



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 36 OF 2013

(Formerly Nairobi Cause No. 610 of 2011)

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

-VERSUS-

CARZAN

**FLOWERS.....RE
SPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26th July, 2013)

JUDGMENT

The claimant the Kenya Plantation and Agricultural Workers' Union filed the memorandum of claim on 18.04.2011. The union prayed for judgment against the respondent for:

- a. A finding that the lock-out, suspension, dismissal and termination of over 400 Applicant's members was unfair, wrongful and illegal.
- b. The respondent to be ordered to immediately withdraw without conditions the illegal lock-out, suspension, dismissal or termination of the over 400 applicant's members.
- c. The court to order the respondent not to victimize any of the applicant's members for participating in the protest.
- d. In alternative, the court to order the respondent to pay full terminal benefits of each of the over 400 employees in accordance with the CBA in force including:
 - i. Days worked if any;
 - ii. Notice in lieu of pay;
 - iii. 2010 annual leave if any;
 - iv. Appropriate leave travelling allowance;
 - v. Gratuity for each of completed year of service and payment prorated for those who have not completed a year of service;
 - vi. 12 months compensation for wrongful loss of employment.
 - vii. Certificate of service.

The respondent filed the memorandum of defence on 17.04.2013 through the Federation of Kenya Employers. The respondent prayed that the claim be dismissed for lacking factual or any legal basis.

The case was heard on 4.06.2013 and on 20.06.2013 when the respondent's witnesses testified. The claimant opted to rely entirely on the documents and pleadings on record. The respondent's 1st witness (RW1) was Robert Mutembei, the respondent's Unit Manager at all material times; the 2nd witness (RW2) was Christine Otieno being a legal officer at the Ministry of Labour at all material times deployed at the Nakuru Office; the 3rd witness (RW3) was Livingstone Karanja, being a Labour Officer deployed at Nakuru at all material time; and the 4th witness was (RW4) was Jacob Lenjo, the respondent's human resource officer at all material times.

The facts of this case are generally not in dispute. The parties are in a recognition and collective agreement. The grievants are employees of the respondent and members of the claimant. The respondent paid the grievants' end-month salaries through the grievants' bank accounts and mid-month advance salaries by cash.

Due to security reasons and high risk of transporting cash, the respondent made a decision to pay the mid-month advance salaries for April 2011 through the bank accounts. The decision was made unilaterally by the respondent without consulting the claimant and against the interests of the grievants. In particular, the grievants relied on the advance salary paid for their daily upkeep including subsistence and daily expenses for reporting at work. Most of the grievants owed their bank some monies borrowed without involvement of the respondent and upon depositing the mid-month salaries the bank acted by recovering the loans otherwise recoverable from the salary deposits made at end month. In the circumstances, the grievants found themselves without subsistence and ability to meet their daily expenses. If the grievants were paid cash, RW4 testified that they would have been paid on 16th or 15th April, 2011.

The grievants raised serious concerns and grievances taking the nature of an unprotected strike of 15.04.2011. RW4 told the court that the grievants agreed to such payments by their signing in agreement as per schedule being appendix 1 on the memorandum of defence. For the claimant, it was submitted that the schedule was not dated as it related to unknown transaction or to initial agreement to pay end month salaries through the bank and not payment of the mid-month advance salaries. The court finds that in absence of a date, the schedule does not serve to show that it related to agreement to effect the kind of payment that subsequently led to stoppage of work by the grievants on 15.04.2011. RW3 was the Labour officer who documented the proceedings of the meetings between the parties relating to the grievance and dispute at hand and he testified that:

- a. Meetings were held on 15th and 16th April 2011 at the respondent's premises to resolve the dispute. The meetings were not a collective disciplinary process against the workers but a process of attempting an amicable resolution. It was a grievance management process and the last meeting was on 16.04.2011 when in RW3's opinion was recorded that the strike was illegal; the respondent could not dismiss by fact or constructively; and the management had a legitimate right to impose prescribed punitive measures which were not to be construed as either actual or constructive dismissal.
- b. The grievants were entitled to be heard in view of the grievance at hand either individually or collectively and the meetings between the parties on 15th and 16th April, 2011 were in the nature of grievance and dispute resolution and were not collective disciplinary action. It was RW3's opinion that a grievance occurred when a party to employment contract expressed dissatisfaction where the other party has failed to deliver upon the obligations as agreed. On the other hand, it was his opinion that disciplinary action followed a misconduct or offence by an employee.

The respondent in view of the stoppage of work on 15.04.2011 issued notices at 11.00 am, 1. 30 pm and, 3.30 pm informing the employees that the strike was illegal and failure to resume work would amount to gross misconduct. The notices are appendix 3 on the memorandum of defence and each one of them stated as follows:

“TO ALL EMPLOYEES

CARZAN FLOWERS (KS & ST FARMS)

RE: NOTICE

It has been noted with concern that you have absented yourself from your place of work on 15th April 2011 from 7.00am without any lawful cause demanding to be paid advance salary in cash.

The management wishes to advise you that the salary advance has been forwarded to the bank due to matters of security. 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

Human Resources Manager”

The respondent considered that the grievants had refused to heed the notices to resume work as the stoppage of work persisted and thus the claimant dismissed the grievants by the notice being appendix 4 on the memorandum of defence and RW4 testified that after the three notices, the respondent issued the general letter later on 15.04.2011. The general dismissal letter stated as follows:

“To: All striking employees

15TH April 2011.

SUMMARY DISMISSAL

You were notified through notices issued to you at 11.00 am and the second one issued to you at 1.30 pm and the last one issued at 3.30 pm. It has been noted with concern that you have defied the lawful order and continued to absent yourself from your place of work. This is a breach of your employment contract and violation of the Employment Act Section 44(4) and the Labour Relations Act Section 80 (1) of the laws of Kenya.

In accordance with the said legal provisions the management has decided to Summarily Dismiss your services with effect from 15th April 2011. You are therefore required to clear with the Company and hand over any Company property in your possession. Your terminal dues consisting

of the days worked, and accrued leave will be deposited in your account immediately you hand in your clearance form. You will also be issued with a certificate of service in line with the law.

The management wishes you luck in all your future endeavours.

Yours faithfully,

For: Carzan Flowers (K) Ltd

Signed

HUMAN RESOURCES MANAGER

CC: District Labour Officer

: The Branch Secretary, K.P.A.W.U.

:The Executive Officer, Agricultural Employers Association.”

Appendix 5 on the memorandum of response is an agreement between the parties. At the meeting of 15.04.2011 they agreed:

1. Salary shall be advanced to individual employees on need basis provided that such provision of the advance shall not be unreasonably denied.
2. Salary shall be paid in accordance with clause 31 of the CBA.

On 16.04.2011, the parties agreed as follows:

1. The matters raised and agreed on stand agreed on 15.04.2011.
2. The parties have agreed that normal work should resume.

The respondent proposed the following but was rejected by the claimant:

1. All workers on leave and on rest day at the start of the strike to be allowed to resume duties.
2. All workers in essential services who participated in the strike to stand dismissed with effect from 15.04.2011 at 4.00pm.
3. All other categories of workers who participated in the strike stand dismissed and can re-apply.

The claimant proposed the following but was rejected by the respondent:

1. No employee shall be victimized as a result of the circumstances arising on 15.04.2011 and 16.04.2011 upon resumption of duties.
2. Unconditional resumption of duties by all the workers who had not resumed duties on 15.04.2011.

The agreement formed the parties' basis of disagreement and agreement leading to the filing of this case. In the meantime, the respondent forwarded to the Ministry of Labour the grievants' intended final dues consequential to the dismissal on 15.04.2011 as per the Cheque No. 010058 for Kshs.335,075/= and No. 010059 for Kshs.776,058/= both dated 6.05.2013 and filed in court on 26.06.2013 attached on the respondent's further list.

The key issues for determination in this case are as follows:

1. Whether section 80 of the Labour Relations Act, 2007 is the exclusive path of handling or dealing with unprotected strikes and lock-outs.
2. Whether termination of contract of employment is available in unprotected strike unless after due process under the Employment Act, 2007.

3. Whether collective disciplinary process and collective imposition of punishment is available in the employment relationship as appears to have happened in this case.
4. Whether the claimant is entitled to the remedies as prayed for.

For the first issue, the respondent submitted that the procedure for imposing disciplinary action in event of an unprotected strike under section 80 of the Labour Relations Act, 2007 is different from the one under section 41 of the Employment Act, 2007. The procedure to be followed, it was submitted for the respondent is the one entailing the principle of fair ultimatum and like in the present case, the grievants were required to heed the ultimatum issued at the time of the unprotected strike. The consequence of the grievants failing to heed the ultimatum as issued by the respondent was that they were liable to be dismissed. By way of three notices, three ultimatums were issued and the union was given a chance and therefore the grievants were legitimately terminated. For the claimant, it was submitted that the respondent had to comply with the principles of natural justice including giving notices and hearing the individual employees before any action to dismiss. The respondent relied on the judgment of this court in **Kenya Plantation & Agricultural Workers' Union –Versus- Roseto Flowers, Industrial Cause No. 44 of 2013**. In that case, the court held that the ultimatum principle does not apply in cases of unprotected strikes and the employer is required to apply the rules of natural justice as provided for in the Constitution and legislation as well as lawful disciplinary procedures agreed between the parties to the contract of employment. The court further held that it was not open for the employer to invent the ultimatum principle as the path of terminating the employees' service in oblivion of the clear provisions of section 80 of the Labour Relations Act, 2007 and the provisions of the Employment Act, 2007 including section 41 on notice and hearing. The court upholds that opinion and to answer the first question the court holds that section 80 of the Labour Relations Act, 2007 is the exclusive path to be invoked by employers in dealing with the employee involved in unprotected strike. The court further holds that under the section the employer must apply the due process of notice and hearing before imposing any punishment. The court upholds its opinion in the case cited for the claimants where at 24 to 26 the court stated as follows:

“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.”

To answer issue number two whether the termination of the contract of employment is available in unprotected strike unless after due process under the Employment Act 2007, the court holds that the employer must comply with due process under the Act. As to issue three being whether collective disciplinary process and collective imposition of punishment is available in the employment relationship as appears to have happened in this case, the court holds that the employer is not permitted under the Employment Act and the Constitution to impose punishment collectively as every employee’s case must be considered on its unique merits.

The final issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

- a. The claimant has prayed for a finding that the lock-out, suspension, dismissal and termination of over 400 Applicant’s members were unfair, wrongful and illegal. The court has found that the collective disciplinary process by way of invoking the ultimatum principle contravened the provisions Constitution, the Labour Relations Act, 2007 and the Employment Act, 2007 on due process and the court finds that the claimant is entitled to the declaration that the termination of the grievants’ employment was unfair and illegal.
- b. The claimant prayed that the respondent be ordered to immediately withdraw without conditions the illegal lock-out, suspension, dismissal or termination of the over 400 applicant’s members. As the dismissal was unlawful, the court finds that the claimant would be entitled to the prayer. The consequence of such an order would be that the respondent would be required to reinstate or reengage the grievants. The court has considered the considerable time that has lapsed from the date of the offensive dismissal on 15. 04.2011 as well as the many grievants involved and considers that implementation of such an order will occasion both parties considerable and unreasonable difficulties. The court considers that the respondent has exhausted its power to dismiss and to lock-out the grievants and the two offensive actions are stale. For the considerations made, the order will be declined because the court should not act in vanity. The same shall apply to the prayer that the court orders the respondent not to victimize any of the applicant’s members for participating in the protest as the grievants are already outside the respondent’s jurisdiction and therefore not amenable to the envisaged victimization as prayed for.
- c. It was prayed that in alternative the court to order the respondent to pay full terminal benefits of each of the over 400 employees in accordance with the CBA in force. In view of that prayer, the court finds that the grievants are entitled to payment for:
 - i. days worked and not paid;
 - ii. pay in lieu of the termination notice as per the CBA;
 - iii. 2010 annual leave due and not taken;
 - iv. appropriate leave travelling allowance;
 - v. Gratuity for each of completed year of service and payment prorated for those who have not completed a year of service and as per the CBA; and
 - vi. 4 months salaries at rate of monthly gross pay as at date of unfair termination;

The court finds that the grievants are entitled to their respective certificates of service.

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

- a. A declaration that the termination of the grievants' employment was unfair and illegal.
- b. The respondent to issue the grievants' respective certificates of service by 1.10.2011.

- d. The respondent to pay grievants:
 - i. days worked and not paid;
 - ii. pay in lieu of the termination notice as per the CBA;
 - iii. 2010 annual leave due and not taken;
 - iv. appropriate leave travelling allowance as per the CBA;
 - v. gratuity for each of completed year of service and payment prorated for those who have not completed a year of service and as per the CBA; and
 - vi. 4 months salaries at rate of monthly gross pay as at termination for unfair termination taking into account the losses the respondent may have incurred on the material day of the undisputed unprotected strike as a mitigating factor against the award of the maximum claim of 12 months salaries, and the grievants' suffering and anguish in view of the sudden termination as the aggravating factors in support of the award.

- c. The claimant to compute the dues in (b) to be served upon the respondent by 15.08.2013 and for the respondent to file and serve any objections by 30.08.2013 for confirmation on a date convenient to both 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 pay costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 26th July, 2013.**

BYRAM ONGAYA

JUDGE