



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**CAUSE NO. 26 OF 2017**

**[Formerly Kisumu 321 of 2017]**

***(Before Hon. Justice Mathews N. Nduma)***

**BAHATI MWAMILI IHONJA .....CLAIMANT**

**VERSUS**

**MUDETE FACTORY TEA GROWERS COOPERATIVE SOCIETY.....RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 13<sup>th</sup> July 2017 seeking a declaration that his summary dismissal was unlawful and unfair and praying for maximum compensation in respect thereof. The claimant further prays for terminal benefits to wit:

- (i) One month salary in lieu of notice Kshs. 65,236.65
- (ii) Payment in lieu of leave days not taken Kshs. 17,396.44.
- (iii) Costs and interest.

2. CW1, the claimant testified that he was employed by the respondent on 1<sup>st</sup> February 2012 as a FOSA supervisor at a monthly salary of Kshs. 20,900. The claimant worked continuously and his gross salary rose to Kshs. 65,000 per month. The claimant went on annual leave sometimes in February to March 2016. Upon resuming duty, he was sent on compulsory leave for a period of 30 days by a letter dated 15<sup>th</sup> April 2016. The claimant was given a letter of suspension from work. He was still in compulsory leave then. The claimant was accused of negligence of duty leading to loss of fidelity bond and insubordination. The suspension was indefinite.

3. The claimant testified further that he did not receive any further communication from the respondent until December 2016 when he learnt that his position had been advertised, recruitment done and he had been replaced.

4. The claimant testified that he was constructively dismissed without notice, notice to show cause or attending any disciplinary hearing. The claimant stated that he was not called upon to record any written statement regarding the allegations made against him. The claimant was not paid any salary from April 2016. The claimant prays for the reliefs set out in the statement of claim.

5. RW1 Antony Bitigu Shilongo testified in defence of the case and adopted a witness statement dated 24<sup>th</sup> July 2018 as his evidence in chief.

6. RW1 testified that the claimant had disciplinary issues and by a letter dated 15<sup>th</sup> April 2016 he was suspended pending investigations.

7. That by a letter dated 14<sup>th</sup> March 2017, the claimant was invited to appear before the Board on 21<sup>st</sup> March 2017 to explain himself. The letter was sent by registered post. That the claimant did not turn up.

8. That on 22<sup>nd</sup> March 2017, a second letter was sent to the claimant inviting him to appear before the disciplinary committee on 11<sup>th</sup> April 2017. The letter was sent by registered post on 22<sup>nd</sup> March 2017. The claimant did not turn up again.

9. The board decided therefore to dismiss the claimant at a meeting held on 28<sup>th</sup> June 2017. The dismissal was communicated to the claimant by a letter dated 29<sup>th</sup> June 2017 sent to the claimant by registered post on 30<sup>th</sup> June 2017.

10. RW1 stated the claimant was lawfully dismissed and the suit be dismissed.

11. Mr. Shifwoka for the claimant closely cross examined RW1 and RW1 admitted that the respondent did not produce any investigation report of the matters raised against the claimant. RW1 admitted also that minutes of alleged Board meetings and disciplinary committee meetings were not before court.

12. RW1 insisted that invitation letters were sent to the claimant by registered post. RW1 was unable to explain particulars of negligence against the claimant and what bond was lost due to the actions by the claimant. RW1 admitted also that the respondent did not provide particulars of insubordination.

13. RW1 did not recall if the letter of suspension was hand delivered. RW1 said the claimant was not on duty at the time of suspension. RW1 admitted that the position of the claimant was advertised and applications were to be received by 30<sup>th</sup> September 2016. That the positions were filled in October 2016 though he could not recall the dates.

14. RW1 stated that the respondent did not specifically fill the position of the claimant since the respondent has similar positions in other branches. RW1 stated that the claimant was under suspension without pay and he was finally summarily dismissed.

15. RW1 stated that he had no particulars of alleged indiscipline against the claimant. RW1 stated that the suit was filed after the summary dismissal on 29<sup>th</sup> June 2017 and letter of dismissal was sent by post on 30<sup>th</sup> June 2017. RW1 stated that the claimant received salary for March 2016.

### **Determination**

16. The issues for determination are:

(i) Whether the claimant was constructively dismissed by the respondent.

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

17. In answer to issue (i) above, the court has carefully considered the testimony of CW1 *vis a vis* that by RW1. It is not in dispute that the claimant was placed on 30 days compulsory leave followed by indefinite suspension upon return from a one month leave. RW1 admitted that the specifics of the allegations made against the claimant were not given to him nor were they produced before court.

18. The claimant testified that he did not receive a notice to show cause or any invitation to attend a disciplinary hearing. RW1 alleges that these notices were sent on registered mail but did not disclose to what address nor were the certificates of mail produced before court. RW1 admitted that the summary dismissal of the claimant was on 26<sup>th</sup> June 2017 more than a year from the date the claimant received letter of suspension on 15<sup>th</sup> April 2016.

19. It is the court's finding that keeping the claimant on an indefinite suspension without pay fundamentally breached the claimant's contract of service and amounted to a constructive dismissal. The Respondent did not justify the dismissal as required under *Section 43(1) and (2) read with Section 45 and 47(5) of the Employment Act*.

20. Clearly, the dismissal did not follow a fair procedure in violation of *Section 41 of the Employment Act, 2007*.

21. The reasons for dismissal were admittedly vague and embarrassing and did not constitute valid reasons for the dismissal of the claimant.

22. Accordingly, the claimant has proved on a balance of probabilities that the claimant was unlawfully and unfairly constructively dismissed with effect from the date of his unlawful suspension on 15<sup>th</sup> April 2016. The claimant remained in limbo and without pay until the date a letter of summary dismissal was written by the respondent though not received by the claimant on 29<sup>th</sup> June 2017.

23. The claimant is entitled to compensation in terms of *Section 49(1) (c) and 4 of the Act*. In this respect the court considers that the claimant was kept in limbo without pay for a period of one year and two months. (14 months). The claimant was not paid any terminal benefits upon dismissal. The claimant did not receive a certificate of service. The claimant was not compensated for the loss of his employment.

24. The claimant lost prospects of career advancement and suffered loss and damage. There is no possibility of reinstatement to his job and so the claimant has to look elsewhere for alternative employment. The court has considered the case of *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited (2014) eKLR*, and *Pamela Nelima Lutta vs Mumias Sugar Company Limited (2017) eKLR* where the claimant was replaced before the letter of termination was issued as in the present case. The claimant had served for a period of four (4) years.

25. Considering especially the 14 month period he was kept in limbo without pay, the court considers this an appropriate case to award the claimant maximum compensation equivalent to 12 months salary in the sum of Kshs. (12x65,22236.65) 782,839.80.

26. Terminal benefits

(a) Notice pay Emanating from the finding above that the dismissal was unlawful and unfair, the claimant is entitled to one month salary in lieu of notice in the sum of Kshs. 65,236.65 which the court grants.

(b) 8 days prorata leave The claimant is entitled to 8 days prorata leave and therefore payment in lieu thereof is awarded in the sum of Kshs. 17,396.44.

27. For the avoidance of doubt, the court did not make a finding that the claimant was discriminated upon there being insufficient evidence in that regard.

28. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

(a) Kshs. 780,000 in compensation.

(b) Kshs. 65,000 in lieu of notice.

(c) Kshs. 17,396.44 in lieu of leave days not taken.

**Total Kshs. 865,472.89**

(d) Interest at court rates from date of judgment in respect of (a) above and from date of filing suit in respect of (b) and (c) above till payment in full.

(e) Costs of the suit.

**Judgment Dated, Signed and delivered at Nairobi this 13<sup>th</sup> day of May, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Shifwoka for Claimant

Mr. Indimuli for Respondent

Chrispo – Court Clerk