



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA
ELR. CAUSE NO. 66 OF 2017
(FORMERLY KSM ELR. CAUSE NO. 111 OF 2016)

ALFRED KIPKOECH KIBET.....CLAIMANT

VERSUS

MUMIAS SUGAR COMPANY LTD.....RESPONDENT

JUDGEMENT

1. By a Memorandum of Claim dated 30th April 2016 and amended on the 7th June, 2019, the Claimant sought the following orders: -
 - (a) A Declaration that the termination of the Claimant's employment by the Respondent was unfair.
 - (b) Payment of Kshs. 2,908.655.78/- being the Claimant's dues.
 - (c) An order for the issue of certificate of service.
 - (d) Costs and interest on (a) and (d).
2. The Claimant further filed his verifying affidavit sworn on the 30th April, 2016 filed with the claim, list of documents and bundle dated 30th April, 2016 produced and marked as Claimant's exhibits 1-9.
3. The Respondent filed response to the claim dated 21st September 2017 , together with witness statement of Immaculate Okite dated 8th September, 2017, witness statement of David Wanjala Juma dated 21st September 2017, witness statement of 21st September 2017 and witness statement of Ababu Moses Ambani of 21st September 2017. The Respondent filed together with its response a bundle of documents under list dated 21st September 2017.
4. The matter was listed for hearing before me on the 27th October 2021. The Respondent was absent. The Claimant had filed affidavit of service indicating that the Respondent had been served in person following the withdraw of its Advocate.

The Claimant's evidence.

5. The claimant was duly sworn in .

He told the court resides in Kwale currently a shift engineer with Kwale Sugar Company. That the Respondent is his former employer from November 2010 when he was first engaged as a management trainee. That he was officially appointed on 17th November, 2011 as Electrical and Instrument Superintendent (exhibit 1). He was confirmed to employment after 6 months by letter of 6th August 2021 (exhibit 2). He was earning kshs 70,000 as a Management Trainee. On confirmation he earned Kshs.80,500/-with some allowance. He produced payslip for January 2016 . As at termination the Claimant was earning gross salary Kshs.177,098.77/. (exhibit 3 at page 19 of Claimant's bundle). There was a job evaluation job group harmonization and he got a letter dated 20th September, 2012 and Management was satisfied with my employment (exhibit 4) .

6. The Claimant told the court that initially he was working under electrical & Instrument Auxiliaries Department and was transferred to work in Ethanol Plant of the company pursuant to a memo (exhibit 5). On transfer he was supposed to act for 6 months and was kept on acting allowance which was 25% of his basic salary. The Respondent terminated his employment stating he had conspired with other

employees to steal. That it was his opinion he was terminated because after acting for over 18 months he wrote a letter to the Human Resource through his boss seeking a clarification to know why he was not confirmed into the position he had been acting in. That he felt he was not getting fair share. (Exhibit 6). That the Company terminated his services because of that letter. The company did not respond to my request directly. That they met with the boss and they said they are working on his promotion. He said that was in his email. That the document was not before court. That he was not aware of investigations. That he only learnt of the allegation against him through the show cause letter dated 18th January, 2016.

7. The Claimant told the court that prior to the show cause letter, he had been called by the Security Officer Mr. Wanjala around 5.00 pm while he was still in his office. The said Wanjala asked if he had gone to Booker Academy and re replied that went there. That Mr. Wanjala then told him he will call later.

The witness produced exhibit 7 being a statement he recorded with security. He was aware a colleague Humphrey Anyagi wrote a statement in the matter. The Claimant told the court there was investigation ongoing (exhibit 8).

The Claimant admitted he knows Wilbroda Apiyo Esala and was aware she wrote a statement against him which he got from his advocate (exhibit No. 9). That he knew Titus Shifwoga (exhibit 10) and Mitdieli Okoth his former colleague (exhibit 11).

10. The Claimant told the court that under the Under Show cause letter the employer said he conspired with Titus Shifwoga & Humprey to take 8 rolls of copper tapes. That he responded to the Show Cause vide letter dated 19th January, 2016 (exhibit 12). He said that he was not invited to any disciplinary meeting. Other than meeting with Mr. Wanjala there was no meeting and only time he learnt of the conspiracy allegations was from the show cause letter.

At the meeting with Wanjala we never talked of the conspiracy.

8. The Claimant's employment was terminated on the 2nd February 2016 (exhibit No. 13). In the termination of service letter the employer referred to his show cause letter and his response . That he appealed against the termination on 22nd February, 2016 (exhibit No. 14). He said that he was not given a hearing on the appeal.

9. The Claimant told the court that the employer wrote a letter dated 25th February 2016 (exhibit 15) responding to the appeal. That he was not happy with the termination as he was not given the investigation report and had no opportunity to question their witnesses incriminating him. That his alleged Co-conspirators statements said he did not take anything from the school. That the was not given a hearing opportunity. That his services were terminated when he was on leave. That his boss just told him to come pick a letter without explaining and that he almost fainted. That he was not paid my dues. He asked the court to grant his prayers under the claim as amended.

Defence case

The defence case was closed for non-attendance.

10. The court gave directions for filing of written submissions. The Claimant filed written submissions dated 23rd November 2021 together with authorities. The Respondent did not file submissions.

11. DETERMINATION

LEGAL ANALYSIS AND FINDINGS

Issues for determination

12. The parties did not file the issues for determination. After carefully analyzing the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- i. Whether there were valid and justifiable reasons or reason for the termination of the Claimant from employment .
- ii. Whether the termination from employment of the Claimant was lawful and fair.
- iii. Whether Claimant is entitled to reliefs sought.

THE RELEVANT LAW

13. Section 45(i) of the Employment Act provides that no employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove:-

- (a) 'That the reason or the termination is valid .
- (b) That the reason for the termination is a fair reason .
- (i) Related to the employee's conduct, capacity or compatibility or

(ii) Bases on the operational requirements of the employer was that the employment was terminated in accordance with fair procedures:’

14. Section 45 (4) of the Employment Act further states,

‘A termination of Employment shall be unfair for the purposes of this part where :-

‘(a) The termination is for one of the reasons specified in section 46 or

(c) it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment.’

15. The Procedure for termination of the employment of an employee is defined under Section 41 of the Employment Act.

“ (1)An employer shall before terminating the employment of an employee, on grounds of misconduct, prior performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to another employee or a shop floor union representative of his choice present during his explanation.’

16. The Court of Appeal has held the provisions of section 41 of the Employment Act to be couched in mandatory terms. The court in *Postal cooperation of Kenya -vs- Andrew K. Tanui (2019)* the court pronounced itself on procedural fairness as herein under:-

(i) Four elements must thus be discernable for the procedure to pass muster:-...

(ii) The reason or which the employer is considering termination

(iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and

(iv) Hearing and considering any representation made by the employee and the person chosen by the employee.’

It is against the above legal criteria this court proceeds to determine the instant claim.

ANALYSIS OF THE ISSUES AND FINDINGS

(i) On whether there were valid and justifiable reasons or reason to terminate the services of the Claimant

17. The Claimant told the court the Respondent terminated his employment stating that he had conspired with other employees to steal 8 copper tape rolls (Claimant’s exhibit 14 being the Show Cause Letter) states he conspired with other staff working on lightening protection system at Booker Academy to take away eight rolls of plain cooper tapes for his own benefit and as a result the company lost kshs.309,600/-. The Respondent’s Show Cause letter states that it came to the conclusion following investigations. The report of investigation is in Respondent’s bundle at page 18.

18. The Claimant told the court in his opinion he was sacked because after acting for over 18 months he wrote a letter to the Human Resource through his boss seeking a clarification to know why he was not confirmed into the position he had been acting in . That he felt he was not getting a fair share. The Claimant produced a letter dated 21st December, 2015 on the issue(exhibit 8). The court notes the letter is not acknowledged as received by the Human Resource Office or by anyone else on behalf of the employer.

19. The Human Resources person Immaculate Okite of Respondent in her statement dated 8th September, 2017 filed in court denied the Claimant’s position of having written a letter complaining about the acting and that is the basis of the termination of service and stated upon checking the Claimant’s file with the Respondent she did not see such a record.. The court notes that in his response to the show cause letter the Claimant did not raise that issue. He who alleges must prove and the Claimant failed to prove that the alleged complaint led to the investigations leading to his dismissal from employment. The court finds that opinion by the Claimant to be unfounded for lack of evidence.

20. The Respondent filed in court the investigation report and statements of several persons interviewed during the investigations including that of the Claimant. Section 43 (2) of the Employment Act states that “ the reasons or reasons for termination of a contract are the matters that the employer at the termination of the contract germanely believed to exist and which caused the employer to terminate the services of the employee”.

The court notes that the Claimant admitted to have been at Booker Academy on 19th November 2015 around the time when the taking away of the copper rolls is reported to have happened. The Claimant produced witness statement of the Security Officer on duty Wilbrodah Apiyo Esaala who stated the material were delivered by one Electrician called Humphrey around 10.00 am on 19th November, 2015 and she had been informed by the said person that the materials were for the Claimant who had loaned them the material. The said witness states that after 20 minutes of delivery she met Humphrey and Mr. Titus Shivoga (the alleged conspirators) walking towards the generator cage where the rolls had been earlier stored and they said the Claimant had come to collect the materials. That they loaded 5 rolls of cooper tapes in the private car of the Claimant KBS 488S who drove off. It is this witness on suspecting theft had just happened who reported the matter with the Security Services Section. The alleged co-conspirator Titus Jack Shivoga admitted the security guard was there when the Claimant came

to the school. He denied he carried anything. The other alleged co-conspirator Humphrey Ayudhi states in his statement that the Claimant came to the school around 11 .00 am and states he did not know his business at school and denied telling the security guard the boss (Claimant) would come to collect the material.

21. At page 6 of the Respondent's documents filed in court is witness statement of Ababu Moses Ambani dated 23rd November, 2015 who was in the Company of one of the alleged co-conspirator Humphrey in the stealing copper tape rolls.. The investigating report was referred to by the Claimant and the hearing and he said he was not given opportunity to cross examine the witnesses. The court notes from the response the co-conspirators were deducted upon exit from employment their share of costs of the said 8 rolls of copper tapes.

22. Having evaluated the entire evidence before the court , the court is satisfied the employer had a valid and justifiable reason to terminate the employment of the Claimant but the question remains to be whether the termination was lawful and fair.

Section 41 of the Employment Act provides for mandatory procedure to be followed before the termination of employment. The procedure under section 41 is that before termination of employment, explaining to the employee in a language they understand the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor Union representative of his choice present during the explanations.

23. The Court of Appeal in the Postal Corporation case (supra) has held Section 41 of the employment Act to be couched in mandatory terms.

The show cause letter dated 18th January 2016 disclosed the offence and invited response for the Claimant as to why disciplinary action should not be taken (Claimant exhibit 14). The Claimant responded to the show cause letter vide letter dated 19th January 2016(Claimant's exhibit No. 15). What followed was a letter of termination of service by the Respondent to the Claimant dated 1st February 2016(Claimant's exhibit 16). The letter refers to the letter of show cause and the Claimant's response. There was no hearing and thus the termination process was not compliant with the provision of Section 41 of the Employment Act thus unlawful and unfair. Despite the finding that the reasons existed the Claimant was nevertheless entitled to fair hearing including being represented by fellow employee as he was in management and not unionisable.

24. The court finds the procedure for termination of the services of the Claimant was unlawful and unfair.

25. Is the Claimant entitled to reliefs sought? The court proceeds to address the reliefs as follows:-

a. A declaration is issued that the termination of the employment of the Claimant by the Respondent was unfair.

b. On payment of kshs.2,908,655.78/- the court examines the breakdown of his claim under paragraph 16 of the amended claim :-

i. On claim for payment in lieu of notice 2 months kshs.354,157.54. The Respondent states the Claimant is only entitled to one month. The contract of employment provided for 2 months' notice(Claimant's exhibit 1). The employer manual (exhibit No. 2 of Respondent's bundle of documents) provided for 2 months notice on service over 5 years. The Claimant served from 17th November 2011 (letter of appointment page 1 of Claimant's documents). The Letter of termination is dated 1st February 2016. The Appointment letter is a binding contract between the parties. The court finds the Claimant is entitled to 2 months notice pay as prayed and awards notice pay of the total sum of Kshs. 354,157.54.

ii. On claim for unpaid salary for February 2016 the same is dismissed as the termination letter was issued on 1st February 2016. The Claimant did not serve in February 2016 hence not entitled to salary.

iii. On the claim for unpaid leave of 28 days. The Respondent did not dispute this claim or provide records on the Claimant's leave status as required under section 74 (1) (f) of the Employment Act which provides that the employer shall keep record of particulars of employee's annual leave entitlement days and days due as specified in section 28 of Employment Act. This position was upheld in the case of *Gilbert Mariera Makori -vs- Equity Bank Limited 2016 Eklr*. The Claimant is granted compensation for 28 days of leave as prayed for the total sum of Kshs. 81,368.00.

iv. Claim for arrears - Gas allowance (6 months @ 31,500)-Kshs.189,000/. The genesis of this claim is a decision by the Board of Directors of the Respondent to reduce car and gas allowances for all staff effective 1st march, 2015 albeit due to financial constraints. All staff were affected. The full allowances were reinstated as per internal memo to staff dated 25th September, 2015 (exhibit No. 20 of Respondent's documents) and the Claimant informed on 2nd October 2015.

In the letter to the Claimant it is indicated that the issue of the allowance arrears payment was to be considered on consultation with the Board and on improvement of the company cash flow position and overall performance. There was no evidence placed before the court that the conditions in the said letter(of improved cash flow and Board consultation) were met or other employees were paid the arrears. Consequently, without evidence that other staff were paid the claim is declined.

v. The position in claim (d) above applies a claim for gas allowance is declined.

d. On claim for Compensation for unfair termination. The court found the termination was unlawful and unfair. The claimant states he is entitled to 12 months compensation total Kshs.1,046,166.72/-. Section 49 (1) (c) of the Employment Act states where the dismissal is unlawful the Labour officer may recommend the employer to pay equivalent of salary not exceeding 12 months based on

gross salary of employee at time of dismissal. Section 50 of the Employment Act provides that the court is to be guided by provisions of Section 49 in complaint of wrongful dismissal and unfair termination . The court already found the Claimant to have been unfairly terminated. He sought damages. Section 49 (4) provides that in considering the remedies under sub section (i) including damages the court is to take into account *inter alia* the wishes of the employee, the circumstances under which the termination took place, including the extent, if any to which the employee caused or contributed to the termination, the employee's length of service with the employer, reasonable opportunities available to the employee for securing comparable or suitable employment with another employer. The Claimant told the court that currently he is a shift engineer with “ Kwale sugar company”. He worked for approximately 5 years with the Respondent. The court found there were valid reasons to terminate his employment and hence he contributed to the termination. The court found the procedure for termination to be unlawful and unfair. Considering the above factors, the court finds compensatory damages for 3 months gross salary to be adequate compensation thus Kshs. 177,076.77 as per his payslip of January, 2016 (exhibit 19) to be adequate and reasonable compensation for the unfair termination. The Claimant is awarded the total sum of Kshs. 531,236.31.

e. On Claim for costs. The principle is that costs follow the event. However since the Claimant did not serve a demand notice to the Respondent prior to filing this claim the court declines to award costs.

f. Interest at court rates from date of judgement is awarded

CONCLUSION AND DISPOSITION

26. I have found that the termination of the Claimant's employment contract by the Respondent was unfair and unlawful. I now enter judgment for the Claimant against the Respondent in the following terms:-

a. Compensatory damages for 3 months at gross salary at dismissal of Kshs. 177,076.77 x 3 total sum of Kshs. 531,236.31. the court awards the Claimant the total sum of Kshs. 531,236.31 as compensatory damages.

b. Notice pay for 2 months salary Kshs. 177,076.77 x 2 for the total sum of Kshs. 354,157.54.

c. Accrued annual leave for 28 days is awarded of the total sum of Kshs. 81,368.00.

The award in (a) (b) and (c) above is subject to statutory deductions.

d. I also award the Claimant interest on the award sum (a ,b and c above) at court rates from the date of judgment until payment in full.

e. Each party to bear own costs.

DATED, DELIVERED AND SIGNED THIS 16TH DECEMBER 2021 AT BUNGOMA

J.W. KELI

JUDGE

In the presence of:

Court Assistant- Brenda

For Claimant- Absent

For Respondent:- Absent