



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 187 OF 2015

JAMES WANJALA MUREKA.....CLAIMANT

VERSUS

NZOIA SUGAR COMPANY.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this case through a Memorandum of Claim dated 20th May, 2015 and filed before court on 9th June, 2015. He seeks a declaration that his suspension and subsequent termination of service is illegal.
2. The Claimant further seeks payment of four months' salary, annual salary increment, salary reimbursement, pension contribution, National Social Security Fund (NSSF) contribution for the four months he was out of work, costs of the suit and interests.
3. The Respondent entered appearance and filed a statement of response to the Claimant's claim dated 29th June, 2015 and filed in court on 6th July, 2015.
4. During the hearing, the Claimant testified in support of his case. He adopted his witness statement of 9th June, 2015 and produced his bundle of documents of even date.
5. The Respondent did not participate in the hearing despite being notified of it through various hearing notices.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent in 1978 as a general labourer. He states that he rose through the ranks to the position of Employment Officer and later in 2009, the head of Agronomy Laboratory.
7. The Claimant states that at the time of termination his grade at the Respondent's Salary structure was MG 6 whose basic entry point was Kshs. 56,000. He avers that his salary rose through annual increment to Kshs. 71,065 and which was his salary at the time of termination.
8. It is the Claimant's case that in the year 2010 upon the promulgation of the 2010 constitution, he together with other employees in the sugar industry, resolved to register a Trade Union to represent the interest of management staff in the industry.
9. The Claimant states that on 27th September, 2011, he wrote a Memo as the Interim Secretary of the proposed union, inviting staff in the sugar sector to a meeting to deliberate on the formation of the union.
10. The Claimant states that on 29th September, 2011, he received a letter from the Respondent Human Resources Manager threatening him with disciplinary action and declaring his intended meeting illegal. The Claimant avers that he cancelled the meeting following threats from the Respondent.
11. The Claimant's further case is that he was sent on suspension and placed on half pay and asked to show cause why disciplinary action should not be taken against him for insubordination and use of insulting language.
12. The Claimant states that he responded to the show cause letter on 5th October, 2011, wherein he responded to the charges levelled against him.

13. The Claimant states that the Respondent terminated his services through a letter dated 14th March, 2012. He states that he lodged various appeals against his termination to the Respondent's Chairman of the Board, resulting in his reinstatement on the 27th June, 2012. The Claimant further states that the letter reinstating him, indicated that he will not be paid for the period he was away during termination. He avers that the Respondent owes him his salary for the four months he was on termination resulting from the reinstatement.

14. The Claimant states that he did not get annual increments since the year 2010, and that his letter to the Respondent on the increments did not elicit a response. He states that while his contemporaries were earning a gross salary of Kshs. 95,000/-, he was stuck at a gross salary of Kshs. 72,000/=.

15. The Claimant states that he was singled out and targeted for victimization on account of exercising his constitutional rights in agitating for the registration of a trade union.

16. The Claimant prays for judgment against the Respondent and that he be awarded the reliefs listed in his statement of claim.

The Respondent's Case

17. The Respondent through its Memorandum of Reply and Defense, denies most of the Claimant's claim.

18. The Respondent states that annual increment is based on the employee's performance and are given on merit and are not automatic.

19. The Respondent states that the Claimant in writing inviting the staff in the sugar sector to a meeting breached company policy and that he sought to undermine industrial harmony and peace within the Respondent's establishment.

20. The Respondent states that the Claimant wrote them a rude letter in response to their cautionary letter of 29th September, 2011, which letter he sent to all the employees of the Respondent as well as posting it in the Respondent's notice boards. The Respondent avers that the Claimant's conduct was inciteful and aimed at provoking industrial disharmony and tension within the Respondent's Company.

21. The Respondent states that it invoked disciplinary measures within its code of conduct by calling upon the Claimant to answer to specific breaches and that it accorded him an opportunity to defend himself. The Respondent further states that the Claimant refused to withdraw the disrespectful letters, resulting in them exercising their right of termination per Section 44 (4) of the Employment Act, 2007.

22. The Respondent states that the Claimant wrote several letters of appeal where he admitted his mistakes and showed remorse resulting in the Respondent's decision to reinstate him. The Respondent states that the reinstatement was conditional upon the Claimant losing some benefits and which conditions the Claimant accepted and is estopped from suing on the basis of conditions that he accepted prior to his reinstatement.

23. The Respondent states that the Claimant was terminated based solely on his failure to abide by the Company code of conduct and ethics and deny that the termination was premised on his union activities.

24. The Respondent states that the termination of the Claimant was lawful and within company policy and labour laws in force in Kenya.

25. The Respondent prays that the Claimant's case be dismissed with costs.

Determination

26. The Claimant having been reinstated to the service of the Respondent where he served until retirement, leaves one issue for determination; which is whether the Claimant is entitled to the reliefs sought.

Whether the Claimant is entitled to the reliefs sought.

27. The Claimant seeks that he be paid four (4) months' salary, being the period he was on termination, annual salary increments, reimbursement, pension contribution, monthly NSSF contribution, costs of the suit and interests.

Four Months' (4) Salary

28. The Claimant's case is that the Respondent should pay him salary for the four months he was on termination and which should have been paid upon his reinstatement.

29. The Respondent's letter reinstating the Claimant, indicated that he will not be paid for the period he was on termination. The Respondent stated in their memorandum of response that the Claimant's reinstatement was conditional on losing some benefits.

30. The condition in the reinstatement letter and for which the Claimant had to accept read as follows: -

"I have read the contents of this reinstatement letter and *commit to abide by the provisions of the Company Policy, Company Code of Conduct and the Company Rules and Regulations.*"

31. It is clear that the Claimant's commitment was in regard to adherence to company policies, code of conduct, rules and Regulations and not an acceptance of the none payment of salary for the period he was on termination.

32. Reinstatement subsequent to a successful internal appeal, has a similar intention of restoring the employee to the actual position they actually occupied or to a comparable post on the basis that no wrong is assignable to the affected employee. An attempt to introduce a clause that denies an employee salary in a letter of reinstatement, is to incorporate an unconscionable term into the contract of employment. **(See Banking Insurance and Finance Union of Kenya v Kenya Commercial Bank Limited, ELRC Cause No. 642 of 2013)**

33. The clause in the reinstatement letter to the effect that the Claimant will not be paid for the period he was away on termination is in my opinion, an unconscionable term. The assertion that the Claimant is estopped from claiming this payment cannot stand as an employee's consent to an unconscionable term of contract is of no legal effect and is hereby quashed and is set aside.

34. The upshot is that the court finds and holds that the Claimant is entitled to payment of four months' salary for the time he was on termination on account of the reinstatement.

Annual Salary Increments and Reimbursement

35. The Claimant's case is that he was not given salary increments owing to his participation in the activities of a trade union. He further states that his contemporaries were earning a gross salary of Kshs. 95,000 while he stagnated at Kshs. 72,000.

36. The only pay advise/pay slip produced in evidence by the Claimant, indicates that his salary is a gross of Kshs. 95,055.00. This does not support his assertion that his earning was either Kshs. 72,000 or below his contemporaries who he stated were earning a similar amount. The claim is unproved and it fails and is dismissed.

37. The reimbursement is claimed on the basis of none remittance of a check-off deductions from the Claimant's salary. It is not clear what the check-off was to cover. The amount has also not been proved to be owing or that the Claimant paid the amount from his own pocket.

38. The Claimant was the burden bearer and has failed to substantiate or prove the claim as against the Respondent and the same fails and is dismissed.

Pension Contribution and NSSF Contribution

39. The pay slip produced in evidence clearly shows that the Claimant was in a Contributory Pension Scheme. The Claim for pension contribution is merited and I order that the same be paid in accordance with the provisions of the Retirement Benefits Act.

40. For the avoidance of doubt, the awards herein are subject to statutory deductions. It then follows that payment of the four months' salary ordered herein, will include deductions to the NSSF which the Claimant can thereafter claim from the Fund.

41. In conclusion judgment is entered for the Claimant against the Respondent as follows: -

- i. Payment of four months' salary at Kshs. 288,000/-
- ii. Payment of Pension Contribution in accordance with the RBA
- iii. Costs of the suit and interest.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3RD DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

N/A for the Respondent

Christine Omollo- C/A