



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO. 877 OF 2017

BETWEEN

HUMPHREY ASHUBWE.....CLAIMANT

VERSUS

KWALE INTERNATIONAL SUGAR COMPANY LIMITED....RESPONDENT

Rika J.

Court Assistant: Benjamin Kombe

Nyadwat Odundo & Co. Advocates for the Claimant

Lloyds & Partners Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 22nd November 2017. He states, he was employed by the Respondent Sugar Company as an Administration Manager on 6th October 2014.
2. He was sent on compulsory leave by the Respondent, on 31st December 2015. The accusations against him were imprecise. He was, on 3rd November 2015, subjected to unlawful arrest and detention, at the behest of Employees, acting on instructions from Senior Management.
3. He was not invited for a disciplinary hearing after the prolonged compulsory leave. His contract was terminated on 11th April 2017.
4. He had left a well – paying job as Regional Manager of a Multinational Security Company before joining the Respondent. He relocated from Mombasa to Ukunda in the South Coast, so as to take up the job with the Respondent. The cost of relocating with his family had been agreed at Kshs. 200,000 between the Parties, but was never paid.
5. The Claimant’s last salary was at a rate of Kshs. 187,000 per month.
6. He prays the Court to find termination was unfair and unlawful, and grant him Judgment against the Respondent in the following terms.
 - a) 12 months’ salary in compensation for unfair termination at Kshs. 2,244,000.
 - b) Exemplary damages at Kshs. 5,000,000.
 - c) Relocation expenses at Kshs. 200,000.
 - d) Declaration that termination was unfair.
 - e) Costs.
 - f) Interest.

g) Any other suitable relief.

7. The Respondent filed its Statement of Response on 22nd February 2018. Its position is that it employed the Claimant as an Administration and Transport Manager on 6th October 2014, until 11th April 2017. His salary was Kshs. 187,000 monthly. His contract was terminated for poor performance. The Respondent carried out an appraisal on or about 30th December 2015, of the security and transport management plan put in place by the Claimant. It was concluded: there was unreasonable deployment of security officials leading to incidents of theft; theft of fuel was prevalent; and there were increased incidents of sugarcane fires. The Claimant was sent on paid compulsory leave. His contract was subsequently terminated on 11th April 2017. He was paid terminal dues, comprising service and notice pay, at Kshs. 202, 035. Termination was fair.

8. The Claimant gave evidence, as did Respondent's Legal Officer David Kulecho, on 12th March 2019 when hearing closed.

10. The Claimant restated in his oral evidence, the contents of his Statements of Claim and Witness. He explained that around 15th November 2015 some of his Colleagues made false accusations against him, alleging that he had sexually harassed his Secretary. The Secretary confessed later, that she was coerced by Respondent's Manager to make the false accusations. He was placed on compulsory leave, which lasted for well over 1 year. The issues about poor performance were raised in afterthought, 1 year and 4 months after the Claimant was sent on compulsory leave. There was no correspondence about poor performance while the Claimant was in employment. He was promised relocation allowance by word of mouth. It was never paid. His salary for the period of compulsory leave was paid, albeit inconsistently.

11. Cross-examined, the Claimant told the Court the Letter of Offer of Employment, dated 2nd September 2014, stated he would sign a contract upon joining the Respondent. He was not issued such a contract. His role included security and transport. The Claimant did not specify who the Complainant in the sexual harassment allegation was, in his Statements of Claim and of Witness. The letter of compulsory leave states there were complaints against the Claimant, with regard to conduct and execution of his duties. At page 20 of Claimant's documents, the Claimant requests Management to be allowed to tell his side of the story. The Director replies that they would welcome his side of the story. The Director states that allegations touched on administration and security. The Claimant was paid his salary while on compulsory leave. Termination letter did not say exactly what the reasons for the decision were. He never demanded to be paid relocation allowance while in employment. He received a net sum of Kshs. 167,351 in terminal benefits. He works for another Company called Urgent Cargo Limited presently. He started working for this Company while on compulsory leave. He did not inform the Respondent about this, and did not agree that he dishonestly earned two salaries, from different Employers, at the same time. Redirected, the Claimant told the Court that he was never given any specific charges by the Respondent.

11. Learned Counsel Kulecho, told the Court that the Claimant was responsible for Respondent's Administration and Security. He was tasked the role of streamlining administrative functions.

12. The Respondent carried out appraisal on 30th December 2015. The Claimant was sent on compulsory leave, to give room for investigations. He was paid his salary in full for the period of compulsory leave. During his absence, it was noted there was marked improvement in his docket. In April 2017, his contract was terminated. He was given adequate opportunity to explain his position. The Respondent did not initiate any complaint of sexual harassment against the Claimant. Relocation allowance would have been provided for in the letter of employment. The Claimant did not disclose that he worked for Urgent Cargo. He was dishonest. His Claim is meritless.

13. Cross-examined, Counsel told the Court he was employed by the Respondent in 2017, and was not there, when the Claimant worked and left employment. His evidence is based on information gleaned from Claimant's employment record. The Claimant did not contest his duty description. The General Manager supervised the Claimant. Appraisal was on 30th December 2015. Counsel was not able to say who in particular, carried out the exercise. He did not know if the Claimant was on annual leave, at the time appraisal allegedly took place. The Claimant was asked to respond to the allegations against him, via e-mail. The letter of compulsory leave refers to minor and serious allegations of criminal nature. There is no Investigation Report, detailing these complaints. The Claimant was not given warning on performance. He was heard through e-mail.

The Court Finds:-

14. The Claimant was employed by the Respondent Sugar Company as an Administration Manager, commencing 6th October 2014. His salary was Kshs. 187,000. The letter offering him employment, is dated 2nd September 2014. It indicated that the Claimant would sign a contract upon joining the Company, which he never did.

15. It was the responsibility of the Respondent under Section 9(2) of the Employment Act 2007, to cause the intended contract to be drawn up. In the absence of any other contract, the letter dated 2nd September 2014, which is signed by the Parties, suffices as the sole contract document.

16. The Respondent sent the Claimant on compulsory leave on 31st December 2015. The letter did not give the Claimant specific details of the allegations over which he was being placed on compulsory leave.

17. The Respondent states it had received several complaints with respect to Claimant's conduct and manner of execution of his duties. The complainants or complaints, are not stated.

18. It is alleged that there were some minor issues, and serious allegations of a criminal nature. Again no details are given. The Respondent does not disclose what crime the Claimant was being investigated for, and who made a complaint, to whichever law enforcement agency, against the Claimant.

19. Several incidents are said to have taken place, leading to loss of Respondent's property. The incidents are not disclosed, and the Respondent does not say what Claimant's participation in the incidents, was. These are cryptic accusations.
20. The Claimant was sent on compulsory leave for 1 year and 4 months, to enable the Respondent 'thoroughly' investigate the allegations.
21. There is no letter to show cause on record, indicating that the Claimant was called upon to respond to specific charges.
22. The Court does not think that Claimant's offer to give his side of the story, and Director's welcome of this offer, can be seen to amount to a fair procedure before termination.
23. The e-mail at page 21 of the Statement of Claim, shows that the Claimant informed the Director he would be happy to give his side of the story, but did not know what the allegations were. In the series of e-mails exchanged between the Parties, the allegations against the Claimant were never specified.
24. The letter of termination gives the reasons for termination to include: unreasonable deployment of security officials, which amounted to mismanagement of Respondent's resources; fuel theft; cane fires; and mismanagement of transport operations.
25. These grounds of termination are not supported by evidence. There are no details of fuel theft, unreasonable deployment of security officials, cane fires and mismanagement of transport operations. There are no numbers given, and no actionable Investigation Report is exhibited, to support these grounds.
26. The Respondent started off with cryptic accusations in the letter of compulsory leave and ended up with a cryptic letter of termination.
27. In between, for 1 year and 4 months, the Claimant was not taken through a disciplinary hearing, as contemplated under Section 41 and 45 of the Employment Act.
28. Serious allegations of a criminal nature mentioned in the letter of compulsory leave, are not revisited in the letter of termination.
29. The Court is convinced termination did not adhere to the minimum statutory standards of substantive and procedural fairness under Sections 41, 43 and 45 of the Employment Act.
30. The Respondent has not made any Counterclaim with regard to the Claimant's involvement with Urgent Cargo Limited, during the period of compulsory leave. There is nothing for the Court to rule upon this involvement. The Respondent argues that the Claimant was dishonest, but what should be the Court's intervention in this dishonesty?
31. The Claimant worked for about 2 years, 7 months. His contract was for an indefinite period. He did not inform the Court how long he expected to go on working for the Respondent. He mitigated his loss by securing another job with Urgent Cargo Limited. He secured the job, while still in the payroll of the Respondent. He was paid terminal dues comprising service and notice pay, at Kshs. 202,035 before tax. There is nothing on record to suggest the Claimant caused, or contributed in any way to, the decision to terminate his contract. Termination was faulty on both substantive justification and procedural fairness. ***The Court grants the prayer for compensation, equivalent of 6½ salary at Kshs. 1,215,500.***
32. There is no evidence showing the Claimant was promised relocation allowance of Kshs. 200,000. It is not documented. The Claimant never made this demand while in employment for over 2 years. The prayer is declined.
33. Exemplary or punitive damages are granted where the Respondent's willful acts are shown to be malicious, violent, oppressive, fraudulent, wanton or grossly reckless. Such damages are awarded as a punishment, and to set a public example. The conduct of the Respondent in terminating the Claimant's contract, while clearly amounting to unfair termination, meriting statutory compensation, can hardly be said to have been of such nature as to justify the punishment of the Respondent. It does not call upon the Court to grant exemplary damages to set a public example. The order for statutory compensation is proportionate to the economic injury sustained by the Claimant.
34. ***Costs to the Claimant.***
35. ***Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.***

IT IS ORDERED:-

(a) It is declared that termination was unfair.

(b) The Respondent shall pay to the Claimant, equivalent of 6½ months' salary in compensation for unfair termination at Kshs. 1,215,500.

(c) Costs to the Claimant.

(d) Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 31st day of July 2019.

James Rika

Judge