



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 242 OF 2017

JACK OMEGA OLIECH.....CLAIMANT

v

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

JUDGMENT

1. Jack Omega Oliech (the Claimant) was offered employment as a *Pump Attendant Boiling House* by Kibos Sugar & Allied Industries Ltd (the Respondent) on 13 January 2011.
2. On 9 December 2016, the Respondent notified the Claimant of the termination of his employment, and this prompted the Claimant to institute these legal proceedings alleging that the decision was unfair.
3. The Claimant also alleged breach of contract.
4. The Respondent filed a Response on 24 July 2017, contending that if the Claimant's employment was terminated, then it was lawful.
5. The Claimant joined issue with the Response on 2 August 2017, and the Cause was heard on 14 October 2019 when the Claimant testified and 2 March 2021 when the Respondent's Human Resources Manager testified.
6. Pursuant to Court directives, the Claimant filed his submissions on 23 March 2021. The Respondent filed its submissions on 5 May 2021.
7. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

8. The Respondent issued a show-cause notice dated 15 November 2016 to the Claimant, and the allegation was: *absenteeism on 14 November 2016 and leaving work without permission on 15 November 2016*.
9. The notice requested the Claimant to respond within 24 hours.
10. The Claimant responded on 16 November 2016, stating that he had a doctor's appointment on 14 November 2016. He denied being absent on 15 November 2016.
11. On 17 November 2016, the Respondent suspended the Claimant for 21 days to carry on further investigations.
12. The Claimant replied to the suspension letter indicating that the doctor had changed the appointment date from 12 November 2016 to 14 November 2016.
13. On 1 December 2016, the Respondent invited the Claimant to attend a disciplinary hearing on 5 December 2016. The invitation was copied to the Claimant's Union.
14. The Union responded to the invitation on 4 December 2016, indicating that it would not attend the hearing because the invitation letter did not outline the allegations against the Claimant and because the Claimant had been advised to be accompanied by a union representative who would not be on duty.

15. The Union also requested that the hearing be rescheduled.
16. On 9 December 2016, the Respondent terminated the Claimant's employment and gave him 14 days to appeal. The Claimant appealed on 17 December 2016.
17. The Claimant asserted that he was not afforded an opportunity to make representations before the termination because the Union's request to reschedule the hearing was not responded to.
18. The show-cause notice issued to the Claimant set out the allegations the Claimant was expected to confront.
19. The Claimant was requested to make a written response which he did. He was then invited to a disciplinary hearing which both he and the Union snubbed.
20. The first ground for snubbing the disciplinary hearing was that the allegations were not set out in the invitation letter.
21. The Court finds no merit on this ground. The Claimant was aware that the subject of the hearing was absenteeism on 14 November 2016 and 15 November 2016.
22. The second ground of challenge was that the condition to attend the hearing with a union representative who was not on duty was not reasonable.
23. The Union cited section 55(2)(a) & (b) of the Labour Relations Act.
24. Section 55 of the Labour Relations Act provides for the election of trade union officials, and the Court finds it not applicable.
25. Section 56 of the Act may have been relevant, but it requires that there be in place a recognition agreement providing for a trade union official to represent an employee during a disciplinary hearing.
26. The Claimant did not demonstrate that there was a recognition agreement with the Respondent.
27. The Court, therefore, finds that the Respondent was in substantial compliance with the statutory requirements of procedural fairness.

Substantive fairness

28. By dint of sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to prove and prove that the reasons for the termination of the Claimant's employment were fair and valid.
29. The reason for the termination of the Claimant's employment was absenteeism on 14 November 2016 and leaving work without permission on 15 November 2016.
30. The Respondent did not produce any evidence that the Claimant left work on 15 November 2016. No attendance records were produced.
31. On the absenteeism on 14 November 2016, the Claimant had asserted that he initially had a doctor's appointment on 12 November 2016, but it was rescheduled to 14 November 2016.
32. The Claimant produced a medical card from Kisumu County Hospital dated 8 November 2016.
33. The card does not indicate that the Claimant had an appointment with a doctor on either 12 November 2016 or 14 November 2016.
34. The attendance before the doctor on 14 November 2016 was peculiarly within the Claimant's knowledge, and without any records or evidence that he attended before a doctor as alleged, the Court cannot fault the Respondent's decision.

Breach of contract

Leave for 2015 and 2016

35. The Claimant sought a total of Kshs 33,971/- on account of accrued leave for 2015 and 2016.
36. The Respondent offered to pay the accrued leave in the letter of termination of employment, but it did not indicate the amount.
37. Considering the offer and section 10(3) & (7) of the Employment Act, 2007, the Court will allow this head of the claim.

Conclusion and Orders

38. The Court finds and declares that the termination of the Claimant's employment was fair.

39. However, the Court finds a breach of contract and awards the Claimant:

(i) Accrued leave **Kshs 33,971/-**

40. The Claimant has succeeded only partially. Each party to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF JUNE 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant P.D. Onyango & Co. Advocates

For Respondent Onsongo & Co. Advocates

Court Assistant Chrispo Aura