



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 25 OF 2017

(Before Hon. Justice Mathews N. Nduma)

DENNISH OWINO OMEGA.....CLAIMANT

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant worked for the respondent as a Technician in the packaging plant from the year 2012.
2. On 25th October 2016, the claimant was served with a show cause letter to explain his absence from work between 15th and 19th September 2016.
3. The claimant explained in a letter dated 26th January 2016 that he was at work on the stated days. The claimant was given a 1st and final warning letter dated 3rd March 2016.
4. The claimant testified that this was a witch-hunt as the 17th, 18th and 19th fell on a weekend and the claimant's supervisor was away on leave.
5. On 7th November 2016, the claimant got a 2nd notice to show cause in which same issues were raised. The claimant responded by a letter dated 8th November 2016. The claimant was accused of insubordination in that he had refused to apply for leave for the 3 days he was said to have been absent earlier. The claimant explained that he had worked on those days and therefore he saw no need to apply for leave in respect of the said days.
6. Claimant further testified that his colleagues confirmed that he was at work. These colleagues were Mr. Bultan, M/S Lois, Mr. Mechack and Mr. Koome. On 10th November 2016 the claimant was issued a letter of suspension up to 14th December 2016. The claimant was called to a disciplinary hearing on 13th December 2016. At the meeting the claimant was not given a chance to speak. The notice did not explain what the meeting was for. The claimant was dismissed on 15th December 2016.
7. At the time, the claimant earned Kshs. 155,733 per month as per the pay slips before court.
8. The claimant was paid two months salary in lieu of notice.
9. The claimant testified that there was no valid reason to terminate his employment and that the dismissal was unlawful and unfair.
10. The claimant said that he had a good record at work and had never absented himself at work. The claimant seeks compensation for the unlawful and unfair dismissal.
11. The respondent did not call any witness to refute the testimony by the claimant. The evidence by the claimant that he was dismissed for no valid reason remains uncontroverted. The court is satisfied that the claimant was at work on the days he was wrongly accused of being absent. The claimant rightly refused to apply for leave in respect of the said three days because he had worked during the said three days.
12. The court is also satisfied that the claimant had already received warning in respect of the alleged absenteeism despite protestation that he was in.

13. It was malicious and wrongful for the respondent to terminate his employment in respect of the same matter he had been previously warned over.

14. The respondent violated *Sections 41, 43, 44, 45 and 46 of the Employment Act* in that the termination was not for a valid reason and a fair procedure was not followed in effecting the termination.

15. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Employment Act, 2007*. The claimant had served the respondent diligently for a period of about six (6) years. The claimant had rose through the ranks and had his salary increased. The claimant had good career prospects at the respondent's company. The claimant was wrongfully victimized for an offence of absenteeism which he had not committed. The supervisor exhibited malice in this matter and this is an aggravating circumstance. The claimant received notice pay upon termination. The claimant only seeks compensation having testified that he was paid in lieu of two months notice.

16. The claimant suffered loss and damage due to something he had not done at all.

17. The claimant had not gotten alternative employment but was doing some business.

18. The claimant relies on the case of *Alphonse Maghanga Mwachanya vs Operation 680 Limited (2013) eKLR* in which Rika J. awarded 12 months salary in compensation for the unlawful and unfair termination of employment.

19. The court has considered the case of *Mary Chemweno Kiptui vs Kenya Pipeline (2014) eKLR* and all the factors above in awarding the claimant the equivalent of five (5) months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs. 778,665.

20. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

(a) The equivalent of five (5) months salary in compensation for unlawful and unfair termination in the sum of Kshs. 778,665.

(b) Interest at court rates from date of judgment till payment in full.

(c) Costs of the suit.

Judgment Dated, Signed and delivered this 16th day of September, 2019.

Mathews N. Nduma

Judge

Appearances

M/S Otieno for claimant.

Mr. Osodo for Respondent

Chrispo – Court Clerk