



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 13 OF 2013

(Formerly Cause No. 912 of 2011 at Nairobi)

ZEPHANIA O. NYAMBANE.....1ST CLAIMANT

FRANCIS N. MAKOKHA.....2ND CLAIMANT

-VERSUS-

**NAKURU WATER AND SANITATION SERVICES COMPANY
LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2013)

JUDGMENT

The 1st Claimant is **Zephania O. Nyambane** and the 2nd claimant is **Francis N. Makokha**. The claimants filed the statement of claim on 16.06.2011 through Katunga Mbuvi & Company Advocates. The claimants prayed that the court finds that the respondent acted without any jurisdiction in terminating the claimants' services; the court to order reinstatement of the claimants back to their posts within the respondent's establishment as provided for in section 49(3) of the Employment Act, 2007; and in alternative find that the claimants suffered wrongful termination to warrant an award of maximum compensation as provided for by section 49(1) of the Employment Act, 2007.

The respondent filed the memorandum of defence on 22.08.2012 through the Federation of Kenya Employers and prayed that the court finds that the dismissal of the claimants was lawful and fair; to uphold the dismissal; and costs of the suit be awarded to the respondent. The claimants filed the reply to the memorandum of defence on 31.10.2012. The respondent filed the further reply to the memorandum of claim on 12.04.2013 through Odhiambo & Odhiambo Advocates and claimants filed a reply thereto on 25.06.2013. The reply to further reply to memorandum of claim was filed on 25.06.2013.

The case was heard on 2.07.2013, 29.07.2013, and on 23.09.2013. The claimants gave evidence to support their case. The respondent's witnesses were the human resource manager Joyce Kibenei (RW1), the managing director John K. Cheruiyot (RW2), and the board chairman Ibrahim Mohammed Osman (RW3).

The claimants were employed by the Municipal Council of Nakuru in the council's water department. Following statutory reorganization of water management in the public sector, the respondent being a state corporation was established. The claimants were among the council's employees who were absorbed into the employment of the respondent. The 1st claimant had been employed as a driver on 23.03.1986 and while in the service of the respondent was promoted to the position of a commercial credit controller.

The 2nd claimant was employed as a labourer on 24.10.1997 and while in the service of the respondent was promoted to the position of a plumber. The claimants were active members of the Kenya Local Government Workers Union and as union officials, at all material times they actively participated in union activities agitating for workers rights.

The claimants' case was that their employment was terminated unfairly. The evidence on record establishes the circumstances of the termination as follows:

The Kenya Local Government Workers Union was the union responsible for the rights of the workers who were absorbed into the service of the respondent. However, with passing of time, another union known as the National Union of Water and Sewerage Employees was registered and it sought to become the union to cater for the respondent's unionisable employees. At the material time, there ensued a scramble for the respondent's unionisable employees between the two unions characterized with court battles including Industrial Cause No. 1341 of 2010 at Nairobi between the respondent and the Kenya Local Government Workers Union. In that cause, the court gave the order of 1.11.2010 prohibiting the respondent's staff from participating in any strike or industrial action pending the hearing of the application filed in court by the respondent in that case. The order being appendix 8 on the further reply to memorandum of claim was issued by the court on 1.11.2010 and received by the respondent on 02.11.2010.

On 1.11.2010, there was a strike and industrial unrest at the respondent's premises which seriously affected the respondent's service delivery. The strike was prompted by failure of the respondent to deduct and remit union dues to the Kenya Local Government Workers Union. As per RW1, the Kenya Local Government Workers Union had objected to deduction of the union dues due to it and their being remitted by the respondent to its rival, the National Union of Water and Sewerage Employees.

It is worth to note that long after the strike, the decree in Industrial Cause No. 1142 of 2010 between the National Union of Water and Sewerage Employees against the respondent, the Kericho Water and Sanitation Company Limited and the Kenya Local Government Workers Union issued on 1.03.2012 which ordered thus:

1. That the National Union of Water and Sewerage Employees was the appropriate and right union to represent the water and sewerage sector.
2. That a permanent injunction was issued against the Kenya Local Government Workers Union restraining the union from interfering in water and sewerage sector.
3. The respondent was to stop deducting union dues or any other money from employees and remitting to the Kenya Local Government Workers Union otherwise due to the National Union of Water and Sewerage Employees or terminating recognition of the National Union of Water and Sewerage Employees.
4. That a permanent injunction was issued against the Kenya Local Government Workers Union restraining the union from purporting to represent and or holding itself out as the agent of the members of the National Union of Water and Sewerage Employees and to stop encroaching or recruiting such members.

Thus, as at 1.11.2010, there was an active union rivalry between the two unions which was not resolved until the decree in Cause No. 1142 of 2010 issued on 1.03.2012 as per appendix 5A on the further reply to memorandum of claim.

RW1 testified that in that state of rivalry and the working atmosphere at the respondent's establishment, on the morning of 1.11.2010 the claimants caused the respondent's workers to assemble leading to a strike and serious disruption of work on that day. On the evening of that date, RW1 testified that the respondent's managing director RW2 directed staff to resume work the following day. On 2.11.2010, she prepared the show-cause letters for the claimants as per copies at appendix 19 and 14 of the further reply to the memorandum of claim. The claimants testified that they did not receive the show-cause letters. The copies of the letters dated 2.11.2010 were similar in content and addressed to each claimant separately stated as follows:

“RE: CO-ORDINATION OF AN ILLEGAL STRIKE

It has been noted with great concern that you actively participated in coordinating the illegal strike that paralyzed operations at the Head Office through the following activities:

- **Instructing the Guard on duty not to open the main door at 8 am.**
- **Manning the main door and obstructing customers from accessing the banking hall.**
- **Gathering staff at the banking hall.**

Please note that an employee who uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer and an employee who commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property is liable to disciplinary action upto including summary dismissal.

In this regard, show cause why a disciplinary action should not be taken against you for the aforementioned issues. The explanation should reach the undersigned by close of business on Wednesday 3rd November 2010. In addition, you are required to appear before the Staff Advisory Committee on Thursday 4th November 2010 at 10am at the Boardroom.

Yours faithfully,

Nakuru Water and Sanitation Services Company Limited

Signed

J. Kibenei

HUMAN RESOURCE OFFICER”

RW1 testified that the secretary to RW2, the managing director was responsible for delivering the letters to the claimants and at the end of the day the secretary informed RW1 that the claimants had not come to collect the letters. In her testimony, RW1 stated during cross-examination thus, “I confirm they (the claimants) did not receive the show cause letters. They were called to come and pick the letters. They refused to come and pick the letters. I was not able to force them. I proceeded even without their receiving the letters. The committee never called them to confirm they never picked letters. The managing director’s secretary came to the meeting and confirmed they had not picked the letters.”

The staff advisory committee proceeded without the claimants’ reply and in absence of the claimants and RW1 further confirmed that the respondent’s board met on 5.11.2010 and directed the termination of the claimants’ employment. The termination letters being appendix 15 and 20 on the further reply to the memorandum of claim were issued. The copies of the letters dated 5.11.2010 were similar in content and addressed to each claimant separately stated as follows:

“RE: DISMISSAL FROM EMPLOYMENT

Following the strike called by the Kenya Local Government Workers Union starting Monday 1st November 2010, which has paralyzed operations, it has been established that:

1. **You actively participated in the strike by paralyzing operations at the head office through:**
 - i. **Instructing the security Guard on duty not open the main door at 8 am.**
 - ii. **Taking over the manning of the main door hence locking out customers.**

iii. **Gathering other staff at the Banking Hall.**

2. **You caused the company to loose revenue of approximately 1.63 Million by locking the main door and denying customers access to the pay points.**
3. **You harassed and compelled other employees by use of threatening language, including those in management, to abandon their duties.**

The above mentioned issues are contrary to the provisions of the Labour Relations Act sections 76, 77 and 78.

In view of the above, and as per the provisions of the Employment Act 2007, section 44 (4) (d) and (g), it is with regret that we have to inform you of the company's decision to summarily dismiss you from employment for the aforementioned issues.

Consequently, your last day of service is 5th November 2010.

Your terminal dues will be paid as follows:

1. **Salary and house allowance up to 5th November 2010.**
2. **Any earned overtime or allowance.**
3. **Pro-rata leave earned up to 5th November 2010.**
4. **Less any other monies owed to the Company.**

Payment of your terminal dues will be subject to company clearance and adequate handover to your supervisor.

Enclosed are clearance forms for you to complete and return.

Yours faithfully,

Nakuru Water and Sanitation Services Company Limited

Signed

J.K. CHERUIYOT

MANAGING DIRECTOR

The claimants have challenged their dismissal.

The claimants' submissions were filed on 01.10.2013. The respondent's submissions were filed on 09.10.2013. Mr. Mbuvi Advocate for the claimants and Professor Ojienda for the respondent further made oral submissions on 11.10.2013.

The court has considered all the pleadings, the evidence and the submissions on record. The main issues for determination in this case are as follows:

1. **Whether the procedure for termination was fair.**
2. **Whether the reason for termination was valid.**
3. **Whether the termination was fair or unfair.**
4. **Whether the claimants are entitled to the remedies as prayed for.**

On the first issue, it was submitted for the claimants that they were not accorded fair procedure as envisaged in Article 50 of the Constitution and section 41 of the Employment Act, 2007. Section 41 of the Act entitled the claimants to a notice of the allegations made against them and to a hearing but which

they were not accorded. It was submitted for the claimants that the show-cause letter was never received by the claimants, the claimants never made representations in self-exculpation and they were never heard. Thus, it was submitted that the procedure was unfair.

For the respondent, it was submitted that the claimants engaged in gross misconduct justifying summary dismissal under section 44 of the Act.

The court has considered the submissions and the evidence. There is no doubt that the claimants were not served with or did not receive the show cause letters. The evidence by RW1 was that the secretary to the managing director (RW2) confirmed to the Advisory Committee that the show-cause letters were never delivered to the claimants. RW1 did not testify that the secretary confirmed that she called the claimants to collect the letters and they refused to go and collect the letters from the secretary. In any event, the respondent failed to call the secretary to testify on the crucial aspect of delivery of the show-cause letters to the claimants.

Accordingly, the court finds that in absence of the evidence that the show-cause letters were delivered to the claimants, the disciplinary procedure never commenced as the notice of the alleged misconducts was not given to the claimants as provided for in section 41 of the Act. The court holds that where it is established that the notice of alleged misconduct or poor performance was not given like in the instant case, then the disciplinary action by the employer is null *ab initio*.

The court further holds that in cases of alleged gross misconduct, notice and a hearing are mandatory as envisaged in section 41 of the Act. The only reprieve the employer enjoys in such circumstances is to give a shorter notice than was otherwise agreed in view of the alleged gross misconduct. The court upholds its opinion in **SHANKAR SAKLANI -VERSUS- DHL GLOBAL FORWARDING (K) LIMITED [2012]eKLR, Industrial Court Cause No. 562 of 2012 at Nairobi**, thus,

“Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.

To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract.”

In the instant case, the court finds that no notice was given and no hearing was accorded so that the claimants were not removed in a fair procedure. To that extent, the termination was unfair.

The second issue for determination is whether the reasons for termination were valid. Section 43 of the Act required the respondent as the employer to prove the reasons for the termination being matters the employer at the time of the termination genuinely believed to exist and which caused the employer to terminate the employment. First, there are no materials before the court to show that at the time of the termination, the respondent had established the allegations made against the claimants to have been matters that had been in existence at the time of the termination. Secondly, there is no evidence that the

respondent made any substantive findings in internal investigations that made adverse reports against the claimants as alleged.

Thirdly, the respondent referred to claimants' involvement in trade union activities which is not a valid reason for termination under section 46 (e) and (f) of the Act. If the alleged strike was illegal as alleged, the respondent was entitled to take disciplinary action and withhold payment for the day of the strike as envisaged in section 80 of the Labour Relations Act, 2007 but which, in the findings of the court, the respondent failed to invoke. The court upholds its opinion in **KENYA PLANTATION & AGRICULTURAL WORKERS' UNION –VERSUS- ROSETO FLOWERS [2013]eKLR, Industrial Cause No. 44 of 2013**. In that case, the court stated thus, **“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.”** The court finds that in absence of due disciplinary process as expressed in that opinion, it cannot be found that in the current case the reasons for the termination were valid or were established by the respondent against the claimants because they were not, before the termination, established at all.

Finally, in the present case, the respondent has shown that the allegations against the claimants kept on moving and if the allegations never stabilized then the court's opinion is that the reasons were not genuine. For instance, in the show cause letter there was no reference to the financial losses allegedly attributed to the claimants in the termination letter. The court holds that where the particulars of the

alleged misconduct keep on varying during the employer's administrative disciplinary process, the employee is thereby hindered and disadvantaged from preparing for his or her effective defence towards self exculpation. In such cases, it is the view of the court that the employer fails to demonstrate good faith in invoking the disciplinary procedure and it is justified for the employee to infer bad faith calculated to lead to imposition of a punishment including dismissal at all costs and means. The court holds such to be unfair disciplinary process falling short of due process of justice. Further, where the reasons alleged in the notice or the show-cause letter are substantially at variance with the reasons for termination as was the case in the present dispute (as per the show-cause letter and the termination letter reproduced in this judgment), the court holds that the reasons for the termination must be found to have been invalid and the termination therefore unfair.

Thus to answer the second issue for determination, the court finds that the alleged reasons for termination were never established as they were fictitious as not established to exist at the time of the termination and therefore not valid.

The third issue for determination is whether the termination was unfair. The court has found that the termination was premised on invalid reasons and the claimants were not accorded the due process of fairness. Accordingly, the court returns the finding that the termination of the claimants' employment by the respondent was unfair.

The fourth and final issue for determination is whether the claimants are entitled to the remedies as prayed for. The claimants have prayed for reinstatement. The claimants are keen to continue in employment. The respondent is a public body and the claimants as public officers have a legitimate expectation to retire upon attaining sixty years of age. The court has considered Article 236(b) which provides that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The court finds that the claimants are entitled to the constitutional protection and, in absence of any compelling reason they are entitled to continue in public employment. Taking all the circumstances of the case into account, the court finds that the claimants are entitled to reinstatement as no serious bar to their reinstatement has been established by the respondent.

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

- a. a declaration that the termination of the claimants' employment by the respondent was unfair;
- b. the claimants are reinstated to their respective offices in the employment of the respondent with full salary, remuneration and all attached benefits with effect from 5.11.2010;
- c. the respondent to pay all the accumulated pay in view of the reinstatement from 5.11.2010 to the date of this judgment by 1.12.2013, failing interest at court rates to be payable from the date of the judgment till full payment;
- d. the claimants to report on duty on 4.11.2013 at 8.00 am for assignment of duties by the respondent's managing director and to remain in employment unless otherwise, and for substantially different reasons from those leading to this judgment, lawfully terminated from such employment; and
- e. the respondent to pay costs of this suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 1st November, 2013.**

BYRAM ONGAYA

JUDGE