



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 159 OF 2013

(Before Hon. Justice Mathews N. Nduma)

ENOS MANG'WANA MAKOKHA.....CLAIMANT

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT

J U D G M E N T

1. In the Amended Statement of Claim filed on 24th September, 2015, Claimant seeks a declaration that termination of his employment was wrongful and unfair and payment of terminal benefits including:-

- a. Two months salary in lieu of notice and
- b. Salary for 17 days worked in November 2010
- c. An order compelling Respondent to account for the proceeds of sale of Motor Vehicle Registration No.KBK 944 A.

2. The Claimant was employed by the Respondent on 17th November, 1993 as a field assistant and worked diligently, and continuously until 17th November, 2010 when his employment was terminated on allegations that he had given a false report on a lead land. The Claimant denies the allegation. At the time of termination he was a field supervisor and earned Kshs.43,557.33 per month.

3. He was given a notice to show cause and he gave his explanation in writing on 17th November, 2010. On 14th December, 2010 he received a letter of termination. He appealed the decision to terminate his employment on 14th December. The Appeal was rejected by a letter dated 14th December, 2010. He was not required to appear before the appeal panel.

4. The Claimant produced documents marked exhibit '1' to '8' in support of his case.

5. The Claimant told the court that a Motor Vehicle he had bought on loan was repossessed and sold by the Respondent upon termination. Its registration number was KBK 944 A. The claimant states that he has suffered loss and damage and seeks compensation in respect thereof.

6. The Respondent was served with a hearing notice for hearing of the suit on 3rd October, 2018. A return of service was filed on 1st October, 2018 showing that the hearing notice was received by the firm of Prof. Tom Ojienda & Associates for the Respondent.

7. The Advocates failed to attend the hearing of the suit without any explanation and matter proceeded to hearing *ex parte*.

8. The suit is therefore undefended since the testimony by the Claimant alleging that he was unlawfully and unfairly terminated was not rebutted. The claims made by the Claimant are therefore not opposed.

Determination

9. Notwithstanding that the Respondent did not adduce any evidence to rebut the testimony by the Claimant. The Claimant has the primary onus of proving on a balance of probabilities that his services were terminated unfairly in terms of section 47(5) of the Employment Act 2007 as read with sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya. That onus has been discharged by the Claimant.

Notice Period

10. In terms of the letter of appointment produced by the Claimant dated 17th July, 1993, the Claimant was upon serving 5 years entitled to two (2) months termination notice. The Claimant was not given the notice nor paid in lieu thereof, the court awards the Claimant two (2) months salary in lieu of notice in the sum of Kshs.87,114.66.

Salary for November, 2010

11. The Claimant testified that he was not paid for the 7 days worked in the month of November. The Claimant is awarded salary 17 days in the sum of Kshs.24,693

Accounts for Motor Vehicle Registration No. KBK 944 A

12. The Claimant did not adduce sufficient evidence to question the manner of the sale and the manner the proceeds of sale were applied by the Respondent. The claim is dismissed for want of proof.

Compensation for Unfair Termination

13. Testimony by the Claimant that he had not committed alleged breach and that he had given a reasonable explanation on the events leading to the termination of his services was not rebutted by the Respondent.

14. The court has already found that the Claimant has proved on a balance of probabilities that the termination of his services was not for a valid reason. The court finds that the termination violates sections 43 and 45 of the Employment Act and the Claimant is entitled to compensation in terms of section 49 of the Act.

15. In this respect the Claimant had served for 17 years without any adverse record. The Claimant's employment was terminated for an invalid reason and he suffered loss and damage. The Claimant was not paid terminal benefits upon termination including salary for the last month worked. The Claimant did not contribute to the termination. The court awards the Claimant 10 months salary in compensation for the unlawful termination of employment in the sum of Kshs.435,773.

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

(a) Kshs.435,773 in compensation.

(b) Kshs.87,114 in lieu of two months notice.

(c) Kshs.24,693 in respect of 17 days worked in November, 2010 salary.

Total award Kshs.547,580

(d) Interest on the award at court rates from date of Judgment in respect of (a) above and of filing suit in respect of (b) & (c) above till payment in full.

(e) Respondent to pay costs of the suit.

Dated, Delivered and Signed in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Kweyu for the Claimant

Prof. Ojienda & Co. Advocates for the Respondent

Chrispo – Court Clerk