



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 446 OF 2017 CONSOLIDATED WITH CAUSE 447 OF 2017

(Before Hon. Justice Mathews N. Nduma)

NABORTH OMWAKWE MBALANYA.....CLAIMANT

VERSUS

MUMIAS SUGAR COMPANY LTD.....RESPONDENT

JUDGMENT

1. The suit in Cause no. 446 of 2017 commenced by a statement of claim dated 20th December 2017 in which the claimant seeks the following reliefs: -

- a. An order for payment of arrear salaries for the month of March to December 2017 in the sum of Kshs. 415,067 per month.
- b. A declaration that the termination of employment of the claimant was unlawful, unfair and violated the constitution of Kenya 2010 and the Employment Act, 2007.
- c. An order for reinstatement to the job previously held by the claimant and in the alternative compensation for the unlawful termination including payment of the following terminal benefits.
 - i. 2 months' salary in lieu of notice in the sum of Kshs, 830,134.
 - ii. Payment in lieu of 275 accrued leave days.
 - iii. Payment of pension held in respondent's staff retirement benefit scheme.
 - iv. General aggravated and exemplary damages for breach of agreement.
 - v. Release of claimant's statements for PAYE, HELB, NSSF, NHIF, Sukari SACCO and Stima SACCO.
 - vi. Costs and interest.

2. The suit is premised on facts set out in the statement of claim, verifying affidavit and list of documents filed by the claimant.

3. The respondent filed notice of appointment vide the firm of OkweAchiando & Company Advocates dated 26th February 2018 on 28th February 2018, but did not file a statement of defence to the claim. The matter proceeded to formal proof on 25th October 2019 and CW1 the claimant testified under oath in support of the claim.

4. CW1 relied on the contents of an affidavit deposed to on 17/12/2017 and filed on 19/12/2017 as his evidence in chief. CW1 produced the documents contained in the list of documents dated 20th December 2017 as exhibits '1' to '11'.

5. CW1 further relied on the particulars of claim set out in the statement of claim and the prayers sought therein.

6. CW1 further produced a letter dated 27/12/2017 which was a response to the Appeal he had lodged dated 8/12/2017 as exhibit '12' and an email marked exhibit '13'. The claimant prayed to be awarded accordingly.

7. The suit in cause No. 447 of 2017 was consolidated with cause no. 446, filed by the 2nd claimant, Amunge Osborne Oyola. The 2nd claimant sought similar reliefs as the 1st claimant except that the 2nd claimant earned 179,009.03 per month and therefore sought payment of arrear salary from March 2017 to December 2017. All other reliefs are similar to those sought by the 1st Claimant.

8. The 2nd Claimant testified as CW2 in support of his claim and adopted an affidavit sworn on 19/12/2017 and filed on same date as his evidence in chief. CW2 produced exhibits '1' to '12' in support of his case. He relied on the particulars of claim and the prayers set out therein and prays to be awarded accordingly.

9. Both suits were undefended by the respondent.

Summary of facts of the consolidated case.

10. CW1 and CW2 were both employed by the respondent in the position of sales manager and security officer respectively. The terms of their employment are contained in the respective letters of appointment produced before court.

11. The two officers worked continuously and diligently until their employment was terminated on grounds arising from the same set of facts and transaction. CW1 and CW2 both received letters of termination dated 8th December 2017 and were both accused of the same misconduct as follows:-

12. *“ Investigations have revealed that you failed to ensure that the right quality and quantity of molasses was delivered to Mumias Sugar company limited. Only 34.27 metric tons of molasses was delivered to Mumias sugar company Limited, out of the 461.12 metric tons of molasses that should have been delivered, besides some lots of molasses received in Mumias sugar company limited had compromised quality as per laboratory analysis report. In defence you have provided to management so far, you have not provided any satisfactory explanations for the above failure.”*

13. It is common cause that the 1st claimant was suspended from duty on 22nd September 2017 and the 2nd claimant was suspended from duty on 13th October 2017. It is also common cause that the two claimants were subjected to a disciplinary procedure that entailed service with show cause letters to which they both responded to and both attended disciplinary hearings pursuant to which their employment was terminated. It is also common cause that the claimants appealed the decision to terminate their employment but the appeals were not successful.

14. The two claimants gave explanations before court in the filed affidavits why the termination were unlawful and unfair and why the same should be declared so and the court to grant them the reliefs sought.

15. CW1 explanation of the events that led to this termination may be seen in paragraphs 13,14,16,7,18,19,20,21,22,23,24,25,26,27,28,29,30,31,32,33,34,35,36,37,38,39,40

16. In which CW1 explains the entire process CW1 was taken through investigating the charges leveled against him concerning loss of molasses and delivery of poor quality molasses under his watch.

17. Similarly, CW2 explained his case in paragraphs 6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24,25,26,27,28 and 29.

18. It is clear that CW1 and CW2 were charged with serious offences of misconduct and were subjected to legal disciplinary process whilst under suspension. The two were given opportunity to defend themselves which they proceeded to do. The respondent found the explanation given by the two officers unsatisfactory and terminated their employment.

19. Both officers appealed their termination but the appeals were not successful.

Determination

20. The issues for determination are:-

a. Whether the respondent had a valid reason to terminate the employment of the claimants.

b. Whether the claimants are entitled to the reliefs sought.

21. Section 43 (1) and 2 of the Employment Act, 2007 provides as follows:-

“1. In any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of sections 45.

2. The reason for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”

22. On the other hand section 47(5) provides as follows:-

23. 'For any complaint of unfair termination of employment or wrongful dismissal the burden of providing that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.'

24. The fact of unlawful and unfair termination is based on two criteria in terms of section 45 of the Act namely: -

- i. Whether the employer had a valid reason to terminate the employment and
- ii. If the employer followed a fair procedure as set out under section 41 of the Act.

25. In the present case the two claimants adduced extensive evidence concerning the charges of misconduct leveled against them by the respondent, being in sum failure to ensure that the right quantity and quality of molasses ordered by the respondent from a third party was delivered to the company leading to the loss and detriment of the respondent.

26. The two claimants adduced evidence that they were subjected to an elaborate disciplinary procedure leading to the termination of their employment.

27. Even though, the respondent did not testify in this matter, the claimants placed before court a set of a fact that any reasonable person would consider valid reason for termination of an employee charged with the responsibility to ensure that the alleged loss did not occur.

28. In their extensive affidavits, CW1 and CW2 did not provide any reasonable defence against the offences laid against them by the respondent which caused the respondent to terminate their employment.

29. The two did not deny that the massive loss of molasses occurred and that poor quality molasses was delivered under their watch. CW1 was in charge of the purchase process whereas CW2 was in charge of security to ensure that the correct quality and quantity of molasses was delivered to the company.

30. The law under section 43(2) provides that the reason for the decision to terminate is subjective as at the time of the decision to terminate.

31. The two claimants have failed to discharge the burden placed on them under section 47(5) to demonstrate that the termination was wrongful and unfair despite the failure by the respondent to testify in the matter.

32. Accordingly, the court finds that the termination of the employment of the claimants was for a valid reason(s) and the respondent followed a fair procedure in terminating their employment. The claims for reinstatement, compensation and/or award of damages lack merit and is dismissed.

Arrear Salary

1. The claim for payment of Arrear salary from March to December 2017 has merit. The respondent was duly bound to pay the claimants for days worked. The Court therefore awards each claimant arrear salary for the months of March to December 2017 as set out in the respective claims.

2. In the final analysis Judgment is entered in favour of the claimants as against the respondents as follows:-

a. **Naborth Omwakwe Mbalanya** (CW1) salary arrears as follows; -

March to November (415,06 X 9) Kshs. 3,735,603 and 8 days for December 2017 in the sum of Kshs. 11,084.

Total: **Kshs. 3,746,687.**

b. **Osborne Amunya Oyalo** (CW2) salary arrears as follows: -

March to November (179,009.03 X 9) Kshs. 1,611,081.27 and 8 days for December 2017 in the sum of Ksh. 47,728.

Total amount: **KSH. 1,658,806.27.**

c. Payment in lieu of leave days not taken to be paid for CW1 (27.5 days) and for CW2 to be assessed and paid upon being filed in court.

d. Facilitation of payment of pension held in Respondent's staff retirement benefits scheme and any money held in Sukari and Stima Sacco for CW1 and CW2.

e. Costs of the suit for CW1 and CW2.

f. Interest at court rates from date of filing suit till payment in full for CW1 and CW2.

Dated, Signed and Delivered at Nairobi this 17th Day of September 2020

Mathews N. Nduma

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, this ruling 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

Appearance:

Mr. Kadenyi for claimants

Mr. OkwehAchiado for Respondent.

Chrispo: Court Clerk.