



**REPUBLIC OF KENYA**

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

**CAUSE NO. 61 OF 2017**

**PHILIP SOITA MAYAVI.....CLAIMANT**

**VERSUS**

**WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 5/3/2015 seeking the following reliefs:

**(a) General Damages for unlawful and unfair termination calculated at Kshs.19,558 for the lost 29 years.**

**(b) Kshs.19,558 being annual leave for the year 2015.**

**(c) One month salary in lieu of notice.**

**(d) Costs and interest.**

2. Memorandum of defence was filed on 22/4/2015 by the respondent denying all Particulars of claim except admission that claimant was employed by the respondent, as a field Assistant with effect from 1/4/2009 and that the claimant's employment was terminated on 23/11/2012 for poor work performance and failing to achieve Cane delivery targets.

3. C.W.1, the claimant testified that he was employed on 1/4/2009 and worked till 30/11/2012 as field Assistant. That he earned Kshs.19,600 at the time of termination. That he worked for a period of 3 years and 8 months. That his work was to give permits to farmers to harvest cane; gave extension work and conducted field days.

4. That on 13/8/2012 a manager Mr. Raman gave C.W.1 a Show Cause letter to explain why cane supply was reducing in the area.

5. C.W.1 testified that he responded to the Show Cause letter and explained that a competitor by the name Butali Sugar Company had opened and the new company paid farmers higher rates for cane than the respondent and so farmers preferred to take cane to Butali.

6. C.W.1 explained that Butali Sugar Company categorised the area as Zone 'A' and their transport costs were lower than the respondent. That the respondent categorised the area as Zone 'B' hence their transport costs were higher. C.W.1 explained that it was difficult to compete with Butali Sugar Company in the circumstances.

7. C.W.1 explained also that Butali Sugar Company gave farmers inputs at lower rates. That this explanation was contained in a written reply dated 13/8/2012.

8. C.W.1 testified that the manager did not respond to his letter and C.W.1 continued working and on 13/11/2012 he received another Show Cause Letter and he gave the same explanation for the low cane received by the respondent.

9. C.W.1 stated that on 21/11/2012, he was transferred to Samitsi from Mache area. That on 30/11/2012 C.W.1 was called by the Human Resource Manager and he received a letter of termination dated 23/11/2012. The termination was for poor work performance in that the cane supply was low.

10. C.W.1 stated that he had no previous warning and was not given notice of termination. That the Manager Mr. Michael M.C. Chumo told C.W.1 to go home.

11. C.W.1 stated that he was paid salary for November, 2012 and his contribution to Ken-India Insurance in the sum of Kshs.49,000.

12. C.W.1 stated that he reported the matter to the Union Secretary but he waited till the year 2014 without any communication hence he filed the suit.

13. C.W.1 stated that his employment was unlawfully terminated because there was no one month notice and Section 41, 43 and 45 of the Employment Act, 2007 was contravened.

14. C.W.1 stated that he used to go on leave but was yet to go on leave for one year and claims one month salary in lieu of leave. That he also claims one month salary in lieu of notice in the sum of Kshs.19,558 and claims damages for the unserved term to the age of retirement in the sum of Kshs.6,806,186. That he was 31 years old at the time of termination and was yet to serve 29 years to retirement at age 60.

15. That in January, 2014, he was employed as an Agriculture teacher at Lugali and was paid Kshs.10,000 per month. That he worked there until the year 2016 and left for non-payment. That he suffered loss and damage; suffered psychological trauma for the loss of support for his 3 children who were still in school. That he had a Certificate from Institute of Science and Technology.

16. Under cross-examination C.W.1 stated that Butali Sugar Company was started in the year 2011. That issue of failing to meet the target arose in the year 2012. That he had a report on the challenges met in acquisition of Sugar. That Robert Saiya was his last Supervisor and he had issues with him though he did not make a formal complaint in writing. C.W.1 stated that he did not meet Management on the issue of targets at all. C.W.1 stated that minutes dated 7/8/2012 were manufactured. C.W.1 admitted that his performance was low but had explanation for it.

17. R.W.1 Denis Adika testified for the respondent and adopted a witness statement dated 10/4/2018 as his evidence in Chief. He produced documents filed on 14/6/2016 as exhibits "1" to '17'.

18. R.W.1 testified that a series of Show Cause letters were written to the claimant. That performance data was presented to him and this led to disciplinary action against him.

19. That the 2<sup>nd</sup> Show Cause letter was issued on 13/8/2012 and he responded on the same day.

20. On 17/8/2012, the claimant was given a caution letter. That after four (4) Months grace period, on 13/12/2011 another Show Cause letter was written to him and on 23/12/2012, the claimants employment was terminated for poor work performance. That the claimant cleared and his final dues were paid to him including one month Salary in lieu of notice in the sum of 9,634; 54 days annual leave Kshs.40,878 less taxation and loans taken by him. That the claimant received a net pay of Kshs.6,364. That the claimant still owe the company Kshs.84,956 for support farming. That the claimant sold his cane elsewhere to avoid clearing the loan.

21. That the termination was lawful and fair and the suit be dismissed.

22. Under cross-examination R.W.1 said the transfer and termination came at the same time but there was nothing wrong with that. R.W.1 insisted that the claimant had issue of performance. R.W.1 insisted that claimant attended meeting on 7/8/12 to discuss his performance. That he was given three months grace period but did not improve.

23. R.W.2 Willis Kudhek also testified for the respondent. He said that he was Agricultural Services Administration Manager. R.W.2 adopted witness statement dated 14/5/2018 as his evidence in chief. R.W.2 stated that the respondent conducted yearly performance review. That the company gave employees time to determine, if they are able to perform. R.W.2 stated that he worked in Zone 'D'. R.W.2 denied that Butali Sugar Company had lower transport rates than the respondent. R.W.2 said transport per tonne was the same across the Board even when Butali Sugar Came. R.W.2 stated that some employees did 81 to 120 tonnes per month but the claimant did 9.81 tonnes only which reflected only one trailer per month. That there was non-performance by the claimant. R.W.2 denied that Butali offered better terms to farmers than the respondent. R.W.2 said that the respondent was the first company to subsidize Cane farming and that the company charged same rate in all zones. R.W.2 insisted that a fair process was followed to allow the claimant to improve his performance but he had failed hence the termination. That even when transferred he did not improve. R.W.1 also stated that the claimant was given opportunity to explain himself and was placed on a 3 months improvement programme. The respondent prays the suit be dismissed with costs.

### **Determination**

The issues for determination are:-

**(a) Whether the claimant's employment was terminated for a valid reason following fair procedure.**

**(b) Whether the claimant is entitled to the reliefs sought.**

24. In answer to issue (a) above the Court has carefully considered the evidence by C.W.1 vis a vis that by R.W.1 and R.W.2 and has arrived at the following conclusion of fact:-

(i) The claimant was employed as a field assistant on 1/4/2009 at a monthly salary of Kshs.9,829.00.

(ii) The claimant worked continuously until 23/11/2012 when his employment was terminated for poor work performance.

(iii) That on 13/8/2012, the claimant was given a Show Cause letter for poor work performance in that the cane supplied in the area he served was below the agreed target.

(iv) That the claimant responded to the Show Cause letter and was given a letter of caution dated 17/8/2012 and was placed on 3 months improvement grace period.

(v) That on 13/11/2012, the claimant received a Notice to Show Cause letter for failing to improve performance during the 3 months grace period given to him.

(vi) On 14/11/2012, the claimant responded to the Show Cause letter giving explanation for his failure to meet the agreed target of Cane tonnage.

(vii) On 23/11/2012 the respondent having considered the response by the claimant terminated the employment of the claimant for poor performance.

(viii) The claimant was paid one month salary in lieu of notice; 54 days salary in lieu of leave days not taken and was also paid terminal benefits by Ken-India insurance.

25. The Court is satisfied that the respondent had genuine grievance against the claimant in that he was not meeting the set targets for cane supply in his area.

26. The respondent demonstrated that other employees in the same position as the claimant met their targets and therefore the explanation given by the claimant for failing to meet his set targets was not genuine.

27. The Court finds that the respondent had a valid reason in terms of Section 43,44, and 45 of the Employment Act, 2007 to terminate the employment of the claimant.

28. Furthermore, the claimant was given opportunity to explain himself by way of two show cause letters to which he had replied. The claimant had also been given a letter of caution and a grace period of 3 months to improve his performance but he had failed in that regard.

29. The Court finds that the respondent used a fair process in terminating the employment for the claimant.

30. The Court finds that the claimant was paid his terminal benefits and had moved on in his life in that he had obtained alternative employment in the year 2014.

31. In the final analysis, the Court finds that the suit by the claimant lacks merit and is dismissed in its entirety.

32. In recognition of the services given to the respondent by the claimant the Court finds this a suitable case for each party to meet their 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**

**Claimant in person**

**M/s Odek for respondent.**

**Chrispo: Court clerk.**