



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 25 OF 2017

[Formerly Kisumu E&LRC Cause No. 115 of 2017]

FREDRICK ODEKE WERE.....CLAIMANT

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant was employed as a yard cleaner by the respondent and was paid a daily rate of Kshs. 359.50 per day. The claimant worked 7 am until 5 pm for 7 days.
2. The claimant testified that he was entitled and was not paid overtime. The claimant became a mechanic labourer in 2013 and was entitled to Kshs. 802.90 daily just like other mechanics but was not paid.
3. That on 6th October 2016, he was accused of stealing oil and oil seal and was reported and taken to Andungosi Police Station. Claimant was released on Kshs. 10,000 bond. The claimant was not prosecuted by the police. The claimant denied having stolen oil and oil seal. He testified that he was victimized for joining a union. The claimant was dismissed the same month he joined the union.
4. The claimant prays to be reinstated to his job and/or paid compensation for the unlawful and unfair dismissal. Claimant testified that he was not paid service pay and was not paid extra pay for working during holidays. That he never went on leave and was not paid in lieu of leave. The claimant testified that he had served diligently for 5 years. That his name was spoiled by false accusations. That he could no longer pay rent for his house. That he suffered loss and damage. Under cross examination the claimant insisted that mechanic helpers at the weighbridge were paid Kshs. 802.90. That he had written to the workshop manager demanding to be paid properly. Claimant added that he worked on holidays and Sundays and was paid just the same salary. That he was 29 years old and had lost career advancement. That he now does casual jobs with different employers at Busia. Claimant added that he was paid fortnightly via mpesa. That he worked at Olepito and not at West Kenya. The claimant stated that he could not read and write and that police report shows the case was withdrawn by the employer. That he had joined the union on 3rd October 2016 and he was arrested on 6th October 2016.
5. RW1 Dennis Andika testified that he was the Human Resource Manager at West Kenya Sugar Company. RW1 testified that the claimant was intermittently employed by the respondent as a yard cleaner. That he was employed through contractors though the respondent paid the claimant. That the claimant was paid fortnightly based on a daily rate between 2012 and 2015. That the claimant worked and was paid only when work was available. That the claimant was not therefore eligible to be a union member and could not benefit from the CBA. That the claimant was initially paid cash and later by mpesa. That NSSF dues were paid on his behalf. That the claimant left West Kenya in 2015 and was employed at Olepito as a mechanic helper. That this was a new engagement at a salary of Kshs. 13,560 per month from October 2016. The claimant had now become a regular employee and enjoyed all the benefits including leave, overtime, house allowance and others. That Olepito was not fully operational in 2016, and so West Kenya financed its operations and paid salaries. RW1 insisted that between 2012 and 2015, the claimant was a freelance employee and is entitled to benefits only after 2016. RW1 added that the claimant and another were suspected of theft of spare parts and were arrested. That the case was subsequently withdrawn by the respondent provided the spare parts were returned. The employment of the claimant was terminated in 2016. RW1 stated that the claimant is entitled to a certificate of service from Olepito who are not part of the case. That Olepito is separate from West Kenya Sugar. That it is a unit of West Kenya. RW1 denied having underpaid the claimant under cross examination and that claimant was entitled to CBA terms. RW1 insisted that the claimant did not work continuously until October 2016. That the claimant's consolidated pay was Kshs. 18,560. RW1 stated that the claimant stopped working due to theft of spare parts. RW1 added that Olepito was not operational in the year 2012.

Determination

6. The issues for determination are:

- (a) Whether the claimant worked for the respondent continuously from the year 2012 up to the year 2016.

(b) Whether the dismissal of the claimant was for a valid reason and followed a fair procedure.

(c) Whether the claimant is entitled to the reliefs sought.

Issue (a)

7. The claimant testified that he was employed by West Kenya Sugar Company Limited from the year 2012 as a yard cleaner and worked continuously in that capacity until he was employed as a mechanic helper at Olepito in the year 2016. That Olepito was a unit of West Kenya Sugar and the respondent paid his salary at all material times. The respondent refuted this claim stating that the claimant was employed from 2012 up to the year 2015 as a yard cleaner as and when work was available. That he did not work continuously for the respondent therefore. That it was only after October 2016 when he was employed as a regular employee as a mechanic helper by Olepito, a unit of the respondent. That RW1 conceded that the claimant was not paid all benefits when he worked as a casual since he only worked only when available.

8. The court has however examined the NSSF record for the claimant and found that the respondent registered the claimant as its employee on 11th December 2012 and contributed NSSF dues for the claimant regularly and continuously from December 2012 up to August 2016 with the only gap being the month of July 2013. It is manifestly clear from this NSSF record that the claimant worked continuously for the respondent from the year 2012 up to August 2016. This NSSF record corroborates the testimony by the claimant that he was a regular employee of the respondent between the years 2012 up to August 2016.

9. The testimony by RW1 is therefore not credible in this respect and is rejected. The claimant testified that he was entitled to all benefits provided in the CBA between the respondent and the Kenya Union of Sugar Plantation Workers during the entire period he worked for the respondent either at West Kenya factory or at Olepito.

10. RW1 conceded that the claimant was not paid any of the claimed benefits alleging that the claimant did not work continuously for the respondent which allegation the court has found to be untrue.

11. The court therefore finds that the claimant was a regular employee of the respondent for the five (5) year period he worked for the respondent and is entitled to all the terminal benefits provided for in the CBA of the respondent.

12. Furthermore, the respondent could only dismiss the claimant from employment for a valid reason and only upon following a fair procedure. The claimant testified that he was simply chased away from work on false allegations of theft which charges were later withdrawn by the respondent.

13. The claimant was not subjected to any disciplinary hearing to establish if there was any valid reason to dismiss him from employment. The claimant has therefore proved on a balance of probabilities that his dismissal was wrongful and unfair and in violation of *Sections 36, 41, 43 and 45 of the Employment Act 2007*. The respondent failed to discharge the onus placed on it *under Sections 41, 43 and 47 (5) of the Act* to establish that there was any valid reason to dismiss he claimant summarily from employment. The respondent equally failed to demonstrate that it had followed a fair procedure in summarily dismissing the claimant from employment. This answers issues (i) and (ii) above.

Reliefs

14. As to whether he claimant is entitled to the reliefs sought the court finds as follows:

Compensation

15. The claimant did not include reinstatement as a relief in the statement of claim but instead sought maximum compensation for the wrongful and unfair termination of employment. In this respect the provisions of *Section 49(1) (c) and (4)* are applicable. The claimant lost a good job at the young age of 29 years unlawfully. The claimant did not contribute to the job loss. The claimant was summarily dismissed without notice and without payment of terminal benefits. The claimant was underpaid for the entire period of 5 years and was not accorded benefits due to him like his fellow workers. The claimant was not given notice of the job loss and so he suffered severe loss and damage and could not pay his house rent. The claimant was not given a certificate of service to enable him get a reliable job as a mechanic helper. The claimant was not getting casual jobs from different employers.

16. The claimant was therefore badly exploited by the respondent and the court treats this as a proper case to award the claimant the equivalent of ten (10) months salary in compensation for the wrongful and unfair termination of employment.

Terminal benefits

17. The court has found that the claimant was a regular employee from the year 2012 up to the date of dismissal and was entitled to payment of all benefits in the CBA including annual leave, house allowance, overtime for the public holidays worked for the period of 5 years. The claimant was not paid all these dues upon termination and the court finds that the same are due and payable to the claimant as set out in prayers 4, 5, 6, 7 and 8 of the memorandum of claim.

18. Accordingly, judgment is entered in favour of the claimant as against the respondent as follows:

(a) The equivalent of ten (10) months salary in compensation for the wrongful and unfair dismissal.

(b) Payment in lieu of two (2) months notice.

(c) Arrear salary in terms of the CBA, as from the year 2013 when the claimant became a mechanic helper at the rate of 802.90 per day instead of 359.50 per day which the claimant was paid.

(d) Payment in lieu of Annual leave not taken for the years 2013, 2014, 2015 and 2016. The award in (a) (b) (c) and (d) above to be calculated on the basis of the proper salary that the claimant ought to have been paid at the time of his summary dismissal in October 2016. The computation to be done and filed by the claimant within 14 days and served on the respondent for a response to be filed within 14 days of service.

(e) Interest at court rates from date of judgment till payment in full.

(f) Costs of the suit.

Judgment Dated, Signed and delivered this 29th day of January , 2020

Mathews N. Nduma

Judge

BUNGOMA

Appearances

Claimant in person.

Mr. Samba for Respondent.

Chrispo – Court clerk.