



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI.

(Before: Charles P. Chemmutut, J.,

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

CAUSE NO. 69 OF 2006.

KENYA LOCAL GOVERNMENT WORKERS' UNIONClaimants.

v.

KIKUYU TOWN COUNCIL.....Respondents.

Issue in Dispute:-

Dismissal of:-

- 1. Gad Njenga Wanjohi - Chairman.**
- 2. Peter Christopher Wanjohi - Branch Vice Chairman.**
- 3. Erastus Mugane - Branch Secretary.**
- 4. Samuel Kibuthu Kinoru - Assistant Secretary.**
- 5. Florence Njeri Mbugua - Treasurer.**
- 6. Rose Wairimu Chege - Women representative.**
- 7. Francis Njunge Wainaina - Shopsteward.**
- 8. Lawrence Maina Muigai - Shopsteward.**
- 9. Martha Nyambura - Member.**
- 10. Joshua Njuguna King'ori - Member.**

Boniface M. Munyao, National General Secretary, for the Claimants (hereinafter called the Union).

No appearance for the Respondents (hereinafter called the Council).

A W A R D.

The Minister for Labour referred this dispute to the Court on 10th July, 2006, under powers vested in, or conferred upon, him by Section 8 of the Trade Disputes Act, Cap. 234, Laws of Kenya (hereinafter referred to as the Act); and his reference, together with the statutory certificates from the Labour Commissioner and the Minister himself under Section 14(9)(e) and (f) of the Act, were received by the Court on 18th July, 2006. The dispute was then listed for mention on 3rd August, 2006, when Messrs. Boniface M. Munyao and Stephen N. Kiiru, Deputy Clerk to the Council, who appeared for the parties respectively, were directed to submit or file their respective memoranda or statements on or before 9th and 24th August, 2006, and the dispute was fixed for hearing on 19th September, 2006. Mr. Munyao submitted his memorandum, on behalf of the Union, on 7th August, 2006, but the Council did not file its reply statement thereto as directed by the Court. On 19th September, 2006, Mr. Munyao appeared for the Union and the learned counsel, Ms. Kellen Njue, Advocate, who appeared for the Council, applied for two (2) weeks extension of time within which to file a reply statement, on behalf of the Council. The application was granted and the learned counsel was directed to file her reply statement on or before 26th September, 2006, and by mutual agreement of the parties the dispute was fixed for hearing on 3rd October, 2006. The learned counsel for the Council, Mr. Karuga M. Maina, filed his reply statement on 26th September, 2006, and the case was heard *ex-parte* as aforesaid, i.e. on 3rd October, 2006, as the counsel for the Council did not appear for arguments and to support his written submission, and no reasons were given for his non-appearance.

In his opening submission, Mr. Munyao averred that the dispute arose because the Council deliberately and unlawfully delayed payment of the employees' salaries and accumulated arrears, amounting to Kshs. 6.0 million, in total disregard and contrary to the labour legislations governing the protection of payment of salaries and wages in this country, especially Section 4(2) of the Employment Act, Cap. 226, Laws of Kenya, and Rule 4 of the parties' collective agreement. Section 4(2) of the Employment Act, Cap. 226, Laws of Kenya, provides as follows:-

“4(2): Payment of wages shall be made on a working day, and during working hours at or near to the place of employment or at such other place as may be agreed to between the employer and the employee.”

Rule 4 of the parties collective agreement runs thus:-

“One twelfth of the annual salary shall be payable on the last day of each calendar month or on such other day in each calendar month as administrative convenience may require.”

However, on realizing that the Town Clerk and the Treasurer had made arrangements to pay to the employees Kshs. 1.2 million, being arrears accrued from their services to Kiambu County Council, the Chairman of the Council, Cllr. S.K. Njane, and the Chairman, Finance, Cllr. M.K. Kibugu, wrote a joint letter to the Town Clerk on 25th May, 1998, to stop payment of the said amount to the employees until certain conditions therein were met or complied with (see App. A). Mr. Munyao observed that this was illegal and contrary to Section 86A of the Local Government Act, Cap. 265, Laws of Kenya, which provides as hereunder:-

“86 A(1) No member of a local authority shall give orders with regard to any matter under the jurisdiction of that local authority or give instructions to any officer or employee of that local authority.

(2) No member of a local authority shall, unless so authorized in writing by that local authority or a committee thereof:-

(a) inspect lands or premises which that local authority has the right or duty to inspect or enter upon, or give orders respecting, works which are being carried out by or on behalf of that local authority;

or

(b) engage in correspondence for or on behalf of that local authority, particularly with regard to conveying decisions or instructions of that local authority.

(3) A member of local authority who contravenes any provisions of this section shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings.”

Mr. Munyao pointed out that the salaries and wages of the employees remained unpaid due to differences and infighting between the Town Clerk and the Councilors, particularly the Chairman of the Council. On 1st July 1998, the employees assembled at the Town hall to press for the payment of their salaries, but they were allegedly victimized and forcibly dispersed by the police at the instance of the Council. Consequently, on 20th July, 1998, the entire Branch officials of the Union (hereinafter called the grievants), who are the subject of this dispute, were suspended and interdicted on account of absenteeism, abusive language, assault, ejection, illegal strike, malicious damage to property, e.t.c. (See App. B(i) - B(iv)). The common letter of suspension reads as follows:-

“RE: SUSPENSION.

You have been identified as one of the members of staff who on 1/7/98 stormed the office of the Council Chairman with the intention of ejecting the newly posted Town Clerk. In the process, the clothes of the Council Chairman and the Town Clerk were torn. In addition you committed the following misconduct during the material day:-

- you used abusive language to the Town Clerk, Council Chairman and other Senior Staff members.

- you assaulted the Chairman and Town Clerk.

- resulting from your actions, you facilitated general unrest in the office which affected adversely the smooth running of Council services.

- since 1/7/98 you have been on illegal strike despite the fact that no grievances have been advanced to the Council.

In the circumstances and as per the resolution of the Council, vide minute FSGP/30/98 you are hereby suspended from the services of the Council until your case will be conclusively determined by the Council.

In the meantime you are given two weeks from the date of this letter to show cause why you should not be summarily dismissed for the aforementioned shortcomings.

Yours faithfully,

(Sigd.)

SAMUEL P. N. KURIA.

TOWN CLERK.”

On 10th July, 2000, the grievants were retrospectively dismissed from the services of the Council with effect from 1st July, 1998. A sample of the said common letter of their dismissal states, *Inter alia*, as hereunder:-

“RE: DISMISSAL.

I wish to notify you that following your suspension.....and subsequently consideration of your case, the Council resolved under Minute No. FSG/28/2000 that you should be dismissed from the Council service w.e.f. 1st July, 1998.

Please be informed accordingly.

Yours faithfully,

(Sigd.)

D.M. MACHARIA.

TOWN CLERK.”

The union took up the matter with the Council, and by numerous exchange of correspondence, meetings between the parties to resolve it and appeal by the grievants, no agreement was reached (see Apps. C. to N).

On 26th February, 2005, the Union reported a formal trade dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Mr. P.N. Macharia of Ministry of Labour Headquarters to act as the Investigator; and in his report, which was released to the parties on 29th December, 2005, the Minister found and recommended as follows:-

“FINDINGS.

..... the Town Council of Kikuyu was unable to pay its workers full salaries such that as at May, 1998 the arrears had accumulated to over Kshs. 6m.

.... around May the Town Clerk prepared to pay salary arrears amount to Kshs. 1.2 m but this was stopped by the council chairman. On 1st July, 1998 all the unionisable employees totaling over 50 staged a sit in at the chairman’s office demanding that they be paid their salary arrears.... the council wrote suspension letter to all the affected employees following the alleged illegal strike vide letters dated 29th July 1998.... on 4th November, 1998 the council interdicted two employees namely – M. N. Njenga and J.N. King’ori on the grounds that they has been charged in a court of law on matters related to the events of 1st July, 1998. The two were however acquitted under Section 210 of the CPC as the court did not find sufficient evidence to put them on their defence upon acquittal the council failed to reinstate the two officers contrary to rule 26(1)(a)(b) and 37 (d)(1) of the Public Service Commissions (Local Authority Officer’s Regulations) of 1984 as well as Clause 30(c) (d) of the parties Collective Bargaining Agreement.

In its dismissal letter to the branch officials which were identical, the town council clearly stated that the action has been occasioned by the events of 1st July, 1998 in which they incited other workers to go on an illegal strike. In selecting the officials for punishment out of the total labour force of 50 employees it is evident that this was actuated by a motive to victimize them on account of their trade union activities. Such an action is manifestly in contravention of Article 13 of the parties Collective Bargaining Agreement; Section 23 of Cap. 233, the Industrial Relations Charter as well as the provisions of ILO Conventions 98 and 135. All the above instruments protect workers representatives against prejudicial acts including dismissal based on their status as workers representatives.

.... in a similar case under cause No. 8 of 2001 the Industrial Court found that the action taken of dismissing the entire branch officials was legally wrong and unjustified and indeed smacked of unfair labour practice and victimization on account of their trade union activities. The same sentiments were established to exist in this case.

RECOMMENDATION.

..... I recommend that all the grievants be unconditionally reinstated to their former posts from the date of their dismissal i.e 1st July 1998 without loss of their full salaries, benefits, continuity and or seniority.”

Finally, the Minister appealed to the parties to accept the recommendation as a basis of resolving this dispute. The Union accepted the findings and recommendation, but it would appear that the Council rejected the same on the ground that they were inaccurate and inconclusive. Hence this dispute for adjudication and determination (see Apps. O.to T).

Briefly, Mr. Munyao strongly contended that the grievants were denied personal hearing and the action which was taken by the Council against them was contrary to all norms of employment law, illegal, unjustified, and smacked of unfair labour practice and victimization on account of their trade union activities. He submitted further that the decision to dismiss the grievants was also in violation of Rule 13 of the parties’ Memorandum of Agreement and ILO Conventions Nos. 98 and 135.

In support of his case, Mr. Munyao relied on the decision of this Court under similar circumstances in Cause No. 8 of 2001 between the same Union and Mombasa Municipal Council, and finally prayed that the grievants be unconditionally reinstated to their posts from which they were arbitrarily, unlawfully and illegally dismissed by the Council on 1st July, 1998, without loss of salaries, benefit, continuity of service, seniority and any other privileges.

In his written submission, the learned counsel for the Council, Mr. Karuga M. Maina, submitted that this dispute arose from a demonstration by some employees, including the grievants, who unlawfully and illegally stormed the office of the Council Chairman on 1st July, 1998 with the intention of ejecting the newly posted Town Clerk to the Council, and not as a result of non- payment of salaries. He stated that the grievants were suspended and eventually dismissed on account of gross misconduct in inciting the employees to participate in an illegal strike. In the circumstances, Section 23 of the Trade Union Act, Cap. 233, Laws of Kenya, and Rule 13 of the parties’ Memorandum of Agreement were not applicable to this matter as the conduct of the grievants was not in good faith and in furtherance of their legitimate trade union activities. The learned counsel averred further that the grievants were suspended from the Council’s services and given an opportunity to show cause why they should not be summarily dismissed, but they did not. They were consequently summarily dismissed as aforesaid under Section 17 of the Employment Act, Cap 226, Laws of Kenya. The Public Service Commission was informed of the action taken by the Council and the grievants were advised to appeal against the decision. They did not, and the Public Service Commission upheld the dismissals.

Mr. Maina maintained that the events of 1st July, 1998 were not activities in furtherance of a trade dispute for the employees’ rights, but they were activities orchestrated to paralyse the administration and operations of the Council which is mandated, under Local Government Act, Cap. 265, Laws of Kenya, to offer essential services to the inhabitants falling under its jurisdiction. In his view, the conduct of the employees, including the grievants, amounted to a breach of law and peace which obstructed the Council from being able to continue offering services to the public as mandated by law.

In the circumstances, the learned counsel prayed that the demand by the Union be rejected.

There is no gainsaying the fact that the grievants comprised of the entire branch officials of the Union in the Council's employment at the time of their dismissal. It is also not denied that the salary arrears of the Council's employees had accumulated and remained unpaid to the tune of Kshs. 6.0 million at the material time, when they assembled at the Council offices to demand payment of the same. Consequently, the grievants were selected for punishment out of the total labour force of 50 employees, on account of unsubstantiated multiplicity of offences, e.g. absenteeism, abusive language, assault, ejection, incitement and malicious damage to property. In our view, the demand by the employees of their said salary arrears did not amount to misconduct under Section 17 of the Employment Act, Cap. 226, Laws of Kenya, in view of the fact that employees in this country, or in any other country in the developing world, are in general not economically well-off, and any delay in payment of their dues may create some reasonable or justifiable crumbling by them (*see Cause No. 50 of 2000: Kenya Union of Commercial Food & Allied Workers v. Security Holdings Ltd.*).

In dealing with a trade dispute arising out of dismissal or termination of service, the Court is entitled to enquire whether the impugned order of the employer has been passed *mala fide* and with improper motive or is the result of a desire to victimize the employees. On careful perusal of the submissions of the parties, we accept the views expressed by Mr. Munyao that the action taken by the Council against the grievants smacked of partiality and amounted to unfair labour practice and victimization of the entire branch officials of the Union purely for their trade union activities as it was their legitimate right and responsibility to ventilate the grievances of the Council's unionisable employees. On the other hand, we find that the written submission by the learned counsel for the Council, Mr. Maina, lacks credence and amounts to bare allegations without any supporting documents. The dismissal of the grievants was too severe and extremely harsh. Punishments should be commensurate with the offence and should be given with a view to correction and may be deterrent at times but not vindictive. We are not, however, unaware of the fact that in matters of internal administration, the management has and should have very wide and extensive powers. But powers should be exercised judiciously even where they are not exercised judicially:

"It is excellent to have a giant's strength. But it is tyrannous to use it like a giant."

This case is on all fours with *Cause No. 8 of 2001* whereby the Municipal Council of Mombasa summarily dismissed all the officials of the Union on the ground that they had taken a leading role or part in an illegal strike inasmuch as they instigated the other employees to stage the illegal strike. In the circumstances, the Court observed at page 10 therein that:-

"In selecting the grievants for disciplinary action and punishment, the Council was actuated by a motive to victimize them for their trade union activities. The action was also in violation or contravention of Article 13 of the parties' Memorandum of Agreement, the Industrial Relations Charter, the provisions of I.L.O. Conventions Nos. 98 and 135 and the principle of natural justice embodied in the maxim: audi alteram partem (no man shall be condemned unheard)."

In the circumstances and considering the overwhelming documentary evidence brought on the record by the Union, we are of the considered opinion that the suspension and subsequent dismissal of the grievants was un-called for, legally wrongful and unjustified. This being the case, we award and order as follows:-

ORDER.

In exercise of the powers conferred upon, or vested in, this Court by Section 15(1)(i) of the Act, we uphold the Minister's findings and recommendation and order that the grievants be unconditionally reinstated to their jobs or posts from the date of their dismissal, i.e. on 1st July, 1998, without loss of their full salaries and all other benefits, allowances, privileges, seniority and continuity of service with effect from the said date. It is ordered further that the grievants shall unconditionally report to the Town Clerk within **twenty one (21) days** from the date of this award for deployment.

Copies of this award be served upon the Permanent Secretary, Ministry of Local Government, and the Town Clerk, Kikuyu Town Council.

DATED and delivered at Nairobi this 15th day of February, 2007.

Charles P. Chemmutut, MBS.,

JUDGE.

O.A. Wafula,

J.M. Kilonzo.

MEMBER.

MEMBER.