



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 80 OF 2017

GODFREY JUMA NYATIGI.....CLAIMANT

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 29/5/2010 by the claimant seeking the following reliefs

- (a) Reinstatement of employment.
- (b) Payment of terminal benefits including:-
 - i. One month salary in lieu of notice Kshs.32,200
 - ii. 19 days prorata leave Kshs.20,393.35.
 - iii. Severance pay for the period 2001 to July, 2009 at 23 days per year Kshs.173,380.
- (c) Responsibility allowance of 1800 per month – Kshs 1,800.
- (d) Leave travelling allowance at Kshs1,200 per annum Kshs.1,200.
- (e) 2 days salary for July, 2008 – Kshs.2,140.7.
- (f) 2 days house allowance July, 2008 at 4,200 Kshs.161,50
- (g) Annual bonus of 50,100 basic salary per year Kshs.14,000.
- (h) Travelling allowance upon termination from West Kenya to Bondo Kshs.20,000
- (i) Travelling expenses from Bondo to Kakamega to attend Labour meetings 4 times – Kshs.2,400.
- (j) In the alternative to reinstatement compensation for unlawful termination.

3. The respondent filed statement of defence on 3/1/2011 in which the claim is denied and claimant put to strict proof. The respondent, however admits having employed the claimant in 2001 and that his services were terminated by a letter dated 2/7/2008.

4. The claimant (C.W.1) testified that he was now employed by Kwale Sugar Company at the Coast.

5. That he filed the suit upon being terminated from employment. That he relied on the particulars of claim in the statement of claim and the documents attached thereto. C.W.1 testified further that the claim was considered by the Labour office and C.W.1 adopts the recommendations of the Labour Officer in the reconciliation report marked “H” as his evidence in chief. That the Labour Officer recommended that the respondent to pay him Kshs.654,0855. That he was only paid Kshs.31,063,90 out of the recommended sum . That he now claimed the balance of Kshs.581,580.25. That the amount was calculated on 4/5/2009. C.W.1 added that he no longer wished to be reinstated to his job but he should be paid salary for the days the respondent has been in default to date at Kshs.32,200 per month.

6. That C.W.1 be given a Certificate of Service. C.W.1 also prayed for interest and costs of the suit.
7. Under cross-examination C.W.1 stated that he was employed as a production supervisor and later became Production Superintendent following internal interview. That he also acted as Engineering Superintendent though he was not an engineer.
8. That his work was to ensure juice produced was of high quality. That he was employed in 1995 and was declared redundant in the year 2000. That he was recalled in 2001 and worked till 2/7/2008 when he was terminated without notice for services not required. That he earned 32,200 at the time. That he got the current employment in the year 2014. That he was pensionable from the year 2007 and was now 55 years old. That he was paid pension due since termination. C.W.1 states that he accepts the proposal by the labour officer though he wished to be paid Kshs.3.6 million earlier.
9. R.W.1 Duncan Elphas Aswano testified that he was the Human Resource and Administration head and was employed by the respondent in May, 2019.
10. That the claimant worked for the respondent from 1995 to the year 2000 and was declared redundant. That the claimant was re-employed in the year 2001 as a Juice treatment supervisor until the date of separation on 2/7/2008. That the claimant was again declared redundant as there was no more work for him.
11. R.W.1 relied on list of documents filed on 13/1/2011. R.W.1 also relied on the demand letter produced by the claimant.
12. R.W.1 testified that the claimant was paid full benefits in terms of Section 40 of the Employment Act, 2007. The computation is dated 17/7/2008. He was paid Kshs.119,537 which included salary for days worked; house allowance; Accrued Leave; Notice period and Severance Pay calculated at 15 days salary for each complete year of service.
13. That the gross payment had deductions made to it and the claimant received net payment. That the Clearance Certificate indicate the payment deductions were for P.A.Y.E Kshs.10,320; Advance given to C.W.1 Kshs.8,500; Sacco Loan Kshs.27,242.00; Net paid was Kshs.31,0083.90. The document is before Court. That the claimant had initially rejected the payment but he later accepted the same. R.W.1 stated that a Conciliation report was filed by District Labour Officer Kakamega and it deals with all the issues settled in the final dues. That annual bonus was not paid since that was at the discretion of the company. That the Labour Officer recommended 12 months salary in compensation for the termination which the respondent rejected as it was not deserved.
14. Under cross-examination R.W.1 insisted that the Claimant was declared redundant and was paid all dues in terms of section 40 of the Employment Act, 2007. R.W.1 admitted that the letter of termination dated 2/7/2008 indicated reason for termination to be "service no longer required" and that redundancy was not mentioned.
15. R.W.1 admitted also that the Labour Officer found that the termination was unprocedural and unfair. R.W.1 stated that the claimant should have requested for travel allowance upon termination. That it was paid at the discretion of the company. That bonus was paid at the discretion of the company but based on performance also. That the claimant has not produced documents to show he was entitled to the bonus. That the deductions made from the terminal benefits were monies lawfully owed by the claimant.
16. R.W.1 stated that the claim has no merit and it be dismissed with costs.

Determination

17. It is common cause that upon termination of employment by the respondent on 2/7/2008 the claimant reported the dispute to the Kakamega Labour Office and conciliation took place between the parties.
18. That the parties agreed on the terminal benefits payable to the claimant in term of Section 40 of the Employment Act, since the respondent stated that the claimant had been declared redundant.
19. It is also common cause that a sum of Kshs.119,532 gross payment was paid pursuant to the reconciliation by the parties and upon deduction of monies owed by the claimant to 3rd parties and Statutory deductions the claimant received a net payment of Kshs.31,063.90.
20. The claimant did not disclose these details in the Statement of Claim and simply said he was paid Kshs.31,063.90 and was owed a balance of Kshs.581,580.25 which according to him included 12 month salary in compensation for the unlawful termination.
21. The respondent admitted that it did not pay compensation because the declaration of redundancy was lawful.
22. The claimant produced the Clearance Certificate dated 3/7/2008 reflecting the full payment made to in the sum of Kshs.119,577.90 and a net of Kshs.31,063.90 pursuant to a redundancy settlement.
23. The claimant in his testimony did not adduce sufficient evidence to demonstrate that the termination of his employment was wrongful as is required of him under Section 47(5) of the Employment Act, 2007.
24. P.W.1 on the other hand adduced credible evidence that the claimant was first employed in 1995 and worked for the respondent until the year 2000 when he was declared redundant.
25. That the claimant was recalled in the year 2001 and was again declared redundant on 2/7/2008 since the work he did had diminished.

There is no evidence that the claimant's employment was terminated for misconduct. The use of the words "*services no longer required*" was explained by R.W.1 to have been an indication that the work done by the claimant was not available at that time hence the declaration of redundancy.

26. Indeed in accepting the terminal benefits that included severance pay for each completed year of service, the claimant tacitly admitted that he had been declared redundant. The matter was duly reported to the Labour Office which office ensured all terminal benefits were paid to the claimant, including one month salary in lieu of notice paid to the claimant.

27. It is the Court's finding that the respondent had a valid reason to terminate the employment of the Claimant.

28. R.W.1 admitted that the claimant was entitled to travel allowance upon request. This was not paid at the time of termination. The Court therefore awards the claimant Kshs.20,000 being travel allowance from West Kenya Sugar to Bondo upon termination.

29. Other claim for bonus pay was not adequately proved and is disallowed.

All other terminal benefits set out under paragraph 6 of the Statement of Claim were taken care of in the settlement at the labour office and are disallowed.

30. The respondent did not follow the strict procedure for redundancy set out under Section 40 of the Employment Act, in that it did not give the claimant one month prior notice before declaring him redundant. The required notice was also not sent to the Labour Office as is required by the law. The reasons for the redundancy were not clearly set out in the letter dated 2/7/2008. Though the respondent has a valid reason to declare the claimant redundant from the testimony of R.W.1 the respondent did not follow a fair procedure.

31. The Court awards the claimant three (3) months' salary for the unprocedural declaration of redundancy in the sum of Kshs.31,063.90X3 – 93,191.70.

32. In the final analysis judgment is entered in favour of the claimant against the respondents as follows:

(a) Kshs.20,000 travelling allowance upon termination.

(b) Kshs.93,191.70 being 3 months compensation for unprocedural termination.

Total Award: 113,191.70

(c) Interest at Court rates from dated of judgment till payment in full.

(d) Costs of the suit.

Dated and delivered at Nairobi this 28th day of January, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Mwamu for Claimant

M/s Ashitiva for Respondent

Chrispo: Court clerk.