Kenya Union of Sugar Plantation and Allied Workers v Kibos Sugar and Allied Industries Ltd (Employment and Labour Relations Cause 98 of 2019) [2022] KEELRC 12882 (KLR) (12 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12882 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

EMPLOYMENT AND LABOUR RELATIONS CAUSE 98 OF 2019

S RADIDO, J

OCTOBER 12, 2022

BETWEEN

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

AND

KIBOS SUGAR AND ALLIED INDUSTRIES LTD ..... RESPONDENT

JUDGMENT

1. On September 12, 2017, Kibos Sugar & Allied Industries Ltd (the respondent) issued (a) show cause notices to Paul Chika Alaro (1st grievant) and Stephen Owino Odinga (2nd grievant), and the allegations were maliciously causing a breakdown at the boiler by stopping an ID fan.

2. The grievants were requested to make a written responses within 48 hours. The grievants responded as requested.

3. On or around December 1, 2017, the grievants were charged with offences of malicious damage to property and criminal negligence.

4. The respondent then terminated the grievants' contracts through letters dated December 15, 2017.

5. Attempts to resolve the dispute at the parties own level failed, and on February 7, 2018, the Kenya Union of Sugar Plantation & Allied Workers (the union) reported a trade dispute to the cabinet secretary, labour.

6. The dispute was not resolved at conciliation, and the union moved to court on October 30, 2019, alleging unfair termination of employment and breach of contract.

7. The respondent filed a response on February 17, 2021.

8. On February 21, 2021, the court directed the county labour officer to conciliate the dispute, and he filed a report with the court on March 20, 2021.

9. In the report, the labour officer found that the termination of the employment of the grievants was unfair because the respondent had failed to prove its case beyond a reasonable doubt.

10. Proof beyond a reasonable doubt applies in criminal cases and not cases of a civil nature. The labour officer, therefore, based his conclusions on the wrong legal principles and the court will not consider the recommendations.

11. The cause was heard on March 24, 2022 and June 2, 2022.

12. The grievants, a human resource manager and electrical engineer with the respondent testified (the respondent purported to file another response on June 13, 2022. Since the response was filed after the close of the respondent's case and without leave, the court expunges it from the record).

13. The union filed its submissions on July 18, 2022. the respondent filed its submissions on July 15, 2022.

14. The court has considered the pleadings, evidence, and submissions.

Breach of contract

Underpayment of wages

15. Despite seeking relief on underpayments of wages in respect of the 1st grievant, a basis for such relief was not set out in the memorandum of claim.

16. Concerning the 2nd grievant, the union asserted that he was earning a basic salary of Kshs 13,250/- and house allowance of Kshs 1,987/50, while the collective bargaining agreement in place at the material time provided for a basic salary of Kshs 15,986/25.

17. The 2nd grievant was a feed water pump attendant. A copy of his pay slip for October 2017 indicates a basic salary of Kshs 13,250/- and a house allowance of Kshs 1,987/-.

18. The respondent admitted that the grievant was earning the salary pleaded.

19. A copy of the collective bargaining agreement provided for minimum remuneration as contended by the union. But the union did not disclose to the court the period for which the 2nd grievant was underpaid.

20. The court will, therefore, only allow this head of the claim for the period reflected in the payslip, the month of October 2017.

Accrued leave

21. The union did not disclose the accrued annual leave owing to the 1st grievant by the time of separation. The termination letter indicated that the grievant had utilised all his annual leave days. Considering that the union did not lay an evidential basis or rebut the contention in the dismissal letter, the court will decline to allow this head of the claim for the 1st grievant.

22. The 2nd grievants letter of termination of employment indicated that he was due annual leave for 2016/2017 but that the same had been withheld on account of pay in lieu of notice for desertion.

23. The respondent did not counterclaim for breach of contract on the part of the 2nd grievant, and the court will find in favour of the grievant.

Unfair termination of employment

Procedural fairness

24. The grievants were issued with show cause notices dated September 12, 2017. The notices outlined the allegations against the grievants and called on them to respond in writing within 48 hours.

25. The grievants responded, and on December 4, 2017, the respondent wrote to them, inviting them to attend oral hearings on December 8, 2017.

26. The grievants denied receiving the invitation letters, but the respondent asserted that since they were not reporting to work by that time, the letters were sent through their postal addresses.

27. The grievants nevertheless conceded the letters were served upon the union.

28. Although the respondent did not allow the grievants to make oral representations, considering that they made written representations, the court finds that the respondent was in substantial compliance with the statutory requirements of procedural fairness.

Substantive fairness

29. By dint of sections 43 and 45 of the *Employment Act*, 2007, the employer has the burden of not only proving but proving as valid and fair the reasons for terminating an employment contract.

30. The 1st grievant's contract was terminated on an allegation of malicious stoppage of an ID fan leading to damage and loss.

31. To discharge the burden of proving the validity and fairness of the termination of the contract of the 1st grievant, the respondent called an electrical engineer who was on inspection duties at the boiler area on September 6, 2017.

32. The engineer testified that on the material day, at around 1.40 pm, while on inspection duties in the boiler area, he saw the 1st grievant standing next to the emergency stop button and that soon thereafter, the boiler plant stopped working.

33. The witness stated that at the material time, the 1st grievant was with the 2nd grievant and that he approached them and inquired what they were doing.

34. The witness further stated that technically, it is very rare for a boiler to stop operating unless there is an emergency breakdown. He also testified that the fan couldn't have tripped without human intervention.

35. The evidence by the respondent's engineer that it was rare for the boiler to stop without any intervention was not controverted. The testimony remained unshaken.

36. It is not in dispute that the ID fan stopped. No plausible explanation for the stoppage was given. The grievants were sighted in the boiler room at the time in question, and there was evidence that trouble had been brewing at the time because of non-payment for overtime work. It is probable that the machine was stopped through deliberate human intervention. Only the grievants were on site.

37. The court is satisfied that the grievants interfered with the boiler system causing the damage and loss and that the respondent had valid and fair reasons to terminate their contracts.

38. The respondent gave another reason for the termination of the employment of 2nd grievant. This was desertion of duty.

39. It is not in dispute that the respondent involved the police, that the grievants were interrogated on September 9, 2017, and that the 1st grievant was arrested on December 1, 2017 and was charged with the 2nd grievant (in absentia).

40. The 2nd grievant was not, however, arraigned in court. In his written witness statement, adopted as part of the evidence, he stated that he opted not to go to the police station, fearing arrest.

41. The court finds it more probable that the 2nd grievant never reported back to work after November 30, 2017, fearing arrest by the police. He was in breach of contract by not appearing at work.

42. Before concluding, the court notes that there was no material placed before it that the parties had exhausted the alternative dispute avenues outlined in part VIII of the *Labour Relations Act* (no certificate of unresolved dispute).

Conclusion and orders

43. The court finds the claims for unfair termination of employment without merit, and the same is dismissed.

44. The court also finds that the 1st grievant was not underpaid and had no accrued leave. These heads of the claims are dismissed.

45. The court further finds and awards the 2nd grievant:

    i. Underpayment of wages for October 2017.

    ii. Accrued leave.

46. The respondent to compute the awards in paragraph 44 above and pay the same within 30 days, in default, the awards to attract interest at court rates from the date of judgment till payment in full. Due to the social partnership between the parties, each party bears own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 12TH DAY OF OCTOBER 2022.

RADIDO STEPHEN, MCIArb

JUDGE

Appearances

For the Union Mr Aveza, Industrial Relations Officer

For Respondent Mr Onsongo, instructed by Onsongo & Co. Advocates

Court Assistant Chrispo Aura/Wycliffe