



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 389 OF 2015

(Before Hon. Justice Mathews N. Nduma)

GERISHON OJWANG OTUWI.....CLAIMANT

VERSUS

KIBOS SUGAR AND ALLIED INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed suit on 2nd November 2015 praying for the following reliefs:

- (a) Maximum compensation for unlawful and unfair termination of employment.
- (b) Terminal benefits to wit:
 - (i) Service pay Kshs. 93,750.
 - (ii) Notice pay Kshs. 25,000
 - (iii) Unpaid house allowance Kshs. 30,000.
 - (iv) Unpaid holiday pay Kshs. 82,719.
- (c) Provision of certificate of service
- (d) Costs of the suit.

2. CW1, the claimant testified that he was employed by the respondent as a general worker on 20th June 2006. That he worked continuously and was promoted to a field supervisor earning Kshs. 25,000 a month. The claimant was also appointed the chairman of Kibos SACCO. The claimant stated that on 11th December 2012 the claimant received a show cause letter accusing him of spreading false information to 3rd parties. The claimant responded to the letter denying any such disclosures to 3rd parties.

3. CW1 testified that he was not told what false information he had spread to what particular person(s). However, the claimant received a letter of summary dismissal on 13th December 2012. The claimant appealed the decision but was not successful and prays to be awarded as prayed.

4. RW1 David Moli Odongo testified that he was the Human Resource Manager at the respondent. RW1 stated that he relied on a witness statement filed on 9th March 2017 as his evidence in chief. RW1 also produced exhibits marked '1' to '5'. RW1 told the court that he knew the claimant well as an employee of the respondent and that the claimant served as the chairman of Kibos SACCO.

5. RW1 testified that the claimant worked at the Agriculture Department as Field Assistant and was not a supervisor before he was dismissed.

6. RW1 told the court that the claimant gave false information about the respondent company to the Ministry of Co-operative Development and marketing that the company was not making deductions from the members and was not making timely remittance of the monies deducted to Kibos SACCO.

7. That the Ministry wrote to the company inquiring about the same vide a letter dated 8th November 2012 informing the company of the same.

8. That due process was then followed and the claimant was given sufficient notice to show cause why disciplinary measure should not be taken against him.

9. That the dismissal was therefore lawful and the claimant was dismissed for his own fault. That the suit be dismissed with costs.

Determination

10. The issues for determination are:

(a) Whether the respondent had a valid reason to dismiss the claimant from employment and if the respondent followed a fair procedure in doing so.

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

Issue (a)

11. Section 43(1) of the Employment Act provides:

*“In any claim arising out of termination of a 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 Section 45” (emphasis mine)*

12. In the present case RW1 told the court that the claimant was summarily dismissed for spreading false information to the Ministry of Co-operative Development and Marketing that the company was not making deductions from the members and making timely remittances of the monies deducted to Kibos SACCO. The ministry wrote to the company inquiring about the same by a letter dated 8th November 2012.

13. RW1 produced the letter dated 8th November 2012. The court has carefully considered the same letter and is satisfied that the ministry made no reference at all to the claimant nor did the ministry mention the claimant as its source of information regarding release of remittance cheque to Kibos SACCO. However, the letter by the ministry was copied to the Chairman of Kibos SACCO, who is the claimant.

14. The court has also carefully considered the show cause letter dated 11th December 2012 written to the claimant by RW1. RW1 did not disclose the nature of alleged “false information” he alleged the claimant was spreading against the company. RW1 did not also mention in the show cause letter to who the alleged false information was spread by the claimant. The claimant noted these anomalies in his response to the notice to show cause but the respondent did not provide the alleged false information and to whom the information was spread to the claimant.

15. It is the court’s considered finding that the respondent has failed to prove on a balance of probabilities that it had a valid reason to summarily dismiss the claimant from work.

16. The respondent did not also call the claimant to any disciplinary hearing despite his candid denial of unspecified allegations made by the company against him. The court finds that the respondent did not follow a fair procedure in this regard.

17. Accordingly, the respondent violated sections 36, 41, 43 and 45 of the Employment Act, 2007 and the claimant is entitled to compensation for unlawful and unfair dismissal from employment.

18. In this regard, the claimant had served the respondent diligently for a period of six (6) years. The claimant had risen in rank from a general worker to a supervisor and served as a Chairman of the employees SACCO. This is testimony of his good service and character. The claimant did not contribute to his summary dismissal. The claimant was not paid any terminal benefits upon dismissal and was not compensated for the sudden loss of income and livelihood. The claimant suffered loss and damage.

19. The court has considered the above factors and the case of ***Kenya Broadcasting Corporation vs Geoffrey Wakio: Court of Appeal Civil Appeal No. 352 of 2017 (2019) eKLR***, in which the Court of Appeal varied the award of general damages to the claimant for unlawful dismissal by this court to 12 months compensation.

20. Accordingly, the court awards the claimant the equivalent of six (6) months’ salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 150,000. The claimant is also awarded Kshs. 25,000 in lieu of one month notice.

Terminal benefits

21. In terms of *Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya*, he who alleges must prove the fact alleged. The claimant pleaded a raft of unpaid terminal benefits including Kshs. 93,750, Service pay; Kshs. 30,000 unpaid house allowance and Kshs. 82,719 unpaid holiday pay but offered no evidence at all to substantiate the aforesaid claims. These specific claims are therefore dismissed for want of proof.

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

- (a) Kshs. 150,000 in compensation.
- (b) Kshs. 25,000 in lieu of notice.
- (c) Interest at court rates from date of judgment till payment in full.
- (d) Costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 15th day of October, 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 15th 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. Opondo for claimant.

Mr. Olel for respondent

Chrispo- Court clerk