



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 236 OF 2017

ABISALOM OMOLO OPIYO.....CLAIMANT

v

KIBOS SUGAR CO LTD.....RESPONDENT

JUDGMENT

1. This Cause was heard on 29 April 2019 when Abisalom Omolo Opiyo (the Claimant) testified and closed his case and on 3 December 2019 when a Human Resource Manager with Kibos Sugar Co. Ltd (the Respondent) testified.

2. The Claimant filed his submissions on 24 February 2020 while the Respondent filed its submissions on 19 November 2020.

3. The Claimant identified 2 Issues in his submissions

(i) Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful?

(ii) Whether the Claimant is entitled to the relief sought?

4. In its submissions, the Respondent addressed the question of burden of proof.

Unfair termination of employment

5. The Claimant asserted that the termination of his employment on 6 January 2017 was unfair because a fair procedure was not followed. He testified that he was not given a show-cause notice nor granted an opportunity to be heard.

6. As part of his case, the Claimant produced a letter dated 3 January 2017 from the Electrical Engineer to the Payroll Manager through the Human Resource Manager instructing him to terminate the Claimant's employment with effect from 6 January 2017. The reason given was rudeness to his supervisors and failing to report on duty on 1 January 2017.

7. The Respondent's witness denied that the process was unfair. He stated that he had summoned the Claimant for a hearing, but he failed to turn up.

8. He also stated that the Claimant did not respond to a show-cause notice dated 6 January 2017 (produced) or attend a disciplinary hearing despite written invitation dated 14 January 2017 (produced) and that consequently, he wrote a letter dated 9 February 2017 informing the Claimant of the termination of his employment. The letters, he stated were sent through the post office.

9. The Respondent's witness did not explain why the letters were sent to the Claimant through the post office, assuming he was still an employee reporting to work but he admitted that he took note of the letter dated 3 January 2017 from the Electrical Manager directing that the Claimant's employment be terminated.

10. The Electrical Manager's letter indicated that a decision had already been taken to dismiss the Claimant by 3 January 2017. By that date, there was no evidence that the Claimant had been afforded an opportunity to be heard. It appears that his fate had been sealed.

11. Further, the Claimant served the Respondent from 2010 to 2017. Pursuant to section 37 of the Employment Act, 2007, his employment was deemed as converted from (regular) casual (as alleged) into term employment.

12. By dint of section 37 of the Act as read with section 35(1) of the Act, the Claimant was entitled to written notice of termination of employment. No such written notice was produced. Equally, there was no evidence that the disciplinary hearing, if any was conducted, was

preceded by a notice nor the length of the notice.

13. The Court, in consideration of the above-cited provisions of the Employment Act as well as section 47(5) of the Act finds that the Claimant's employment was terminated unfairly.

Compensation and pay in lieu of notice

14. The Claimant served the Respondent for about seven years, and in light of the length of service, the Court is minded to award the equivalent of 6-months gross wages compensation (the pleaded sum was Kshs 15,000/- per month (cumulative)).

15. The Court will also allow a 1-month salary in lieu of notice (Kshs 15,000/-).

Breach of contract

Underpayments

16. The Claimant pleaded that he was underpaid by Kshs 622,473/-. Underpayment of wages occurs in instances where an employer pays wages below the prescribed minimum wage or below the contractually agreed wages.

17. The Claimant anchored his claim on the prescribed minimum wages, but he failed to prove what the prescribed minimum wages for his occupation was during the material time. This head of the claim was not proved.

Unpaid leave

18. The Claimant sought accrued leave for six years, and he computed the same as equivalent to Kshs 120,504/-.

19. Section 28(4) of the Employment Act, 2007 circumscribes the number of leave days which can be carried forward. The Claimant did not suggest that he had the permission of the Respondent to carry forward leave or that he applied for leave and was denied.

20. This head of the claim is, therefore declined.

House allowance

21. On account of house allowance, the Claimant sought Kshs 216,907/-. The Claimant testified that he was paid a daily rate.

22. Daily rates, under the *Regulation of Wages Amendment Orders*, include house allowance. The Claimant was, in the circumstances, not entitled to house allowance.

Overtime

23. The Employment Act does not prescribe minimum working hours but leaves it to the discretion of the parties.

24. The Claimant did not disclose the contractually agreed working hours beyond which overtime pay would become due.

25. If any of the *Regulation of Wages Amendment Orders* which provide for hours of work applied in the Claimant's case and/or to the sector the Respondent operated in, the same was not disclosed to serve as a foundation for this head of the claim. Relief is declined.

26. The Claimant sought to rely on a collective bargaining agreement. An extract of the collective bargaining agreement was filed in Court, but there was no disclosure whether it had been signed and/or registered with the Court to be enforceable.

Transport allowance

27. Evidential foundation to this head of the claim was not produced, and relief is declined.

Certificate of Service

28. A certificate of service is a statutory entitlement, and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

29. From the foregoing, the Court finds and declares that the Claimant's employment was terminated unfairly.

30. The Claimant is awarded

(i) Compensation Kshs 90,000/-

(ii) Salary in lieu of notice Kshs 15,000/-

TOTAL **Kshs 105,000/-**

31. Respondent to issue Certificate of Service within 21 days.

32. Claimant to have costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ms. Atieno/Mr. Odinga instructed by Nyanga & Co. Advocates

For Respondent Ms. Othong/Mr. Que instructed by Onsongo & Co. Advocates

Court Assistant Chrispo Aura