



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 55 OF 2015

(AS CONSOLIDATED WITH CAUSE NOS. 38, 40, 42, 44, 46, 47, 48, 49, 60, 62, 67, 76, 83, 84, 85, 95, 164, 165 and 405 OF 2015)

(Before Hon. Justice Mathews N. Nduma)

1. NANCY CHRISTINE OTIENO
2. DAMARIS APIYO WAMANI
3. THOMAS PIUS AMBETSA ODERA
4. DANIEL OTIENO ONYANGO
5. KENNETH MBOGA KIBONG
6. MAKOMERE JARED OMWAKA
7. TITUS WILLIS WANZALA MAKHOHA
8. OBULIALIA PATRICK WASICHE
9. CYPRIAN DONALD WAMBANI
10. PATRICK GICHUKI MAINA
11. VICTOR ANAMANJIA OKUSUMBA
12. IAN KOPAR ODUK
13. ANTONY ERIC OSUNDWA
14. WYCLIFFE ABUKO NZUYA
15. HEBRON LITSULITSA ADOLI
16. WASIKE GOSKIN MUMELO
17. BARASA PIUS
18. MARK WANYONYI SALE
19. MUSA ANIGRO ODONDI
20. FLORENCE AUMA WERE
21. GODWICK OMONDI BARAZA
22. CHARLES KOGURE

23. CHARLES OTIENO KALANGI
24. BARNABUS SHITSUKANE MAKONJERO
25. CLEPHUS WANYAMA WABOMBA
26. KIZITO MUGAISI SHIKOKOTI
27. DAMASENO JUMA WALUSALA
28. MICHAEL SANDE CHITECHI
29. ABRAHAM MULIARO WAFULA
30. HERI WASWA LIWA
31. AGGREY OYIENGO AMBANI
32. LIVINGSTONE WANDO AKATO
33. JOHN UHURU OMUKE
34. GEORGE MUTSOTSI ANGINYA
35. RICHARD ANTONY ANDATI.....CLAIMANTS

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....DEFENDANT

J U D G M E N T

1. Suit No. 77/2015, **Dorothy Vivian Atieno Ogutu vs Mumias Sugar Company Limited** was concluded by a Judgment delivered by Maureen Onyango J. on 30th March, 2017 in which the court found that the Claimant's employment was terminated without a hearing on the specific grounds in the letter of termination. The court therefore stated:-

“I find that the Claimant was not subjected to a fair procedure process to the termination of employment.”

2. The court further held:-

“This suit was selected as a test suit for several other cases. It is my opinion that the facts of this case are unique and may not necessarily apply to the others. Although the procedure for termination was the same in all the cases, the culpability of each Claimant and remedies where applicable, ought to be assessed individually. This case will therefore be a test case only in so far as procedure for termination of employment is concerned.”

3. On 28th June 2017, Lady Justice Onyango made further orders as follows in cause No. 55 of 2015:-

“The parties will file detailed witness statements and written submissions. Orders to apply to file Nos. 38/2015; 40/2015; 42/2015; 44/2015; 46/2015; 47/2015; 48/2015; 49/2015; 60/2015; 62/2015; 67/2015; 76/2015; 83/2015; 84/2015; 85/2015; 95/2015; 164/2015; 165/2015 and 405/2015.”

4. The test judgment in cause No. 77/2015 shall apply to the aforesaid causes accordingly as directed in the said judgment on the procedure for termination, which the judged found was same in all cases, and went ahead to fault the said procedure, as unfair for failure to accord the Claimant a hearing.

Submissions

5. The Claimant filed written submissions dated 26th July, 2017 providing details in respect of twenty two causes listed under paragraph 2 thereof.

Reinstatement

6. Claimants in cause nos. 60, 62, 67, 83, 84 and 85 of 2015 seek reinstatement.

7. The court is asked to adopt the judgment of the court in cause No. 77 of 2015 and reinstate the Claimants in these causes since their employment was terminated for the same reason and in the same manner as the Claimant in cause No. 77 of 2015 and therefore it is fair and just to treat the said Claimant equally.

8. Notwithstanding the judgment of the court in cause no. 77 of 2015, the court is bound by the provision of section 12(3)(viii) of the Employment and Labour Relations Court Act Cap No. 20 2011, as amended by Act No. 8 of 2014 as follows:-

“(3) In exercise of its jurisdiction under the Act, the court shall have power to make any of the following orders:-

(i)

(ii)

(iii)

(iv)

(v)

(vii) An order for reinstatement of any employee within three years of dismissal subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law.”

9. The court has jurisdiction to make orders provided under this section and in that regard, the court may only make an order for reinstatement within three years of dismissal.

10. In terms of the pleadings before court, all the Claimant’s services were terminated by the Respondent by letters dated 13th February, 2015.

11. The judgment of the court delivered on 30th March 2017, was done within the three years mandatory limitation period in which the court may reinstate an employee. The limitation period expired on 13th February, 2018. The remedy of reinstatement is therefore no longer available to the Claimants.

12. The provisions of section 12(3)(viii) however empowers the court to provide –

“any other appropriate relief as the court may deem fit to grant.”

13. Indeed, all the Claimants have prayed for any other or further remedy the court may deem just and expedient to grant in the various statements of Claims in addition to a plea of award of damages in the alternative to reinstatement.

14. All the other Claimants in causes nos. 38, 40, 42, 47, 49, 55, 65, 67, 83, 84, 85, 95, 164, 165, & 405 of 2015, as set out in paragraph 4 of the submissions, seek payment of terminal benefits and compensation as set out in the respective memoranda of claim and in the written submissions.

15. The court has considered the pleadings before court, and the judgment in cause no. 77 of 2015 on liability and has come to the conclusion that the Claimants’ services were terminated at the same time and for similar reasons.

16. The only different aspect of their case, are the different positions held by the claimants and the respective periods served by each Claimant. The Claimants served in similar environment and had similar terms and conditions of service.

17. Following the judgment of the court in cause no. 77 of 2015, the services of the Claimants were terminated without following a fair procedure, by the same disciplinary panel.

18. Accordingly, the court finds that the termination of the employment of all the Claimants herein was in violation of sections 41, 43 and 45 of the Employment Act, 2007. The Claimants are therefore entitled to compensation in terms of section 49(1)(c) as read with sub-section 49(4) of the Employment Act, 2007.

19. The Respondent in paragraph 16 of their written submissions, urged the court not to award the Claimants more than the equivalent of six (6) months salary in addition to the various terminal benefits they are entitled to.

20. The court has taken into account the similar circumstances surrounding the termination of the Claimants services and also noted that the relative length of service given by the Claimants.

21. The court takes into account that the Claimants lost their employment in questionable circumstances not of their own making.

22. There is apparent confusion on the Respondent’s policy of terminating plots which led to the victimization of the Claimants. The court finds therefore that the Claimants did not contribute to their loss of employment. The Claimants have suffered loss and damage having lost

their legitimate source of income. The claimants were not paid terminal benefits upon termination. The terminal benefits were however paid later.

23. The court has considered similar cases including the following:-

a. Tom Mabya Luseno vs Mara West Camp ELRC, Nairobi Cause No. 795 of 2010.

b. Franklin Kaime Wanyoike vs China CAMC Engineering Co. Limited Nairobi ELRC No. 909 of 2014.

c. Isaiah Nyakoe vs Kenya Wildlife Service Nairobi, ELRC Cause No. 274 of 2013.

and awards all the Claimants equivalent of six (6) months salary in compensation for unlawful loss of employment.

Terminal benefits

Service pay

24. No basis has been laid by any of the Claimants for the respective claims for payment of service gratuity. All the Claimants had NSSF dues deducted and paid on their behalf by the employer. Service pay is therefore not available to the claimants in terms of section 35(5) of the Employment Act, 2007 which provides:-

“An employee whose contract of service has been terminated vide sub-section (1) (c) shall be entitled to service pay for every year worked the terms of which shall be fixed.”

25. Section 35(6) provides-

“This section shall not apply where an employee is a member of –

(d) The National Social Security Fund”

26. The Claims for service pay have no merit and are dismissed.

27. The Respondent admits claims in respect of salary earned up to and including the date of termination, accrued leave days, pension withdrawal benefits as per mumias sugar company staff Retirement Benefit Scheme Rules, and provision of Certificate of Service.

28. The court therefore awards each of the Claimants the respective amounts claimed in the memoranda of claims and summed up in the written submissions by the Claimants in respect of Notice pay; arrear salary and payment in lieu of leave days not taken, only in the event same has not yet been paid.

29. In the final analysis, judgment is entered in favour of the Claimants as against the Respondent as follows:-

(a) Equivalent of six(6) months salary in respect of all the Claimants as follows:-

1. Nancy Christine Otieno

(Kshs.185,567 x 6) Kshs.1,113,456.24

2. Damaris Apiyo Wamani

(Kshs.154,580 x 6 months) Kshs. 927,483.36

3. Richard Antony Andati

(Kshs.70,312.34 x 6 months) Kshs. 421,874.04

4. George Musotsi Anginya

Kshs.115,978.40 x 6 months) Kshs. 695,870.4

5. John Uhuru Omuke

(Kshs.190,687.57 x 6 months) Kshs.1,144,125.42

6. Antony Eric Osundwa

(Kshs.202,059.50 x 6 months)	Kshs.1,212,357
7. Florence Auma Were	
(Kshs.154,581 x 6 months)	Kshs. 927,486
8. Cyprian Donald wambani	
(Kshs.91,783.95 x 6 months)	Kshs. 550,703.7
9. Titus Willis Wanzala Makokha	
(Kshs.91,783.93 x 6 months)	Kshs. 550,703.58
10.Wycliffe Abuko Nzuya	
(Kshs.164,375.12 x 6 months)	Kshs. 986,250.72
11.Thomas Pius Ambetsa Odera	
(Kshs.101,903.35 x 6 months)	Kshs. 611,420.1
12.Jared Omwaka Makomere	
(Kshs.99,639.94 x 6 months)	Kshs. 597,839.64
13.Livingstone Wando Akatu	
(Kshs.201,788.68 x 6 months)	Kshs.1,210,732.08
14. Kenneth Kibong Mbagaa	
(Kshs.96,341 x 6 months)	Kshs. 578,046
15. Michael Sande Chitechi	
(Kshs.96,335 x 6 months)	Kshs. 578,010
16. Hesbon Litsulitsa Adoli	
(Kshs.389,406.84 x 6 months)	Kshs.2,336,441.04
17. Kizito Mugaisi Shikokoti	
(Kshs.155,733 x 6 months)	Kshs. 934,398
18. Goskin Mumelo Wasike	
(Kshs.196,985.87 x 6 months)	Kshs.1,181,915.22
19.Charles otieno Kalangi	
(Kshs.134,244 x 6 months)	Kshs. 805,464
20.Barasa Pius	
(Kshs.258,233.12 x 6 months)	Kshs.1,549,398.72
21.Aggrey Oyiengo Ambani	
(Kshs.192,158.87 x 6 months)	Kshs.1,152,953.22
22.Daniel Otieno Onyango	

Kshs.116,622.15 x 6 months)	Kshs. 699,732.9
23.Damaseno Juma Walusala	
(Kshs.192,834.03 x 6 months)	Kshs.1,157,004.18
24. Abraham Muliaro Wafula	
(Kshs.147,986.28 x 6 months)	Kshs. 887,917,68
25. Godwick Omondi Baraza	
(Kshs.87,180.56 x 6 months)	Kshs. 523,083.36
26. Patrick Obuliala Wasiche	
(Kshs.9,783.93 x 6 months)	Kshs. 58,703.58
27. Ian Kopar Oduk	
(Kshs.185,576.04 x 6 months)	Kshs.1,113,456.24
28.Mark Saleh Wanyonyi	
(Kshs.116,146.83 x 6 months)	Kshs. 696,880.98
29.Heri Saleh Liwa	
(Kshs.191,236.12 x 6 months)	Kshs.1,147,416.72
30.Victor Okusimba Anamanjia	
(Kshs.185,576.04 x 6 months)	Kshs.1,113,456.24
31. Charles Muteithia Kagure	
(Kshs.185,576.04 x 6 months)	Kshs.1,113,456.24
32.Patrick Gichuki Maina	
(Kshs.192.187.02 x 6 months)	Kshs.1,153,122.12
33. Mussa Anigro Odondi	
(Kshs.186,891.73 x 6 months)	Kshs.1,121,350.38
34.Barnabas Shitsukane Mukonjero	
(Kshs.70,312 x 6 months)	Kshs. 421,872
35.Cleophas Wanyama Wabomba	
(Kshs.97,539.93 x 6 months)	Kshs. 585,239.58

(b) Provision of certificate of service to all the Claimants within 30 days of the judgment.

(c) The Claims in respect of notice pay arrear salary and payment in lieu of leave having been paid are not awarded.

(d) The compensation in (a) above is payable with interest at court rates from date of judgment till payment in full.

(e) The costs to abide the outcome.

Judgment Dated, Signed and delivered this 10th day of May, 2018

Mathews N. Nduma

Judge

Appearances

Bruce Odeny for Claimant

Okweh Achiando for Respondent

Chrispo – Court Clerk