the strike. The Grievants were thereafter invited for a hearing on 24<sup>th</sup> December 2009 and were subsequently dismissed on 28<sup>th</sup> December 2009.
10. With regard to the 18<sup>th</sup> Grievant, Anthony Koyaa, the Respondent states that on 7<sup>th</sup> November 2009 he ordered and placed drinks on an unoccupied table thereby exposing the Respondent to loss. The Respondent avers that this conduct amounted to improper and negligent performance of work warranting summary dismissal under Section 44(4) of the Employment Act, 2007. Koyaa was suspended with pay on 9<sup>th</sup> November 2009 pending investigations. He was then invited for a hearing on 25<sup>th</sup> November 2009 and was dismissed on 1<sup>st</sup> December 2009.
11. The 19<sup>th</sup> Grievant, Josephat Mose Nyancheka was said to have recklessly, carelessly and negligently driven a motor vehicle within the Respondent's premises thereby damaging a gate and endangering the lives of other persons at the premises. Nyancheka was also accused of reporting to work while intoxicated. He was suspended on 9<sup>th</sup> November 2009 pending investigations and was heard on 25<sup>th</sup> November 2009. He was thereafter dismissed on 1<sup>st</sup> December 2009.

### **Findings and Determination**

12. The issues for determination in this case are as follows:
  - a. Whether the Respondent had a valid reason to terminate the Grievants' employment;
  - b. Whether in effecting the termination, the Respondent followed due procedure;

- c. Whether the Grievants are entitled to the reliefs sought.

### **Reason for Termination**

13. Section 43(1) of the Employment Act, 2007 provides that:

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

14. The 1<sup>st</sup> -17<sup>th</sup> Grievants were accused of participating in an illegal strike on 5<sup>th</sup> December 2009, an allegation consistently denied by the Claimant. The 12<sup>th</sup> Grievant, Joseck Josiah Opunga testified that in fact there was no strike on 5<sup>th</sup> December 2009.

15. Stewart Donald Granville Vetch on the other hand told the Court that on the said date at 1.30 pm, he was called from his house where he had been on bed rest to talk to the Respondent's unionisable employees who had staged a sit-in at the Staff Canteen. Vetch managed to convince majority of the employees to go back to work but the 1<sup>st</sup> -17<sup>th</sup> Grievants refused to go back to work. The 17 Grievants were therefore suspended on 9<sup>th</sup> December 2009 and were thereafter subjected to a disciplinary hearing on 24<sup>th</sup> December 2009 and finally dismissed on 28<sup>th</sup> December 2009.

16. Vetch told the Court that the 17 Grievants were identified by their managers as having refused to go back to work alongside their colleagues. These managers were however not called to testify and according to the evidence adduced before the Court, there were approximately 220 employees.

17. Moreover, in its Memorandum of Claim, the Claimant gives a detailed account of the activities of each of the 17 Grievants on the day of the alleged strike and the Respondent made no effort to respond to the averments made by the Claimant in this regard. The Court was therefore unable to understand the criteria used by the Respondent in determining the employees who had refused to go back to work following the intervention by Vetch. The Court therefore finds that the Respondent has failed to establish a valid reason for dismissal of the 1<sup>st</sup> -17<sup>th</sup> Grievants.

18. The 19<sup>th</sup> Grievant, Josephat Mose Nyanchoka admitted having driven a motor vehicle within the Respondent's premises thereby causing damage to one of the Respondent's gates. The Court therefore finds that the Respondent had a valid reason to terminate Nyanchoka's employment.

### **Termination Procedure**

19. The charges leveled against the Grievants constitute what is commonly known as misconduct. Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

20. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

21. The Respondent's second witness, Joshua Wambua who was part of the Disciplinary Committee appointed to hear the cases against the 1<sup>st</sup> -17<sup>th</sup> Grievants testified that a union representative by the name Johnstone Maluki took part in the disciplinary proceedings. This evidence was confirmed by the testimony of Joseck Josiah Opunga. The Court was therefore satisfied that the 1<sup>st</sup> -17<sup>th</sup> Grievants were given an opportunity to be heard.

22. The 19<sup>th</sup> Grievant, Josephat Mose Nyanchoka told the Court that before his dismissal he was called to a disciplinary meeting where it was agreed that the damage he had caused be assessed for him to make good. The Court therefore finds that he too was given a fair hearing.

## **Reliefs**

23. In view of the Respondent's failure to prove a valid reason for dismissal of the 1<sup>st</sup> -17<sup>th</sup> Grievants, I make the following award:

- a. Each of the Grievants (1<sup>st</sup> -17<sup>th</sup> ) shall be paid notice in accordance with the Collective Bargaining Agreement obtaining at the date of dismissal;
- b. The 1<sup>st</sup> Grievant, Rose Omole shall be paid 6 months' pay in compensation for unfair termination of employment
- c. The 2<sup>nd</sup> Grievant, Dickson Ayuya Bukasa shall be paid 9 months' pay in compensation for unfair termination of employment
- d. The 3<sup>rd</sup> Grievant, Joseph Ndichu Wangui shall be paid 9 months' pay in compensation for unfair termination of employment
- e. The 4<sup>th</sup> Grievant, Nashon Musee Thuo shall be paid 8 months' pay in compensation for unfair termination of employment
- f. The 5<sup>th</sup> Grievant, Robert Masai Nzue shall be paid 4 months' pay in compensation for unfair termination of employment
- g. The 6<sup>th</sup> Grievant, Benard Mailu shall be paid 3 month's pay in compensation for unfair termination of employment
- h. The 7<sup>th</sup> Grievant, Boniface Ndungu shall be paid 5 months' pay in compensation for unfair termination of employment
- i. The 8<sup>th</sup> Grievant, Newton Ondieki shall be paid 1 month's pay in compensation for unfair termination of employment
- j. The 9<sup>th</sup> Grievant, Stephen Muriithi Ndwiga shall be paid 11 months' pay in compensation for unfair termination of employment
- k. The 10<sup>th</sup> Grievant, Christopher Juma Kona shall be paid 1 month's pay in compensation for unfair termination of employment
- The 11<sup>th</sup> Grievant, Stanley Muinde Munguti shall be paid 2 months' pay in compensation for unfair termination of employment
- m. The 12<sup>th</sup> Grievant, Joseck Josiah Opunga shall be paid 8 months' pay in compensation for unfair termination of employment

- The 13<sup>th</sup> Grievant, Peter Ngigi Kamau shall be paid 12 months' pay in compensation for unfair termination of employment
- The 14<sup>th</sup> Grievant, Jared Makori shall be paid 1 month's pay in compensation for unfair termination of employment
- p. The 15<sup>th</sup> Grievant, Joseph Muinde Makau shall be paid 5 months' pay in compensation for unfair termination of employment
- q. The 16<sup>th</sup> Grievant, Evanson Mwangi Mborora shall be paid 4 months' pay in compensation for unfair termination of employment
- r. The 17<sup>th</sup> Grievant, Alfred Matisha shall be paid 5 months' pay in compensation for unfair termination of employment
- s. The amounts payable to each Grievant shall be agreed upon by Counsels for the parties within the next 21 days from the date of this award.

24. The 18<sup>th</sup> Grievant, Anthony Koyaa was accused of placing drinks on an unoccupied table thus exposing the Respondent to loss. While the Claimant has given an elaborate explanation on the circumstances surrounding Koyaa's case, no evidence was led to prove these averments and the Court therefore found no basis for the claim on account of this Grievant which is hereby dismissed.

25. In view of the finding that the Respondent had a valid reason to terminate the employment of the 19<sup>th</sup> Grievant, Joseph Mose Nyanchoka and that he was accorded a fair hearing, his claim is also dismissed.

26. Each party will bear their own costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nyabena for the Claimant

Mr. Njuguna for the Respondent