



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 104 OF 2019

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS.....CLAIMANT

VERSUS

MUHORONI SUGAR COMPANY (in receivership.....RESPONDENT

JUDGMENT

1. Chrispine Odhiambo Ochieng (the Grievant) was employed by Muhoroni Sugar Co. Ltd (in receivership) (Respondent) as a Fitter on 11 August 2007.
2. The Grievant joined the Kenya Union of Sugar Plantation & Allied Workers (the Union) and rose through the ranks to become a shop steward and branch chairman.
3. On 29 March 2018, the Respondent served the Grievant with a show-cause notice, and the allegation was set out as insubordination.
4. The particulars were that the Grievant had on 27 March 2018 mutilated an official general notice on factory re-organisation while accompanied with other union officials.
5. The show-cause notice also alleged that the Grievant had posted (union) notices on the Respondent's notice boards on 27 March 2018, urging the staff not to comply with a new shift regime, and on 28 March 2018 asking the employees to attend an unauthorised meeting.
6. The Grievant was instructed to respond within 48-hours.
7. The Grievant responded indicating that the actions in contention were done by the branch secretary.
8. The Respondent suspended the Grievant on half-pay through a letter dated 5 April 2018, to pave way for further investigations and on 19 April 2018, the Grievant was asked to attend a disciplinary hearing on 24 April 2018 accompanied with a representative of choice. The invitation letter was sent through post.
9. On 26 April 2018, the Respondent extended the suspension and the reason given was that the Grievant had refused to accept delivery of the suspension letter or pick up calls. The Respondent viewed the failures as gross misconduct.
10. The letter also requested the Grievant to respond to the new allegations of misconduct within 48-hours.
11. The Grievant responded on 27 April 2018, indicating that he had appeared for the disciplinary hearing on 24 April 2018, but he could not be heard.
12. The Union felt the extension of suspension contravened the provisions of the collective bargaining agreement and it wrote to the Respondent on 27 April 2018 to inform it as much.
13. On 4 May 2018, the Respondent invited the Grievant to appear for a disciplinary hearing on 8 May 2018.
14. The Grievant attended the hearing but it aborted because the Union raised concerns about the participation of the chair of the panel.
15. The hearing was postponed to 10 May 2018 when it proceeded and when an outcome was not forthcoming the branch secretary sought an appointment with the Human Resource Manager through a letter dated 17 May 2018.

16. The request was not responded to. Instead, on 21 May 2018, the Respondent wrote to the Grievant informing him of a decision to summarily dismiss him.
17. The Grievant appealed against the dismissal on 22 May 2018. The Union also sought a meeting with the Respondent's Human Resources Manager on the same day.
18. The Respondent did not accept the invitation for a meeting because the Grievant's appeal was still pending.
19. An appeal hearing was held on 13 June 2018 and on 22 June 2018, the Respondent reduced the summary dismissal to termination of employment with terminal benefits.
20. The Union was dissatisfied, and it reported a trade dispute to the Cabinet Secretary, Labour on 22 May 2018.
21. In a report dated 25 July 2018, the Conciliator made certain findings which included that the offences placed on the head of the Grievant were committed by the branch secretary, the dispute was not handled in good faith by the parties, the Grievant had no past disciplinary history, the Disciplinary Committee and Appeals Committee comprised the same members, no eye witnesses were presented to corroborate the allegations against the Grievant, there was discrimination in handling the Grievant's case and that the real reason why the Grievant was dismissed was on account of union activities.
22. The Conciliator recommended that the Grievant be reinstated back into employment without loss of benefits but with a warning letter.
23. The Respondent did not accept the recommendation and the Union moved the Court on 6 November 2018, alleging unfair termination of employment.
24. The Respondent filed a Memorandum of Response on 6 October 2020, and the Cause was heard on 19 May 2021 when the Grievant testified and on 30 November 2021, when the Respondent's Human Resources Manager testified.
25. The Union filed its submissions on 8 December 2021 and the Respondent filed its submissions on 1 February 2022.
26. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

Procedural fairness

27. The Union asserted that the Respondent did not comply with clause 9(d) of the collective bargaining agreement in extending the Grievant's suspension and that the members of the Disciplinary Committee and Appeals Committee were the same, thus rendering the process unfair.
28. It is correct that the Respondent did not secure the agreement of the Union before extending the Grievant's suspension, but in the view of the Court, that by itself did not render the process unfair.
29. The inference which the Court can make from the failure to consult the Union is to agree with the Conciliator that the Respondent did not act in good faith while handling the case against the Grievant.
30. On the question of bias or conflict of interest, the Court has looked at the minutes of the disciplinary hearing and those of the appeal hearing.
31. Save for the acting Human Resources Officer, the members of the panels were not the same.
32. The Grievant was issued with a show cause notice, he was requested to respond and thereafter he was invited to an oral hearing during which he was accompanied by union officials.
33. The Court finds that the Respondent complied with the procedural fairness requirements as set out in sections 35(1) and 41 of the Employment Act, 2007.

Substantive fairness

34. By virtue of sections 43 and 45 of the Employment Act, 2007, the Respondent was required not only to prove but prove as valid, the reasons for dismissing the Grievant.
35. Although the Grievant faced allegations in 2 show-cause notices, the ultimate reasons given for termination of employment were insubordination (*failing to receive suspension letter and invitation letter to disciplinary hearing until 24 April 2018*) and falsification of dates when he eventually received the 2 letters.
36. To discharge the burden imposed on it, the Respondent called a Human Resource Officer.

37. The witness stated that the Grievant refused to receive the suspension letter dated 5 April 2018, and that he only accepted the letters on 24 April 2018, after the Respondent indicated his disciplinary case would not be heard until he had picked the 2 letters.

38. The witness produced a copy of a delivery book indicating that the Grievant declined to accept a letter on 6 April 2018, at the place of work but promised to collect the same from the records office but he did not collect the same.

39. The delivery book also indicates that the Grievant collected a letter on disciplinary hearing on 19 April 2018 at 4:30pm; the suspension letter on 24 April 2018 at 5.24pm and the letter extending suspension and show-cause letter on 27 April 2018 at 3:13pm.

40. The suspension letter was dated 5 April 2018. The letter inviting the Grievant to appear for a disciplinary hearing was dated 19 April 2018.

41. The person who attempted to deliver the letters in contention to the Grievant was not called to testify. The failure to call him was not explained.

42. Without first hand evidence from the delivery person, the Court finds that the Respondent did not discharge the burden imposed on employers by sections 43 and 45 of the Employment Act, 2007 to demonstrate insubordination or forgery of dates in the delivery book.

43. The Court consequently finds that the termination of the Grievant's employment was not for valid or fair reasons.

Wages during suspension

44. The Respondent did not comply with the terms of the collective bargaining agreement when extending the Grievant's suspension, and the Court finds breach of contract warranting an order that salaries withheld during the period of suspension from 5 April 2018 to date of termination on 22 May 2022 be awarded to the Grievant.

Discrimination

45. The Grievant alleged discrimination in that the union officials (a Mr Apopa) he was alleged to have been with when notices were mutilated was not dismissed.

46. Since the Respondent ultimately terminated the Grievant's employment on other allegations, the Court finds that discrimination in treatment was not proved.

Appropriate remedies

47. The Union prayed that the Grievant be reinstated.

48. 3-years have elapsed since the separation between the Grievant and the Respondent and by dint of section 12(3)(vii) of the Employment and Labour Relations Act, 2007, reinstatement is not available as a remedy.

49. In lieu of reinstatement and considering that the Grievant served the Respondent for about 10-years, the Court is of the view that the equivalent of 10-months gross wages as compensation and terminal benefits in terms of the collective bargaining agreement upon normal separation would be appropriate (the compensation should be computed using the Grievant's February 2018 gross wage, bring the last full month at work).

Conclusion and Orders

50. The Court finds and declares that the Respondent failed to discharge the burden of proving as valid and fair, the reasons for the termination of the Grievant's employment, hence the decision was unfair.

51. The Grievant is awarded:

- i. The equivalent of 10-months gross wages as compensation to be computed using the gross wages for February 2018.
- ii. Withheld salaries during suspension from 5 April 2018 to 21 May 2018.
- iii. Terminal benefits in terms of the collective bargaining agreement in 2018.

52. The awards to attract interest at court rates from date of judgment if not paid within 21-days.

53. Due to the social partnership between the parties, each party to bear own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9TH DAY OF MARCH, 2022

RADIDO STEPHEN

JUDGE

Appearances

For Union Lincoln Aveza, Industrial Relations Officer

For respondent Dickens Ouma, Advocate instructed by Federation of Kenya Employers

Court Assistant Chrispo Aura