REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmuttut, J.,

J.M. Kilonzo & D.K. Siele, Members.)

CAUSE NO. 81 OF 2005.

KENYA ENGINEERING WORKERS' UNION ....Claimants.

v.

BROLLO KENYA LTD..Respondents.

Issue in Dispute:-

"Unlawful lock-out of 37 employees and the employer's refusal to implement interpretation of a court award"' namely:-

1. **Kazungu Tsuwi.**
2. **Wilson Mabwea.**
3. **Muli Masaku.**
4. **Albert Maina.**
5. **Simon Mutuku.**
6. **Leonard Otieno.**
7. **Abdalla Mwijaka.**
8. **Duncan Wachira.**
9. **Abdalla Mohamed.**
10. **Daniel Maindi.**
11. **Mbuli Ngonyo.**
12. **Kahindi Mae.**
13. **John Abwao.**
14. **Kithome Makau.**
15. **Joseph Warutere.**
16. **Barua Nyae.**
17. **Patrias Kaleli.**
18. **Hassan Suleiman.**
19. **Sila Odira.**
20. **Peter Kazungu.**
21. **Mfamaji Ndilo.**

22. Chone Chiti.
23. Luka Kipkoech.
24. Mwagambere Omar.
25. Chombo Nyawa.
26. Clement Mutula.
27. Nyamawi Mwayaya.
28. Simon Ng'eno.
29. Wycliffe Omollo.
30. Albert Mutugi.
31. Simon Mbukuli.
32. David Tuva.
33. Kenneth Kibigo.
34. George Mungai.
35. Peter Moranga.
36. Fred Nyangweso.
37. David Njenga.

Joseph A.N. Omolo, Industrial Relations Officer, for the Claimants (hereinafter called the Union).

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

A W A R D.

This dispute was referred to the Court for adjudication and determination by the Minister for Labour on 22nd June, 2005 in accordance with the powers conferred upon, or vested in, him by Section 8 of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act); and the Minister's 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 29th June, 2005. The dispute was then listed for mention on 15th July, 2005, when Messrs. Joseph A.N. Omolo and Jason N.Namasake, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 8th and 31st August, 2005, and the dispute was fixed for hearing on 26th September, 2005. Mr. Omolo submitted his memorandum, on behalf of the Union, on 8th August, 2005, while Mr. Harrison O. Okeche, Senior Executive Officer, F.K.E., belatedly filed his reply statement thereto, on behalf of the Company, on 13th September, 2005. Consequently, the dispute suffered several adjournments and the case was ultimately heard on 15th August, 2006.

The Union is registered as such under Section 11 of the Trade Unions Act, Cap. 233, Laws of Kenya, while the Company is a limited liability concern incorporated in Kenya under the Companies Act, Cap. 486, Laws of Kenya. The Company is situated at Miritini, Mombasa, and engages in the manufacture of steel plates, sheets and strips.

It is common ground that the Company was a member of the Engineering Association of F.K.E. (which is hereinafter referred to as the Association), until 16th September, 1997, when its membership ceased. Subsequently, the parties entered into a separate collective agreement allegedly with effect from 1st September, 1996, but the Company refused to implement the same on the ground that its membership with the Association came to an end in January 1996, and not on 16th July, 1997 (see Union App. I). The Union reported a formal trade dispute to the Minister for Labour against the Company on the "Employers' refusal to implement the negotiated CBA". The Minister accepted and processed the dispute in accordance with the laid down machinery, and referred it to the Court for adjudication and determination. The case was received by the Court and registered under Cause No. 5 of 1999, and in its award thereof, which was delivered on 11th November 1999, the Court made the following decision:-

"The Court accordingly awards that the Respodents should implement the first year of the collective agreement between the Claimants and the Association which was effective from 1st September, 1996. Thereafter the Claimants and the Respodents should negotiate an independent collective agreement between them to cover the period 1st September, 1997 and a further two year period making the duration of this agreement three years effective from 1st September, 1997."(see Union App. 2).

It is stated that the Company complied with the award and implemented the first year of the collective agreement by paying the arrears to the employees, except six (6), namely, Fred Nyangweso, Boniface Ambani, Daniel Maindi, David Tuva, Peter Gori and Mbuli Ngonyo, who, according to the Company, had either been promoted from unionisable employees to higher posts or had irregularly received salary increases before the award, and the Company had to regularize their earnings (see Company

Ann. I). On 21st February, 2000, the Company applied for an interpretation of the award because of some differences between the parties of its interpretation, and in its ruling of the interpretation of the award, which was announced on 28th July, 2003, the Court ruled, *inter alia*, that:-

"(a) …………………………………………………………………………..

(b) …………………………………………………………………………

(c) ………………………………………………………………………..

(d) The six employees mentioned above should be paid their arrears based on the positions they held at the time of the determination of the dispute. Meanwhile the Respondents, if they so wish, should file a separate dispute relating to the other issues raised in respect of the six employees and if the dispute is ruled in their favour, then the six should be paid the balance if any of their arrears." (see Union Apps. 3 and 4).

According to Mr. Omolo, the Company did not comply with or deliberately defied the ruling of the Court. On the other hand, Mr Okeche submitted that the Company complied with the Court ruling by computing what it considered to be the arrears of the six employees, but the Union rejected the computation or calculations. The parties held several meetings to resolve the matter and eventually agreed that the Management of the Company should work out and submit the calculations of the arrears to the Chairman, a Mr. Menza. Mr Okeche pointed out that on 12th February, 2004, the Management of the Company submitted its proposal on the calculation of the arrears to the said Chairman; but instead of responding to the Company's proposal, the Union issued a twenty one (21) days strike notice (see Union App.5 and Company Anns. 2 to 2(e) and 3).

The Minister for Labour Hon. Amb. Chirau Ali Mwakwere, MP, intervened and issued the following order, dated 4th March, 2004, under Section 29 of the Act:-

"Where it appears to the Minister that there is an actual or threatened strike or lock-out arising out a Trade Dispute at Brollo (K) Limited and that the Minister is of the opinion:

(a) That the matters to which the Trade Dispute relates have been settled by an agreement or award; and

(b) That the employer and a substantial proportion of employees in that industry are either directly or through their respective organizations of employers or employees, parties to that agreement or award; and

(c) That the agreement or award is expressed to have effect from 1st September, 1996.

The Minister by order:-

(i) Requires the parties to that dispute to comply with that agreement or award; and

(ii) Declares any strike or lock-out (whether actual or threatened) in that section of industry to be unlawful." (see Union Apps. 6A and 6B and Company Anns. 4 and 4A).

The Union and the employees ignored the Minister's order and persisted in the strike (Union Apps. 7 and 8). Meanwhile, the Management of the Company wrote to the Minster on 3rd March, 2004, to the effect that it had complied with the order and enclosed copies of vouchers of payment to the six employees (see Company Anns. 5 to 5D). By exchange of further correspondence, the parties were unable to settle the matter. On 8th March, 2004, the Company issued a warning letter to the employees to resume work by 2.00p.m. on that day, but they continued with the strike, and consequently they were summarily dismissed (see Union App. 9 and Company Anns. 6, 7, 8 and 8A). A sample of the common letter of summary dismissal reads thus:-

“**RE: DISMISSAL**.

Further to out Notice dated 8th March, 2004 instructing you to go back to work by 2.00p.m. failure to which you will be considered as having been dismissed. Please be informed that you disobeyed lawful instructions given to you by refusing to go back to work as per the Management’s directive.

Therefore, the Management has no other alternative and you are hereby dismissed from the services of the Organization with immediate effect.

Kindly not that your dues will be calculated as hereunder:-

(a) Salary upto the last day worked.

(b) Pending Leave (if any).

(c) Any other money earned but not yet paid (if any).

(d) Less Loans/Advances.

Thank you.

Yours faithfully,

BROLLO KENYA LTD.

(Sigd.)

L.P.DOSHI

M.DIRECTOR/CHAIRMAN.”

The parties met severally at their own level to settle the matter, but no compromise was reached or arrived at; and on 7th April, 2004, 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 under Section 7 of the Act appointed Mr. P.M. Wamoto of the Ministry of Labour Headquarters to act as the Investigator. However, during the course of investigation and conciliation proceedings, the parties were unable to agree. Consequently, the Minister released his report to the parties on 24th August, 2004, in which he found at length and recommended as follows:-

“**FINDINGS:**

Both parties were not in dispute that the genesis of the matter was as a result of the Court award, cause No. 5 of 1999,

which provided that employees be paid the arrears of wages.

………………because of differing views over the award, management applied for its interpretation, which was done, and direction given by the court. Indeed management had failed to implement the award as was confirmed by the court in its interpretation of 28th July 2003.

………….. all other employees were paid their arrears except for the above mentioned six, whom the employer had argued, their earnings were above the award, and had made recovery of what he viewed as an overpayment from what would have been the arrears, hence arising a dispute.

……………….. the court during its interpretation had heard this argument and had advised the union that they could report a separate dispute, where other issues were arising in regard to the dispute in question, and in the event there was a stale mate.

The parties heeded the courts advice, and had met on 11th February 204, deliberated and agreed that management submit their proposals, which they did the following day, 12th February 2004,

…………… the union however, instead of communicating their view on the proposals, they issued a 21 days strike notice to the Minister for Labour, on the 16th February 2004.

The Chief Industrial Relations Officer, while responding to the threat advised the parties on 19th February 2004, to ensure implementation of the court award and report a dispute on any other matters arising, which in managements' opinion, they had paid the arrears, but were entitled to recover what they viewed as an overpayment to the six employees, an approach the union vehemently opposed, hence another dispute.

The management on the other hand had also written to the Minister and the union, detailing their course of action they had taken in trying to resolve the dispute and denouncing the strike as an action geared towards straining their relations.

…………….. the Minister for Labour further issued, on 4th March 2004, an order for compliance by the parties in respect of the court award, and asked the union to withdraw the strike threat, as the avenues for settlement of the dispute were still open. The strike threat was essentially then declared as illegal.

The union in disregard of the Minister's advice furthered their threat in another letter of 15th March 2004, to management that the strike was imminent.

…….. indeed come the 8th March 2004, and the strike was actualised, impairing any would have been avenues for further dialogue. Efforts by the Ministry of Labour officials to restore order, and broker a settlement were absolutely rejected by the workers. This action, which had become a norm in the organization, as there had been a number of strikes staged before, was viewed by management as a deliberate refusal to honour the contractual obligations, and defiance of lawful instructions, that employees were now getting used to.

The 37 employees who staged the strike were therefore eventually summarily dismissed from employment on grounds of gross misconduct.

Perhaps it is worth noting here that whereas justice delayed is justice denied, actions geared towards the promotion of anarchy would be a total deviation from the legislation as well as the principles and the spirit of the Industrial Relations Charter, a guiding instrument to the parties that have partnered to be dialoguing.

Additionally, disregard for law has always annulled any consideration that may have been useful or of gain to even the offended.

…….. finally some of the employees, at least seven (7) have already collected their terminal dues, confessed in writing to management, admitting to have been misled and requesting for reinstatement, which has been considered and are back at work.

<u>RECOMMENDATION.</u>

……..I recommend that Management's action to dismiss the thirty seven (37) employees be upheld."

The Minister finally appealed to the parties to accept the recommendation as a basis of resolving the dispute. The Management of the Company accepted the recommendation but the Union refused to accept it on the ground that the same was totally baseless.

It is stated that the Management of the Company refused to countersign the Notification of Dispute, Form 'A', for consideration and determination of this dispute by the Court. In the circumstances, the Minister for Labour invoked Section 8

of the Act as aforestated (see Union Apps. 9,10,11,13,13A,14,15 and 16).

Mr. Omolo's written submission is riddled with massive repetitions and monotony, but in brief he contended that the Management of the Company was extremely unco-operative, recalcitrant and vindictive to the extent that it ignored and flouted the Minister's order with impunity, and also out to victimize the grievants and deny them their right entitlements under the law. For the foregoing reasons, Mr. Omolo prayed that the grievants be unconditionally reinstated to their jobs without loss of wages or salary, privileges and other benefits; or, in the alternative, they paid the following terminal benefits:-

(a) Gratuity.
(b) Provident Fund.
(c) Notice pay in lieu of notice.
(d) Leave pay and leave travelling allowance.
(e) Overtime.
(f) Days worked.
(g) 12 months' compensation for unlawful lock-out and loss of employment, e.t.c.

Mr. Kariuki resisted the demand on the ground that the strike was unlawful and in violation of the Minister's said order under Section 29 of the Act, and also contrary to Section 26(b) thereof, which states that:-

"26 A strike or lock-out shall be unlawful –

(a) ………………………………………………………………………..

(b) if the Minister has within the period of twenty one days refused to accept the report under section 5(1)(b), unless the Minister or the Industrial Court has revoked that refusal."

Therefore, the Management of the Company was justified and entitled to summarily dismiss the grievants for persistently participating in an unlawful strike against all odds while negotiations were still in progress regarding payment, if any, of the arrears to the six (6) employees.

Mr. Kariuki relied on Section 34, of the Act, which provides in a nutshell that anyone who declares or instigates or incites others to take part in an unlawful strike is guilty of an offence, and that any person who ceases work or refuses to continue work in furtherance of unlawful strike breaches their contracts of employment. He accused the Union of inciting the grievants to participate in an unlawful strike against the law and the laid down industrial relations machinery for resolving trade disputes. This assertion is supported by the admissions of some of the grievants who later on wrote to the Management of the Company that they were misled by the union officials to participate in an unlawful strike (see Company Anns. 9 (a) to ((h)).

In the circumstances, Mr. Kariuki prayed that the demands by the Union be rejected as they amount to perpetuation of an illegality and an abuse of the Court process. He prayed further that the Union officials be ordered to pay a fine or be imprisoned for an appropriate term in accordance with Section 34 of the Act, and that a further appropriate order be made for payment of costs to the Company in terms of Section 32(1) of the Act.

The issue in this case is not about payment of arrears to the six (6) employees, but whether the grievants were locked-out or they staged or participated in an unlawful strike. Lock-out is defined under Section 2 of the Act as under:-
' "Lock-out" means the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling those persons, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.'
It is not denied that when the grievants were dismissed as aforestated, they had struck work. It is in the submission of both parties that the grievants went on a spontaneous strike. Strike is defined under Section 2 of the Act as follows:-

' " strike" means the cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been so employed, to continue to work or to accept employment and includes any interruption or slowing down of work by any number of persons employed in any trade or industry acting in concert or under a common understanding (including any action commonly known as a "sit down strike" or a "go slow")'.

A plain reading of this definition means that there must be cessation of work by a body of employees and there must be a combination among them in ceasing to work upon a common understanding. In this case, the grievants deliberately brought about the cessation of work, although it might have been for a short period, but nonetheless it was a strike as it is evident from the definition given in Section 2 of the Act inasmuch as there is no mention of the duration of the period which can be said to

be a criterion for determining a strike. The criterion for finding a strike is both subjective and objective. The subjective criterion is that the employees must intend to stop the work and the objective criterion is that this intention, in fact, will bring about stoppage of work. What has happened here was that the grievants refused to work under a common understanding and the stoppage of work was commenced without taking recourse to the provisions of the law. It is clear from the pleadings that no notice, or proper notice, of strike was given by the grievants to the Management of the Company before resorting to strike in accordance with Section 26 of the Act, and that no trade dispute had been raised by them pursuant to Section 4 of the Act before going on strike. These are the basic facts in this case.

From the foregoing, we are clear in our minds that there was no lock-out by the Management of the Company, but the grievants had taken recourse to an unlawful strike without adhering to the provisions, especially Sections 26 and 28 of the Act. The grievance of non-payment of the arrears to the six (6) employees was not of such an urgent nature that the interest of labour would have suffered irrepairably if the procedure prescribed by law for settlement of such disputes through the Act was resorted to. After all, it is not the employer who suffers if production is stopped by strikes. While on the one hand it has to be remembered that strike is a legitimate and sometimes unavoidable weapon in the hands of employees, it is equally important to remember that indiscriminate and hasty use of this weapon should not be encouraged. It will not be right for employees to think that for any kind of demand a strike can be commenced with impunity without exhausting reasonable avenues for peaceful achievement of their objects.

There may be cases where the demand is of such an urgent and serious nature that it would not be reasonable to expect employees to wait till after they request the Government to make a reference to the Court. In such cases, strike even before such a request has been made, may well be justified. The present case is not, however, one of such cases. In the circumstances, we are afraid that we cannot hold that the grievants were dismissed wrongfully. We consequently see no force in this demand and hereby reject it as untenable.

While rejecting the demand, we are constrained to impose any penalties on the grievants or the Union officials and/or all of them.

During the proceedings of this dispute in Court, and through correspondence thereafter from both parties, the parties mutually conceded that the following grievants, i.e. Nos. 28,31,32 and 34 hereinabove, were on leave during the period of strike:-

1. Simon Ng'eno.

2. Simon Mbukuli (Sunguti).

3. David Tuva.

4. George Mungai (Kamau).

Mr. Simon Ng'eno was on compassionate leave while Messrs. Simon Mbukuli, David Tuva and George Mungai were on annual leave. These grievants suffered the same fate, i.e dismissal, like the rest and yet there is no evidence, or credible evidence, on the record to link or associate them with the strike. In such a case, the general rule is that where an employee remains out of employment as a result of an illegal order, or for no fault of his own, he would be entitled to his wages or salary, e.t.c for the period of his unemployment pursuant to an order which was found to be bad in law. This being the case, we award and order that the aforementioned four (4) grievants be reinstated forthwith to their jobs in terms of Section 15(1)(i) of the Act. But considering the long period during which these grievants have remained absent, we award further that they be paid half (½) of their wages or salary from the date of their wrongful dismissal to the date of their reinstatement. The other entitlements, e.g. continuity of service, leave, e.t.c. should also be restored to them.

If the said four(4) grievants have since found alternative employment elsewhere, or they do not wish to work for the Company any longer, then they should be paid their terminal benefits in terms of the collective agreement in force at the time of their wrongful dismissal; and, in addition, twelve(12) months' wages or salary each, pursuant to Section 15(1)(ii) of the Act, as compensation for wrongful dismissal.

While disposing of this dispute as hereinabove, we must observe, considering the plight of the employees, that the Court, however much it may desire, is not expected to be guided by the straightened circumstances of the employees, but by law. In the circumstances of the present case, however, and keeping in mind the attitude of the Management of the Company of keeping the door open from time to time for the employees to resume duty, we hope the Management will be generous enough to repeat the offer; and our advice to the employees is that if the offer is repeated, they should accept it and forget the past. The

Management must be aware of the effort that the Government is making to overcome economic difficulties and to create jobs or employment. Thus, harmonious relationship between labour and capital, we are sure, will improve the economy of the country. It is, therefore, our pious hope in this case that the Management will do its best to repeat the offer or reinstate as many employees as possible.

With these observations, we award and order as aforestated.

DATED. and delivered in Nairobi this 3rd day of April, 2007.

Charles P. Chemmuttut, MBS.,

JUDGE.

J.M. Kilonzo. D.K. Siele,

MEMBER. **MEMBER.**