



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**CAUSE NO. 69 OF 2017**

**(FORMERLY KISUMU ELRC CAUSE NO. 137 OF 2016)**

**KENNEDY KIM MOGAKA.....CLAIMANT**

**VERSUS**

**MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 25/5/2016 seeking the following reliefs:-

- (a) Lost earnings during suspension between November, 2015 to January 2016 at Kshs.91,089 per month in the sum of 273,267.36.
- (b) General damages for false arrest and imprisonment and breach of his rights to privacy, human dignity by way of forced and involuntary medical testing for alcoholic contents.
- (c) Compensation for unlawful and unfair termination.
- (c) One month salary in lieu of notice.
- (e) Costs and interest.

2. Respondent filed a statement of defence on 17/1/2016 in which the employment of the claimant as a Distillation Technician Grade C on 23/2/2012 is admitted. The monthly salary of Kshs.91,089.12 is also admitted.

3. The rest of the claim is denied and the claimant put to strict proof thereof.

4. C.W.1, the claimant testified under oath and told the Court that he lived in Kitale and that he worked for the respondent until date of termination. The claimant relied on particulars of claim in the statement of claim and annexures thereto as his evidence.

5. That the Claimant on 1/2/2016 received a letter of termination for being drunk at work and having one (1) litre of alcohol in his possession.

6. C.W.1 testified that during the process of distillation, he and others did organoleptic test to ascertain the quality of liquor produced. That he liaised with the laboratory in this regard. That he smelt and tested samples. That he got intoxicated by laboratory odour. That he did not drink alcohol and that he was maliciously victimized. C.W.1 denied he had alcohol content of 176.6 stating that that test was for a driver and not himself. C.W.1 stated that he was not tested. C.W.1 stated that he was suspended on ½ pay from 6<sup>th</sup> November, 2015 to February, 2016. That he was given a Show Cause letter but was not given a hearing. That he just received a letter of termination.

7. That he was taken to the police by Security guards of the respondent where he was kept overnight and no charges were preferred against him. The claimant prays that the suit be allowed in terms of the prayers set out therein.

8. Under cross-examination the claimant stated that he has suffered loss and damage. He now owes Barclays Bank Kshs.1.5 million. That he was not given opportunity to be heard. That he had responded to the show cause letter in writing but was not called to a hearing. The claimant admitted that he had apologized to the production manager for misconduct in his response to the Show cause letter dated 6/11/2015. The claimant admitted the alleged misconduct in the response. The claimant told the Court that he admitted the misconduct under protest. The claimant told the Court that he was aware he was not supposed to drink at work.

9. The claimant admitted that he had a previous record of consumption of alcohol prior to this date. The claimant also admitted that he had been subjected to alcohol therapy to clean up his system. That he was given time to clean up and return to work. The claimant stated that he was in a rehabilitation centre between 3/12/2015 to 3/3/2016. That his employment was terminated during that period. The claimant stated that the duress came from his addition to alcohol. The claimant also admitted under cross-examination that he was tested for alcohol at the medical Laboratory. The claimant stated that he got addicted because of working and conducting organoleptic tests at work. That they used to taste and smell alcohol, hence the addiction.

10. That the termination was not lawful and the suit be allowed.

11. The respondent did not call any witness to defend its case despite being given opportunity to do so by the Court. The facts adduced by the claimant therefore remain uncontradicted.

12. The issues for determination are:-

(i) Whether the respondent had a valid reason to terminate the **employment of the claimant.**

(ii) Whether a case of false arrest and imprisonment had been proved against the respondent

(iii) Whether the rights of the claimant were violated by a forced medical test for alcohol.

(iv) What reliefs if any are available to the claimant.

13. The claimant was suspended from work on half pay from 6/11/2015 to 1/2/2016, the date of termination. The respondent did not testify to support any lawful policy to place the claimant on half pay pending a disciplinary hearing.

14. The claimant has proved on a balance of probability that he was wrongfully placed on half pay between the period 6/11/2015 to 2/2/2016. The Court grants the claimant Kshs.273,267.36 being unpaid salary for the period he was still an employee of the respondent and did not receive his full pay.

15. The Court has carefully perused the notice to Show Cause dated 6/11/2015 to the claimant wherein he was accused of misconduct for being found in possession of one litre of ethanol and that he was drunk.

16. The claimant replied to the said notice to show cause on 6/11/2015 in which he vehemently denied allegations made against him. It was put to the claimant by Counsel for the respondent during cross-examination that the claimant had admitted the misconduct it alleged against him and the claimant appeared to admit that allegation.

17. The Court has however carefully perused the response by the claimant to the Notice to show Cause and nowhere in the letter did the claimant admit to having taken 1 litre of ethanol nor that he was drunk. The claimant did not therefore admit the alleged offence and no disciplinary hearing was conducted against him.

18. The claimant denied being drunk and or having been in possession of ethanol before Court.

19. The respondent failed to call any witness to rebut the testimony by the claimant. The Court finds that the respondent had no valid reason to terminate the employment of the claimant.

20. The Court finds that the nature of work done by the claimant exposed the claimant to alcohol exposure and possible addiction through tasting and smelling of alcohol whilst testing the quality of the same in the distillation process. The testing conducted was referred to as Organoleptic test.

21. There is uncontradicted evidence that the respondent had taken the claimant for rehabilitation since the addiction arose from exposure at work.

22. It was wrong and unfair to terminate the employment of the claimant while he was still at the rehabilitation centre. Indeed the claimant would in an appropriate cause be entitled to damages for wrongful exposure to harmful substance which led to his alcohol addiction which was misconstrued to be misconduct.

23. Accordingly, the Court finds that the termination of the claimant violated sections 43, 44 and 45 of the Employment Act, 2007 and same was unlawful and unfair. The claimant is entitled to compensation in terms of Section 49(1) (c) and 4 of the Employment Act, 2007.

24. In this regard, the claimant was exposed to harmful substance in the course of employment and the same exposure was used to victimize him and termination of his employment. The claimant had served the respondent in a technical position for a period of four years and earned Kshs.91,089.12 at the time of termination.

25. Terminating the employment of the claimant when the respondent had placed him in a medical rehabilitation centre was an aggravating factor. The claimant was placed on half pay for several months and was not compensated for the unlawful and unfair loss of his employment. The claimant suffered loss and damages and suffered financial ruin due to inability to pay his loan at Barclays Bank.

26. The Court has considered the case of **John Rioba Mango –vs- Riley Falcon Security Services Ltd. (2016) eKLR and Janet Nyandiko –vs- Kenya Commercial Bank Limited (2017) ekLR** to find this an appropriate case to award the claimant five (5) months' salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.(91,089,12 X 5) 455,455.60.

27. The claims for forced medical testing and false arrest and imprisonment have not been adequately proved and are dismissed.

28. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:-

(a) Kshs.273,267.36 being unpaid salary.

(b) Kshs.455,455 being five (5) months salary in compensation for unlawful and unfair termination.

Total Kshs.728,712.96.

(c) Interest at court rates in respect of (a)) above from date of filing suit till payment in full and from date of judgment in respect (b) above till payment in full.

(d) Respondent to pay costs of the suit.

**Dated and delivered at Nairobi this 28<sup>th</sup> 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 15<sup>th</sup> 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. Mogambi for Claimant

Mr. Sam Onyango for Respondent.

Chrispo: Court Clerk