



REPUBLIC OF KENYA



KENYA LAW
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**OMEGA v KIBOS SUGAR & ALLIED INDUSTRIES LTD (Cause
159 of 2016) [2022] KEELRC 11 (KLR) (4 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 11 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 159 OF 2016**

S RADIDO, J

MAY 4, 2022

BETWEEN

JUSTUS DENNIS OMEGA CLAIMANT

AND

KIBOS SUGAR & ALLIED INDUSTRIES LTD RESPONDENT

JUDGMENT

1. Justus Dennis Omega (the Claimant) brought forth this suit vide a Memorandum of Claim dated 30 May 2016, seeking the following orders:
 - i. a declaration that the termination of the Claimant's services was illegal, unlawful, and wrongful.
 - ii. An order directing the Respondent to pay the Claimant as itemised in paragraph 13 herein totalling kshs 455,000/-.
 - iii. Interest on (ii) above as from October 2013 till payment in full.
 - iv. Costs of the suit
2. The Respondent filed a Response on 4 November 2016, and the Cause was heard on 2 December 2021 and 14 December 2021. The Claimant and the Human Resources Manager with the Respondent testified.
3. The Claimant filed his submissions on 14 March 2022 and the Respondent on 21 March 2022.
4. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment



Procedural fairness

5. The Respondent suspended the Claimant through a letter dated 26 October 2013. The letter set out the allegations against the Claimant and requested him to make a written response.
6. The Claimant responded on 29 October 2013 and, on 4 March 2014, appeared for an oral hearing. The Claimant was accompanied by a witness and a Union official during the hearing. However, the Claimant and his witness walked out of the hearing.
7. The Respondent gave written notice of contemplated disciplinary action to the Claimant. He was informed of the allegations to confront and was instructed to make a written response which he did.
8. The Respondent later called the Claimant to an oral hearing, and he attended accompanied by a union official and his brother, but the hearing was aborted because he walked out.
9. An employee is under a common law obligation to cooperate with the employer during a disciplinary hearing. The Claimant was afforded an opportunity to be heard, but he snubbed the last opportunity.
10. The Court finds that the Respondent was in substantial compliance with the requirements of procedural fairness.

Substantive fairness

11. In terms of sections, 43 and 45 of the *Employment Act*, 2007, an employer should place before the Court valid and fair reasons to justify the decision to terminate an employee's contract.
12. The reason given for the termination of the Claimant's employment was involvement in the theft of scrap metal.
13. To discharge the burden of justifying the reason, the Respondent called its Human Resources Manager to testify.
14. The witness adopted his filed statement and produced documents.
15. During cross-examination, the witness stated that the Claimant was suspended on suspicion of engaging in theft of company property and that as the Human Resource Manager, he received complaints of theft of spare parts and factory machines, and he summoned the Claimant as the items were hidden in the bagasse section which was under his control.
16. Despite highlighting the allegations of theft in the suspension letter(s), the Respondent did not put before the Court any other evidence of theft in the factory.
17. The person who informed the witness of the theft was not called to testify, and the failure to call him was not explained.
18. The Respondent did not equally provide any proof that it reported the theft to the police for further action.
19. It is trite law that the onus of proving or justifying the reasons for dismissal lies with the Employer.
20. In the case of *Bamburi Cement Limited vs. William Kilonzi* (2016) eKLR, the Court of Appeal expressed itself as follows on the nature of proof required:

The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5), the burden of proving that



the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing..... The test to be applied is now settled. In the case of the Judicial Service Commission vs. Gladys Boss Shollei, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in *Mc Kinley vs. B.C.Tel. (2001) 2 S.C.R. 161*

Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

21. In the present case, the Respondent has not proven on a balance of probability that the Claimant was involved in a theft. The description of the property the Claimant is alleged to have stolen is not given, and there is no corroborating evidence from any other worker in the bagasse section.
22. Given the foregoing, the Court finds that the Respondent did not prove the validity or fairness of the reason for the termination of the Claimant's employment.

Compensation

23. The Claimant worked for the Respondent for 7 years. In consideration of the length of service and circumstances of termination, the Court is of the view that the equivalent of 3-months of gross wages as compensation would suffice.

Salary in lieu of notice

24. The Respondent offered the Claimant 1-month pay in lieu of notice.

Breach of contract

Leave allowance and accrued leave

25. The Claimant sought Kshs 35,000/= as unpaid leave allowance and Kshs 35,000/= as accrued leave for 2 years.
26. The general law of employment does not provide for the payment of a leave allowance. The Claimant did not disclose the source of the prayer for this head of the claim, and relief is declined.
27. The Claimant did not also disclose whether he applied for leave and was denied or whether the leave was accrued with the Respondent's approval.
28. Considering the provisions of Section 28(4) of the *Employment Act* and that the Respondent offered the Claimant accrued pro-rata leave, nothing turns on this head of the claim.

Unpaid salary from October 2013 to April 2014



29. The Claimant sought Kshs 122,500/- under this head of the claim, and he contended that he was not at work of his volition from the 26 October 2013 to the 28 March 2014 when he got a letter of termination.
30. To support the head of the claim, the Claimant testified that at the end of the 21-days suspension, he went back to work but was told to go away and that he later on, through his advocate, wrote a letter to the Respondent inquiring why the suspension had taken so long.
31. However, a cursory look at the letter shows that it is a demand letter and not an inquiry on suspension or when to resume work.
32. The Claimant did not provide his labour for the period in contention, and the Court declines to allow this head of the claim.

Conclusion and orders

33. From the above, the Court finds and declares that the termination of the Claimant's employment was not for valid or fair reasons.
34. The Claimant is awarded:
 - (i) Compensation Kshs 52,500/-.
35. The Respondent to pay the dues outlined in the letter of termination if the same were not paid
36. The Claimant to have costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 4th day of May 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant DOE Anyul & Co. Advocates

For Respondent Onsongo & Co. Advocates

Court Assistant Chrispo Aura

