



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 483 OF 2017

BETWEEN

KENNEDY SILA MAKENZIL.....CLAIMANT

VERSUS

KWALE INTERNATIONAL

SUGAR COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oloo & Chatur Advocates, for the Claimant

Lloyds & Partners, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 19th June 2017. He avers, he was employed by the Respondent Sugar Company as a Security Officer on 5th December 2014. He worked until 3rd May 2017 when the Respondent terminated his contract. His last salary was Kshs. 79,247.

2. The Claimant faults termination. He was not issued notice, or paid in lieu of notice. The letter of termination indicated reason for termination to be unsatisfactory performance on the part of the Claimant. He was not afforded a fair and reasonable opportunity to defend himself. He had previously been awarded salary increment based on good performance. He prays for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 79,247.
- b) Overtime worked on public holidays, at Kshs. 124,608.
- c) Overtime worked on weekdays and weekends at Kshs. 109,386.
- d) 12 months' salary in compensation for unfair termination at Kshs. 950,964.

Total...Kshs. 1,264,205.

- e) Certificate of Service.
- f) Declaration that termination was unfair.
- g) Any other suitable relief.
- h) Costs.

3. The Respondent filed its Statement of Response on 6th September 2017. It is conceded that the Claimant was employed by the Respondent on terms and conditions of service, disclosed in the Statement of Claim. His contract was terminated for poor performance, following an appraisal, which was conducted as per Respondent's terms and conditions of service. He was paid terminal dues. He was paid for excess hours worked. His prayer for overtime is speculative and untenable. The Respondent asks the Court to dismiss the Claim with costs.

4. The Claimant, and Respondent's Legal Officer Gibson Kabue Mathenge, both testified on 18th February 2019. Daniel Odera, a Branch Manager of Kenya Commercial Bank, Mombasa, testified for the Respondent on 19th June 2019, bringing the hearing to an end.

5. The Claimant adopted his Statements of Claim and Witness, in his oral testimony. He was based at Kwale, overseeing Respondent's security. He exhibited 9 documents, among them the letters of employment and termination. He was told he did not meet performance expectation. He had undergone probation, and was confirmed. His work was good. He had performance-based salary increment. He was congratulated for good work. He was not asked to show cause, why his contract should not be terminated for poor performance. There was no notice and no hearing. He was not paid notice. He worked throughout, including on public holidays and weekends. He was not availed his certificate of service.

6. Upon cross-examination, the Claimant told the Court, pay slip for November 2017 shows he was paid overtime of Kshs. 31,000. On other occasions he was paid overtime of Kshs. 27,240 and Kshs. 49,952 respectively. He would do his computation of overtime, using an overtime form, and submit to the Human Resource Section for processing. He filed these forms for overtime claimed in the suit before the Court. He did not have a KCB account. Page 19 of Respondent's documents shows there was a KCB account in the name of Sila Makenzi. He has never been the holder of a KCB account. It was alleged that he was paid Kshs. 88,483 through this KCB account. Leave days, pending salary, notice and service are indicated to have been paid. Leave form exhibited by the Respondent shows the Claimant took 20 days of annual leave. Performance was assessed during probation. Salary was raised because of good performance. He did not perform poorly after salary increment. Redirected the Claimant told the Court he was not paid for excess hours worked. He received what is shown in the pay slips. He has never operated a KCB account. He was paid some money through Equity Bank and M-pesa. He did not have the details of payment.

7. Learned Counsel Mathenge, confirmed that the Claimant was an Employee of the Respondent. His performance dipped. He was engaged about this by his Supervisor severally. Oral warning issued, without improvement. His contract was terminated. There was no ill will on the part of the Respondent. He was paid terminal dues including service pay, even though he was registered with the N.S.S.F. Terminal dues were deposited in his salary account with KCB Mombasa. He was paid overtime worked every end of the month. Notice was included in terminal dues paid. Termination was fair. He is not entitled to compensation.

8. Mathenge confirmed on cross-examination that Claimant's salary was increased based on good performance. He was notified orally by his Supervisor, about dipped performance. Employees were paid through their bank accounts. Human Resource Section tabulated his terminal dues. Termination was fair. He was orally warned on several occasions. He was heard by his immediate Supervisor. He was paid overtime of Kshs. 31,202 in November 2016, Kshs. 27,240 in December 2016, and Kshs. 49,957 in March 2017. He worked for 2 years in all. Redirected, Counsel told the Court that the Claimant was paid equivalent of 1 month salary in lieu of notice.

9. KCB Bank Branch Manager Mombasa, confirmed, that on 13th July 2017, the Respondent made bulk payments to Kennedy Sila Makenzi, Account 11401620255524, through electronic transfer to Equity Bank. The Witness availed to the Court a screenshot of the transaction. Cross-examined, the Manager told the Court that the Claimant was a customer of Equity Bank. Transfer was made on the instruction of the Respondent, on 13th July 2017.

The Court Finds:-

10. It is agreed that the Claimant worked for the Respondent over a period of 2 years, commencing 8th December 2014, terminating 3rd May 2017. Termination was instigated by the Respondent, on allegation of unsatisfactory performance by the Claimant.

11. The Claimant was paid leave at Kshs. 57,026, pending salary at Kshs. 7,924, notice at Kshs. 79,245, service at Kshs. 86,638- gross total at Kshs. 116,781. After-tax terminal benefits paid, totaled Kshs. 88,483.

12. The Claimant was not truthful in his evidence on payment of this amount. He offered that he was paid some amount whose details he did not have, through his account with Equity Bank, and M-pesa.

13. He made it necessary for the Respondent to call KCB Mombasa Branch Manager, to explain details of payment. It is clear that KCB transferred electronically, upon instruction from the Respondent, the sum of Kshs. 88,483 to Claimant's Equity Bank account. The Claimant did his credibility no good, by contesting payment of this sum through his Bank.

14. Similarly, the Claimant was paid overtime on various occasions, as shown in his pay slips on record. He was paid at the end of the month. Instead of acknowledging what was paid in overtime, and claiming any pending overtime, the Claimant unconvincingly pleads and testified he merits overtime pay, for excess hours worked on weekends, weekdays and public holidays throughout the 2 years. He did not supply the Court with records, supporting this. He did not account for what was paid, as shown in the pay slips. The 2 prayers for overtime pay are declined.

15. Notice was part of the benefits already received by the Claimant. Why does he strain judicial economy by seeking double notice pay?

16. On 13th September 2016, the Respondent conferred upon the Claimant enhanced monthly salary. The letter indicates this was after review of Claimant's performance and commitment to his duties. This was in September 2016. Termination was on 3rd May 2017, less than a year later, on the allegation of unsatisfactory performance.

17. This is inexplicable. There is no document showing that the Claimant was appraised afresh, in the period September 2016 – May 2017, and found wanting. An international company cannot claim to have conducted such an important exercise orally. The Claimant was not placed on any Performance Improvement Plan [PIP]. The Court has not been told what goals the Claimant was expected to achieve, and failed to achieve, within specified timelines. Learned Counsel Mathenge, told the Court that the Claimant was engaged severely by his Supervisor, and issued oral warnings. There is no record of performance appraisal, and no written warning. There is no record of a PIP.

18. And there was no hearing before termination. No letter laying the charges against the Claimant, and seeking his explanation, was produced by the Respondent. The Respondent stated in its evidence that the Claimant was heard by his immediate Supervisor before termination. The same Supervisor is alleged to have appraised the Claimant and issued warnings.

19. The Court is satisfied that the Respondent did not meet the standards of fairness required of an Employer, under Sections 41, 43 and 45 of the Employment Act 2007. The Claimant merits compensation for unfair termination.

20. The Claimant was on an indeterminate contract. He had served probation, was confirmed, and afterwards garlanded for good performance. His salary had been raised on account of good performance. His career was on upward trajectory. The Respondent appears to have changed its view of the Claimant within a span of less than 1 year, declaring him to be an underachiever. His career progression with the Respondent was frustrated. The Claimant worked for 2 years, and expected, based on his good work, to go on working. He did not contribute to the circumstances leading to termination. It is noted also, that he was paid terminal benefits, which included service pay, notwithstanding his subscription to the N.S.S.F regime. ***He is granted equivalent of 8 months' salary in compensation for unfair termination, at Kshs. 633,979.***

21. ***Certificate of Service to issue.***

22. ***Costs to the Claimant.***

IN SUM, IT IS ORDERED: -

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant equivalent of 8 months' salary in compensation for unfair termination at Kshs. 633,979.

c) Certificate of Service to issue.

d) Costs to the Claimant.

Dated and delivered at Mombasa this 19th day of September 2019.

James Rika

Judge