REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 44 OF 2013

(Formerly Nairobi Cause No. 1797 of 2011)

KENYA PLANTATION AND AGRICULTURAL WORKERS' UNION.....CLAIMANT

-VERSUS-

ROSETO FLOWERS.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2013)

JUDGMENT

The claimant is Kenya Plantation and Agricultural Workers' Union represented in this case by Mr. Meshack Khisa. The respondent is Roseto Flowers represented by the Federation of Kenya Employers through Mr. Masese. The respondent filed the memorandum of claim on 26.10.2011, seeking prayers against the respondent for:

a. **a declaration that the lock-out, dismissal and termination of Edward Mogaka and over 100 other employees was wrongful and unfair;**

b. **the court to order the respondent to immediately withdraw without conditions the un-procedural lock-out, dismissal or termination of the grievants and reinstate them to their former positions without loss of benefits; and**

c. **in alternative, the respondent to pay the employees full terminal benefits including one month notice in lieu of pay, days worked if any, overtime worked if any, annual leave due, and 12 months wages compensation in accordance with section 12 (3) (v) of Industrial Court Act, 2011 for wrongful loss of employment;**

d. **certificate of service; and**

e. **costs and interest.**

The respondent filed the memorandum of response on 24.04.2013 and prayed that the claim be dismissed with costs. The claimant filed a response to the respondent's memorandum of defence on 14.05.2013.

The claimant opted to rely on the pleadings and the documents on record without calling any witness. The respondent's 1st witness (RW1) was Tom Welikhe, the respondent's Human Resources and Administration Officer. The respondent's 2nd witness (RW2) was Ashok Shah, the respondent's

Operations Manager. Their evidence was heard on 13.05.2013.

RW1 testified as follows:

a. It was in May, 2011 and the respondent's employees had disputes and the union called a strike. The issues were about deductions in view of the clock-in and clock-out system. The claimant addressed a letter dated 8.09.2011 to the respondent being appendix 2 on the memorandum of response. The letter was a strike notice asking a refund of the unfairly deducted salaries in view of the unfair clock-in and clock-out system. The respondent replied by the letter dated 12.09.2011 asking that the strike notice be stayed as per appendix 3 on the response. On 14.09.2011, the parties held a meeting and the parties arrived at an agreement as per minutes at appendix 3 on the response. It was agreed that a meeting be held at the respondent's farm on 15.09.2011 to address workers on the terms of the agreement.
b. On 17.10.2011, the workers frog-march RW1 from his office to the farm gate. The workers were on strike. Thus, the parties concluded the return to work formula of 17.10.2011 being appendix 4 on the response. All workers were to resume duty that day without victimization. The management agreed to make changes in the Human Resource department effective that day and the claimant to allow the management time to recruit a Human Resource Manager. Shop stewards were to be trained and a meeting to be held at the labour office to discuss the pending issues.
c. RW1 reported to the police three employees who started the process of his frog-marching to be charged with the offence of assault. On 21.10.2011, employees Edwin Mogaka and James Owirere were arrested. Edwin was the Chief Shop-steward who lead the workers in assaulting RW1.
d. On 22.10.2011, employees approached the management that the two arrested employees be released failing which they would not resume work. The employees refused to go to perform their respective duties. On that day, work was not done. There was no strike notice issued by the claimant's secretary general yet the workers went on strike that day. The employees who do spraying reported early morning but did not work at all. The acting Human Resource Manager and the General Manager addressed the workers but they refused to resume work.
e. The management convened a meeting and explained the arrests had nothing to do with the respondent because the two as arrested were personally liable. Two verbal communications were made at about 8.00 am and 8.30 am. At 11.00 am, the management issued a notice at appendix 6 of the response stating as follows:

"TO ALL EMPLOYEES ROSETO LTD

RE: NOTICE

It has been noted with concern that you have absented yourself from your place of work on 22nd October 2011 from 7.00am without any lawful cause.

You are therefore warned that in accordance with the Labour Relations Act 2007 Section 80 (1) which states:

'80.(1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and?

a. **is liable to disciplinary action; and**
b. **is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike.**

(2) A person who refuses to take part or to continue to take part in any strike or lock-out that is not in compliance with this Act may not be?

a. **expelled from any trade union, employers organisation or other body or deprived of any right or benefit as a result of that refusal; or**
b. **placed under any disability or disadvantaged, compared to other members or the trade**

union, employers' organisation or other body as a result of that refusal.

(3) Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court.'

Take note that any employee who will not be in their workplace by 9.00 am will have committed a serious gross misconduct and liable to disciplinary action as provided for in section 44 of the Employment Act, 2007 of Laws of Kenya

Signed

General Manager"

f. By 1.00 pm the employees had not resumed work. The notice to resume work quoted above had been placed at the gate and the pack house where the staff had gathered. All the employees were within the respondent's premises. At all material time, the union was aware of the strike and two union officials one Musumba and Thomas Kipkemboi, RW recalled, jumped over the respondent's gate into the premises to address the employees. They addressed staff between 1.00 pm and 2.00 pm and after the notice quoted above to resume work had expired. Two hours lapsed between the notice to resume work and the notice of summary dismissal. Some workers were willing to resume work but were intimidated not to do so. Employees stayed on but did not work and were not paid for that day. The respondent had already issued the summary dismissal being part of appendix 6 on the memorandum of response as follows:

"22/10/2011

ALL EMPLOYEES

ROSETO LTD

RE: SUMMARY DISMISSAL

You have been issued with three notices starting at 7.00 a.m asking you not to participate in the prohibited strike and resume your normal duties.

You have defied all notices and continued to do so contrary to section 78 of Labour Relations Act 2007. Please note that the Ministry of labour has been notified accordingly and your dues will be deposited at the District Labour Office, Nakuru.

This is therefore to inform you that the management has been left with no option but to take disciplinary action in accordance with section 80 of the Labour Relations Act, 2007.

Consequently, your services have been summarily dismissed with the Company with effect from 22nd October 2011 in accordance with section 44 of Employment Act, 2007, Laws of Kenya. Please hand over all company property in your possession and collect your dues and certificate of service from District Labour Office, Nakuru."

g. The number of employees who went to strike was about 103. They were all dismissed as per the notice of summary dismissal. On the date of the strike, the respondent's flowers were not harvested and they went to waste.
h. The parties were bound under the collective bargaining agreement.
i. On 22.10.2011, the police were called to the respondent's premises to protect the property. The two arrested employees were also released on 22.10.2011 and they were present during the better part of the strike.
j. It was not practical to subject each of the employees to appear for a hearing in a disciplinary process. The employees were not issued with individual dismissal letters. There was no evidence

that the terminal dues were deposited with the District Labour Office.

RW2's testimony was as follows:

a. The parties were at all material time bound by a recognition and collective agreement. The CBA stated that assault was a gross misconduct. On 22.10.2011, the employees went on strike due to the arrest of the two employees who had been arrested for assaulting RW1. The assault did not relate to employees terms and conditions of service. Employees refused to resume work after the notices to resume work had been issued and were subsequently dismissed summarily.
b. The strike on 22.10.2011 was from about 8.00 am to 1.00 pm, the time of the dismissal. Some of the employees dismissed were trying to work but feared to continue work. No staff was locked out.
c. There was no evidence of the deposit of the final dues with the District Labour Office.

The respondent's final submissions were filed on 14.06.2013 and parties made their respective oral submissions on 21.06.2013. The issues and questions for determination are as follows:

1. ***Whether the strike of 22.10.2011 was lawful.***
2. ***Whether the principle of ultimatum applied in this case as opposed to the rules of natural justice.***
3. ***What is the effect and scope of section 80 of the Labour Relations Act, 2007 in event of a prohibited strike?***
4. ***Whether the claimants are entitled to the remedies as prayed for.***

Issue No. 1: Whether the strike of 22.10.2011 was lawful

The respondent has submitted that the reason for the strike was the arrest of two of the grievants that took the law into their hands and assaulted the human resource manager. The issue did not concern the terms and conditions of employment as provided for in section 76 (a) and (b) which respectively provide that a person may participate in a strike or lockout if the dispute in issue concerns terms and conditions of employment or the recognition of a trade union; and the dispute is unresolved after conciliation. The respondent further submitted that the strike was unlawful because it did not related to a trade dispute that had been referred for conciliation under Act or the collective agreement as envisaged in section 78(1) (e) of the Act. The strike was also unlawful because it was not in furtherance of a trade dispute as per section 78(1) (g) of the Act.

For the claimant, it was submitted that employees had a right to be informed on 21.10.2011 by the respondent that the arrests of their Chief Shop steward and another employee was an individual issue and being handled under the provisions of criminal law in view of the alleged assault and that the arrest was not on account of being the Chief Shop steward. It was submitted that if the respondent had communicated accordingly to the employees then the strike would not have occurred.

The court has considered the respective submissions. A trade dispute is defined in section 2 of the Act, thus, **"trade dispute"** means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union**.**

The court has considered the entire account of the circumstances of the case. There was a smearing dispute on the issue of the respondent reforming the Human Resource office as per the agreement between the parties, then the frog-marching of RW1, then the arrest of the two employees. The arrest would, in the opinion of the court, generate an apprehended dispute or difference between the employees and the respondent in view of the smearing changes in the office of Human Resource which was a valid employment issue between the parties as per the agreement on record. The criminal element and the employment issue of reforms in the Human Resource office formed a miscible mixture. The court finds there was a trade dispute within the definition.

However, the strike took place without the process of the trade dispute being unresolved in reconciliation process under the Act or the conciliation as may have been agreed between the parties in the collective agreement. To that extent, the court finds that the strike was unlawful. The court holds that the step of engaging in conciliation before any strike is at the core of industrial stability and amicable settlement of trade disputes. The conciliatory step constitutes the harmonious and peaceful attempt to bargain before invoking the strike process as the ultimate bargaining mechanism and which invariably would disrupt the flow of work in the ensuing industrial unrest.

Issue No. 2: Whether the principle of ultimatum applied in this case as opposed to the rules of natural justice

The respondent submitted that the principle of ultimatum as opposed to the rules of natural justice as provided for in sections 41 and 45 of the Employment Act, 2007 applied in this case. The respondent submitted that the employees were given an ultimatum to resume work by way of the notice that was issued by the respondent, they squandered the opportunity, time ran and the employees correctly suffered the consequences of their actions which was the summary dismissal by the notice issued by the respondent. For the respondent, it was submitted that individual misconduct attracts individual disciplinary process through the rules of natural justice as provided for in the Employment Act, 2007 while on the other hand, collective workers' misconduct attracts collective punishment of the workers through the ultimatum process addressed to the employees collectively. The employer, it was submitted, will skillfully sieve out the innocent staff saving them from the collective punishment while the employees who fail to comply with the ultimatum terms are visited with the punishment in terms of the ultimatum. It was submitted that the ultimatum principle applied only in strikes for the purpose of managing the strike.

It was also submitted that section 80 of the Labour Relations Act, 2007 should be interpreted to be given flesh as unlike the equivalent South African statute which had the flesh, the Kenyan provision was skeletal and it was the court's interpretation function to transplant the flesh from the South African application of the law.

For that purpose, the court was referred to the judgment of the Honourable Justice Bhoola of the Labour Court of South Africa at Johannesburg in **David Masilela and Others –Versus- Reinhardt Transport (Pty) Ltd and 3 Others, Case JS38/07.** The court cited the applicable law stating that the Labour Relations Act of South Africa guarantees the right to procedural and substantive fairness to employees engaging in unprotected strike action because section 68(5) of the Act provides thus;

"PARTICIPATION IN A STRIKE THAT DOES NOT COMPLY WITH THE PROVISIONS OF THIS CHAPTER, OR CONDUCT IN CONTEMPLATION OR IN FURTHERANCE OF THAT STRIKE, MAY CONSTITUTE A FAIR REASON FOR DISMISSAL. IN DETERMINING WHETHER OR NOT THE DISMISSAL IS FAIR, THE CODE OF GOOD PRACTICE: DISMISSAL IN SCHEDULE 8 MUST BE TAKEN INTO ACCOUNT."

The cited code of good practice as quoted at page 19 of the judgment then provides as follows:

> **"1) PARTICIPATION IN A STRIKE THAT DOES NOT COMPLY WITH THE PROVISIONS OF CHAPTER IV IS MISCONDUCT. HOWEVER, LIKE ANY OTHER ACT OF MISCONDUCT IT DOES NOT ALWAYS DESERVE DISMISSAL. THE SUBSTANTIVE FAIRNESS OF DISMISSAL IN THESE CIRCUMSTANCES MUST BE DETERMINED IN LIGHT OF THE FACTS OF THE CASE, INCLUDING-**

a. **THE SERIOUSNESS OF THE CONTRAVENTION OF THE ACT;**
b. **ATTEMPTS MADE TO COMPLY WITH THE ACT;**
c. **WHETHER OR NOT THE STRIKE WAS IN RESPONSE TO UNJUSTIFIED CONDUCT BY THE EMPLOYER.**

2. **PRIOR TO DISMISSAL THE EMPLOYER SHOULD, AT THE EARLIEST**

OPPORTUNITY, CONDUCT A TRADE UNION OFFICIAL TO DISCUSS THE COURSE OF ACTION IT INTENDS TO ADOPT. THE EMPLOYER SHOULD ISSUE AN ULTIMATUM IN CLEAR AND UNAMBIGUOUS TERMS THAT SHOULD STATE WHAT IS REQUIRED OF THE EMPLOYEES AND WHAT SANCTION WILL BE IMPOSED IF THEY DO NOT COMPLY WITH THE ULTIMATUM. THE EMPLOYEES SHOULD BE ALLOWED SUFFICIENT TIME TO REFLECT ON THE ULTIMATUM AND RESPOND TO IT EITHER BY COMPLYING WITH IT OR REJECTING IT. IF THE EMPLOYER CANNOT BE EXPECTED TO EXTEND THESE STEPS TO THE EMPLOYEES IN QUESTION, THE EMPLOYER MAY DISPENSE WITH THEM."

It was submitted that as held in that case, the purpose of an ultimatum is to afford the striking employees sufficient opportunity to consider their position before action which may have dire consequences is taken against them. It gives them a sufficient time to consider the matter and consequences of non-compliance with the ultimatum as well as to seek advice before taking the decision to comply or not to comply with the ultimatum. The law therefore requires the ultimatum to be considered in clear and unambiguous terms and should set out what is required of them including the time frames within which they are expected to comply and indicated the possible consequences of failure to comply. Further an ultimatum is different from a hearing. In a hearing as it was held in the case, it was submitted for the respondent, the purpose is to hear what explanation the other side has for its conduct and the representations that can or should be taken against it. On the other hand, an ultimatum does not elicit information or explanations from the workers but it is an opportunity for the workers to reflect on their conduct to digest issues and if necessary seek advice before deciding to heed the ultimatum or not. Thus, it was submitted that ultimatums do not invite hearings and representations. The respondent also referred the court to the Judgment of the *Honourable Justice Basson* in the Labour Court of South Africa at Johannesburg, **Steel Mining and Commercial Workers Union, H Seutane and Others –Versus- Brano Industries (Pty) Limited and 2 Others, Case No. J1428/97**, where the opinion in the above cited case was similarly applied. The respondent concluded the submissions by urging that the respondent in the instant case afforded the workers humble and adequate time to reflect upon their actions and the collective summary dismissal for the collective misconduct was just under the ultimatum principle.

The claimant objected to the ultimatum principle and submitted that the rules of natural justice apply in Kenya's legal system as codified and legislated in section 80 of the Labour Relations Act, 2007 and the Employment Act, 2007. The summary dismissal letter, it was submitted, invoked section 44 of the Employment Act, 2007 and it cannot be said that the respondent complied with the provision as invoked because the employees were not served the notices of the alleged gross misconduct and they were not heard at all. The claimant submitted that the respondent had failed to comply with the rules of natural justice on notice and hearing or fair procedure as provided for in sections 41 and 45(2) (c) of the Employment Act, 2007 as well as Article 47(1) prescribing individual fundamental right to fair administrative action. The court was referred to the judgment of this court in **Shankar Saklani –Versus- DHL Global Forwarding (k) Ltd, Industrial Cause No. 562 of 2012 at Nairobi**, where it was held:

a. Termination has the constitutional basis in Article 47(1) and decisions by employers are properly administrative actions within the provisions of the Article on fair administrative action.
b. A hearing and notification on the part of the employer is mandatory where it is contemplated to terminate the employment on account of misconduct, poor performance or physical incapacity of the employee and the same standard applies to cases of gross misconduct.

The claimant also cited the award by the *Honourable Justice Mathews N.Nduma* in **Kenya Plantation Workers Union –Versus- Plantation Plants (K) Limited, Cause No. 1153 of 2012** where the court held that the procedure in section 41 of the Employment Act, 2007 is meant to facilitate validation of the reason for intended termination or dismissal and where the process does not take place, the opportunity to validate the reason is lost making it difficult for the employer to discharge the onus under section 45(2) of the Act to prove:

a. **that the reason for the termination is valid;**

b. **that the reason for the termination is a fair reason:**

i. **related to the employee's conduct, capacity or compatibility; or**
ii. **based on the operational requirements of the employer; and**

c. **that the employment was terminated in accordance with fair procedure.**

The claimant also referred the court to the judgment by the Honourable Justice **Onesmus N. Makau in Kenya Union of Commercial Food & Allied Workers –Versus- Delmonte (K) Limited** where it was held:

a. Section 41 of the Employment Act, 2007 is in mandatory terms that an employer shall not terminate an employee on ground of misconduct before explaining to him in a language he understands and in the presence of a workmate or shop floor union representative of his choice, the reasons for which he intends to terminate his employment and the section forbids termination before hearing and considering the employee's representation. The omission is fatal to the employer's case and it offends section 45(1) and (2) (c) of the Act. Any employer who ignores section 41 of the Act does so at his own peril.
b. Section 7 and 8 of the Act subjects all employment contracts to the Act and leaves no room for the employer to invent his own disciplinary procedures which offend express provisions of the Act.

The claimant further submitted that the ultimatum principle did not apply in Kenya in view of the clear constitutional and statutory provisions and the cited South Africa's authorities did not apply in Kenya.

Collective responsibility is a concept or doctrine according to which people are to be held responsible for other people's actions by tolerating, ignoring or harboring them without actively collaborating in those actions. The concept is for example found in the Biblical Old Testament such as the stories of the flood, the Tower of Babel and Sodom and Gomorrah. In those accounts, entire communities were punished on account of the misconduct of the majority of their community members. However, it is impossible that there were some innocent people or children too young to be responsible for their actions. Collective responsibility in the form of group punishment is often used as a disciplinary measure in closed institutions such as boarding schools, military units and youth camps.

Collective ownership means that the people in a society such as a state or a company collectively own the society's goods and services or resources or liabilities. It is the sense of collective ownership that leads to the notion of collective responsibility.

The notions of collective ownership and collective responsibility are best implemented through citizens' participation in decision making. The idea of ownership is extended to cover control of shared resources and liabilities. The consequence is to achieve intergenerational justice and fairness. Future interests and fairness amongst varying interest groups in the state are taken care of as in **"sustainable environmental management"**. Collective ownership, collective responsibility and people-participation are at the core of good governance as a basis of the other principles such as accountability, transparency, affirmative action, meritocracy and constitutionalism. In that perspective, the notions of collective ownership and responsibility yield desirable outcomes.

However, when applied in misconduct and punishment, the notions of collective ownership and responsibility as invoked in the ultimatum principle can very easily yield into absurd and unjust outcomes. It can very easily lead to imposing punishment against innocent persons who are not aware of the ultimatum or who are not involved in the dispute at hand or who have individual explanations in self-exculpation.

The court has considered the submissions and finds that under our constitutional and statutory regime in employment and labour relations law, the string that flows throughout is that employers must uphold due process in a fair procedure in terminating employment on account of

poor performance, misconduct and even ill-health. The constitutional and statutory law does not provide for the ultimatum principle as it obtains in South Africa and as submitted for the claimant, in absence of legislation on ultimatum principle, the court finds that the court may not coin an interpretation as to apply it in cases of strikes in Kenya's employment and labour relations. The court upholds the opinions as consistently elaborated in the cases cited for the claimant.

To answer the second issue, the court holds that the ultimatum principle does not apply in event of an unlawful strike and the employer is required to apply rules of natural justice as provided for in the provisions of the Constitution and the legislation cited in the authorities referred to by the claimant in this case as well as the lawful provisions on disciplinary process as may be agreed between the parties. The court further holds that it was not open for the employer to invent the ultimatum principle as the path of terminating the employees' employment in oblivion of the clear provisions of section 80 of the Labour Relations Act, 2007 and the provisions of the Employment Act as cited in the authorities invoked for the claimant.

Issue No. 3: What is the effect and scope of section 80 of the Labour Relations Act, 2007 in event of a prohibited strike?

Section 80 of the Labour Relations Act provides as follows:

'80. (1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and?

a. **is liable to disciplinary action; and**
b. **is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike.**

(2) A person who refuses to take part or to continue to take part in any strike or lock-out that is not in compliance with this Act may not be?

> **(a) expelled from any trade union, employers organisation or other body or deprived of any right or benefit as a result of that refusal; or**
>
> **(b) placed under any disability or disadvantaged, compared to other members or the trade union, employers' organisation or other body as a result of that refusal.**

(3) Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court.'

First, it is the view of the court that a punishment including the dismissal on account of an employee's involvement in a strike that does not comply with provisions of the Labour Relations Act, 2007 can only be imposed by the employer through a fair process that affords the employee an opportunity to know the allegations leveled and a chance for the hearing. The Labour Relations Act, 2007 does not prescribe the procedure for the disciplinary action and the court holds that such procedure is provided for in the principles of due process of justice set out in the Constitution such as Articles 47 and 50(1), the provisions of the Employment Act, 2007 and the lawful provisions of the agreement between the parties.

Secondly, the court finds that under section 80 of the Act, the primary punishment to be imposed by the employer is to deny payment to the concerned employee for the period of the strike because the section declares, such an employee **"….is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike...".** While making this holding, the court further holds that the imposition of that primary punishment can only take place after the employee has been accorded due process to establish that the employee was indeed involved in the strike that did not comply with the statutory provisions. The primary punishment cannot be imposed sweepingly like by invoking the ultimatum principle which is devoid of the statutory and constitutional fair process as already elaborated and as innocent employees could easily be unfairly punished.

For avoidance of doubt, the drastic punishment of dismissal may be imposed in appropriate cases under due process but the view of the court is that the primary punishment is preferable so as to foster collective bargaining recognising that employees usually do not go on lawful or unprotected strikes with the evil design to injure the employer and end the relationship; it is bargaining chip invoked as a last option to strike amicable balance - the storm before the tranquillity. The purpose of the strike is seldom to trigger a separation and termination or dismissal should, in the opinion of the court, be invoked in extremely rare and obviously justified cases.

Thirdly, the court finds that under section 80 of the Act, the employee does not surrender the right and freedom not to participate, so to say, to refuse to participate, in a strike that does not comply with the statutory provisions. This principle against expulsion, disability or disadvantage for refusal to take part in a strike because it contravenes the statutory provisions imports individual responsibility of the employee in a strike situation and the collateral obligation upon the employer is to deal with staff individually in strike cases. That effect of the section effectively makes the ultimatum principle unavailable in our strike legislative framework.

Fourthly, the jurisdiction to determine the legality of a strike is vested in this court as per provisions of section 80 of the Act.

Issue No. 4: Whether the claimants are entitled to the remedies as prayed for

The final issue for determination is whether the claimant is entitled to the remedies as prayed for in the memorandum of claim. In view of the findings already made, the pleadings, the evidence, the documents filed and the submissions, the court finds that the claimant is entitled as follows:

a. To a declaration that summary dismissal of Edward Mogaka and over 100 other employees as listed in the letter dated 30.04.2013 Ref. No. KPAWU/IC/120/04/2013 submitted in court on 21.06.2013 was wrongful and unfair.
b. To an order, the respondent to pay the employees full terminal benefits including one month notice in lieu of pay, days worked if any, overtime worked if any, annual leave due, and 6 months gross monthly wages for compensation in view of the unfair termination. In making the award for 6 months gross salaries, the court has taken into account the losses the respondent may have incurred on the material day of the undisputed strike as mitigating the maximum claim of 12 months, the service the employees rendered, the anguish the employees suffered from the sudden termination and all the other circumstances of this case.
c. To certificates of service.
d. To costs and interest.

The respondent submitted that the memorandum of claim did not have the prescribed verifying affidavit. It was a belated submission long after taking all the evidence at the hearing. The court notes that the evidence was by the respondent's witnesses. The claimant referred the court to the judgment by the *Honourable Justice James Rika* in **John Kakai – Versus- Daystar University, Industrial Cause No. 977 of 2010 at Nairobi**, where it was stated as follows:

"We have evaluated the written submissions and documents filed by the parties. It is correct position of the law that rule 5(1) of the Industrial Court Procedure Rules 2010 requires a memorandum of claim be accompanied by a verifying affidavit. The rule is couched in mandatory terms. It is also a correct position of law that in determining employment disputes, the Court is called upon to disregard technicalities, and determine issues in dispute on merit. Rule 5(1) essentially requires parties to verify the correctness of the facts stated in the claim. Where the correctness of the main facts is not contested, then verification becomes superfluous. In this dispute, the employment and termination are not contested facts. The contestation is on issues of law, whether termination was fair and whether compensation and terminal dues are merited. Issues of law would not require to be verified by an affidavit. It is not always the case that where a rule is expressed in mandatory terms the Courts blindly enforce such rules, regardless of the broader issues of substantive justice. We think to strike out and dismiss the claim for lack of a

verifying affidavit would be manifestly unjust, and would not serve the intended purpose of the Labour Institutions Act and the Employment Act both of 2007. We refuse to dismiss the claim on that ground."

The court upholds that opinion and finds that dismissing the claim in the present case would undermine the tenets of substantive justice in the case where facts were not significantly contested. The court further takes the view that such objections ought to be raised early in the proceedings and long before the hearing if they have to serve the desired purpose including saving the time of the court where the parties have not complied with the pre-trial issues.

In conclusion, judgment is entered for the claimant against the respondent for:

a. A declaration that summary dismissal of Edward Mogaka and over 100 other employees as per the respondent's list attached to the letter dated 30.04.2013 Ref. No. KPAWU/IC/120/04/2013 by the claimant and submitted in court on 21.06.2013 was wrongful and unfair.
b. An order the respondent to pay each of the employees affected the full terminal benefits including one month pay in lieu of notice; days worked if any; overtime worked if any; annual leave due; and 6 months gross monthly wages as at termination for compensation in view of the unfair termination.
c. An order the claimant to compute the dues in (b) to be served upon the respondent by 5.07.2013 and for the respondent to file and serve any objections by 12.07.2013 for confirmation on a date convenient between the parties.
d. The respondent to pay the dues as confirmed by 1.10.2013 failing which interest to be payable at court rates from the date of the judgment till full payment.
e. The respondent to deliver to each of the affected employees the respective certificate of service by 1.08. 2013.
f. The respondent to pay costs of the case.

Signed, dated and **delivered** in court at **Nakuru** this **Friday, 28th June, 2013.**

BYRAM ONGAYA

JUDGE