



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT BUNGOMA
CAUSE NO. 23 OF 2017

CHARLES SAMSON NAMUSASI.....CLAIMANT

VERSUS

WEST KENYA SUGAR COMPANY LTD.....RESPONDENT

J U D G M E N T

The suit was filed on 27.3.2017. The Claimant seeks 12 months salary in compensation for unlawful and unfair dismissal from employment and various unpaid terminal benefits to wit:-

- a. Salary in lieu of 3 months notice
- b. Severance pay calculated at 15 days salary for 26 years.
- c. Under payments from 1st November 2013
- d. Unpaid annual leave for the year, 2016
- e. Damages for injured feelings
- f. Certificate of service.
- g. Costs of the suit.

The Claimant was employed by the Respondent on 20th April, 1990 as a casual up to 15th August 1996, when he was converted to permanent employee.

On 1st November, 2013, the Claimant was promoted to the position of Cane yard Supervisor which position he held until he was dismissed on 9th April, 2010.

That the Claimant earned Kshs 31,648 per month.

In comparison to his colleague who was also a cane yard supervisor on the mills section he was under paid in that the colleague was paid Kshs 39,753.76 per month. The Claimant seeks payment of the difference in salary from 1st November 2013 to the date of dismissal at the rate of Kshs 8,105.70 per month.

The Claimant was given a show cause letter on 20/3/2016 on charges of failure to obey lawful instructions in that on 24.3.2016 at 10 p.m a bar coupling was found at the entry of HD knives damaging the knives causing the mill 3 hours stoppage. It was alleged that all yard supervisors and charge hands had been informed that the tail bar couplings were put on foundation as barricade and cane around the foundation must be picked by the BELL loader instead of the shovel. That the command was not observed resulting in the damage carried to the HD knives.

The Client was asked to respond within 48 hours which he did on 27.3.2016. The Claimant explained that on the 24.3.2016 he had worked day shift up to 10 p.m. successfully and handed over to his colleague Matayo Kakai some minutes to 10 p.m. That he handed over to him including:

- i. Where to start milling from

ii. Table four held much cane at the feeding slope and cropper crane had a break down.

iii. Advised him to maintain table one, two and three.

That the Claimant punched out and left for home. The three tables were running well.

At 10.15 p.m the Claimant was informed of the coupling having been found in the HD. The Claimant had warned the shovel operator not to push cane towards the coupling. That if he did that, it was after the Claimant had left and his reliver had taken over.

Disciplinary hearing was held on 31.3.2016 in which the Claimant was heard and found guilty. He received a letter of termination dated 9.4.2016 in which he was told he had failed to demonstrate and convince management that he had not been informed to take care of the coupling barricading the foundations. He was found guilty of negligence that caused serious damage to HD knives resulting to a loss of 3 hours of milling time.

The Claimant was summarily dismissed in terms of Section 44(4) © of the Employment Act, 2007.

The Claimant prays the reliefs sought in the suit be granted as claimed.

Response.

RW1 Dennis Adika testified in support of the respondent's case. RW1 told the court that he was the Human Resource Manager of the Respondent. That the Claimants employment was terminated following a fair procedure. That he was given a notice to show cause to which he had responded. The Claimant was called to a disciplinary hearing where he was given opportunity to explain himself. That the Respondent was not satisfied with the Claimant's explanation and his employment was terminated for a valid reason. RW1 was not in the employment of the Respondent when the Claimant's employment was terminated. He told the court under cross-examination that he relied on the documents presented in court and marked exhibits '1 to '9' in the list filed on 28.5.2018.

RW1 confirmed that the Claimant had handed over to Mr. Matayo Kakai on the material day the accident happened. RW1 did not have the handing over report.

RW1 denied there was to be further investigation arising from the disciplinary hearing. RW1 said that the Claimant was found to have been negligent. RW1 confirmed that Kakai checked in at 21.56 hrs and the Claimant checked out at 21.57 hrs.

RW1 confirmed that the accident happened after 22.00 hrs and that the Claimant was not at work then.

RW1 confirmed that the Claimant was given one day notice to attend the disciplinary hearing and denied that the Claimant did not have sufficient time to call a witness.

RW1 denied that the Claimant was entitled to 7 days notice to prepare himself. RW1 said that the Claimant was represented by the chairman, vice chairman and vice secretary general of the union at the disciplinary hearing and that the Claimant did not raise any concerns at the disciplinary hearing.

RW1 concluded that this suit be dismissed with costs.

Determination:

The issues for determination are:

- i. Whether the termination of employment of the Claimant was for a valid reason(s) and done in terms of a fair procedure.
- ii. Whether the Claimant is entitled to the reliefs sought.

Issue 1.

From the testimony of RW1 and the letter of termination, the Claimant was not summarily dismissed and therefore was in the first place entitled to three months notice or payment in lieu of three months notice in terms of the Collective Bargaining Agreement between the parties.

The Respondent did not pay the Claimant in lieu of notice and he is granted Kshs 94,944 in lieu of three (3) months notice.

In terms of the report produced before court, the incidence happened just before the change of shift “ and on the basis of this finding they decided to charge the yard supervisor, the Claimant, Bramwel Wanambisi, Feeder Table Operator, Anthony Aswani- Yard Charge Head and Edward Matete – Shovel Operator who were found to have contributed to the entry of the shovel into the carrier hence damaging the bolts of the old fence bar coupling kept on foundation as barricade.

These four employees were said in the report to have been on duty when the accident happened.

The evidence by the Claimant and that by RW1 contradicts the findings in this report. It is clear that the accident happened after the change of shift and not before.

This is the report that was relied upon at the disciplinary hearing that found the Claimant negligent. This was despite clear explanation by the Claimant in his written response to the notice to show cause dated 26.3.2016 and produced in court as exhibit 3 'b' by the Claimant that the accident happened after one Matayo Kakai had taken over from him as the yard supervisor. This evidence was confirmed by RW1 in court.

The submissions by the Claimant at the disciplinary hearing whose minutes were produced by RW1 as Exhibit '7' clearly shows that Mr. Matayo Kakai reported on duty around 21.45 hours and the Claimant handed over to him and punched out at 21.55 hours. That the accident happened while the Claimant was away is without a doubt.

The Claimant clearly explained at the disciplinary hearing the instructions he had given the workers whilst he was in shift to avoid such an accident. He also explained that the Bell Loader had a break down and was at the workshop for repair. The feed table operator Mr. Wanambisi had also testified at the disciplinary hearing that he had left the shift at 10- p.m on 24th March, 2016. That he also had handed over to Mr. Peter Muchende at 21.55 hours. That he had clocked out at 22.05 and as at that time the accident had not happened.

The disciplinary committee had in the minutes observed that the report of investigations contradicted the evidence before them as to whether the incident occurred before or after the change over.

The disciplinary committee observed that this discrepancy gave room for further investigations.

The testimony by RW1 before court confirmed that the incident had occurred after the change over.

Clearly, there was no evidence at all during the disciplinary hearing and before court to support the finding that the Claimant and his shift caused the accident. All the evidence points to the contrary.

The Respondent had no valid reason to terminate the employment of the Claimant who had diligently served in the same area for a period of 26 years. No adverse record was produced by the Respondent against the Claimant for all this time.

The Claimant was actually dismissed without payment of salary in lieu of notice for an offence he clearly did not commit nor did he contribute to it's happening.

The Claimant has proved on a balance of probabilities that he was unlawfully and unfairly victimized for an incident that happened in his absence and no causal link was established between him and the incident.

Accordingly, the Respondent violated Sections 43 and 45 of the Employment Act 2007 by dismissing the Claimant from employment for no valid reason.

The Respondent followed a fair procedure but completely disregarded the evidence by the Claimant and his cohorts that the accident happened after they had handed over operations to the 10 p.m shift.

The court finds that the purported termination of employment which was in fact a summary dismissal because notice was not given nor payment in lieu of notice made was unlawful and unfair.

The Claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Employment Act.

In this regard, the Claimant had served faithfully and diligently for a period of 26 years.

He did not contribute to the termination as the evidence clearly shows. The Claimant was not paid any terminal benefits including notice pay and payment in lieu of leave days not taken upon separation.

The Claimant was paid less than his counter parts since he was promoted to a supervisor in the year 2013.

These are aggravating circumstances in this case. The court relies on these factors and the case of ***Cornel Otieno Otieno & Another -vs- Midland Energy Limited, Nairobi ELRC NO. 221 of 2015*** in which Wasilwa J awarded the Claimant the equivalent of 12 months salary in general damages for unlawful and unfair termination of employment.

The Claimant in this case deserves more than the equivalent of 12 months salary in compensation barring that the award is the statutory maximum provided by law.

Accordingly, the court awards the Claimant the equivalent of 12 months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs 379,776.

The Claim for payment of service gratuity at the rate of 15 days salary for 26 years has not been proved and same is disallowed.

Under payment.

It is true that the Claimant was paid less than his counter part upon being promoted to yard Supervisor position. The Claimant however did not prove that this entitled him to a salary increment. No evidence in this respect was adduced. The claim is disallowed.

Annual leave.

The claim for payment in lieu of 28 days leave for the untaken leave in 2018 is allowed and the Claimant is awarded 28,232.40 in lieu thereof.

Certificate of Service.

The Claimant is to be granted Certificate of Service within 30 days of the judgment.

In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:

- a. Compensation Kshs 379,776
- b. 3 months notice pay Kshs 94,944
- c. In lieu of 28 days leave Kshs 28,232.40

Total award Kshs 502,952.40.

- d. Interest at court rates from date of filing suit in respect of (b) and (c) above and from date of judgment in respect of (a) above till payment in full.
- e. Certificate of service to be provided within 30 days.
- f. Costs of the suit.

DATED, SIGNED and DELIVERED at BUNGOMA this 29TH day of MARCH, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearances:

Claimant in person

Mr. Mulema for Respondent.

Chrispo: Court Assistant.