



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 16 OF 2013

MWITANI SIKWAINI DANIEL.....PLAINTIFF

VERSUS

MUMIAS SUGARCO. LTD.....1ST DEFENDANT

SUKARI SACCO.....2ND DEFENDANT

JUDGEMENT

INTRODUCTION

1. The plaintiff herein filed his plaint on the 10th day of May, 2013. His claim against the defendants jointly and severally is for:-

- a. Three months salary and *three (3) months pay in lieu of notice of Ksh. 197,553/=*;
- b. *Payment of his cane proceeds of Ksh. 49,234.62*;
- c. *Costs and interest*;
- d. *Any other relief this honourable court may deem just and expedient.*

2. The defendants filed their defences denying the allegations and the claim by the plaintiff and they put the plaintiff to strict proof thereof. At the close of pleadings the case was set down for hearing.

The plaintiff's case.

3. The plaintiff is a private sugar cane farmer and an employee of West Sugar Company. He testified that he was a casual employee of the 1st defendant as from the 12th January, 2009. He was employed as a casual Harvesting Field Assistant on wage pay of Ksh. 66/= per hour and he served in that capacity until 30th July, 2015.

4. He used to report to the harvesting and Transport Supervisor who also assigned him duties and appraised him. He produced the original letters of contract as follows:-

- 12/1/2009;

- 19/3/2009;
- 19/5/2009;
- 14/8/2009;
- 6/10/2010.

Which were produced and marked as PExh.1 (a) – (e).

5. His contract was for 2 months and was renewable. When the management was satisfied with his service, he was offered another contract for 11 months at a monthly wage of Ksh. 32,925.50 which contract was renewable. He made mention of an appointment letter dated 26th July, 2012 which he wanted to produce but counsel objected to its production as it was not on the letter head of the 1st defendant. It was just marked for identification “PMFI -1”.

6. He told the court that on the 9th September, 2009 he harvested sugar cane and delivered the same to the 1st defendant company and was paid his dues see the delivery note dated 9th September, 2009 and the ones dated 11th September, 2009 PExhibits 3 (a) – (f) and the Farmers Final statement dated 15th September, 2009 P. Exh. 4.

7. He again harvested on the 9th October, 2010 and delivered the cane to the 1st respondent see the delivery notes marked 5 (a) – (c) and the Farmers Final Statement dated 18th October, 2010 marked as PExh. 6.

8. He adds that he was given a letter by the chief of Bunyala West location which authorized him to harvest his private sugar cane and deliver it to West Kenya see P. Exhibit 7 the letter from the chief dated 22nd November, 2011. He also produced the letter from the DO which introduced him to West Kenya.

9. The said letter is dated 22nd November, 2011 and was marked as P. Exh. 8. He added that he harvested sugar cane in December, 2011 and delivered to West Kenya Sugar co. as shown on the Farmers Weightment notes P. Exh. 9 (a) – (c) and the Farmers Payment Statements P. Exh. 10 (a) – (c). This was his 3rd harvest the 2nd ratoon cycle and it was paid by West Kenya Sugar Co. Ltd.

10. In December, 2012 he applied for a private field number from Mumias Sugar Co. Ltd to enable him harvest his 4th Sugar cane plantation being the 3rd ratoon cycle. He claims that the allocation was done by word of mouth and that he harvested 12 stacks of sugar cane which were delivered to the 1st Respondent between 30th December, 2012 and 2nd January, 2013. The delivery was done by Agrolyne Hauliers Ltd the transport company contracted by Mumias Sugar Co.

11. He claims to have handed over both delivery notes to the tractor drivers. He claims that another delivery was made by chairman Agricultural Contractors Ltd contracted by Mumias Sugar Co. Ltd. and he handed the delivery notes to the track drivers. The delivery done on 1st January, 2013 was done by Shilvan a Mumias Sugar Co. contracted transporter and he handed over one delivery note to the lorry driver while at the field. The last stack of sugar cane was transported by Channan and he gave the delivery note to the driver of the lorry.

12. He further testified that the delivery notes were given to the Harvesting Sugar Cane Supervisor one Mr. James Sumba. He adds that on the 7th February, 2013 he collected payment statements from Outgrowers Development Section of the 1st respondent for the 12 stack deliveries which totaled 98.26 tonnes worth Ksh. 281,959/=.

13. On 11th February, 2013 he was summoned to the transport office by one DAVID ONYANGO the

Transport Administration Supervisor. He met one Lazarus Odima who accused him of having delivered sugar cane that did not belong to him which allegations he denied. He produced the 12 delivery notes PExh. 11 (a) – (h) and Farmer Final Statement P.Exh. 12. After deliberations on the 14th February, 2013 on the issues raised by Lazarus he wrote his statement.

14. On 15th February, 2013 he went to cash his proceeds at the 2nd respondent offices and was told that his account No. 5071049200 had been frozen by both the defendants. This was the position on the 6th March, 2013. He produced his account statement P. Exh. 13. On the 17th April, 2013 he was summoned to the 1st Defendant's Harvesting Manager Office where his services were terminated, but he refused to sign the termination letter.

15. He claims that on the 9th May, 2013 he was paid Ksh. 232,695/= by cheque which he banked. The cheque is marked as P. Exh. 14. He was also given Farmers Payment Statement dated 2nd February, 2013 which showed that he had delivered 10 stacks of sugar cane weighing 81.52 tonnes equivalent to Ksh. 232,695/=. There were two (2) stacks missing on the statement stacks for delivery notices No. 137030841 and 137030842 for 17.1 tonnes and worth Ksh. 49,234/= which amount was due to him. The statement is marked as P.Exh. 15. He prays for the orders as sought in the plaint.

16. He was cross-examined by Mrs. Wilunda Advocate for the 1st respondent and was referred to PMF1 2 which is the letter dated 26th July, 2012 at paragraph 5 captioned "NOTICE". He explained it as follows: - "If I was involved in misconduct, termination would have been without notice. He further explained why he did not sign the termination notice and reiterated his earlier testimony on the harvests he made and deliveries to the 1st respondent. He maintained that although he was paid by the 1st respondent for the months worked they owed him Ksh. 49,625/=.

17. On cross-examination by Mr. Nandwa for the 2nd defendant, he explained the production of cane he made in his farm and also clarified the acreage of his farm. He added that production is not fixed and that one acre could produce up to 100 tonnes. He clarified that he didn't have contract with the 2nd respondent who were his bankers. He was shown P. Exh. 14 which showed cane payment. He testified that even though the 1st respondent stopped payments he expected the 2nd respondent to pay him.

18. He also blamed the 1st respondent for the deduction of the two stacks and adds that the Ksh. 49,000/= originated from the deducted stacks. He was also shown P. Exh. 13 the statement dated 6th March, 2013 which on the last entry showed available balance of Ksh. 281,579.92. There was nothing on the statement that showed his account was frozen nor any letter from the 2nd respondent telling him the account had been frozen. The plaintiff closed his case by telling the court that after he recorded his statement with Mumias Security Officers no criminal charges were preferred against him.

The defence case.

1st Defendant's case.

19. The 1st defendant called seven (7) witnesses while the 2nd defendant called 2 witnesses DW1 GODFREY IKOMOLE ORUPWA who works for Agroline Couliers who are contracted contractors by the 1st defendant adopted his statement dated 15th March, 2013.

20. He testified that the plaintiff worked for the 1st respondent in the Harvesting Station. His role for Agroline Couriers was to coordinate transportation of cane from farms to the factories in accordance with the 1st defendant's programmes. He also distributed tractors and drivers to the various cane sites. On 30th January, 2013 he sent 5 tractors to Budonga Block 3 next to Private Block 73. Private Block 73 was owned by Daniel Mwitani. Three drivers were allocated to block 3:-

1. Kennedy Okuta.
2. Khayinga.
3. Ndiege.

Two others were allocated to Private 73: (i) Ohaga & (ii) Matengani.

21. He explained that the drivers work was to pick cane from the respective fields and deliver them to the factory. As proof of work done, the farmer would give the driver a delivery note and it would be wrong for any driver to carry a delivery note meant for a field to which he was not sent. He was shown the records for transport section covering 30th January, 2013 for drivers allocated to various fields which captures the names of drivers, block allocated and Delivery Note Number. He added that the Delivery Notes are generated by the 1st defendant and gives to transport companies and it is a clerk who receives the record. The record was marked as DMFI 2 (a) (b) (c) and (d).

22. When cross examined by the plaintiff he explained that they were given a programme for each day a day before like for the 30th January, 2013, the programme was given to them on 29th January, 2013. He further testified that the only farmer who approached him to carry his cane on 30th January, 2013 was James Miano and not the plaintiff.

23. He reiterated his earlier statement on the tractors he dispatched on 30th January, 2013 and that the two (2) tractors whose drivers were Ohaya and Mutengani went to the plaintiff's farm to carry his cane. He further explained that according to DMFI – 2 (d) which is prepared by Agroline Staff Okuta delivered the cane for Block 73 and cane delivery notes are collected on the farm by drivers.

24. DW2 KENNEDY OTIENO OKUTA, a driver with Agroline Hauliers also adopted his statement dated 14th February, 2013 as evidence in this case. He testified that on 30th January, 2013 he was under the supervision of DW1 who sent him to the farm of one Miano Budonga Block 3 Plot No. 24.

25. He loaded his tractors with 2 stakes and was given two delivery notes by Miano. As he went to the factory he was again stopped by a person who resembled Miano who told him that he had been given wrong delivery notes and was given others in exchange. On 15th February, 2013 he was called to the transport office and was told he had not delivered Miano's cane but he explained what had happened whereafter he wrote his statement.

26. On cross-examination by the plaintiff he explained that he delivered Daniel's cane and that the drivers do not sign delivery notes. On re-examination by Miss Wilunda DW2 explained that whenever they miss cane in one field they can be sent to another field.

27. DW3 JAMES SUMBA JUMA, a field assistant with the 1st respondent having worked for five (5) years. He testified that on the 30th January, 2013 he was acting as a supervisor and was supervising operations in 2 farms that of the plaintiff farmer Miano in Budonga Block 3 and Daniel Mwitani's shamba. Budonga 3 produced 16 stacks. There were 6 deliveries on 31st March, 2016 10 from private 73 which produced 12 stacks delivered on 30th January, 2016. He gave Budonga 3 six (6) deliveries on 30th January, 2013 to the farmer.

28. The delivery Notes are used by the farmer to have his cane delivered and the farmer gives the Delivery Notes to the driver. He added that each delivery note has the farmer's name and is signed. On cross-examination by the plaintiff he reiterated his earlier testimony and added that the Delivery Notes are generated in triplicate one copy to the Harvesting Section, one to the transport section and one to the farmer. He also explained that the plaintiff's cane was of CO945 type and Miano's case was EAK 73355 type.

29. Oscar Odhiambo Okello testified as DW4. He is a transport assistant with the 1st defendant company. He adopted his statement as evidence in this suit. His role as transport assistant was to oversee transportation of sugar cane from farms to factory by filling form D with the help of details from the Delivery Note provided by the drivers. The D Notes are prepared by Harvesting Section. He confirmed that he was the one who prepared DExhibit 2 (a) (b) (c) and (d).

30. According to DExh. 2 (a) names of drivers are filled after the driver surrenders the D Notes details of the tractor are also filled and the DNote number. He also explained D Exh. 2(b) and (a) which under item 11 showed the name of the driver as K. Okuta, trailer No. KH 516 and on first trip he transported cane from Sidikho 161 and the 2nd trip was Budanga Private 73.

31. He explained that from DExh. 2, it transpired that K. Okuta was not coming from Budanga Private 73 but from Budanga Block 3 and that the information contained in DExh. 2 (a) (b) (c) and (d) is the primary information on which farmers can be paid.

32. He went further and explained that after weighing cane a ticket is issued showing weight of cane then the case goes to accounts for verification before payment is done. If there is a complaint payment cannot be effected until the complaint is resolved.

33. He added that he was the one who prepared DEx. 2 (a) (b) (c) and (d) based on information provided by the driver. On cross examination he explained that there were 3 DNotes from the plaintiff's field but he didn't know what transpired in the field and on the way.

34. DW5 – James Miano Kariuki a farmer also adopted his statement as evidence in this case. He told the court that he supervised the harvesting of his cane on 30th January, 2013 on Budonga/Field 3 plot 24. 6 stacks were transported by 3 tractors which were driven by:-

i. Keny Okuta – Tractor No. KBH 516 C.

ii. Khanja – Tractor No. KBL 587.

iii. Ndiege – Tractor No. KVL 591.

35. On the 31st January, 2013 another 10 stacks were cut on the same shamba but he did not take down the names of the drivers though he gave the DNotes. After seven days he got an interim statement which showed the DNote and the weight of each delivery plus amount payable.

36. He noticed 2 deliveries (2 stacks) had not been accounted for. He made enquiries from M/s. Agroline Hauliers and was given a statement that showed one Kenneth Okuta was the driver who was supposed to have delivered the cane.

37. He then filed a complaint with the 1st respondent through the zonal manager. On 24th February, 2013 he was informed at a meeting that his 2 stacks of cane had been delivered for the account of the plaintiff. He thereafter recorded his statement. He was paid for all the 16 stacks delivered. He reiterated his statement on cross-examination.

38. DAVID WANJALA JUMA, DW7 worked for the 1st respondent as the Human Resources Investigating officer having worked for 21 years. He investigated the complaint made against the plaintiff which alleged that the plaintiff had interchanged delivery notes for one JAMES MIANO KARIUKI.

39. He received the complaint from the Harvesting and Transport Section. His investigations entailed interviewing and recording statements of the people named. He relied on Transport Form D and Delivery Notes together with his findings were that JAMES MIANO cost Ksh. 65,407.50.

42 On cross-examination by plaintiff he explained that on the 30th January, 2013 12 stacks were harvested, there were 12 delivery notes and plaintiff was to deliver 12 stacks. The 2 stacks delivery for JAMES MIANO KARIUKI were delivered as No. 137030841 – 30 and 137030842 -31 which were meant to be for 10 delivery notes 1307030993 – 45 and 137030094-46 which were for JAMES MIANO KARIUKI. They were part of 12 stacks the plaintiff delivered.

41. He further explained that JAMES MIANO KARIUKI had 16 stacks & 16 delivery notes and only 14 stacks were captured. On JAMES MIANO's statements there were 14 stacks although the statement was not signed. The variety of JAMES MIANO KARIUKI was EAK 73335 and the plaintiff's variety was C.O. 945.

42. He added that JAMES MIANO KARIUKI's cycle was plant cycle and the plaintiff's cycle was third ratoon as indicated on delivery. He also explained that exchange of delivery notes took place along the way. His investigation involved both farming and employment matters. The case was not reported to the police nor did he prosecute the plaintiff. He established that the plaintiff took two (2) stacks of cane which belonged to Miano.

43. On cross-examination by Mr. Nandwa he (DW7) confirmed that the two stacks were paid to JAMES MIANO after conclusion of investigations. Payment was forwarded to the 2nd defendants by 1st defendant. On re-examination by Ms. Wilunda for the 1st defendant, he explained that delivery notes are signed by transport assistant on information provided by the farmer who is transporting cane. In this case he reiterates that Kennedy Okuta Otieno was the driver. He adds that the 1st defendant had policy on dealing with theft and misconduct.

44. DW7 VITRALIS ODERA LIPUKU, the administration manager with the 1st defendant company adopted his statement as evidence in this case. He explained his tasks which includes receiving communication from the legal department. He received a memo dated 7th June, 2015. He produced the plaintiff's letter of appointment DExh. 4 which contained the terms and conditions of this contract. He explained that the period of termination was 1 week but for misconduct, termination was summary without notice. He further explained that the plaintiff was a contracted employee and he signed the contract. He added that the employees dismissal was not unfair.

45. He testified that the plaintiff was dismissed on June, 2013 on the grounds that he was involved in fraud as per the findings by their investigation. He added that he defrauded one farmer JAMES MIANO by taking 2 cane deliveries from him. He added that the company owes the plaintiff his terminal dues but he (plaintiff) has to sign termination letter and clear with the company to get the same.

46. On cross-examination by the plaintiff, he reiterated his earlier testimony and explained that the 2nd defendant was advised not to pay plaintiff. He added that the plaintiff was not issued with letter to show cause, nor warning letter and that he was not suspended as it was a case of gross misconduct. The plaintiff was also not prosecuted. Ms. Wilunda re-examined DW7 who told the court that there was needed to give notice of termination of the contract as seen on clause 5 on summary dismissed. The 1st defendant closed its case at this juncture.

2nd defendant's case.

47. The 2nd defendant called MARTIM MUGAYA NDEGEYO their employee and holder of card No. 20811. He adopted his statement dated 10th August, 2016. He testified that the 1st defendant forwarded to them money to pay several farmers on specific accounts but gave instruction that the plaintiff should not be paid pending some investigation and the second instruction was to remit the monies back to the 1st defendant. They followed the instructions of the 1st defendant and returned the money back to them. He maintained that they didn't owe the plaintiff any money.

48. On cross-examination by the plaintiff DW8 verified the plaintiff's account No. 5071049200 which

was initiated by the 1st defendant for paying farmers. The 2nd defendant closed its case and they all filed and exchanged written submissions.

Submissions and determination.

49. The parties filed their respective submissions which this court has taken time to consider at length. From the pleadings and submissions the following are the pertinent issues which this court will consider:-

1. *Whether the plaintiff's contract was unlawfully terminated;*
2. *Whether the plaintiff is entitled to payment of the dues as prayed in the plaint.*

50. In dealing with the 1st issue, the court finds that there is no dispute on the employment on contract of the plaintiff by the 1st defendant. It has been proved by evidence that the plaintiff was an employee on contract. A letter to that effect has been produced by DW7 being DExh. 4 which letter contained the terms and conditions of the contract. Paragraph '5' of the said of the said letter has been referred to under the head "NOTICE" which reads as follows:-

"The period of notice will be one week on either side although in the event of misconduct on your part the company has a right to terminate your services summarily without notice and pay."

51. It has been alleged and witnesses have testified that the plaintiff was involved in fraud while delivering sugar cane to the 1st defendant. These allegations have been investigated by the 1st defendant internally who called witnesses to prove that there was fraud by the plaintiff.

52. Three months after the investigations the plaintiff was dismissed from his employment contract and payment to him by the 1st defendant through the 2nd defendant stopped. There was no notice to show cause issued to the employee, nor was the employee warned, suspended or prosecuted.

53. The industrial court has now built firm jurisprudence on circumstances within which the employer and employee relationship can be terminated or how the process of summary dismissal can be conducted so as to meet the trick provisions of the law and to avoid making the same invalid.

54. In the case of **Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco Limited Cause No. 74 of 2013**, the Industrial Court held that whatever reason or reasons that arises to cause an employer to terminate an employee, the employee must be taken through the mandatory process as outlined under section 41 of the Employment Act 2007. This Act applies in a case for termination as well as in a case that warrant summary dismissal. The section states as follows:-

"41 (1) subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

55. Section 41 of the employment Act is couched in mandatory terms where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

56. The situation is worse where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.

57. In other words before an employer can exercise the right to terminate the contract of an employee there must be a valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity, once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided based on the representations made by the affected employee.

58. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanisms with due application of the provisions of section 5 (7) (c) of the Employment Act. where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have, would be with regard to substantive issues only.

59. Summary dismissal on the other hand is largely at the instance of an employer. The standard applicable are higher in nature as the same is prone to abuse as the employer is in a more superior position than an employee.

60. Summary dismissal can take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.

61. However, even in cases of serious breach of contract as under section 44 (3) or on committing acts as outlined under section 44 (4) of an employee being absent from work being intoxicated, negligent, abusive, failure to obey lawful orders, criminal arrest or charges, suspect in a criminal case, all these serious acts, such an employee is subject to be treated as under section 41 of the Employment Act 2007 with regard to being accorded a hearing.

62. Under section 43 (2) of the Employment Act 2007 the reason or reasons for termination of a contract are the matters that the employer at the time of termination of contract genuinely believe to exist and which caused the employer to terminate the services of the employee. However these reasons should be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should not be given after the termination has taken effect.

63. The upshot of the above is that the termination of the employment contract of the plaintiff herein was unlawful. He was not given any notice by the 1st defendant as required by law nor was he given a chance to defend himself as the rules of natural justice require. He was never suspended, prosecuted for his alleged crimes or even warned. The "NOTICE" at paragraph 5 of his letter of appointment is illegal because it is against the clear provisions of the Employment Act.

64. In answer to the second issue I do find that the plaintiff is entitled to payment of his benefits for the time he worked for the 1st respondent i.e. Three months' salary and three (3) months' pay in lieu of notice of Ksh. 197,553/=; but he is not entitled to payment of Ksh. 49,232.62 as those were not for his cane proceeds but for proceeds he fraudulently obtained from the 1st defendant.

65. The evidence on recorded proved on balance of probabilities that he committed fraud alleged against him. However he has proved his case on a balance of probabilities that his termination was invalid and thus costs are awarded to him as against 1st defendant but suit against 2nd defendant is dismissed with costs. The court thus makes the following orders. The 1st defendant to pay:-

- a. Three months' salary and three (3) months' pay in lieu of notice of Ksh. 197,553/=;
- b. Costs of the suit
- c. Interest from date of filing suit.
- d. The plaintiff to pay 2nd defendant costs.

SIGNED, DATED and DELIVERED at KAKAMEGA this1ST day ofDECEMBER,..... 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**In person** **for the Plaintiff.**

.....**N/A** **for the 1st Defendant.**

.....**Mukabwa for Nandwa** **for the 2nd Defendant.**

.....**Lilian** **Court Assistant.**