



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 111 OF 2015

(Before Hon. Justice Mathews N. Nduma)

CLIFFORD MABELE WEFWAFWA.....CLAIMANT

VERSUS

NZOIA SUGAR COMPANY.....RESPONDENT

JUDGMENT

1. The claimant was appointed Head of Department, Senior Manager in charge of sales by a letter dated 28th April 2008 at a salary of Kshs. 186,000. The claimant worked continuously until 13th June 2014 at the time his salary was Kshs. 320,000. The claimant worked for over five (5) years. CW1 testified that he had a good work record and had no warning.
2. In November 2014, CW1 was suspended by the Managing Director on allegations that CW1 was involved in loss of sugar. That a transporter Magnum International was involved in the loss. CW1 testified that the supplier was arrested and charged in Bungoma court and he paid for the lost sugar. That the transporter was fined Kshs. 30,000 and ordered to pay Kshs. 924,726, being the value of the lost sugar. That the supplier paid accordingly. That the suspension of the claimant was briefly lifted in January. In June, the employment of the claimant was terminated. CW1 testified that he was not given a hearing and was not paid terminal benefits nor compensated for the job loss.
3. CW1 however stated that he was offered salary for days worked, two months salary in lieu of notice; 74 days in lieu of leave days not taken and pension. CW1 stated he was not paid the stated amounts. The claimant prays for the terminal benefits and compensation for the termination.
4. Under cross examination, the claimant stated that he was sales and marketing manager and was in-charge of the warehouse; to get market for the sugar produced; he was head of staff in the department and reported to the CEO. CW1 further stated that he was in-charge of effective sugar distribution and was a member of an Adhoc committee.
5. CW1 stated Magnum provided transport services but was not a supplier of sugar. Magnum was at the material time transporting sugar to Ukwala, a customer.
6. CW1 stated that he appointed distributors but transporters had to meet certain requirements. Tenders were floated under purchasing department. CW1 stated that it was not his job to manage transporters. CW1 responded to notice to show cause. Sugar lost was worth Kshs. 2.4 Million.
7. CW1 stated that he disagreed with the reasons given for the termination. CW1 admitted he appeared before the Chairman and three board Members before the termination. Employment was terminated for three (3) reasons being, causing loss of sugar, failure to attend a meeting and crossing to Uganda with company motor vehicle without authority.
8. CW1 stated that he simply walked across the border and did not use company motor vehicle to cross. CW1 stated period of the contract has now ended. CW1 stated pension was payable by a different entity.
9. CW1 stated that he was not paid salary for November 2013 to date of termination, a period of 8 months. Respondent offered to pay for that period in the termination letter. CW1 stated that the Board that terminated his employment was not properly constituted. Claimant prays to be awarded as prayed.
10. RW1 Shadrack Nyongesa Masinde testified for the respondent. He was acting Human Resource Manager and relied on statement of defence and list of documents attached thereto which were produced as exhibits '1' to '13'. RW1 had worked for respondent for 15 years.
11. CW1 stated that the claimant was employed on 28th April 2008 and was charged with formulation of sugar distribution policy and its

implementation. That his roles were specified in his letter of appointment. That CW1 was member of distribution, appointment and vetting committee. CW1 served the committee as the secretary. RW1 testified that the claimant was now employed as General Manager of Kenya Association of Music Producers.

12. That employment of the claimant was terminated on 13th June 2014 due to loss of sugar and failure to attend Management Meeting on 4th November 2013 and crossing to Uganda with company motor vehicle without authority.

13. That CW1 replied to show cause letter dated 11th November 2013 on 12th November 2013. That CW1 was suspended from service and was called to a hearing on 25th February 2014. That three (3) Directors sat in the disciplinary hearing. That this was the number gazetted at the time. That the full board had not been constituted. That value of lost sugar was Kshs. 2,459,452.

14. That for a distributor to qualify to get a job, they had to provide insurance cover for goods in transit; provide certificate of good conduct for drivers and provide a bank guarantee. RW1 testified that claimant crossed the border to eat upon filling immigration documents. That claimant apologized for this incident and promised to follow procedure in future.

15. RW1 denied that CW1 crossed on foot. RW1 stated that CW1 was driven by a company driver across the border. That CW1's half salary was reinstated on 19th December 2013. That claimant was offered terminal benefits set out in the letter of termination. That CW1's pension was payable by Alexander Forbes and was paid Kshs. 1,370,667.05 gross terminal benefits.

16. That net payment was Kshs. 966,687.67 after deduction of pay as you earn. That amount payable to CW1 was nil because the company surcharged the claimant for lost sugar in the sum of Kshs. 1,009,452. That CW1 still owes the respondent Kshs. 42,767.33. That the respondent has not filed a counter claim. That CW1 was personally responsible for the loss. He was in charge of physical delivery of sugar. RW1 prays the suit be dismissed with costs.

17. Under cross examination RW1 strongly defended the quorum of the board that terminated employment of the claimant. RW1 insisted that claimant instructed a driver to drive a company car to Uganda without authority. RW1 admitted that the supplier, named Magnum compensated the respondent for the lost sugar. He was also fined Kshs. 30,000.

18. That it only paid Kshs. 900,000. CW1 was surcharged the balance. That total value of sugar was Kshs. 2,459,452 and Magnum only paid Kshs. 900,000. RW1 prays suit be dismissed with costs.

Determination

19. The issues for determination are:

- (a) Whether the termination of employment of the claimant was for a valid reason and followed a fair procedure and
- (b) Whether the claimant is entitled to the reliefs sought.

Issue (a)

20. The claimant was the sales and marketing manager of the respondent. The claimant was also a committee member of the Distributor Appointment committee and vetting pursuant to the marketing policy of the respondent.

21. It is not in dispute that the distributors and transporters of sugar were obliged to:

- (i) Have a certificate of good conduct for the truck drivers.
- (ii) Obtain goods in Transit Insurance to cover the sugar transported to suppliers and
- (iii) Obtain a security or Bank Guarantee on the delivery.

22. It is not in dispute that sugar worth Kshs. 2,459,452 was lost in transit while being transported to Ukwala Super market by Magnum Investment. It is not in dispute that the claimant oversaw the appointment of Magnum Investment as a transporter. It is not in dispute that Magnum Investment had not taken out goods in transit insurance nor had it a Bank Guarantee to secure sugar in transit at the time of the loss.

23. The respondent has demonstrated that the claimant had failed in his core responsibility in ensuring that sugar being transported was fully secured in the event of loss. The claimant was properly charged with the offence of causing loss of sugar. The claimant was given opportunity to answer to the show cause letter which he did. The claimant appeared before a disciplinary committee which found him guilty of misconduct for the loss of sugar among other two offences of crossing Kenya Uganda boarder with company motor vehicle without authority and failure to attend management meeting without lawful cause.

24. The court finds that the claimant has failed to demonstrate that the termination of employment was wrongful and unfair. To the contrary the respondent has demonstrated that it had a valid reason to terminate the employment of the claimant and that it followed a fair procedure in doing so. The claim for compensation for wrongful dismissal is therefore dismissed.

Issue (b)

25. As to whether the claimant is entitled for the terminal benefits sought in the statement of claim the court finds as follows:

(a) The claimant was paid terminal benefits in the sum of Kshs. 1,370,647.05 but the entire sum was offset by the respondent against the balance of Kshs. 1,009,452 in respect of the lost sugar. Magnum Investment was surcharged by the trial court Kshs. 966,687.67 which it proceeded to pay. It is the court's considered finding that the respondent resulted to self-help and had no business to deduct the balance of the price of the lost sugar without obtaining a court order. The respondent did not file a counter claim for the court to determine if the claimant ought to reimburse the respondent for the loss of sugar in transit.

26. The court finds that the claimant is entitled to payment of the full benefits set out in the letter of termination in the sum of Kshs. 1,370,647.05 in full. The court directs the respondent to pay the amount to the claimant subject only to payment of pay as you earn. The claim for pension is payable by Alexander Forbes and not by the respondent. The respondent is however obliged to provide clearance to the claimant to allow release of the full pension by Alexander Forbes. The respondent is directed to issue such clearance to the claimant.

27. The claimant is also entitled to costs of the suit.

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

- (a) Payment of Kshs. 1,370,647.05 being final terminal benefits to the claimant.
- (b) Provide clearance letter to the claimant to enable payment of pension by Alexander Forbes.
- (c) Interest on (a) above at court rates from date of termination till payment in full.
- (d) Costs of the suit.

Judgment Dated, Signed and delivered this 24th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Ogelo for Claimant

Mr. Kisaka for Respondent.

Chrispo – Court Clerk