



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 143 OF 2015

WALTER AMBITO OTIENO

CLAIMANT

v

CHEMELIL SUGAR COMPANY LTD

RESPONDENT

JUDGMENT

1. Walter Ambito Otieno (the Claimant) sued Chemelil Sugar Co Ltd (the Respondent) on 5 May 2015, alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Statement of Defence on 21 July 2015, prompting the Claimant to file a Reply to the Defence on 27 August 2015.
3. The Cause was heard on 18 July 2018, 19 November 2020 and 10 May 2021. The Claimant and the Respondent's Head of Human Resources testified.
4. The Claimant filed his submissions on while the Respondent filed its submissions on 28 June 2021.
5. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

6. The Respondent issued a show-cause notice to the Claimant on 13 August 2013. The notice set out the allegations against the Claimant and requested him to respond within 48 hours.
7. The Claimant responded on the same day, and he was then invited to attend a disciplinary hearing on 14 November 2013, followed by termination of employment on 2 December 2014.
8. From the foregoing, the Court is satisfied that the Respondent was in substantial compliance with the requirements of procedural fairness as contemplated by sections 35(1) and 41 of the Employment Act, 2007.

Substantive fairness

9. In terms of sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to prove that the reasons for terminating the Claimant's contract were valid and fair.
10. The allegations which were indicated in the show-cause notice were:
 - (a) Raising stores issue notes serial nos 1537151 to 1537183 on behalf of users, thus contravening paragraph 2.38.2.1 of the Finance and Administration Standard Operation Procedures (SOP) manual.
 - (b) Causing the backdate of the stores' issue notes.
 - (c) Issuing goods using delivery notes instead of stores racks after having been binned as the procedure is.
 - (d) Allowing Clerks below you, i.e. Mr Ezekiel Chwanya and Mr Apollo Odongo, who were not on duty and on leave respectively, to sign the issue notes to purport having issued goods to the users with knowledge that they were not on duty.

11. The Respondent termed the acts as forgery warranting summary dismissal.

12. In the letter terminating the Claimant's employment, the reasons given were:

(i) Failed to perform your duties which involved supervising stores operations, including verifying, receiving, storage and issuing. This included being in control of stock movement and ensuring safe custody of stock in the storage.

(ii) Wilfully/intentionally and without authority deleted data from the desktop computer which you knew or ought to have known was relevant recording of stores transactions.

(iii) Falsified stores issue notes by backdating and capturing incorrect particulars, which you confirmed that they could not be verified because of failure of keeping proper records.

13. In an attempt to discharge the burden, the Respondent called its Head of Human Resources, and he produced copies of audit/investigations reports.

14. The reports fingered the Claimant and found that in some instances, he would raise Stores Issue Notes, a function reserved for the user department staff by section 2.38.2.1 of the Standard Operations Procedures.

15. In his written response to the show-cause, the Claimant had also admitted culpability by stating:

It has now come to my attention that what I did has gone against company rules and provisions of employment. I, therefore, request the management to give me a second chance since this is the first time to have committed such a serious crime in my employment.

16. With the Claimant's admission and the audit/investigations reports findings, the Court finds that the Respondent had and has proved there were valid and fair reasons to terminate the Claimant's contract.

17. The Claimant is therefore not eligible for an award of compensation or damages.

18. The Court notes that the Claimant was paid the equivalent of one month's salary in lieu of notice as provided in clause 3 of the appointment letter.

Breach of contract

Overtime

19. The Claimant's contract provided for 44 hours of work spread over the week.

20. Apart from stating during examination-in-chief that overtime worked was not paid, the Claimant did not lay an evidential basis for this head of the claim by disclosing the number of hours he worked during the week beyond the prescribed hours.

21. This head of the claim was not proved.

Underpayment of wages

22. To support this head of the claim, which he computed at Kshs 174,416/-, the Claimant testified that he was evaluated and the salary increased, but the same was not effected.

23. The Claimant produced a copy of the evaluation letter dated 9 July 2013. In the letter, the Claimant's salary was adjusted to Kshs 35,592/- and house allowance of Kshs 12,000/-.

24. In its submissions, the Respondent maintained that the Claimant's salary at the time of separation was maintained at Kshs 30,000/- with a house allowance of Kshs 6,000/-, because he had a disciplinary case.

25. The Respondent did not produce any authority to show that its policies restricted the implementation of salary increments because of a disciplinary case.

26. Copies of the Claimant's payslips for August and November 2014 show that the Respondent did not effect the salary increment.

27. Consequently, there was a monthly underpayment of Kshs 11,592/-

28. The Court will therefore find that the Claimant was underpaid from July 2013 to 24 November 2014 by Kshs 174,416/-.

Salary during suspension

29. The Claimant was informed in the termination letter that he would be paid half-salary during the period he was on suspension, from 13

August 2013 to 23 November 2014.

30. Since the Claimant did not demonstrate that he was entitled to full salary during the suspension, the Court finds this head of the claim was not proved.

Accumulated leave

31. The Respondent informed the Claimant that he had 84.5 accrued leave days amounting to Kshs 99,439/-which would be paid as part of final dues, and a cheque was issued. Nothing turns on this head of the claim.

House allowance

32. The Claimant's contract provided for house allowance, and copies of payslips produced in Court indicated that the Claimant was getting house allowance.

Staff retirement benefits

33. The Claimant did not lay an evidential foundation for this head of the claim, and relief is declined.

Conclusion and Orders

34. The Court finds and declares that the termination of the Claimant's employment was fair and that the Respondent was not in breach of contract save for underpayment of wages which is allowed in the sum of Kshs 174,416/-.

35. The Claimant's submissions were not on record by the agreed timeline, and he is denied costs.

36. The Court regrets it could not deliver the judgment as earlier scheduled due to other official engagements.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 25TH DAY OF NOVEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Ms Odhiambo instructed by Okongo, Wandago & Co. Advocates

For Respondent Mr Oyuko instructed by Amos O. Oyuko & Co. Advocates

Court Assistant Chrispo Aura