



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 39 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**ROSELYNE ATIENO OGOLLA.....CLAIMANT**

**-Versus-**

**KIBOS SUGAR INDUSTRIES & ALLIED INDUSTRIES LIMITED.....RESPONDENT**

**J U D G E M E N T**

The Claimant was employed by the Respondent on 22nd January 2009 as a cleaner. On 30th June 2011 at around 11 am she was at the Respondent's reception when the Chairman of the Company Mr. Raju went to the reception and inquired from the Claimant the whereabouts of the receptionist, Susan Nyokabi. The Claimant informed him that Susan had taken a tea break. She was accused by the Chairman of covering up for Susan who according to the Chairman was absent without permission. The Chairman told her to go away and called the Human Resource Manager Mr. David Moli Odongo whom he instructed to dismiss the Claimant. On 5th July 2011 the Claimant was issued with a letter of suspension.

According to the Respondent the Claimant was recalled back to work by letter dated 8th August 2011 which required her to report back to work on 25th August 2011 but she failed to do so. The Claimant however denies receiving the letter requiring her to resume duty.

The Claimant filed this suit against the Respondent alleging that her employment was unfairly terminated by the Respondent. She prays for compensation for wrongful dismissal to a maximum of 32 months wage's at Kshs. 243,309.00, two months' salary in lieu of notice at Kshs. 15,696, and Annual leave allowance and overtime not paid in the sum of Kshs. 23,546.25 being a total of Kshs. 282,551.25. In addition the Claimant prays for general damages, costs and interest.

The Respondent filed a Statement of Response denying the allegations in the Memorandum of Claim. It is the Respondents position that the Claimant failed to resume duty following her suspension. The Respondent denies that the Claimant is entitled to any of the prayers sought and prays that the Claim be dismissed with costs.

The case was heard on 7th October 2015 when the Claimant testified in support of her case and the Respondent called one witness David Moli Odongo who testified on its behalf. Parties filed and exchanged submissions thereafter.

The issues for determination are whether the Claimant was unfairly dismissed as she alleges or she deserted duty as claimed by the Respondent; and secondly if she is entitled to her prayers.

**Whether the Claimant was unfairly terminated**

There is no dispute that the Claimant was verbally sent away from work on 30th June 2011 and thereafter issued with a suspension letter on 5th July 2011. The letter of suspension states that the suspension was indefinite.

According to the Respondent the Claimant deliberately misled the Respondent's Chairman about her colleague Susan and again failed to report back to work after being sent a letter recalling her to report back. The Claimant denied both accusations. According to her testimony she neither misled the Chairman nor received the letter recalling her to work.

For the court to determine the issue it has to consider several factors including whether the suspension was lawful and whether there was proof that the Claimant misled the chairman and/or received the letter recalling her back to work.

Mr. Odongo who testified for the Respondent did not deny that the Claimant was verbally suspended on 30th June 2011 and that the suspension was only later confirmed in writing by letter dated 5th July 2011.

Suspension is not provided for in the Employment Act and can therefore only be resorted to if provided for in the Claimant's terms of employment which were not referred to or submitted to the court. Secondly suspension cannot be verbal unless again specifically provided for in terms and conditions of employment. Thirdly, the letter of suspension states the suspension was indefinite. An indefinite suspension is unfair unless there is valid reason that has been communicated to the employee explaining the same. An employee must not be subjected to uncertainties with regard to their employment status or discipline as this would subject the employee to undue suffering that would constitute unfair labour practice which is unconstitutional. Section 12 of the Employment Act requires employers to specify disciplinary rules applicable to an employee in a document accessible to the employee which must set out the disciplinary process.

Secondly there was no proof of the reasons for suspension. Neither the Chairman who the Claimant is alleged to have misled nor Susan on whose behalf the Claimant is alleged to have misled the Chairman were called to give evidence. Not even their statements were produced in Court. Mr. Odongo who testified on behalf of the Respondent was not present when the conversation between the Claimant and the Chairman took place. He alluded to having been told by Susan during her disciplinary hearing about her whereabouts while the Chairman was looking for her but no minutes or other evidence was produced to prove that any hearing took place or if the hearing took place, that Susan made any reference to the Claimant misleading the Chairman deliberately as alleged.

Besides the foregoing, the Claimant was never given an opportunity to be heard on the allegations made against her. No proof of what transpired at the reception could be ascertained without the Claimant being given an opportunity to tell her side of the story.

Turning to the letter recalling the Claimant to resume duty, all the Respondent says is that the Claimant confirmed that the address was correct. No attempt was made to prove that the letter was ever posted even after the Claimant denied receipt thereof. The Claimant testified that she reported the issue to the union who pursued the case with the Respondent but the Respondent did not cooperate. The Respondent did not comment on Appendix 3 of the Memorandum of Claim which is a letter dated 10th October 2011 from the Union of Sugar Plantation and Allied Workers, Kibos Branch addressed to it. The letter states that the Claimant was terminated for cheating the Chairman. If it is true that the Claimant was not terminated but rather failed to resume duty after being recalled from her indefinite suspension then there was no reason why the Respondent would not respond to the letter to clarify the position and set the record straight. Further, the Respondent has not shown what action it took when the Claimant failed to resume duty. Why was she not dismissed for failure to resume duty?

Section 47(5) of the Employment Act provides that in any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. The fact of the termination

is not disputed and therefore it is the Respondent who has failed to prove the justification for the termination.

I find that the Respondent has failed to prove that it recalled the Claimant from her indefinite suspension. I further find that the indefinite suspension was unlawful as the Respondent did not prove that it is authorised to do so by terms and conditions of employment to which the Claimant was subject.

### **Remedies**

The Claimant prayed for compensation, annual leave and pay in lieu of notice. She further prayed for general damages, costs and interest.

Having found that the termination of her employment was unfair the Claimant is entitled to compensation but not for the 32 months she prayed for. Maximum compensation under the Act is 12 months. I have considered the circumstances of her case and in my view compensation of 4 months is reasonable in the circumstances. At the salary of Kshs. 7848.75 I award the Claimant Kshs. 31395 as compensation. I also award her one months' salary in lieu of notice in the sum of Kshs. 7848.75. The Respondent did not produce or adduce evidence to controvert the Claimant's claim for annual leave and I award her annual leave from February 2009 to June 2011 at 21 days per year being 52.5 days at Kshs. 13,735.30.

No general damages are payable for unfair termination in addition to compensation for unfair dismissal. The prayer for general damages is thus dismissed.

The Respondent shall pay Claimant's costs and the decretal sum shall attract interest at court rates from date of judgment.

**Dated and signed and delivered this 8th day of June, 2017**

**MAUREEN ONYANGO**

**JUDGE**