



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 296 OF 2016

KENYA UNION OF SUGAR PLANTATION

AND ALLIED WORKERS.....CLAIMANT

VERSUS

WEST KENYA SUGAR CO LTD.....RESPONDENT

JUDGMENT

1. The Kenya Union of Sugar Plantation & Allied Workers (the Union) sued West Kenya Sugar Co Ltd (the Respondent) on 4 October 2016, and it stated the Issue in Dispute as:

Wrongful termination of

i. Aggrey Wakhungu Shirandula.

ii. Otari Tom Yeswa.

2. The Cause was heard on 8 May 2018 when the Grievants testified and 17 July 2018, when the Respondent's Human Resources and Administration Manager testified.

3. The Union filed its submissions on 14 April 2021, while the Respondent filed its submissions on 7 April 2021.

4. The Court has considered the pleadings, evidence and submissions.

Nature of 1st Grievant's contract

5. The Respondent employed the 1st Grievant in January 2005. He served the Respondent until May 2014.

6. The Respondent contended that the 1st Grievant was a casual employee paid by the day, and he was free to report or not to report to work.

7. The Grievant had served the Respondent continuously for over 3-months. By dint of section 37 of the Employment Act, 2007, he was deemed as on term contract, and the Court so finds.

Aggrey Wakhungu

Desertion

8. The Respondent asserted that it never terminated the contract of Aggrey Wakhungu and that he stopped reporting to work in early May 2014.

9. The 1st Grievant, however, stated that on 14 May 2014, the Respondent asked him to give a report on elections of loaders he had overseen, which he did and that on 15 May 2014, he was suspended. A copy of a letter dated 16 May 2014 was produced, and it had a subject line: *Problems affecting drivers and reason for being suspended.*

10. Failure to report to work is misconduct that warrants summary dismissal.

11. The Respondent did not demonstrate that it issued a show cause to the 1st Grievant to explain his whereabouts.

12. The 1st Grievant produced a copy of a letter he wrote to the Respondent on 16 May 2014. The letter indicates that the 1st Grievant had been suspended.

13. On the strength of the letter, the Court finds the 1st Grievant's testimony that he was suspended credible, and this discounts the allegations of desertion by the Respondent.

Unfair termination of employment

1st Grievant

14. The Respondent did not issue a show-cause notice to the 1st Grievant as contemplated by section 35(1)

15. of the Employment Act, 2007. No hearing was conducted on the allegations of desertion.

16. The Court can conclude that the Respondent unfairly terminated the 1st Grievant's contract.

Compensation and salary in lieu of notice

17. The 1st Grievant served the Respondent for nearly 14 years, and considering the length of service, the Court is of the view that the equivalent of 8-months gross salary as compensation would be appropriate.

18. The Court will also award the equivalent of 1-month salary in lieu of notice.

Overtime

19. The Union did not provide evidence that the 1st Grievant worked overtime without pay, and relief is declined.

Accrued leave

20. The Union sought Kshs 526,075/- on account of the 1st Grievant's accrued leave over 14 years.

21. No evidential foundation to this head of the claim was laid. Section 28(4) of the Employment Act, 2007 circumscribes how much leave an employee can carry forward. Relief is declined.

House allowance

22. The 1st Grievant was paid using a daily rate.

23. Under the Regulation of Wages Order(s), daily rates include house allowance. Relief is declined.

Otari Tom Yeswa

Procedural fairness

24. The 2nd Grievant was employed by the Respondent in 2006, and on 20 June 2014, the Respondent issued a show-cause letter to him. The allegation was the unauthorised use of an ambulance.

25. The Grievant was requested to respond within 48 hours, and he responded on 25 June 2014.

26. The Court finds that the Respondent was in substantial compliance with the statutory requirements of procedural fairness as envisaged by sections 35(1) and 41 of the Employment Act, 2007.

Substantive fairness

27. The 2nd Grievant was instructed to pick and drop a patient at a hospital. The Grievant was sighted with the ambulance in a place off the route.

28. When asked to explain, he stated that he had diverted from the route at the request of the patient in order to collect money from the patient's relative to purchase drugs. Such a detour was not authorised.

29. In the circumstances, the Court finds that the Respondent had valid and fair reasons to terminate the 2nd Grievant's employment.

Compensation

30. With the findings on validity and fairness of termination of employment, compensation is not available to the 2nd Grievant.

Pay in lieu of notice

31. The Respondent offered the 2nd Grievant a 1-month salary in lieu of notice, and nothing turns on this relief.

Annual leave

32. The 2nd Grievant prayed for Kshs 23,527/- on account of leave for 2014.

33. The Respondent did not produce the records contemplated by section 10(3) of the Employment Act, 2007, and the Court will allow this head of the claim.

Service pay

34. On account of service pay, the 2nd Grievant sought Kshs 100,832/-. A copy of the Grievant's payslip produced in Court indicates that he was a member of the National Social Security Fund and thus not eligible for *service pay*.

Conclusion and Orders

35. The Court finds and declares that the Respondent unfairly terminated the contract of the 1st Grievant and was also in breach of contract.

36. The 1st Grievant is awarded:

i. Compensation	Kshs 192,056/-
ii. Pay in lieu of notice	Kshs 20,876/-
TOTAL	Kshs 212,932/-

37. The 2nd Grievant is awarded:

i. Accrued leave	Kshs 23,527/-
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38. The other claims by the 2nd Grievant are dismissed.

39. The Respondent to issue a certificate of service to the 1st Grievant within 21 days.

40. The Union mixed unrelated causes of action. Each party to bear own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF JULY 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For the Union Mr Akhonya, Industrial Relations Officer

For Respondent Mr Andiwo instructed by O & M Law LLP

Court Assistant Chrispo Aura