REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 11/2013

(formerly NRB HCC No. 814'N' of 2009)

(Before Hon. Justice Hellen Wasilwa on 18th September, 2013)

UNIVERSITIES ACADEMIC STAFF UNION ..... CLAIMANTS

-VERSUS-

MASENO UNIVERSITY …..... RESPONDENT

JUDGMENT

The claimants herein Universities Academic Staff Union hereinafter referred to UASU filed their Memorandum of Claim against the Respondent Maseno university on 18/12/2009. UASU filed this claim on behalf of their members namely; Prof. Adhiambo Odhuno, Dr. Mary Goretti, Dr. Billy G. Ngongah, Prof. Inyani K. Simala and Mr Elvestone C. Zenge Wang'ombe claiming unlawful and unfair termination of employment services by the respondents through the firm of Enonda Makoloo & Makori Advocates.

Background information

The claimant is a trade union duly registered under the Labour Relation Act 2007. The respondent is a public university duly incorporated under the University Act (CAP 200D Laws of Kenya). The claimant and the respondent have a valid recognition agreement. The greviants Prof. Adhiambo Odhuno, Dr. Mary Goretti Kiriaga, Dr. Billy G Ng'ong'ah, Prof. K. Inyani J. Simala and Mr. Elvestone C. Zenge Wangombe are members and officials of UASU Maseno university Chapter. Prof. Adhiambo Odhuno, Prof. Inyani Simala and Mr. Mwang'ombe are members of UASU whereas, Dr. Mary Gorreti Kirianga is an official of UASU Maseno Chapter and Dr. Billy G. Ng'ong'ah is the Secretary General of Maseno Chapter of UASU.

All these greviants are employees of the Respondent in the following capacities:-

(a) Prof. Adhiambo Odhuno was employed as an Associate Professor on 12th February, 2003 in the department of Textile Design and Merchandising.

(b) Dr. Goretti Kariaga was employed as a Senior Lecturer in the department of Botany and Horticulture on 18th December, 1996.

(c) Dr. Billy G. Ng'ong'ah was employed as a tutorial fellow on 1st September 2004 and rose to the position of a full lecturer.

(d) Prof. Inyani K. Simala was employed by Maseno University College (the precursor of Maseno university in March 1995 as a senior lecturer and rose by merit to the rank of associate professor in Kiswahili.

(e) Mr. Elvestone C. Zenge Wangombe was employed as a tutorial fellow on 29th May 1999 and rose to a full time lecturer in the department of Interior Design.

All the greviants' letters of employment were produced before this court and were part of the annextures attached to the claim.

FACTS OF THE CASE

All the 5 greviants gave oral evidence before this court and stated as follows:-

(a) 1st greviant - Prof. Adhiambo Odhuno

She was employed on 12.2.2003 as an Associate Professor in the Department of Textile Design and Merchandising in the service of Maseno university as per Annexture A1 herein. She was initially on probation for a period of one year effective from the time she reported. She signed an acceptance to this appointment on 3.3.2003 and joined the service in June 2003. In November, 2006 she was served with a "show cause" letter by the respondent indicating that between 20th to 23rd November 2006 she had not taught. She replied to this letter vide her letter marked as Annexture A2. She replied indicating that there were no courses allocated to her for the period mentioned. She also brought to the attention of the respondent that the personal number PF/NO/1153 is not her number but PF/NO/1139 and so she assumed that the Memo was sent to her in error. There was no reply to her letter other than some remarks scribbled on the letter and returned to her by the Deputy Vice Chancellor Academic Affairs stating that indeed the letter was meant for her despite the error in the Personal File No. The Deputy Vice Chancellor (Academic) also indicated that indeed no courses were allocated to her during the period because she continued with the strike and refused to sign a return – to – work formula.

She told court that during the period of 20th to 23rd November 2006 the whole university was on strike including herself. She also indicated that she was not in a position to sign a return to work formula as this could only be done by UASU and the university.

On 10.1.2007, she received another letter – Annexture A3 summoning her to a staff disciplinary committee at 9.30 am on 18.1.2007 at the university boardroom. She was expected to answer to 3 charges namely; (i) committing an offence of gross misconduct and neglect of duty and professional incompetence contrary to article 25.2.1(b) of the Terms of Service for Academic Staff of Maseno university. (ii) That on or about 17th November 2007, she refused to sign the return to work declaration/commitment form thereby defying the University's instruction to all staff to sign the form as a condition to resuming work. (iii) That she had consistently failed to discharge her duties as per the required standard in the aspects of setting, making and teaching her courses.

She attended the disciplinary hearing on 18.1.2007. However before that hearing, more charges were levelled against her that she had not surrendered an imprest. At the disciplinary hearing, she responded to the charges that UASU had not officially called off the strike and like everybody else, she could not be on duty. In relation to the charge of not doing her work, the disciplinary committee alleged that she had set the same exam twice. She explained to them that if she is teaching the same course, the standard is the same and there is a likelihood of exams being similar and in any case, she was teaching two sets of classes and there was likelihood of the exam being alike.

On unsurrendered imprest, she explained that she was working on a project and could not surrender the imprest unless the project was complete. Subsequently, she accounted for this imprest and surrendered

it as per her annexture A6. The university owed her Ksh 34,400/= from this surrender and they paid her the said amount in the year 2012.

After the disciplinary hearing, she received a letter terminating her services. The letter is annexture A5 and it indicated that she had failed to carry out her duties and had committed an offence of a scandalous nature by not surrendering imprest. She indicated that at the disciplinary hearing she was not given an opportunity to be represented by any official of UASU who were not allowed into the university grounds. She says she could not defend herself effectively as the chairman of the committee Prof. Fredrick Onyango was very intimidating. Prior to this; Prof. Odhuno told court that she had never had any disciplinary cases against her. Previously, she had taught at Egerton University and she says she did a good job, and was in fact head – handed by Maseno University Vice Chancellor to come to Maseno University. Other than teaching, Prof. Odhuno told court that she also did other jobs for the University including decorating the Kisumu hotel and furnishing the Vice Chancellor's Office at Maseno university and improving other departments.

She asked this court to reinstate her unconditionally with all her benefits. She is also claiming for her salary from March 2007 to date. In the alternative she seeks to be paid all her terminal benefits from March 2003 to date. She has not got any other employment since as the Vice Chancellor had meetings with other Vice Chancellors tarnishing her name and so the universities refused to employ her. She received regrets from Egerton University and Moi University and only managed to get a part time job in 2011. Subsequent, to this there had been verbal offers for her to go back to work but when she mentioned the need to be paid what she lost from 2003 the respondent went mum. In cross examination, Prof. Odhuno said she was terminated on 2.2.2007 because of the reason she had already stated and termination letter refers to the same reasons. In relation to respondent's App 9 – the show cause letter addressed to this greviant, she replied that the letter was referring to her involvement in an illegal strike and she replied to this charge, indicating that she was not aware that it was illegal as the whole University was closed down because of the strike. Appendix 8 was a notice signed by the Minister for Labour dated 13.10.2006 declaring the intended strike unlawful. On issue of incompetence in her work, she told court that this was not brought to her notice and if she had some weaknesses, her head of department should have discussed the matter with her. She says the disciplinary committee used the strike issue to bring in other issues. On issue of imprest, she told court that she could not surrender it when the project was on going and thereafter the university's finance department was reluctant to deal with it as the Vice Chancellor had instructed them not to.

(b) 2nd greviant - Dr. Mary Goretti

She told court in her oral evidence that she currently works at Masinde Muliro university. However, the respondent was her employer from 1994 to 2006. She had been employed as a Lecturer in the Department of Botany and Horticulture. In November 2006, apart from being a Lecturer, she was an elected treasurer of UASU Maseno Chapter. She told court that on 23rd October 2006, the national Union called for a strike after failing to negotiate for a new pay deal with the government. There was a requirement that the Chapters call their meetings and decide whether they were going to join the strike. On 19.10.2006, the Maseno university called their meeting which she was unable to attend due to other commitments. The Maseno university went ahead and declared that they were joining the strike. The strike took effect and teaching was paralyzed. After the strike, there was a declaration that the strike was illegal and people should go back to work. She went back to work but was however pulled out of class and told she should not teach without clearance from the Vice Chancellor. She was given a letter dated 23.11.2006 (App B3). She just retreated to her home. They then wrote her another letter Appendix B4 dated 1.12.2006 accusing her of inciting lecturers to go on strike and organizing a meeting on campus on 23rd and 24th October, 2006 without their permission. However she told court that she had not participated in these meetings as she was very busy preparing to attend an international conference. Later on she was accused of paying for a press release. That was aired on Nation television – marked 2B in respondent's supplementary list of documents. She told court that indeed as UASU treasurer, the members had asked her to pay for an advertisement they had agreed upon and she had to sign the voucher. However, she says she didn't draft the advertisement.

She was asked to attend a disciplinary committee meeting as per Appendix 5A. She attended this meeting. The charges levelled against her were:-

(i) Organizing a meeting at the Graduation Square on university campus on 23rd and 24th October, 2006 without permission from the university as is required by regulation.

(ii) Inciting lecturers to go on strike at meetings on various dates despite the fact that the strike had been declared illegal by the Minister for Labour and an Industrial Court order restraining staff from going on strike being in force.

At the committee meeting she defended herself and stated that the allegations were not true, but the committee was very hostile to her. She told court that she was performing her duties well and there was no indication to the contrary. On 4.12.2006, she was on suspension when the Minister for Labour announced that the strike was illegal. She decided to go back to teach. She denies inciting any students as they were not on campus and never went on the rampage. In regard to all these accusation she did a letter dated 15.1.2007 (Appendix 6 – in respondent's supplementary bundle) stating the events she participated in during the time of the strike.

After the hearing, the university was adamant and they issued her with a termination letter on 1.2.2007 (Appending 6B). She appealed against this dismissal which the university again rejected. She then proceeded and filed a Judicial Review case No. 963 of 2007 in Nairobi asking the court to set aside the university's decision. The court ruled in her favour quashing the decision of the university terminating her services. The university never reinstated her and she still seeks orders to be reinstated and years she was out of employment until 20.9.2007 when Masinde Muliro university employed her. She also seeks compensation for the emotional injury she suffered.

In cross examination by counsel for the respondent she says she received her 1st dismissal letter on 27.10.2006. The reasons of the dismissal related to the strike. She was also given a letter on 23.11.2006 (Appendix 3) informing her that the Industrial Court had declared the strike illegal but she says she didn't defy the court as she is not the one who called the strike.She denies going beyond the strike call but admits that she signed for the advertisement as the treasurer as per the minutes of the meeting which she attended. She says she was on suspension on 4.12.2006 but came back to work after the Minister announced that the strike had been called off and nobody would be victimized.

3rd greviant – Dr. Billy Ngong'ah

Dr. Ngong'ah told court that he was employed by the respondent in September 1994 as as tutorial Fellow and rose to the rank of a Lecturer. He was also a member of the claimant's union and secretary general of Masinde Muliro University UASU Chapter. In October, 2006, the union called for a strike after negotiations with the inter Public University Consultative Forum failed. He was suspended on 24th October 2006. Reason given for the suspension was that he had disobeyed a court order declaring the strike illegal. He had not been served with this order though. He was never called for any disciplinary hearing but just received a letter of termination dated 20th November, 2006. It is alleged he had usurped the powers of the University Senate by advising students not to report to the University and also had disobeyed a court order by placing an advert in the Sunday nation page 34 of 19th November 2006. He told court that he never placed the advertisement though it was in his name having been placed by other lecturers. It advised the students not to report back to college until the strike issue was resolved. He appealed against the dismissal but the appeal was dismissed without a hearing. He filed a Judicial Review Application in Nairobi H. C. Misc. appl. No. 527 of 2007. His summary dismissal was quashed and the University was ordered to treat his case within it's rules and regulations provided in Section 25 of Maseno University Act 2003. The University did not reinstate him. They recalled him and sacked him again. They constituted a disciplinary committee to sack him. He defended himself in writing vide his letter dated 14.5.2007. Appendix C6 denying the charge. The charges that were levelled against him were as follows:-

(i) Professional misconduct

(ii) Insubordination and conduct that is scandalous and disgraceful.

The facts were that on 19th November 2006 he caused to be published in The Sunday Nation an advertisement advising students and sponsors that students should not report to the University as earlier advised by the institution knowing that it is only Senate that has that prerogative. No other detailed particulars were given. He did a detailed response. His services were then terminated on 28th May 2009. He appealed against the decision and never received any response. He denies putting up the advertisement and says he was not aware of it until after being dismissed. He says the advert was put up by other people in his name which was in fact mispelt.

He now seeks order as follows:-

(a) immediate and unconditional reinstatement

(b) payment of all withheld dues as from November 2006

(c) payment of all his salary upto his retirement in 2031.

He says he has been unable to get any employment since dismissal.

In cross examination he told court that he does part time teaching job at Great lakes University and he is the Secretary General of Maseno University Chapter. He admits attending the Union meeting on 16.11.2006 when it was resolved that the Union puts up an advertisement advising parents, sponsors, students against reporting until the strike was resolved. He says some Union members put up the advert which bore his name and he could not stop them from doing so. He says he was unfairly dismissed as no valid reasons were given for his dismissal.

4th greviant Prof. K. Inyani Simala

Prof Inyani told court that he was employed by the respondent as a Lecturer on 18.3.1995. On 27th October 2006 he was issued with a suspension letter in which he was accused of disobeying a court order which he was not aware of. He was later dismissed vide a letter dated 23rd November 2006. The reasons given for his dismissal were:-

(i) Being a fervent messenger of those bent to dissuade Maseno University Academic Staff from resuming work

(ii) Refusing to sign a back – to – work – commitment.

He says that he was never given any audience by the University. He appealed against the dismissal to the chairman of the University Council following a Ministerial statement that all dismissed staff should appeal. He also appealed to the Vice Chairman of the University Council and also wrote a letter to the Minister for Education on 5th June 2007. There was no response to this appeal.

He now seeks order for reinstatement and payment of all his monies since he has been out of employment. He also seeks issuance of a certificate of service.

In cross examination, he told court that he was dismissed through a letter dated 23rd November 2006 and his Memo of Claim was filed on 18th December 2009. He is currently an Associate Professor of Cultural Linguistics and Dean of Faculty of Education and Social Sciences at Masinde Muliro University where he was employed on 1st June 2008. He was to be paid for the period he was out of employment from November 2006 to May 2008. He indicates that he was not aware of any court order. He says he was never on strike and did not participate in any strike.

5th greviant – Elvestone C. Zenge Mwangombe

Mr. Mwang'ombe told court that he was employed by Maseno University on 29.5.2000 as a lecturer in graphic design. He worked for the University well until November 2006 when a strike was declared by UASU. In his department, teaching did not go on. Following the action by UASU, he was given a letter by the respondent to show cause why he should not be disciplined for not teaching. He responded to the letter stating that he is not the one who called the strike on and could not call it off and go back to work. He later went back to teach on 24.11.2006 but his head of department told him that he could not teach until the Vice Chancellor had cleared him. He was never paid his December 2006 salary. He was later called for a disciplinary committee meeting referring to his incompetence to teach. The charges levelled against him were as follows:-

(i) Committing an offence of gross misconduct and neglect of duty contrary to Article 25.2.1 of the Terms of Service for Academic Staff of Maseno University.

(ii) That on or about the 17th November 2006, he refused to sign the return to work declaration/commitment form thereby defying the University's instruction to all staff to sign the form as a condition of resuming work.

He appeared before the disciplinary committee on 16.1.2007 but was thereafter served with a termination letter dated 1.2.2007. The letter indicated that he had appeared before the committee for charges of gross misconduct, neglect of duty and professional incompetence contrary to Article 25.2.1(b) of the Terms of Service for Academic Staff of Maseno University and he was found guilty of the offence. It was further indicated in the letter that the Committee took with serious exception of the fact that he had consistently failed to discharge his duties as required in the department and also noted that with his academic background, it was impossible for him to get admission to any University for a post graduate degree and therefore had not been able to attain a Masters and PhD degrees which are minimum qualifications to be a Lecturer in the University. He appealed against this termination which was dismissed.

After the termination of these five greviants, the union reported a dispute to the Minister for Labour. The Minister appointed a conciliator to try to reconcile the parties. The respondents were adamant that the terminations of the greviants was fair and justified. There was no agreement reached and the parties were issued with a certificate of disagreement to enable the dispute to be addressed further through the established channels .

Respondent's Case:

The respondents filed their Memorandum of reply and submissions on 19.4.2010 through the Federation of Kenya Employers herein referred to as FKE. In their reply FKE acknowledged that the respondent through the Inter – Public – Universities Consultative Forum of the FKE has a recognition agreement with the claimant Union. The respondents also called one witness the Registrar (Administration) of Maseno university. In their evidence, the respondent averred that in relation to Prof. Odhiambo Odhuno, she was terminated because she failed to discharge her duties in respect of setting and marking exams. This was brought to her attention before she was discharged. She was also given an opportunity to defend herself. Her discharge was therefore not connected to the strike. In their pleadings, the respondents further content that she committed an offence of a scandalous nature contrary to Article 25.2.1(b) of the terms of service as she failed to surrender imprest amounting to Kshs 291,850 for more than one financial year. On issue of neglect of duty, the respondents contend that on or about September, 2006, the claimant union called out it's members on unlawful strike. On 13.10.2006, the Minister for Labour and Human Resources Development declared the intended strike unlawful. Despite the Minister's order and the attempt to conciliate the parties, the claimant union members including Prof. Odhuno went on strike on 23.10.2006. The matter was subsequently referred to court under case No. 105/2006 and the court declared the strike unlawful and ordered strike and it's members to resume duty immediately in any case not later than 25th October, 2006. The greviant was thereafter dismissed after she refused to resume duty when called to do so.

As concerns Dr. Billy Ngong'ah the respondent's case is that he was indeed an employee of the

University but he abrogated himself powers of Senate and asked students not to come to college against the Vice Chancellor's directive. He did this by putting an advertisement in the daily nation.

On Mr. Elvestone Mwangome, the respondent's case is that he was terminated for failing to perform his duties and also professional incompetence as he failed to produced a Master's certificate. That, he was initially appointed after he informed the university that he was in the final stages of completing his Masters. He was given a letter of show cause on these issues and also called for a disciplinary hearing to defend himself.

In relation to Prof. Inyani, the respondent's contention is that he is currently in employment at Masinde Muliro University. That he was actually discharged because during the period of the strike, he actively participated in threatening other members of staff with dire consequences if they did not participate.

About Dr. Goretti Karianga, the respondents contend that she was dismissed by the University after she issued directives to students and Lecturers not to come to the University. She was also a signatory of the order for space of the advertisement. Other than this she failed to discharge her duties. This was brought to her attention during the disciplinary hearing and in the hearing she admitted having a problem with external examiners who pointed out that her work was not satisfactory and this is what led to her sacking.

In cross – examination, the respondents witness told court that in relation to Dr. Karianga, he had indicated that she failed to set and mark exams. However, the main issue was in relation to the advertisement and the Committee raised issues on the strike. He acknowledged that she put up the advertisement on behalf of the Union and not as an employee of Maseno University. The committee observed she put up the advertisement as an official of UASU. In her defense she also said that she paid for the advertisement as an official of UASU. He also admits that there was a charge against her in respect of her performance which was brought to the meeting as an observation. There was also a confidential report by the chairman of her Department not copied to her and relating to the period from 1997 to 2007 and this report was not given to her. On issue of external examiners, this came up when she was on suspension and the external examiners drew routine comments which did not invalidate the examination.

In case of Mary Odhuno, the witness told court that she was initially charged when the strike was on. She was however terminated not because of the strike but because other issues came up during the disciplinary meeting. Issues of her performance relate to 2006 – failure to teach and issues of the external examiner relate to the 2005/2006 academic year. This issues had not been raised as a disciplinary issue before the strike as the academic year ended in July 2006. On issue of imprest, he said that it was alleged she didn't submit moneys given to her. This was in relation to the refurbishing of an office of the Vice Chancellor. The project was on going at the time the charges were brought up. She finally surrendered the imprest.

Dr. Ngong'a was terminated because of the same advertisement. He filed a case and the court found the termination was not proper. He was then taken through the motions of a disciplinary hearing and the committee found that the advertisement amounted to gross misconduct. The charge never related to his performance. He admits that there was a return – to – work formular signed indicating that people would return to work without victimization. He admits that the advertisement was done before the strike had been resolved. He says the 5 were not terminated because they refused to sign a return to work formular.

On Mr. Mwang'ombe, the respondents contend that he was terminated because of lack of qualifications and non performance. He was employed in 1999 and was reminded to pursue his MBA. The witness indicated that he has no written evidence that the Department followed this. There is also no evidence that he promised he was pursuing his Masters. To teach, one must have a minimum of a Masters and he had indicated that he was about to finish his Masters. The minutes of the disciplinary committee show that he had taken long to do his Masters and was therefore not qualified to teach at the University.

Prof. Inyani on the other hand was never given any disciplinary hearing and this was at the height of the strike. The respondents however content that the 5 were not terminated because of the strike but for 3 of them, the issues related to non – performance. There was confidential communication on the same but which was not brought forward for disciplinary action. He denies that the issue of performance was incidental.

I have considered both the evidence and submissions submitted before this court by both parties, I now frame the issues for determination.

Issues for determination:-

1. Whether the case against the 4th greviant is time barred.
2. What is the applicable law for this case.
3. What were the reasons for which the greviants were dismissed.
4. Whether the respondents were justified in terminating the greviants service.
5. Whether the greviants are entitled to any remedies.

To start with the 1st issue, the 4th greviant, was dismissed by the respondent on 23rd November, 2006. He told court that after he was served with a dismissal letter on this day, he appealed against this dismissal to the chairman and vice chairman of the University Council. He also wrote a letter to the Minister for Education on 5th June 2007 on the same issues. There seems to have been no response to his appeal. In the meantime on 14.5.2007 the UASU reported a dispute to the Minister for Labour and Human Resources. The dispute also concerned the 4th greviant Prof. Inyani Simala. An attempt to reconcile the parties was made and it was only on 28th July 2009, that the conciliator completed their investigation and gave the parties a certificate of disagreement to enable the dispute to be addressed though the court. Promptly, the claimants filed this case in court on 18.12.2009. Under the Cap 234, the Trade Disputes Act (now repealed) Section 14(9)(c):-

"the court shall not, take cognisation of any trade dispute or deal with any matter connected therewith while such dispute or matter is in the process of being settled, investigated or otherwise determined by means of any other proceedings under the provisions of this Act or of any written law."

Under Section 14(9)(d), of the Trade Disputes Act, the court will also not be able to deal with any dispute if if being handled under S.6(1). Section 6 deals with conciliation. While this case was in the hands of the conciliator therefore, the Industrial Court as then constituted could not have dealt with this case. It was therefore impossible to expect the 4th greviant to have filed this case before 28th July 2009. The issue of limitation does not therefore arise and I find that the 4th greviant like all, other greviants filed their case through UASU within the stipulated time and therefore the case is not time barred.

On the second issue of the applicable law in relation to this case. I will refer to the Employment Act 2007. This Act came into operation on 2.6.2008 after the greviant's contracts of employment had been determined. The Labour Relation Act, came into operation on 26th October 2007 repealing the Trade Disputes Act and the Trade Unions Act. Clause 4 of the 5th Schedule of this Labour Relation Act states that:-

"where any of the following matters commenced before the commencement of this Act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed) – (a) any trade dispute which arose before the commencement of this Act (b) ------ (c) ------- (d) any summary dismissal that took place before the commencement of this Act."

Given this provision, it is my finding that the applicable Law relating to this case would be the Trade Disputes Act (now repealed) and Cap 226, the Employment Act (repealed).

I now move on to the third issue. The 1st greviant told court that she was sacked due to her participation in the strike called by UASU. It is however the position of the respondent that she was

dismissed because of committing an offence of gross misconduct and neglect of duty and professional incompetence contrary to Article 22.2.11(b) of the terms of service for academic staff of Maseno university. Particulars are that she failed to discharge her duties as per the required standards, in the aspects of setting, marking examination and teaching courses. She was also found guilty of the offence of committing an offence of a scandalous nature contrary to Article 25.2.1(c) of the terms of Service in that she failed to surrender imprests amounting to Kshs 294,850/= for more than one financial year. The issue then is what were the real reasons for which the 1st greviant was dismissed.

According to the respondents, the 1st greviant did not discharge her duties. It is worth noting that the 1st greviant had been employed by the respondent on 12th February 2003. Prior to November 2006 when she was served with a show cause letter, there is no indication that she had been inept in performing her duties. The respondent have not exhibited any evidence that she was professionally incompetent as alleged. It was alleged that she failed to set and mark examination to the standard expected. She has explained that indeed she was teaching two sets of classes simultaneously and the chances of setting exams which are similar could not be ruled out. If indeed she was incompetent in her work, this issue would have been raised before November 2006 and this was never brought up. In fact the comments on her examination by the external examiner was only raised after this case and was never brought to her notice. In any case, she says this was indeed constructive criticism and was meant to aid her improve in her performance in future.

On issue of failing to sign a return to work commitment form and defying person placed in authority over her, the 1st greviant stated that she was indeed a member of the UASU and the Union had issued a 21 days strike notice on 22.9.2006 as per the respondents Appendix 7. On 13.9.2006 the Minister for Labour declared the intended strike as illegal as per the respondents Appendix 8. The strike however proceeded to take effect. There is no indication that UASU called off this strike and signed a return to work agreement. To expect the greviant to be the one to take the initiative to sign a return to work commitment without the Union's involvement or guidance is asking too much and the greviant could not have been in a position to do this unless the nationwide strike had been called off by the Union officials.

The 1st greviant is also accused of failing to surrender the imprest. She had demonstrated that the work she was doing was a process and she had to buy materials when needed. She finally did surrender this imprest and was cleared by the respondent. This could not therefore be a basis of her dismissal.

Coming as it did in November 2006, the dismissal was in fact triggered off by the strike which affected all public Universities other than the University of Nairobi. The reasons given by the respondent for dismissing the 1st greviant are therefore not valid. I make a finding that the 1st greviant was in fact dismissed for participating in the strike and declining to resume work until the strike had been called off.

Now to the 2nd greviant, Dr. Mary Goretti, after she was dismissed she filed Judicial Review 963/2007 in which the court delivered it's judgment on 5th August, 2009, declaring the action by the respondent of dismissing the 2nd greviant null and void having been made in excess of the respondent's jurisdiction in breach of natural justice. The court quashed that order accordingly. In essence the court reinstated the 2nd greviant to the position she was in before the dismissal, a fact ignored by the respondent. I have already made a ruling on this issue and would not revisit it. A finding has already been made by a court of competent jurisdiction that the dismissal was devoid of sound procedures and therefore null and void. The respondent didn't revisit it. For whatever reason, the respondent terminated the 2nd greviant's services, the reasons still stand unfair and wrongful.

The 2nd greviant was a Union official as the Maseno Chapter Treasurer. She was accused of organizing illegal meeting on Campus on 23rd and 24th October 2006 and inciting lecturers to go on strike. The incitement stemmed from her work as treasurer where she signed for an advertisement in the daily newspaper which asked students, parents and sponsors not to allow students resume school until the strike issue had been amicably resolved. Accordingly to the respondent, she usurped the Senate's role of deciding the university calender. She explained her role as treasurer of UASU Maseno chapter which involved signing for the advertisement in her role as treasurer and not as lecturer. She was therefore dismissed because of her role in the union activities which was part and parcel of her work as union

treasurer.

The 3rd greviant Dr. Ngong'a was summarily dismissed for gross misconduct on 20.11.2006. Like the 2nd greviant, he was a Union official being the Secretary General of UASU Maseno Chapter. He was the one who purportedly advertised in the daily paper that the sponsors, guardians and parents including students of Maseno University to note that the Lectures strike was still on and therefore Lecturers would not be available to teach. He advised them not to report on Monday 20th November, until the strike issue had amicably been resolved. He was accused of participating in the strike which the government and the Industrial Court had declared illegal. He appealed against this summary dismissal which was rejected. He finally filed a petition – Misc App. No. 527 of 2007 at the High Court. Judgment was entered in his favour by the court's finding that the decision of the respondent contained in the impugned letter of 20th November 2006 be quashed by certiorari. The court also granted an order of mandamus to compel the respondent to consider his case in accordance with the rules and regulations made under S. 25 of the Act.

After this, the respondents instituted fresh disciplinary hearing against him and terminated him on 28th May 2009. The reasons for which the 3rd greviant was dismissed definitely relate to his involvement with Union activities being the Union's Secretary General. Indeed there was an advertisement placed in the daily newspaper which the respondent terms as usurpations of Senate's role. The 3rd greviant, if he was involved was involved as a Union official and not as a lecturer. The High Court had already alluded to these reasons in the Judicial Review application.

The 4th greviant Prof. Kenneth Simala was summarily dismissed on 23.11.2006. His letter of dismissal indicated that he was dismissed due to being a fervent messenger of those bent to dissuade Maseno University Academic Staff from resuming work. This was after the government and the Industrial Court had declared the strike illegal. That he also purportedly refused to sign a back – to – work commitment form. He appealed against this dismissal but never received any reply. He was therefore dismissed because of his participation in the strike. I have already in relation to the 1st greviant explained that the issue of signing a return to work commitment could not be done by the greviant unless the Union that had called for the strike, called it off.

On the 5th greviant Mr. Elvestone C. Z. Mwangombe, the respondent's initial complain was his failure to teach. He replied to this contention vide a letter dated 6.12.2006 explaining that he could not be expected to teach when the Lecturers were on strike. He was later summoned before a disciplinary committee to answer two charges – gross misconduct and neglect of duty and (2) refusal to sign the return to work declaration/commitment. The disciplinary committee meeting was postponed from 1st December 2006 to 16.1.2007. After this hearing, he was terminated on grounds of failing to discharge his duties as required in the department. Other than this, the letter indicated that due to his academic background, he had not been admitted to any University for a post graduate degree and was unable to attain a Masters and PhD degrees which were mandatory for one to be a Lecturer in the University. He appealed against this dismissal and the appeal was rejected.

The 5th greviant had taught at Maseno University from May 1999. At the time he was employed, he only had his basic Bachelors degree in graphic design. In October 1999, he received a letter asking for progress on his MBA degree programme (respondent App 2). The respondent informed him that he had been given one month to provide as progress report on the issue failure to which the university will be forced to review his appointment. On 14.9.2000, he received yet another letter from the respondent. It was a first warning letter to improve on his performance and perform his duties to acceptable standards or risk having his appointment being reviewed by the respondent. Nothing more is heard of his performance or inadequacy thereof until November 2006 during the strike period when he is advised of failing to teach.

It is true that the 5th greviant had some short comings as explained before. There was inaction against him for those short comings for 6 years and the issue is only revisited during this period of the strike. The university had threatened to review his engagement with them if he didn't improve. No review was ever undertaken. It is therefore the finding of this court that his performance as a lecturer was not what led to his dismissal. This reason was only used as a cover – up for the real reason which was

his participation in the strike as he was asked to explain in the letter served on him.

From the explanations above all the 5 greviants were terminated for reasons related to their participation in the strike that was called on by the UASU on 22.9.2006 (respondent's App 7). The strike notice was called by the National Secretary General of UASU and only the same office could have call off a strike of such a magnitude.

In relation to issue 4 then were the respondents justified in terminating the greviants' services. At the time the greviants services were terminated, the Labour Law regime was not as advanced as it is currently. However, that as it may be Kenya is a member of the ILO and is expected to respect it's international obligations including respect for International Labour Standards.

The report of the Committee of Experts on the application of Conventions and Recommendations in relation to Protection against Unjustified Dismissals published in 1995 para 75 states as follows:-

"The need to base termination of employment on a valid reason is the cornerstone of the Convention's provisions. The adoption of this principle removes the possibility for the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof ---- In other words, giving the worker a period of notice does not exempt the employer from stating his reason for terminating the employment ."

Such a reason must of necessity be valid. As espoused above, the greviants were terminated due to their involvement in trade Union activities. Whether this is a valid reason or not can be determined from the general survey of the ILO Committee of Experts on unjustified dismissal.

Para 100 of the survey states as follows:-

"Under Article 5 of the Convention, the following *inter – alia* shall not constitute valid reasons for termination (a) Union Membership or participation in Union activities outside working hours or, with the consent of the employer within working hours (b) seeking office as, or actings or having acted in the capacity of a worker's representative ----"

It is noted that the greviants were members of their Union UASU whereas the 2nd and 3rd greviants were Union officials. Being victimized because of their participation in a strike infringed on their right of association. The Committee of experts has also taken a stand on this aspect in their general survey on Protection against Unjustified Dismissal at para 110 where the committee states as follows:-

"Protection against acts of anti-union discrimination, and in particular termination of employment for such activities, is particularly necessary for trade Union leaders and representatives since in order to be able to fulfill their duties freely and independently they must have the guarantee that they will not suffer any prejudice as a result of holding trade union office or taking up trade union activities."

The respondents persistently while dealing with the disciplinary issues and the greviants castigated them for taking part in an illegal strike. The respondents contended that in fact the Industrial Court had declared this strike as illegal. The respondent did not exhibit any evidence that indeed this was the position and that the order of the court had been brought to the notice of the greviants nor the court. That position therefore remains a mere statement.

On the other hand, there is evidence that the Minister for Labour had declared this strike as illegal. As to whether this pronouncement by the Minister had the force of law to enable the strike be called off or not, reference is made to the **Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 5th Edition**. The expert position at paragraph 630 is that:-

"it is contrary to freedom of association that the right to declare a strike in the public service

illegal should lie with the heads of public institutions which are thus judges and parties to a dispute."

At paragraph 628, the Committee states that:

"Responsibility for declaring a strike illegal should not lie with government, but with an independent body which has the confidence of the parties involved."

In this case therefore, the declaration by both the University and the Minister that the strike was illegal, infringes the expert position on freedom of association and had not force of law. It is also the position of the ILO Committee of experts at paragraph 663 that:-

"Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should also be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or to penalize the exercise of the right to strike."

All the 5 greviants except the 4th were given an opportunity to be heard before their termination. Failure to accord the 4th greviant a hearing was also an infringement on his right to be heard before being terminated. Kenya has not ratified ILO Con. 158. However Kenya is a member of ILO and has an obligation to enforce rules of international law and in particular International Labour Standards. Con. 158 at Article 7 provides that:-

"The employment of a worker shall not be terminated for reason related to worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

The Bangalore Principles on Domestic Application of International Human Rights Norms adopted by a high level judicial colloquium in India on 26.2.1988 identifies and recognizes that:-

"there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law is uncertain or incomplete. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling competing claims of individuals and groups of persons with the general interest of the community."

The repealed Trade Disputes Act did not have a provision for this right to be heard but this court draws strength from international law and of late the Constitution of Kenya 2010 which at Article 50(1) provides that:-

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body."

Given that the 4th greviant was not given any hearing before being terminated and for the rest of the greviants they were discriminatory treated by being dismissed for participating in a strike, I find their terminations unjustified and unfair.

Are there any remedies therefore that the greviants are entitled to? The Trade Disputes Act (repealed) in Section 15(1) provides that:-

"In any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the court may order the employer to reinstate that employee in his former employment and the court may in addition to or instead of making an order for

reinstatement, award compensation to the employee provided that such compensation shall not exceed:-

(i) in a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as a result of the wrongful dismissal.

(ii) in any other case twelve months monetary wages."

All the 5 greviants have asked this court to order that they be reinstated having been unfairly dismissed. The respondents contention is that the greviants are not entitled to this remedy having been out of employment for over five years. They refer court to Section 12(3) of the Industrial Court Act 2011 which provides that this court shall have power to make any of the following orders:-

"An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law."

The ILO's Committee of Experts on Freedom of Association para 837 seems to suggest that reinstatement would be the best remedy as follows:-

"No one should be subjected to anti – Union discrimination because of legitimate trade Union activities and the remedy of reinstatement should be available to those who are victims of anti – Union discrimination."

Given the manner the greviants were treated, I agree that reinstatement would have been the best remedy. However, considering the length of time from the time they were dismissed in 2006/2007 to-date, it is over 3 years as cupped by the Industrial Court Act 2011. I will therefore be reluctant to order reinstatement.

However the remedy the greviants are entitled should be such that they will be adequately compensated for the wrong occasioned to them.

At the time the greviants were dismissed they had served respectively for twelve, eleven, three and a half, eight and ten, years. Their gross pay at time of dismissal stood as follows respectively:-

(a) 118,249/=

(b) 105,050/=

(c) 105,050/=

(d) 118,249/=

(e) 103,388/=

In arriving at what remedies the greviants are entitled to, I find that they were unfairly terminated and I make orders as follows:-

1. The purported termination of the greviants employment was unjustified and unfair and I convert it to a normal termination.
2. I order the respondents to pay the greviants 12 months salary as compensation for unlawful termination amounting to:-

1st greviant - Ksh 118,249 X 12 = 1,418,988

2nd greviant - Ksh 105,050 X 12 = 1,260,600

3rd greviant - Ksh 105,050 X 12 = 1,260,600

4th greviant - Ksh 118,249 X 12 = 1,418,988

5th greviant - Ksh 103,388 X 12 = 1,240,656

3. Each greviant shall be issued with a certificate of service.
4. Each greviant is entitled to their terminal benefits calculated at 15 days for each year worked upto the day of this judgment as follows:=

1st greviant - 19 years = Ksh 1,123,365.50

2nd greviant - 15 years = Ksh 787,875.00

3rd greviant - 10 ½ years = Ksh 551,512.50

4th greviant - 15 years = Ksh 886,867.50

5th greviant - 17 years = Ksh 878,798.00

TOTAL for each greviant:-

1st greviant = 1,418,988 + 1,123,365.50 = **2,542,353.50**

2nd greviant = 1,260,600 + 787,875.00 = **2,048,475.00**

3rd greviant = 1,260,600 + 551,512.50 = **1,812,112.50**

4th greviant = 1,418,988 + 886,867.50 = **2,305,855.50**

5th greviant = 1,240,656 + 878,798.00 = **2,119,454.00**

All the payments are subject to statutory deductions.

5. The respondents shall pay costs of this suit.

HELLEN WASILWA

JUDGE

18/09/2013

Appearances:-

Mr. Enonda of Enonda, Makoloo, Makori & Co. Advocates for claimants present

Mr. Oketch of FKE for respondents present

CC. Sammy Wamache.