REPUBLIC OF KENYA.

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Before: Charles P. Chemmuttut, J.,

J.M. Kilonzo & O.A. Wafula, Members.)

CAUSE NO. 113 OF 2007.

KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS.....Claimants.

v.

NZOIA SUGAR CO. LTD.....Respondents.

Issues in Dispute:-

"(i) Summary dismissal of Joseph Masai.

(ii) Termination of services of Kennedy Makhokha and Timona J. Mutonyi." (all of whom are hereinafter called the grievants.)

Mrs. M.N. Gakoi, Advocate, holding brief for Mr. L.G. Menezes, Advocate, of M/S. Menezes, Advocates, for the Claimants (hereinafter called the Union).

Mr.L.W. Kariuki, Principal Executive Officer, F.K.E., for the Respondents (hereinafter called the Company).

A W A R D.

The Notification of Dispute, Form 'A', dated 15th August, 2006, together with the statutory certificates from the Labour Commissioner and the Minister for Labour and Human Resource Development, under Section 14(7) and (9)(e) and (f) of the Trade Disputes Act, Cap. 234, Laws of Kenya, which is hereinafter referred to as the Act (now repealed), were received by the Court on 23rd August, 2007 and the dispute was listed for mention on 12th September, 2007. On this occasion, Messrs. David Osobolo and Mathew Nduma Nderi, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 4th and 25th October, 2007, and the dispute was, with the mutual consent of the parties, listed for another mention on 30th October, 2007. On 24th October, 2007, M/S. L.G. Menezes, Advocates, filed a notice of appointment of advocates for the Union and also submitted their written memorandum. On 30th October, 2007, Messrs. David Osobolo, holding brief for Mr. L.G. Menezes, Advocate, and Mr. L.W. Kariuki, again appeared for the parties respectively, and by mutual agreement of the parties, the dispute was fixed for hearing on 13th February, 2008.

On 13th February, 2007, Mr. L.W. Kariuki for the Company applied for adjournment of the case on the ground that the Company was unable to respond to the claim by the Union because of the post-election violence which erupted in the country after the general election on 27th December, 2007. Mrs. Gakoi opposed the application for adjournment, and urged the Court to give an award in favour of the Union, based on Mr. L.G. Menezes' written submission on the record.

On consultation with the members of the Court, the application for adjournment of the dispute by Mr. Kariuki was overruled because the Federation of Kenya Employers (hereinafter called FKE,) had ample time between 24th October, 2007 and 12th February, 2008, to file its reply on behalf of the Company, to the claim by the Union. Furthermore, FKE did not even intimite to the Court and the learned counsel for the Union, Mr. L.G. Menezes, before the hearing date, of its inability or difficulties in filing its reply, on behalf of the Company. Mr. Kariuki did not participate further in the proceedings of this dispute, and the matter was therefore heard and considered *ex-parte.*

The case of the Union is premised on, or finds its origin in, the memorandum of the Union, dated 10th December, 2003, to the Managing Director of the Company **(App.I.).** The parties were unable to resolve the dispute at their own level, and consequently the Union reported a formal trade dispute to the Minister for Labour and Human Resource Development in accordance with Section 4 of the said Act. The Minister accepted the dispute and appointed Mr. J.M. Kiraguri of Kakamega Labour Office to act as the Investigator, but his appointment was withdrawn and Ms. Hellen Maneno of the same office was appointed as such instead; and in his investigation report, which was released to the parties on 21st February, 2006, the Minister found and recommended as follows:-

"**FINDINGS**

Joseph Wekesa Masai

……..Mr. Joseph Wekesa Masai was an employee of Nzoia Sugar Company and that he was employed as a General Labourer on 12th September 1994. He was promoted to a Security Guard, a position he held until 5th September 2001 when he was summarily dismissed from service vide a letter Ref. No. NS/HRD/PF/4656/2001 dated 5th September 2001. At the time he was dismissed from service his basic salary was Kshs.5,581/= plus a house allowance of Kshs. 614. Throughout his employment service at the company he had only one warning letter issued to him on 16th September 1999 for indiscipline and breach of duty conduct. …..Mr. Masai uttered some words while the Chairman was giving his condolence message to the family.

…….. as the union submitted, there is freedom of expression enshrined in the constitution, but that freedom is not absolute. Mr. Masai in his reply to the show-cause letter stated that being an African, he was merely crying out loud to mourn the deceased whom he claims was his relative. Was it a coincidence that he mourned only when the chairman was giving his speech. The Union's contention that Mr. Masai merely expressed his opinion in public and that he was not on duty at that time does not hold any water as it tends to portray the union as a propagator of the notion that respect for superiors ends at the factory gate. If indeed Mr. Masai has an issue to raise, there were other avenues of expressing them instead of raising them at the funeral, more so when the chairman of the company was addressing the gathering.

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…… it is quite clear that Mr. Masai actually did what he was accused of doing by the management.

Arising from the aforegoing, the management was therefore justified in its contention that Mr. Masai behaved in an unbecoming manner. From the contents of the first warning letter given to Mr. Masai, one cannot help but conclude that Mr. Masai had the habit of openly expressing himself. However, on humanitarian grounds and also considering the fact that Mr. Masai had served the company for seven(7) years, the summary dismissal should be reduced to normal termination to enable him earn his terminal benefits.

Kennedy Makokha

…….Mr. Kennedy Makokha was an employee of Nzoia Sugar Company. He was employed on 2nd October, 1991 as a cleaner and rose through the ranks to become a general clerk in the wages Section, a position he held until he was dismissed on 5th June 1996. At the time his services were terminated his basic salary was Kshs.3,670/= per month, plus a house allowance of Kshs.300/= per month. …….Mr. Makokha was accused of misappropriating Kshs.107,930/= in respect of unclaimed end month salaries. ……..Mr. Makokha appealed against the decision to dismiss him from service thereby prompting a verification exercise by the internal Auditor. As a result of this verification, the actual figure established as money misappropriated was Kshs.80,020/=. …….When the amount of money allegedly misappropriated was reduced from Kshs. 107,930/= to Kshs.80,020, the management reduced the dismissal to normal termination. This action by management raised

some questions. Theft is theft, it does not matter whether the amount involved is big or small. By deciding to reduce the dismissal to termination, the management was merely exposing the indecisiveness that was apparent during the whole verification exercise. The internal audit report accused Mr. Makokha together with two other employees for misappropriation of funds.

The same internal audit department exonerated Mr. Makokha of any blame after he laid down his grounds of appeal. The inter auditor indicated in his report that there was an irregularity in the internal control system but not a non-accountability for pay packets hence regretted the adverse effect of the original audit report. On 1st September 1997 the acting personnel and training manager recommended to the Managing Director that Mr. Makokha be reinstated unconditionally instead of reinstatement, Mr. Makokha's dismissal was refused (reduced) to normal termination on 10th November, 1997.

It is quite baffling that the same audit department in an inter memo dated 7th November 2000 to the Human Resource Manager again accused Mr. Makokha of misappropriating funds after having found him innocent in an earlier verification. I therefore find his dismissal and later termination suspect and unfair. However, considering that a lot of water has since passed under the bridge, asking for reinstatement as requested by the union would be counter productive.

Timona Juma Mutonyi

……. Mr. Timona J. Mutonyi was employed as a cane loader on 24th August, 1981, and rose through the ranks to the position of Tractor Driver, Grade VII which he held upto the time his services were terminated on 26th October, 2001. At the time his services were terminated he was earning a basic salary of Kshs.8,514/= per month plus a house allowance of Kshs.851/= per month. ……Mr. Juma was Tractor Driver but that at the time his services were terminated he was performing the duties of a grantry Crane Operator. He had performed the duties for about six months. ……there was no record showing that Mr. Juma had been promoted to performing the duties of a grantry Crane operator. There is no doubt that on the fateful day, the gantry crane failed to operate, thereby leading to stoppage of work for $3^1/_2$ hours. In his defence, Mr. Juma stated that he had been informed by Mr. Henry Wekesa, whom he took over duties from at 22.00hrs on 30th August 2001 that the gantry crane had a problem with the switch. Management in their submission stated that Mr. Juma was intoxicated and that he decided to operate the crane despite having been advised against it. Now the question is this, if indeed he was intoxicated, why did the supervisor allow him to operate the crane? Section 17 of the Employment Act Cap. 226 clearly provides that an employee who is intoxicated while on duty should be dismissed immediately. The supervisor should have called witnesses and taken statements from them and then proceeded to send Mr. Juma home immediately.

Mr. Juma had served the company diligently for 20 years and during the twenty years, he had not received and (any) warning to the effect that he had been intoxicated while on duty. What the management could have done in this case was to redeploy Mr. Juma back to his duties as a tractor driver instead of terminating his services.

RECOMMENDATION.

1. **Joseph Wekesa Masai**

……..I recommend that Mr. Masai's dismissal be reduced to a normal termination of employment to enable him earn the resultant terminal benefits.

2. Kennedy Makokha

……..I recommend that Mr. Makokha be paid 5 months salary as compensation for loss of employment in addition to the terminal dues already paid to him.

3. **Timona Juma Mutonyi**

…….
I recommend that Mr. Mutonyi should be paid 6 months salary as compensation for loss of employment in addition to the terminal dues already paid to him."

Finally, the Minister appealed to the parties to accept the findings and recommendation as a basis of resolving this dispute. The Union was totally dissatisfied with the findings and recommendation. Hence, this dispute for consideration and determination.

(i) Joseph (Wekesa) Masai (now deceased).

In his written submission, the learned counsel for the Union, Mr. Menezes submitted that the first grievant, who passed away on 24th August, 2005, before the dispute was resolved, was employed by the Company as a general labourer, grade I, on 12th September, 1994, and he was subsequently promoted to a security guard. The first grievant was suspended on 30th July, 2001, on the ground that he had behaved in a disorderly manner by heckling the Chairman of the Company during the funeral of the former Human Resource Manager of the Company, the late Jacob Wangia. It was alleged that the first grievant had contravened the Company's rules and regulations, especially Section F, 6 (c) thereof. The first grievant appeared before a disciplinary committee, without union representative present. This, the learned counsel submitted, contravened the collective bargaining agreement and the rules or principles of natural justice, and as such the disciplinary hearing ought to have been declared null and void in all fairness. Consequently, and in spite of the said anomalies, the first grievant was summarily dismissed on 5th September, 2001, for gross misconduct and his appeal against the summary dismissal was rejected summarily. The learned counsel pointed out that the contention by the first grievant that he never heckled the Chairman of the Company, as was corroborated by the members of the Joint Industrial Council (JIC), was not considered or properly considered by the management of the Company. Furthermore, the fact that the first grievant had been transferred to the security department, without having undergone any external or internal training on the ethics, duties and responsibilities of a security guard, was not given any consideration by the Company; and the contention by the first grievant that, at the material time, he was not on duty but was a mourner at the funeral where he was overcome by emotions, was also totally ignored by the Company. Therefore, the Company failed to apply the principles of natural justice to his case while dismissing him.

Mr. Menezes argued further that the Company did not pinpoint how any of its rules and regulations might have been contravened by the first grievant. In any case, the first grievant was lawfully entitled to exercise his constitutional right of freedom of speech, and if at all the first grievant behaved in a manner likely to cause a breach of the peace, or was otherwise disorderly, then this was a matter for the police, whose duty was to ensure that the laws of the land were adhered to by the public, considering that the funeral was not being conducted within the premised of the Company. As such, the conduct of the first grievant during the funeral was clearly not a matter that would have attracted disciplinary action against him. The learned counsel averred further that the disciplinary proceedings were obviously the subject of undue influence in view of the fact that the Chairman of the Company was the complainant in this case, and no official of the Company could dare to be seen as against his interest. The Company, therefore, acted as the complainant, jury and judge to the detriment of the first grievant. After all, heckling the Chairman at a funeral as alleged did not disclose any cognisble offence and the first grievant was clearly a victim of a vendetta as he did not contravene any of the Company's rules and regulations. The learned counsel maintained that, for the first grievant to be summarily dismissed on the ground that he purportedly heckled the Chairman of the Company at a funeral of a fellow employee, where emotions were obviously running high, was illogical, capricious and high handed. He stated that some employees have contravened rules and regulations of a more serious nature, but have not been treated so harshly by the Company. He asserted that the strictures imposed on the employees are such as would create a very dangerous precedent in that an employee, when accosted by a superior even in a bar or night club, would be under an obligation to obey him even if it is in the employee's house. The learned counsel pointed out that the provisions of the Employment Act, Cap. 226 (repealed) and the Company's rules and regulations, especially Section F.6(c), which was cited when dismissing the first grievant, should not be applied outside the principles of natural justice and fair play, but within reason and not arbitrarily. Therefore, the summary dismissal of the first grievant was too draconian an act because the first grievant had a valid reason and tangible defence which ought to have been given due consideration by the Company.

On the findings and recommendation of the Minister, Mr. Menezes contended that the same were unfair and unreasonable and not supported by the facts at hand. He stated that it was not for the Minister to determinate the limits of first grievant's right to freedom of speech as enshrined in the Constitution; and his (Ministers') recommendation that the first grievant's dismissal be reduced to a normal termination of employment contravened the principles of natural justice as he had not committed any offence to warrant his termination from employment.

(ii)(a) Kennedy Makokha.

The learned counsel, Mr. Menezes, submitted that the second grievant was employed by the Company as a cleaner, grade GI, on 2nd October, 1991, and posted to the welfare section. On 2nd December, 1991, he was transferred and posted as a messenger to the finance section. On 4th January, 1993, the second grievant was promoted to a clerk and posted to the wages section. On 5th December, 1995, he was suspended for allegedly misappropriating Kshs.107,903/= of the Company, but the amount was revised or scaled downwards or reduced to Kshs.80,020/= for which he was dismissed on 5th June, 2006, on account of dishonesty. The second grievant appealed against his dismissal; and after consideration of the appeal, it was found that he was

innocent and was exonerated of the theft charge. In the circumstances, he should have been unconditionally reinstated to his job. The second grievant appealed severally against his termination, and on each occasion his appeal was rejected out of hand.

As regards the recommendation by the Minister, the learned counsel submitted that the same was in blatant breach, totally unacceptable and disregard of the second grievant's legal rights and entitlements; and as such the recommendation is totally unacceptable because it amounts to victimization of the grievant on baseless, false and frivolous allegations of theft.

(ii)(b) Timona J. Mutonyi.

The learned counsel, Mr. Meneze, submitted that the third grievant was employed by the Company on 24th August, 1981 as a cane loader, grade II, and was promoted to a tractor driver, grade VI, on 5th March, 1986. He was promoted further to a tractor driver, grade VII, on 1st September, 1991. The third grievant was also the recipient of several letters of commendation from his departmental head because of his exemplary employment record.

The grievant was suspended on 3rd August, 2001, allegedly on the ground that he poorly operated a gantry crane, thereby damaging the limit switch and occasioning a milling stoppage for about $3^1/_2$ hours. Consequently, he was terminated from employment on 26th October 2001 for gross negligence; and his appeal against the termination was summarily rejected.

The learned counsel recapitulated the Minister's findings, and averred that the third grievant, having been assigned duties for which he was neither trained nor paid for in accordance with the proper scale and considering his clean 20 years employment service, should not have been terminated whimsically. In the circumstances, the learned counsel urged the Court to reject the recommendation by the Minister as contradictory and unacceptable.

In conclusion and for the foregoing reasons, the learned counsel prayed that:-

(a) the second and third grievants be reinstated to their jobs
without any loss of salaries, benefits and continuity of service; and that the Company should tender a written and unequivocal apology to the second grievant because of the false and baseless accusation of theft against him.

(b) the entitlements of the first grievant (now deceased), which he would have earned had the Company not dismissed him summarily, be paid to his next of kin.

Since the demand or claim by the learned counsel, Mr. Menezes, on behalf of the Union, stands unchallenged, the same is allowed and we **AWARD** and **ORDER** as follows:-

1. That the entitlement of the first grievant (now deceased) from the date of his summary dismissal on 5th September, 2001, until his demise on 24th August, 2005, be paid to his next of kin, preferably his wife or grown up son or daughter.

2. (a) That the second and third grievants, i.e. Kennedy Makokha and Timona J. Mutonyi, be reinstated forthwith and unconditionally to their respective jobs, with continuity of service, seniority, promotion, and privileges, if any, with effect from the dates of their respective dismissal, i.e on 5th June, 2006 and 26th October, 2001.

(b) That the said grievants be paid their full wages or salaries, including house and leave allowances, e.t.c., from the said dates until full implementation of this award.

DATED and delivered at Nairobi this 27th day of February, 2008.

Charles P. Chemmuttut, MBS.,

JUDGE

J.M. Kilonzo, O.A. Wafula,

MEMBER. **MEMBER.**