



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 78 OF 2014

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF SUGAR

PLANTATION AND ALLIED WORKERS.....CLAIMANT

VERSUS

KIBOS SUGAR & ALLIED INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 23rd April 2014, by the claimant union on behalf of 10 named grievants who had been suspended and later terminated from their employment.
2. The claimant union states that the suspension and termination of the grievants was unlawful and unfair and should be set aside to allow the grievants to return back to work.
3. The grievants were employed by the respondent in the position of laboratory analyst on 13th June 2012. The respondent placed an advertisement on the notice board for three positions of senior lab analysts and two positions of junior lab analysts.
4. Those interested were invited to attend interviews the next day on 14th June 2012 with their documents. The notice was produced as exhibit – '1'. CW1, Emily Awuor Diaya and CW2 Jacinta Achieng Tola testified in support of the claimants' case. CW1 was on maternity leave from 3rd May 2012 and upon her return, she was served with a letter of suspension. The other grievants also received letters of suspension and notices to show cause. This followed their failure to present themselves for promotion interviews on 26th April 2014.
5. The notice produced as exhibit '3' alleged that the grievants were negligent and that their working analysis has been unsatisfactory and despite being given room to improve they had failed to do so.
6. CW1 was the only grievant who had presented herself for the interviews and had presented her original certificates to the panel. Instead of being promoted, she received a letter dated 30th June 2012, asking her to step aside to allow investigations with respect to all employees working in the laboratory. All the grievants were thus suspended without pay pending the investigations.
7. CW2 collaborated evidence by CW1 that all the grievants were suspended on 27th June 2012 and were to show cause for negligence and poor work performance. The grievants responded to the show cause letters stating that they had never received warning letters that their work was unsatisfactory or that they had been negligent in any respect.
8. That as at the time of filing suit, the grievants were still on suspension without pay. CW1 and CW2 emphasized that they had at all material time done their work well, and had in the past been commended in that respect.
9. That the respondent for unexplained reasons wanted to replace them with other staff and had unfairly advertised their positions. CW2 Jacinta Achieng presented herself for promotion interview but was instead told to step aside from work.
10. CW2 said the interview was a façade to allow their replacement for no valid reason and without following a fair procedure.
11. That the dispute was reported to the ministry of labour. A conciliator was appointed and upon hearing the parties recommended that the

employees be reinstated. The claimants pray for reinstatement.

12. Under cross examination, CW2 produced a letter of congratulations dated 1st February 2011 marked exhibit '9'. CW2 said she had an Applied Science Certificate from Moi Institute of Technology Rongo. That herself and other grievants produced valid certificates before they were employed. CW2 said she was not aware of recommendations by the Kenya Sugar Board for minimum qualifications in respect of laboratory technicians. CW2 denied that the company had requested the grievants to resubmit their certificates for scrutiny. That only an advertisement for recruitment of lab technicians was placed on the notice Board.

13. The claimant prays that the reliefs sought be granted.

Response

14. The respondent filed a statement of response to the statement of claim on 28th October 2014 in which it states that personnel working as laboratory technicians were not up to task. That they produced wrong test results, at times altered results and this affected production.

15. That the grievants were asked both verbally and in writing to submit their academic certificates and other testimonials for re-appraisal.

16. That the grievants refused to submit their documents for scrutiny. The respondent therefore decided to advertise three (3) positions of senior laboratory Analysts and two (2) junior laboratory analysts. That all except one (1) did not apply for the positions. That documents submitted by the one who applied were put to question and she was suspended pending investigations. The rest of the claimants were suspended for failure to submit their certificates for verification.

17. The respondent prays that the suit lack merit and it be dismissed.

18. Respondent called RW1 David Odongo, the Human Resource Manager who testified that he worked for the respondent from the year 2008. That he relied on a recorded witness statement filed on 17th February 2015.

19. He told the court that the employment of the claimants was terminated for poor work performance. That they did not do proper sugar analysis and their results were not accurate. He produced exhibit '8' a memorandum sent to the grievants warning them for tampering with results. That respondent decided to verify the academic certificates of the grievants. He produced exhibit '2' a letter asking for certificates for inspection sent to all the grievants.

20. That the grievants were employed in 2007 and 2008 after the post-election violence. That there was mass recruitment of employees at the time. That the grievants brought photocopies of their certificates arguing that they could not reach where the original certificates were. That verification of originals was therefore necessary in light of the poor work performance. That only 5th grievant brought her certificates. The respondent doubted the same and suspended all the grievants and they were served with notices to show cause. The grievants came to court before producing their certificates. That the respondent conducted interviews to get competent replacements. That the claimants did not return after the suspension. That their employment was fairly terminated.

21. Under cross examination, RW1 said they advertised for jobs while the grievants were under suspension and they were at liberty to apply for the jobs. RW1 said the grievants could be re-employed although they were under suspension. RW1 denied that the respondent had appreciated the good work done by the grievants. He said the letter marked exhibit '9' congratulated all staff but not only laboratory staff. RW1 was shown a letter by managing Director cautioning management staff from tampering with laboratory results and was at pains to explain why it did not refer to tampering by the lab technicians. RW1 prayed that the suit be dismissed with costs.

Determination

22. The issues for determination are:-

(i) Whether the grievants termination was for a valid reason and if it was done following fair procedure.

(ii) Whether the grievants are entitled to the reliefs sought.

Issue 1

23. The grievants have through the testimony by CW1 and CW2 coupled with documentary evidence demonstrated that they were placed on indefinite suspension on 27th June 2012 and asked to show cause why disciplinary action should not be taken against them for unsatisfactory work and in particular laboratory analysis. The claimants responded to the show cause letters stating that they had not done any wrong and had not in the past been made aware of any poor work performance by the respondent.

24. It is not in dispute that on 13th June 2012, the respondent had advertised for filling up of five (5) positions of junior and senior lab analysts, positions held by the grievants. RW1 told the court that they had expected the grievants to apply for their promotion and in the process their certificates would be vetted afresh. That only the 5th grievant applied and the respondent decided to suspend all the grievants after the 5th grievant presented her papers and the respondent doubted their authenticity.

25. It is not in dispute that the grievants were never called to a disciplinary hearing but their positions were filled by new employees who had replaced them.

26. As at the time of filing the suit the claimants remained under suspension. They did not receive letters of termination even though they had effectively been replaced by new employees.

27. These proved facts are a clear indication that the respondent engaged in unfair labour practice contrary to *Article 41 of the constitution 2010* and further the respondent violated the provisions of *Sections 41, 43 and 45 of the Employment Act, 2007* in that it constructively terminated the employment of the grievants without subjecting them to a fair due process.

28. That the respondent used a recruitment promotion process as a trap to vet and replace the grievants without confronting each one of them with a case of poor work performance and afford each one of them opportunity to explain why they should remain in employment.

29. The grievants demonstrated that they had not individually been given a warning on their work performance. That the respondent had not appraised any one of them and presented them with areas that needed improvement and with timelines to improve in any of the identified areas of weakness.

30. Indeed the respondent did not present any tangible evidence in rebuttal to the credible evidence by CW1 and CW2 that they were unlawfully and unfairly suspended and replaced in their positions without being given letters of termination.

31. There is no tangible evidence placed before court by the respondent that any of the grievants had questionable certificates and qualifications. It was all say so by RW1 without substantiation.

32. The respondent cannot be heard to say that the grievants failed to attend a disciplinary hearing without producing a single notice inviting any of the grievants to a disciplinary hearing. A recruitment process cannot be used at the same time as a disciplinary process for the existing employees. The employees had a choice to apply for the advertised positions or not. They chose not to apply except grievant no. 5 and cannot be faulted for that. The case of ***Dorothy Njoki Ndungu vs Machakos University College and 2 others Cause No. 1321 of 2016*** relied upon by the respondent on the need to attend a disciplinary hearing is inapplicable in the circumstances of this case.

33. It is the court's considered finding that the grievants were suspended from employment without a justifiable cause and were subsequently replaced by new employees without being given opportunity to attend a disciplinary hearing or even receiving letters of termination. It is absurd that RW1 testified that the respondent had lawfully and fairly terminated the employment of the grievants given these set of facts which present a bizarre situation unwarranted in the modern, day work place.

34. Accordingly, the court finds that the grievants were unlawfully and unfairly constructively dismissed from employment and replaced with new employees for no valid reason and without following a fair procedure in violation of *Article 41 of the constitution of Kenya 2010 as read with Sections 41, 43 and 45 of the Employment Act, 2007*.

Issue 2.

35. And the grievants are entitled to the reliefs of either reinstatement or compensation provided under *Section 49(1) (c) and (4) of the Employment Act as read with Section 12 of the Employment and Labour Relations Court Act 2011* as amended.

36. The grievants came to court seeking lifting of their indefinite suspension which the court has found was unlawful and unfair labour practice. The court has in the circumstances of the case concluded that the grievants were constructively dismissed from employment and replaced by new employees.

37. It is the court's considered view that reinstating the grievants would place the respondent in difficult predicament even though the respondent has fully contributed to this scenario.

38. Given that the grievants had only sought to be returned to work, the court in the circumstances grant the respondent the choice of reinstating all the grievants to the position they previously held without loss of salary and benefits from the date of their unlawful suspension and in the alternative the respondent compensates the grievants who were all employed at the end of 2007 and the beginning of 2008 after the election chaos that ensued then and had served the respondent up to the 27th June 2012 a period of about five (5) years.

39. The grievants held similar positions; had served the respondent well; they suffered loss and damage as a result of the constructive dismissal. They were not given notice and were not paid any terminal benefits upon suspension and dismissal. They were kept in limbo and had their names tarnished with unproved allegations of fake qualifications.

40. Considering similar cases

(i) ***ELRC Cause 536 of 2014: Jaffer Mohamed vs Ready consultancy Company Limited [2015]*** in which court awarded six (6) months compensation for unlawful and unfair termination and

(ii) ***ELRC at Mombasa Cause No. 308 of 2010: James Buka Beja vs Arm Cement*** in which court awarded 12 months compensation. [2018] eKLR.

41. The court deems that an appropriate case for the respondent to pay the equivalent of twelve (12) months salary to each of the grievants in lieu of reinstatement. In addition to the compensation the respondent is to pay the grievants ½ salary earned by each one of them during the period they were under suspension from 27th June 2012 to the date of filing suit on 23rd April 2014, in recognition of this conduct to be unfair labour practice in contravention of *Article 41 of the constitution of Kenya 2010 and Section 41, 43 and 45 of the Employment Act*.

42. For the avoidance of doubt, if the respondent chooses to reinstate the grievants, then the 12 months compensation is not applicable but the grievants would be entitled to payment of ½ salary from the period 27th June 2012 when they were suspended to the date of filing suit on 23rd April 2014.

43. The remedies provided in this case are due to the peculiar circumstances of the case where an employer places employees under suspension and proceeds to replace them with new employees without communicating termination of employment to the employees, a practice the court has chosen to discourage with the drastic measures it has taken in aid of justice and fair play.

Judgment Dated, Signed and delivered this 21st day of March, 2019

Mathews N. Nduma

Judge

Appearances

G.S. Okoth for the claimant

Chrispo – Court Clerk