



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 218 OF 2016

RITA ACHIENG ONUNGA.....CLAIMANT

v

KIBOS SUGAR & ALLIED INDUSTRIES LTD.....RESPONDENT

JUDGMENT

1. This Cause was heard on 10 July 2017 and 12 July 2018 when Rita Achieng Onunga (the Claimant) and the Branch Secretary of her trade union testified. She then closed her case.
2. Further hearing was on 1 December 2020 when the Human Resources Manager with Kibos Sugar & Allied Industries Ltd (the Respondent) testified.
3. The witnesses adopted their written statements and also produced documents.
4. The Claimant filed her submissions on 27 January 2021, while the Respondent its submissions on 1 February 2021.
5. The Claimant identified the Issues for determination as:
 - (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 reliefs sought?
 - (iii) Who bears the costs of the Claim?
6. The Court has considered the pleadings, evidence and submissions.

Unlawful suspension

7. The Claimant's pleaded case was unlawful suspension from employment and not unfair termination of employment.
8. In her testimony, the Claimant stated that she applied for annual leave on 26 July 2013, which application was approved and that while on leave, she was served with a suspension letter dated 6 August 2013. The letter informed her that the suspension was to facilitate investigations into allegations of sugar theft and that she would be contacted once the Police concluded investigations.
9. According to the Claimant, she never got any further communication, at which point she informed her trade union, and the trade union wrote severally to the Respondent, including on 20 May 2016, but there was no response.
10. Seeing no resolution, the Claimant stated that she sought legal assistance, and a formal demand was written to the Respondent on 6 July 2016. Again there was no response from the Respondent.
11. On the existence of any valid reasons for the suspension, the Claimant testified and produced copies of proceedings in Kisumu Criminal Case No. 423 of 2013 showing that another person had been charged with the alleged theft of sugar.
12. Upon acquittal of the person, the Claimant asserted that she went back to work but was informed by her Manager that her services were no longer required.
13. Contending that the decision was unfair, the Claimant contended that she was not afforded an opportunity to be heard.

14. The Respondent's witness conceded that the Claimant was an employee of the Respondent and that she was one of the suspects in an allegation of theft that occurred in August 2013, which necessitated her suspension.

15. The witness admitted in the written witness statement that he was not conversant with the details of the theft as he was on leave at the material time but that he handled the case upon resuming work from leave but attempts to reach an agreement with the trade union bore no fruit.

16. According to the witness, he got information that the Claimant was out of the country and on that basis, he sent her a dismissal letter dated 7 March 2014 through the post office.

17. Under the common law, *suspension* without pay from work without contractual authority is unlawful (see *McKenzie v Smith* (1976) IRLR 345 and *McClory v Post Office* (1993) IRLR 159). Such suspension would be in breach of contract.

18. The letter suspending the Claimant did not set out the contractual or any other legal authority for the suspension (the Claimant sneaked into the record a copy of a collective bargaining agreement with the submissions, but that was irregular, and the Court will not consider it).

19. The suspension was for an indefinite period. The Court was not informed when the Police concluded investigations, but it appears that a person other than the Claimant was charged with the theft of the sugar, but the Respondent withdrew the charges.

20. The Court finds that the suspension was unlawful.

Unfair termination of employment

21. The Respondent wrote and allegedly posted a dismissal letter dated 7 March 2014 to the Claimant though she denied receiving it. The letter informed the Claimant she would be paid the equivalent of a 1-month salary in lieu of notice.

22. Before the dismissal, it was alleged the Claimant was invited to a disciplinary hearing, but evidence of the invitation was not placed before the Court.

23. Section 41 of the Employment Act, 2007 demands that an employee be accorded an opportunity to make representations before dismissal. There was no evidence from the Respondent that the Claimant was ever called upon to make representations.

24. The Claimant never amended her Statement of Claim to include a cause of action for unfair termination of employment.

25. The cause of action as pleaded was on unlawful suspension.

26. The Court will therefore not venture to make a definitive finding on whether there was unfair termination of employment except to find that the Respondent should make good its promise to pay the Claimant salary in lieu of notice.

Appropriate remedies

27. The Claimant introduced through the submissions reliefs which were not pleaded. The Court will not consider them.

Compensation for unlawful suspension

28. The Court has found the suspension of the Claimant on 6 August 2013 was unlawful. She was on suspension until 7 March 2014.

29. Appropriate relief in the view of the Court would be the salary lost by the Claimant during that period (about 8-months). The grossly monthly salary as of May 2013 was Kshs 13,181/-.

General damages

30. The Court is of the view that general damages would not be appropriate, the Claimant having already been awarded salaries during the suspension.

Conclusion and Orders

31. The Court finds and declares that the suspension of the Claimant was unlawful and awards her:

(i) Salaries during suspension Kshs 105,448/-

(ii) Salary in lieu of notice Kshs 12,000/-

TOTAL Kshs 117,448/-

32. Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 10TH DAY OF MARCH 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ms Nabakka/Ms. Obat instructed by Kuke & Co. Advocates

For Respondent Mr Olel/Mr. Onsongo instructed by Onsongo & Co. Advocates

Court Assistant Chrispo Aura