



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1472 OF 2013**

**MOSES DANIEL NYONGESA.....CLAIMANT**

**V**

**MUMIAS SUGAR COMPANY LTD.....RESPONDENT**

**JUDGMENT**

1. On 20 June 2013, Mumias Sugar Company Ltd (Respondent) wrote to Moses Daniel Nyongesa (Claimant), it's then Director of Agriculture informing him of the termination of his employment. The letter outlined some 3 allegations as the cause of the termination of employment.

2. The Claimant was aggrieved, and on 11 September 2013 he instituted legal proceedings against the Respondent alleging wrongful and unfair dismissal.

3. The Respondent, in a Response filed in Court on 23 October 2013 denied that the termination of the Claimant's employment was unfair or unlawful, and contended that the Claimant had fundamentally breached his contractual obligations.

4. The hearing commenced on 5 March 2015 when the Claimant testified and continued on 19 April 2018 (before Nzioki wa Makau J), and on 22 October 2018 before me after which hearing was adjourned to 5 November 2018 to enable the Respondent lead evidence.

5. The Respondent did not present any witness and the Court declined to grant it an adjournment, forcing it to close its case.

6. The Claimant filed his submissions on 10 December 2018 (should have been filed before 30 November 2018), while the Respondent's submissions were not on file by this morning.

7. The Court has considered the pleadings, evidence and submissions and identified the Issues for Determination as

- i. whether the termination of the Claimant's employment was unfair and
- ii. appropriate remedies/orders including any dues accruing from the relationship.

**Unfair termination of employment**

**Procedural fairness**

8. The Claimant's testimony was that around 30 May 2013, the Respondent informed its Managers that they were required to meet with the Board in Nairobi and when he asked the Company Secretary about the agenda, he was informed that he was expected to make 2 presentations on *cane availability* and *fertiliser regimes*.

9. According to the Claimant, he made a presentation on the *fertiliser regime* while the presentation on *cane availability* was deferred to 4 June 2013. On this latter day in Mumias, the Managing Director called him to the boardroom where he found part of the Board.

10. The Claimant stated that the Board Human Resources Committee Chairman then told him that the Board was not satisfied with his performance and gave him two options; resignation or termination of employment, and that he was given up to 5 June 2013 to make a decision.

11. The Claimant decided to see the Managing Director on 5 June 2013 to deliberate further on the turn of events but according to him, before he could see the Managing Director, he learnt that the Managing Director had issued a circular to all staff informing them that the Claimant and another Manager had decided to leave, to pursue other interests.
12. When the Claimant met the Managing Director in the afternoon he insisted that the Claimant had to resign because of integrity issues (cane poaching to a rival, West Kenya Sugar Ltd) or risk being dismissed.
13. According to the Claimant, he told the Managing Director that he would not resign because the allegations against him were not true and that on 6 June 2013, the Managing Director wrote to him to give a formal response to the Board by 7 June 2013.
14. The Claimant responded reaffirming that he would not resign, but that he was open to discussions on *early retirement*.
15. Upon receipt of the response, the Managing Director wrote to the Claimant on the same day, inviting him to a meeting with the Board Human Resources Committee on 11 June 2013, in Nairobi.
16. At the meeting, the Claimant was informed that he would be sent *compulsory leave* to facilitate the carrying of investigations. He was advised that the Managing Director would communicate with him later.
17. The communication did not come until 21 June 2013 when the Managing Director's secretary called the Claimant to go pick a letter, which turned out to be the termination of employment letter. It was dated 20 June 2013.
18. The Court therefore has to determine at the outset the effective date of termination of the Claimant's employment.
19. The Claimant produced a Circular dated 5 June 2013 from the Respondent's Managing Director, and issued to all staff informing them that the Claimant would be leaving the company with effect from the date of the Circular, 5 June 2013, to pursue other interests. The termination of employment letter sent to the Claimant however was dated 20 June 2013.
20. The statutory provisions governing the process leading to termination are primarily located in section 35(1) of the Employment Act, 2007 which envisages written notice of termination of employment of at least 28 days (for employees paid by the month), and section 41 of the Act which require a hearing (could be oral, through correspondence or a combination of both).
21. Apart from the statutory provisions which set the minimum standards, the Respondent had in place a *Human Resources Policies & Procedures Manual* which at clause 9.2 contemplated an oral hearing, and keeping of records.
22. There was no suggestion that the Claimant was given a notice of termination of employment pursuant to section 35(1) of the Employment Act, 2007 prior to the Circular to staff on 5 June 2013.
23. Equally, the Respondent did not produce any written notice at least 28 days to the letter of 20 June 2013.
24. The written notice envisaged under section 35(1) of the Employment Act, 2007 may be a *show cause notice* alerting an employee as to the reasons as to why the employer is considering bringing the contractual relationship to an end and where it is issued, it triggers and serves to form the basis of the hearing as envisaged by section 41 of the Act.
25. What is noteworthy in section 41 is the mandatory requirement to an oral hearing in cases of summary dismissal on account of gross misconduct.
26. The Claimant's testimony that there was no *notice of termination* or a *hearing* as contemplated in law was not rebutted by filing and/or production by the Respondent of any notice or minutes of a hearing, and the Court is therefore satisfied that the Claimant discharged the burden expected of him by section 47(5) of the Employment Act, 2007.
27. The Circular dated 5 June 2013 alleging that the Claimant was leaving to pursue other interests is telling of *mala fides* on the part of the Respondent. As a fact that was the effective date of termination.
28. It appears like the Board of the Respondent had made up mind to get rid of the Claimant as earlier as 5 June 2013.
29. The Court finds the termination of the Claimant's employment was procedurally flawed.

#### **Substantive fairness**

30. And because the Respondent did not lead any evidence to discharge the statutory obligation imposed on it by sections 43 and 45 of the Employment Act, 2007, the Court can conclude that the termination of the Claimant's employment was not for fair and/or valid grounds (the Court notes that the Respondent secured about 5 adjournments in order to present a witness).

#### **Appropriate remedies/orders**

#### **Reinstatement**

31. This would not be an appropriate case to grant reinstatement as the Claimant has passed the retirement age, during the pendency of this litigation.

### **Compensation**

32. The Claimant served the Respondent for about 18 years, and in consideration of the length of service, the Court is of the view that maximum compensation would be appropriate and fair (gross salary at time of separation was Kshs 647,031/- as per May 2013 pay slip).

### **Damages**

33. Apart from the compensation as envisaged under section 49(1) of the Employment Act, 2007, the Claimant also sought damages for unlawful termination of employment.

34. In the Court's view, damages would not apply or avail the Claimant under the general law when the specific statute has provided a remedy of *compensation* for unfair termination of employment.

### **Terminal dues as per pension fund scheme rules**

35. The Claimant did not lay any contractual, evidential or legal basis for this head of claim/relief.

### **Gratuity**

36. The Claimant sought gratuity for 18 years, but did not disclose whether this claim was anchored in contract or statute. Even the amount was not stated. It is declined.

### **Conclusion and Orders**

37. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(a) Compensation **Kshs 7,764,372/-**

38. Claimant is denied costs for having failed to file submissions within agreed timelines without explanation.

**Delivered, dated and signed in Nairobi on this 25<sup>th</sup> day of January 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Bwire instructed by Echessa & Bwire Advocates LLP

For Respondent Mr. Achiando instructed by Okweh Achiando & Co. Advocates

Court Assistants Lindsey/Sikulu