



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 3 OF 2017

(Formerly Bungoma HCC No. 97 of 2003)

(Before Hon. Justice Mathews N. Nduma)

1. FREDRICK SIMIYU WANYONYI

2. NICHOLAS BARASA WANAMBISI

3. JAFRED WAMALWA KIMOKOTI.....PLAINTIFFS

VERSUS

NZOIA SUGAR COMPANY LIMITED.....DEFENDANT

J U D G M E N T

1. This suit was filed in the year 2003 at the High Court being Bungoma HCC No. 97 of 2003. Matter was transferred to Employment & Labour Relations Court by Justice Ali-Aroni on 6th June 2017, 17 years later before it was heard and determined.

2. The three Plaintiffs allege were unlawfully dismissed from employment and claim various terminal benefits set out under paragraph 7 of the amended plaint being Kshs.708,090.20 for 1st Plaintiff, Kshs.513,624 for 2nd Plaintiff and Kshs.485,910.40 for 3rd Plaintiff, total Kshs.1,707,624.60

3. The Plaintiff further seek an injunction to restrain the Respondent from repossessing motor vehicles registration nos.KAR 596H, KAD 542 Y and KAM 487 A from the Plaintiffs respectively.

4. Further, the Plaintiff seek General Damages for determination by the Chief Executive of Respondent particulars of which are set out in their evidence. Under paragraph 16 of the Plaint, the Plaintiffs seek fuel and gas benefits they were entitled to for the month of November 2003 and May 2003 in respect of 1st Plaintiff.

5. The Plaintiffs further claim interest on the award and costs of the suit.

6. From the outset, the Plaintiff in their testimony admitted owing the Respondent in respect of unpaid car loans as follows:-

a. 1st Plaintiff Kshs.165,536 upon reconciliation during the handing over and prays that the amount be off-set against the award.

b. 2nd Plaintiff Kshs.325,000 which the 2nd Plaintiff states may be off-set against the award; and

c. 3rd Plaintiff admits owing a car loan debt in the sum of Kshs.368,000 and testified the Respondent withheld Kshs.322,502 being proceeds of his sugar cane supplied to the Respondent from his farm which the Respondent promised to pay him after the case is concluded. The 3rd Plaintiff was not cross examined on his testimony.

The Plaintiffs worked as company secretary Human Resources manager and Chief Internal Auditor respectively earning Ksh70,971, 72,095 and 66,464 per month respectively. They were all summarily dismissed on 24th November, 2003 for gross misconduct.

They allege that the Respondent did not act in accordance with the relevant Company Regulation and Procedures contained in the Human Resources Policy named (Revised 2003) and Rules of natural justice. They were not given two (2) months termination notice, as provided in their contract of employment neither were they paid in lieu thereof.

7. The Plaintiff stated that they were owed in lieu of leave for 198; 92 and 123 days respectively and were not paid in lieu thereof. They too claim leave travelling allowance of Kshs.31,500; 13,500 and 18,450 respectively; arrear salary for 28 days worked in November 2003 in the sum of Kshs.66,239.60; 67,288.70 and 62,030.00 respectively. The 1st and 2nd Claimants claim pension at 100% surrender value over a period of 8 and 6 years respectively whereas the 3rd plaintiff claims gratuity for the period 1984 to 1987 in terms of the Collective Bargaining Agreement. These figures were not quantified in the plaint as were unknown to the Plaintiffs at the time of filing suit.

8. The Plaintiffs stated that they were entitled to retain their cars obtained vide a staff car loan scheme and that monies owed by the Respondent to them were sufficient to offset the loans as at the time of their dismissal.

9. The Plaintiffs, state that the Defendant through its Principal Officers published or caused to be published false and defamatory statements against the Plaintiffs alleging that they were involved in corruption. That the said publication was malicious and calculated to injure the reputation of the Plaintiffs by exposing them to hatred contempt and ridicule. The Plaintiff state that they suffered loss and damage and seek payment of general damages in that respect. The Plaintiffs testified under oath and in addition relied on their list of documents and witness statements filed before court. The Plaintiffs further rely on written submissions and pray to be awarded accordingly.

Defence and Counter claim

10. The Defendant filed a statement of defence and counter claim on 5th February, 2004. Employment of Plaintiffs is admitted.

11. The Respondent state that the Plaintiffs owe the Respondent Kshs.220,000 in respect of 1st Plaintiff, Kshs.325,700 in respect of 2nd Plaintiff and Kshs.408,332.50 in respect of the 3rd Plaintiff. These are the sums the subject of the counter claim.

12. Other claims and allegations made by the Plaintiffs in the initial and amended plaint are denied and the Plaintiffs put to strict proof thereof.

Counter Claim

13. The Respondent claims Kshs.385,536.40 in respect of 1st Plaintiff; Kshs.954,437.13 in respect of 2nd Plaintiff and Kshs.784,806.20 in respect of the 3rd Plaintiff. No particulars were set out in the counter claim in respect of the alleged sums owed. Defendant simply stated that the Plaintiffs were well aware of the particulars of the debts.

14. The Defendant prays that the Plaintiff's suit be dismissed and judgment entered in favour of the Defendant in respect of the counter claim. The Respondent prays for interest and costs of the suit.

15. The Respondent relied on list of documents filed and did not file final written submissions.

Determination

16. The parties had filed statement of Agreed issues. The court has crystallized the issues for determination as follows:-

- (i) Whether the Plaintiffs are owed the various terminal benefits and pensions claimed.
- (ii) Whether the Plaintiffs owe the monies counterclaimed by the Defendant.
- (iii) Whether the Plaintiffs were defamed and are entitled to general damages in respect thereof.

Hearing of the Suit

17. As stated at the outset of this Judgment, this matter has taken 17 years from the date of filing to the time of hearing.

18. Upon the matter being transferred to ELRC Kisumu, it was mentioned before Justice Maureen Onyango on 3rd October, 2017 when both parties were absent. Parties were notified to appear for mention for direction on 29th November, 2017, again both parties were absent. Matter was set for mention again on 22nd January, 2018 when Mr. Otsiula appeared for Mr. Ocharo for Claimant and the Defendant was absent. Hearing of the matter on priority basis was set for 29th May, 2018. Claimant was to serve the hearing notice on the Respondent.

19. On 29th May, 2018, both parties were absent without explanation, the entire suit was dismissed for non-attendance but at 11.55 am later in the day Mr. Ocharo for the Claimant and Mr. Murunga for Mr. Kiarie for the Defendant appeared and both parties sought the matter to be reinstated. The court reinstated the suit and Mr. Murunga for the Defendant applied for adjournment on the basis that Mr. Kiarie was committed before the Court of Appeal at Eldoret in Civil Application No. 117 of 2016. The court granted the last adjournment to the parties and the matter was set for hearing on 23rd and 24th July, 2018.

20. On 23rd July, 2018 Mr. Ocharo appeared for the Claimant and was ready to proceed. M/s. Mufutu appeared for Mr. Kiarie for the Defendant and applied for an adjournment on the basis that the Defendant was not ready to proceed because the Defendant had not filed its list of documents and witness statement. M/s. Mufutu was from the same firm of advocates as Mr. Kiarie who was said to be out of the country in the United Kingdom.

21. The parties nevertheless agreed to proceed with the matter the following day the 24th July, 2018 at 9.30 am.

22. The three Claimants testified and the 1st and 2nd Plaintiffs were cross examined by M/s. Mufutu for the Defendant. Counsel had no questions for the 3rd Plaintiff.

23. The Plaintiff's closed their case and defence hearing was set for the 27th September, 2018.

24. On 27th September, 2018 Mr. Ocharo appeared for the Plaintiff and Mr. Simiyu held brief for M/s. Mufutu for the Defendants. Mr. Simiyu sought to have the matter adjourned on grounds that the Defendant did not have either of the two witnesses scheduled to testify for the Defendant. One was said to have gone to labour the night before. There was no explanation why the 2nd witness was not available. The Defendant had filed list of witnesses on 23rd June, 2018 indicating that one Audrey Mukabana Industrial Relations Manager employed by the Respondent in 2017 was due to testify. The 2nd witness was Mr. Nelson Machoka employed by the Respondent in 2011 as Wages Accountant.

25. The application for adjournment was opposed by Mr. Ocharo for the Plaintiffs.

26. The court refused to grant application for adjournment on the basis that there was no explanation why the 2nd witness scheduled to testify was not before court. The court deemed the defence close and gave directions for filing of written submissions.

27. The Plaintiff filed their submissions on 19th October, 2018. Respondent did not file their submissions despite extension of time granted to the Defendant to file the same.

28. It is clear that save for issue which are not in dispute, the Defendant did not rebut the evidence by the Plaintiff in respect of their respective claims.

29. The court is satisfied that the three Plaintiffs have proved on a balance of probabilities that they were each owed terminal benefits set out in the plaint and amended plaint and in their sworn testimony. The court has also noted the admissions made by the claims in respect of balance of car loans advanced to them by the Respondent and were due and owing as at the time of dismissal.

30. The Plaintiffs are also entitled to payment of pension in respect of 1st and 2nd Plaintiffs and gratuity in respect of the 3rd Plaintiff and the Respondent is obliged to provide the necessary clearance to enable payment of the pension and gratuity duly owed to the Plaintiffs.

31. The Counter Claims made by the Respondent have been proved only to the extent of admissions made by the Plaintiffs. No evidence was presented by the Defendant in support of the Claims made in the Counter Claim that is over and above that admitted by the Plaintiffs. Accordingly the Counter Claim succeed only to the extent of the admissions made by each Claimant and the Defendant is awarded accordingly.

General Damages for Unlawful Dismissal

32. As at the time the cause of action arose in 2003, the Employment Act, Cap 226 Laws of Kenya in operation then did not provide for payment of general damages or compensation for unlawful dismissal of employment.

33. The remedy available to the Industrial Court was for commutation of summary dismissal to a normal dismissal which would then enable the court to award payment in lieu of notice and other terminal benefits including pension and gratuity which would otherwise not be payable upon a summary dismissal.

34. The case by each Plaintiff is that there was no valid reason to summarily dismiss them from employment and that the dismissals were effected in total disregard of the relevant Rules and Regulations in the Company's Human Resource Policy Manual. These allegations have gone unanswered by the Defendant. The court finds that the summary dismissal of the Plaintiffs by the Defendant was unlawful and unprocedural and the order that commends itself to the court is to commute the summary dismissal to a normal termination in respect of each of the Plaintiffs. This finding supports the claims by the Plaintiffs for payment of notice pay, Pension, Gratuity and arrear salary for November 2003 as prayed in the amended plaint.

Damages for Defamation

35. The Plaintiffs have failed to discharge the onus placed on them in a case of defamation to warrant an award of damages for defamation. No evidence was tendered to prove on a balance of probabilities the manner, and extent of damage suffered by the Plaintiffs as a result of the publication by Principals of the Respondent regarding to matters that led to their summary dismissal.

36. Accordingly, the court finds that these claims have not been proved and are dismissed.

37. In the final analysis judgment is entered in favour of the Plaintiffs as against the Defendant as follows:-

(i) 1st Plaintiff

(a) Kshs.708,090.20 being terminal benefits set out in paragraph 7 of the amended plaint.

(b) Pension at 100% surrender value over a period of 8 years. Less Kshs.169,913 owed to the Defendant as car loan.

(ii) 2nd Plaintiff

(a) Kshs.513,624 being terminal benefits set out in paragraph 7 of the amended plaint.

(b) Pension at 100% surrender value over a period of 6 years. Less Kshs.325,000 owed to the Defendant as car loan.

(iii) 3rd Plaintiff

(a) Kshs.485,910.40 being terminal benefits set out in paragraph 7 of the amended plaint.

(b) Gratuity for the years 1984 to 1987, served by the 3rd Plaintiff as per the Collective Bargaining Agreement. Less Kshs.368,000 owed to the Defendant as Car Loan.

(iv) The Respondent to provide necessary clearance and/or computation of the pension and gratuity due and owing to the Plaintiffs within 30 days.

(v) The Defendant to pay the costs of the suit despite its limited success on the admitted claims.

(vi) Interest on the awards to be calculated at court rates from date of filing suit till payment in full.

Dated, Signed and Delivered in Kisumu this 24th day of January, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Ocharo for Plaintiffs

M/s. Mufutu for Respondent

Chrispo – Court Clerk