



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 369 OF 2018

KENYA UNION OF SUGAR PLANTATION &

ALLIED WORKERS.....CLAIMANT

v

WEST KENYA SUGAR COMPANY LTD.....RESPONDENT

JUDGMENT

1. This Cause was heard on 2 December 2020. The Kenya Union of Sugar Plantation & Allied Workers (the Union) presented Peter Umbuku Muyaka (the Grievant) to testify. West Kenya Sugar Co Ltd (the Respondent) opted not to lead any evidence.

2. The Union filed its submissions on 27 January 2021, while the Respondent filed its submissions on 25 February 2021.

3. The Issue in Dispute as set out by the Union in the Memorandum of Claim was the unfair, unprocedural and wrongful summary dismissal of the Grievant.

4. On 16 October 2019, the parties caused to be filed a Mediation Agreement which resolved the Issues in dispute save for the question of unfair termination of employment and salary in lieu of notice.

Unfair termination of employment

Procedural fairness

5. The Grievant was dismissed through a letter dated 18 October 2018.

6. The dismissal was preceded by suspension on 19 September 2018 and a show-cause dated 26 September 2018. The show-cause set out the allegations against the Grievant.

7. The show-cause called upon the Grievant to make representations within 48 hours, and he did respond on 29 September 2018. On 2 October 2018, the Respondent extended the suspension, and on 11 October 2018, the Claimant was invited to attend a disciplinary hearing scheduled for 15 October 2018.

8. The invitation informed the Grievant of the right to be accompanied during the hearing, and he attended the hearing.

9. In light of the foregoing, the Court is satisfied that the Respondent complied with the procedural fairness safeguards as contemplated by sections 35(1) and 41 of the Employment Act, 2007.

Substantive fairness

10. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent was expected to not only prove but prove as valid and fair the reasons for the dismissal of the Grievant.

11. The Respondent did not call any witness to discharge the burden on the assumption that the gravamen of the Union's case was that it was challenging the fairness of the dismissal on the sole ground that a dismissal during the pendency of a criminal trial is unfair.

12. The Respondent cited the case of *Hon Attorney General & Ar v Andrew Maina Githinji & Ar* (2016) eKLR to buttress its case.

13. In the view of the Court, the path taken by the Respondent was perilous because of the statutory burden placed on employers by sections 43 and 45 of the Employment Act, 2007.

14. Apart from the obligation, the Union had pleaded at paragraph 10 of the Statement of Claim that the dismissal was unfair because the Grievant had not been afforded an opportunity to make representations.

15. Since the Respondent did not discharge the burden of not only proving but proving as valid and fair the reasons for the dismissal of the Grievant, the Court can only conclude that the reasons were not valid or fair.

Compensation

16. The Grievant served the Respondent from 2005 to 2018, about 13 years. The Court was not informed of the outcome of the criminal charges against the Grievant.

17. Considering the length of service and the circumstances of the separation and that agreement was reached on some of the heads of claim, the Court is of the view that the equivalent of 6-months' gross salary as compensation would be appropriate (gross salary was Kshs 49,873/20).

Salary in lieu of notice

18. The Grievant sought 3-months' salary in lieu of notice anchored on a collective bargaining agreement, but it was not filed in Court.

19. Therefore, the Court will allow the equivalent of 1-month salary in lieu of notice as provided for in the contract (basic salary was Kshs 43,368/-).

Conclusion and Orders

20. From the foregoing, the Court finds and declares that the summary dismissal of the Grievant was unfair, and the Grievant is awarded:

(i) Compensation Kshs 299,238/-

(ii) Salary in lieu of notice Kshs 43,368/-

21. In addition, judgment is entered in favour of the Grievant in terms of the Mediation Agreement as follows:

(i) Accrued leave Kshs 88,237/-

(ii) Earned wages Kshs 3,234/-

(iii) Leave travelling allowance Kshs 2,800/-

(iv) Suspension pay Kshs 29,648/-

Cumulative total **Kshs 466,525/-**

22. Respondent to issue a certificate of service.

23. No order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 17TH DAY OF MARCH 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Union Mr J. Akhonya

For Respondent Mr D. Ouma instructed by Federation of Kenya Employers

Court Assistant Chrispo Aura