



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 2 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

HENRY NYABUTO ONDIEKI.....CLAIMANT

VERSUS

CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent in 1988 as a Field Supervisor. On 22nd April 2015, he received a notice to show cause regarding the allegations of fraud and conflict of interest. The Claimant responded to the same on 24th April 2015 and on 18th June 2015, he was sent on suspension. The Claimant was subjected to disciplinary proceedings and on 30th June 2015, his employment was terminated.

Aggrieved, the Claimant instituted this claim vide the Memorandum of Claim filed 8th January 2016 which was later amended vide the Further Amended Memorandum of Claim filed on 28th May 2018 wherein the Claimant sought the following reliefs:

- a. Reinstatement to his position and payment of unpaid withheld salary and allowances for the entire period. Alternatively the claimant to be paid his full salary until the time of retirement from the time of termination.*
- b. 12 months' salary and 3 months' salary in lieu of notice and pension.*
- c. Exemplary and general damages, annual leave pay and overtime.*
- d. Cost of this suit.*
- e. Interest on (b) and (c) above at prevailing commercial rates.*
- f. Any other and/or further relief that this court may deem fit and just to grant in the circumstances.*
- g. Under paid salary between the salary recommended by Salaries and Remuneration Commission (SRC) and what the respondent was paying the claimant including arrears and annual increments for 9 years and non-remittances and withholding loan obligation of a Kshs.296,000 to National Bank of Kenya, NHIF, NSSF and KRA*

In response to the claim, the Respondent filed the Statement of Defence dated 27th January 2016 which was later amended vide the Amended Statement of Defence filed on 29th March 2016.

Claimant's Case

The Claimant avers that at the time of his termination, his appeal against his suspension was still pending. He avers that the Respondent evicted him from his house which it had provided for him and retained some of the Claimant's necessities such as his children's clothing.

The Claimant testified as CW1 and adopted his witness statement filed on 8th January 2016 which reiterates the averments made in his claim as set out hereinabove. He testified that a member of the public had accused him of failing to pay his money despite harvesting sugar cane. It was his testimony that he responded to the show cause issued to him but no feedback has been given to date.

He stated that he appealed his termination on 13th July 2015 but there was no response. He confirmed that he was paid salary for the days worked. He testified that he was unemployed as the Respondent confiscated all his belongings including his academic certificates, which

incident was reported, a case filed and Respondent directed to return the same.

Upon cross examination, he denied harvesting Mr. Ateku's cane at the same time he was harvesting his. He admitted to being called to a disciplinary hearing but denied getting any document.

He stated that his duties were to ensure that farmers planted cane but contended that that at the material times in dispute, employees were allowed to do business with the employer. He conceded that employees received the circular dated 22nd April 2014 advising them to register their conflict of interest.

He denied payment of his terminal dues or receiving the payment voucher of Kshs.71,281.10 but when the Respondent's counsel presented a bank slip to him, he conceded that he did not check whether the amount had been deposited.

Respondent's Case

The Respondent denies the allegations in the claim and particularly that the Claimant's employment was terminated without him being afforded a proper hearing or having knowledge of the Claimant's appeal of his suspension. It is averred that the Respondent had the right to evict the Claimant from its houses as he was not entitled to occupy the same after the termination of his employment.

From the witness statement of Moffat Omondi filed on 7th September 2018, it is averred that the Respondent received a complaint letter dated 12th April 2015, from a private farmer named Edward Asiachi Ateku.

Mr. Ateku stated that he and the Claimant had leased plots for planting sugar cane, in 2005. In 2006 and 2016 and with authority to do so, the Claimant harvested from the two plots and paid Mr. Ateku Kshs.20,000.00 and Kshs.30,000.00 respectively for the first and second harvest. However, the Claimant did not pay him money for the third harvest though 70 tonnes of sugarcane had been harvested from the two leased plots.

The Mr. Omondi avers that the Claimant denied the charges levelled against him in the notice to show cause, requested for evidence on the said allegations to enable him conclusively reply, prayed for the dismissal of the allegations against him and reinstatement back to work.

It is also averred that investigations were carried out, a disciplinary panel constituted and the Claimant invited to his disciplinary hearing on 9th June 2015 and attended the same as scheduled.

The witness also avers that during deliberations on the disciplinary meetings on 9th, 19th and 25th June 2015, the security officer was asked to provide the Respondent with the Claimant's cane deliveries to the Respondent for the year 2006 and the third harvest. This forced the Respondent to extend the Claimant's suspension. The officer prepared further reports regarding the investigations conducted, and on 26th June 2015, the disciplinary committee deliberated on the Claimant's case and made recommendations to have his employment terminated.

The decision to terminate the Claimant's employment was communicated to him on 30th June 2015, effective immediately. The Claimant was paid half salary for 22nd April to 29th June 2015, accumulated leave days of 38.4 days and salary in lieu of notice, in the sum of Kshs.71,281.10. His retirement benefits pension claim of Kshs.1,577,655.58 paid into CIC Jipange Pensions account.

This witness was not cross examined.

Parties did not file submissions in the matter.

Determination

I have carefully considered the pleadings filed by the parties together with their evidence, and find that the issues for determination before this Court are.

- a. Whether the Claimant's employment was lawfully and fairly terminated.
- b. Whether the Claimant is entitled to the reliefs sought.

The grounds for the termination of the claimant's employment according to the letter of termination were –

1. *Conflict of interest, where you farmed in cane and didn't report to the company through the conflict of interest register.*
2. *Lack of honesty on your part, the statement given to security contradicted the letter to the head of human resource.*
3. *Interference with investigations while suspension.*
4. *Misconduct on your part.*

In the notice to show cause letter, the claimant was required to respond to charges of conflict of interest and fraud.

The disciplinary action against the claimant was prompted by a third party who reported that the claimant had failed to pay him some money from a joint venture as set out in the show cause letter as reproduced below –

“Ref: CSCL/HRD/HRA/PF/1721

22nd April 2015

Henry Nyabuto Ondieki

Thro’ Head of Agriculture

Chemelil Sugar Company Limited

P O Box 177

MUHORONI

Dear Sir

RE: SHOW CAUSE AND SUSPENSION

It has been reported to this office that on 21st April 2015, a complaint was raised by a private farmer, Mr. Edward Asiachi Ateku that:

You leased land belonging to Mr. John Kprono who was a brother to Mr. Benson Tanui and the private farmer, Mr. Edward Asiachi Ateku leased the neighbouring land belonging to Benson Tanui, both of Chemase on 18th March 2005.

Both of you started land preparations on the said land at same time and planted cane.

On maturity of cane in 2006, you acquired authority for harvesting for the two plots and 88.17 tons of cane was harvested that is 43.34 from Mr. Akesu’s plot and 44.83 tons from yours.

Cane was delivered in your name, and hence payments of the 88.17 tonnes were made, by cheque, in your name on which you sent Mr. Ateku Kshs.20,000.00 via Mpesa.

Each of you maintained the ratoon, and in the 2nd harvest, you harvested 85.17 tones through your name again, that is 45 tonnes from Ateku’s plot and 40.17 tons from yours. You were paid Kshs.60,000 advance payment from Chemelil Outgrowers Company on 15th December 2008 out of which you gave Kshs.30,000.00 to Mr. Ateku.

On the third ratoon, you harvested 70 tonnes for the two plots on your name again and you have not paid anything to Mr. Ateku.

This is a case of conflict of interest, if proven, and fraud, justifiable under gross misconduct, a breach of rules and regulations governing your employment justified under summary dismissal and in line with the provisions of the Employment Act, 2007.

In view of the seriousness of this matter, you are hereby **suspended from duty** with immediate effect to pave way from investigations. During the suspension period you will be entitled to **half pay** of your basic salary until the matter is finalized.

Consequently, you are required to **show cause** why disciplinary action should not be taken against you on this account. Your written reply should reach the undersigned within **48 hours** of receiving this letter failure to which the intended action will be taken on you without further reference to you.

Yours faithfully

For: CHEMELIL SUGAR COMPANY LIMITED

SIGNED

J KIPKERING

HEAD OF HUMAN RESOURCE

Cc; Head of Finance”

The findings of the security officer who investigated the matter was that –

“Findings

Ø *The cane deliveries and with bridge tickets pertaining to this matter bear the name of Mr. Henry Nyabuto Ondieki.*

Ø *There is no any transaction herein bearing the name of Mr. Edward Asiachi*

Ø *Mr. Asiachi has not indicated how he acquired seed cane prior to planting including the cost of ploughing and furrowing of the field and has only dealt in cane harvest issue but Henry Ondiek admits that he purchased the seed cane which was subsequently planted in both the fields.*

Ø *The time span taken to lodge the matter by Mr. Asiachi is over 7 years.*

Ø *The complainant could have leased the farm in question but apparently left all the jobs to be done by Mr. Henry Nyabuto as alleged by Mr. Nyabuto but they were friends.*

Ø *The only documents in this file relating to Mr. Asiachi with the case is only the land leasing form and nothing else.*

Ø *The complainant Mr. Asiachi has indicated in his statement that he is demanding Kshs.130,000 from Mr Ondieki though we cannot establish any supporting document to that effect.”*

The whole disciplinary process was on grounds that did not concern the respondent and had no relation with the claimant’s employment. No explanation was given for the finding of conflict of interest as the respondent did not refer to any regulations that bar an employee of a cane growing company from growing cane. It was not explained how selling cane to Chemelil Outgrowers Company which in turn supplied cane to the respondent constituted conflict of interest. I find that there was no valid reason for termination of the claimant’s employment and the termination was therefore unfair.

Remedies

The claimant prayed for various remedies. From the letter of termination and documents on record, he has already been paid one month’s salary in lieu of notice, half salary withheld during suspension, 38.4 pending leave days and staff retirement benefits. He is thus not entitled to the same.

This Court declines to award exemplary and general damages as the Claimant has not established a case to warrant an award of the same. The Court also declines to reinstate the Claimant as more than 3 years have lapsed since the termination of his employment. The claim for payment of salary to date of retirement is also declined as the same is not supported by the law or the claimant’s terms of employment.

The respondent did not controvert the claimant’s prayers for arrears of salary arising from the increments following review of salary in 2014. The respondent is directed to tabulate and pay the difference due to the claimant as a result of the review from the date of review to date of termination of his employment on 30th June 2015.

Having been unfairly terminated the claimant is entitled to compensation. **The Claimant is awarded 12 months’ salary (based on the respondent’s salary increment of 2014) compensation for unfair termination.** I have taken into consideration his length of service, his inability to find alternative employment due to his age, and the circumstances surrounding the termination of his employment.

The Respondent shall bear the cost of the suit which I award the claimant at Kshs.50,000 plus court filing fees. The decretal sum shall accrue interest from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE