



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

CAUSE NO. 122 OF 2013

AND

CAUSE NO.121 OF 2013

(CONSOLIDATED)

(Before Hon. Lady Justice Maureen Onyango)

GRACE ACHIENG OKANGA1ST CLAIMANT

ACLEUS OKUMU KWENA2ND CLAIMANT

-Versus-

SOUTH NYANZA SUGAR COMPANY LIMITED DEFENDANT

JUDGEMENT

The Claimants Grace Achieg Okanga (1st Claimant) and Acleus Okumu Kwena (2nd Claimant) each filed suit against the Respondent South Nyanza Sugar Company Limited alleging unfair termination of employment.

In her Memorandum of Claim filed on 9th May, 2013 the 1st claimant states she was employed by the Respondent on 1st October, 1995 and her services were terminated unfairly by letter dated 16th August, 2010.

The 2nd Claimant in his Memorandum filed on 8th May, 2013 states that he was employed on 15th September, 1994 and his employment was terminated by letter dated 16th August, 2010.

The reasons for termination of both Claimants' employment as stated in their letters of termination is "loss of faith and gross negligence of duty."

Both Claimants testified and the Respondent called one witness, the Industrial Relations Officer Mr. Jack Otieno Opiyo.

The facts of the case are not in dispute. The Respondent, a sugar producer, uses both its own transport and contracted transporters to deliver its sugar to its customers and distributors. In the internal audit for the period ending 2007, It came to the Respondent's attention that there was abuse of the transport process as some transporters were paid transport rebates for transporting their own sugar purchased from the

Respondent's factory at ex-factory prices while some contracted transporters were paid at rates above contracted transport rates. As a consequence the Respondent's board resolved to engage an independent audit firm to carry out an audit on payments for sugar transportation. M/s KPMG Kenya was engaged to carry out the forensic audit. The audit report recommended action against the two claimants among others as follows:-

- *Grace Okanga for approving certificates of completed assignment, used to pay invoices issued at a higher rate than stipulated in the contract between SNSC and MWTL.*
- *Acleus Kwena for approving certificates of completed assignments, used to pay invoices at a higher rate than stipulated in the contract between SNSC and RCL and OTL.*

The Claimant's were first issued with letters to show cause why disciplinary action should not be taken against them by letter dated on 31st October 2008 which they responded to. Thereafter they were both interdicted on half pay then suspended at no pay except house allowance by letters dated 29th October, 2009. The Claimants were interviewed by the external auditors and also appeared before the Respondent's Ad-Hoc Committee which made its recommendations to the Respondent's board. The recommendations were to the effect that the Claimant's services be terminated.

Following the recommendations of the Board the Claimants were issued the letters of termination. The claimants allege that the terminations were unfair and seek the following prayers:-

1st Claimant

1. *A declaration that the claimant's termination was grossly unfair, without basis, unjustified, null and void.*
2. *An order of reinstatement of the claimant back to the employment with full pay and on terms as were applicable as at the date of termination on 16/8/2010 or on such better terms as are applicable to the position currently.*
3. *An Order directing that the Claimant is entitled to payment of her salaries and allowances which were illegally withheld for the period 1st November, 2009 to 31st July 2010 together with interest thereon at the rate of 24% per annum until payment in full.*

In the alternative to Prayer two above

4. *Damages for breach of contract of employment equivalent to the salaries and allowances which the claimant would have earned between the time of unfair termination and the mandatory retirement age of 60 years.*
5. *Costs of these proceedings.*

2nd Claimant

1. *A declaration that the claimant's termination was grossly unfair, without basis, unjustified, null and void.*
2. *An order of reinstatement of the claimant back to the employment with full pay and on terms as were applicable as at the date of termination on 16/8/2010 or on such better terms as are applicable to the position currently.*
3. *An Order directing that the Claimant is entitled to payment of her salaries and allowances which were illegally withheld for the period 1st November, 2009 to 31st July 2010 together with interest thereon at the rate of 24% per annum until payment in full.*

In the alternative to Prayer two above

4. Damages for breach of contract of employment equivalent to the salaries and allowances which the claimant would have earned between the time of unfair termination and the mandatory retirement age of 60 years.

5. Costs of these proceedings.

The Respondent in its Defences filed on 17th October, 2013 aver that the terminations were lawful and the Claimants were paid their full terminal benefits. The Respondent prays that the claims be dismissed.

Findings and determination

The first issue for determination is whether the termination of employment of the claimants was unfair procedurally and/or substantively.

The Claimants submitted that there was no procedural manual that was brought to their attention. They heavily relied on the case of **ABRAHAM GUMBA v KENYA MEDICAL SUPPLIES AUTHORITY [2014]eKLR** in which the court stated that an employee cannot be held accountable to terms and conditions of service that were never brought to their attention.

I do not find that case relevant to this case. Both Claimants in their evidence admitted to approving certificates of completion with rates of transport different from the contracts in whose favour the certificates were prepared. Both Claimants stated that they relied on previous certificates which bore similar rates. Both of them did not seek independent confirmation that the rates previously approved by their colleagues which were obviously higher than those in the contracts had been changed. As stated in the forensic report, they did not raise concerns with their superiors over the discrepancy in the pricing, instead relying on their juniors. As rightfully pointed out in the forensic report, this constituted negligence.

The Claimants raised a further issue about the grounds in the notice to show cause being different from the grounds in the letters of termination. The notice to show cause accused the Claimants of knowingly and with intent to defraud passing for payment inflated transport claims causing the Respondent loss. The letters of termination gave the grounds of termination as loss of faith and gross negligence of duty.

In my opinion, passing for payment invoices with prices different from the contract is negligence of duty. The only element that was not proved is intent to defraud. I do not see how the claimants could have been prejudiced by being found culpable of a less serious ground of termination than that which they were originally charged.

I find that the claimants were found culpable upon their own admission and that there was valid reason to take disciplinary action against them.

The Claimants also raised issue with the procedure adopted by the Respondent in the disciplinary process. They stated that there were inconsistencies in the evidence and that the rules of natural justice were not complied with. Specifically the 2nd Claimant alleged hostility by the Ad-hoc committee and that he was not given an opportunity to present his case. Since the minutes of the ad-hoc committee were not availed and the claimant admitted to not raising any objection at the hearing, and since the determination was largely based on the KPMG Forensic Report, it is the opinion of the court that the 2nd claimant was not prejudiced. It would have been helpful if the 2nd Claimant applied for production of the minutes of proceedings of the report which he did not. There is therefore no sufficient evidence to prove that the 2nd claimant was treated with hostility by the Ad-hoc Committee.

Remedies

The Claimants prayed for a declaration that the termination of their employment was unfair, without basis, unjustified, null and void. I have already held above that there is no proof of unfair termination as both Claimants admitted having approved for payment certificates with rates that were higher than those

in the contracts.

The Claimants also prayed for reinstatement. Having been terminated on 16th August, 2010, they are locked out of the remedy which is only available within 3 years from the date of termination, and only where unfair termination has been proved.

Both Claimants further prayed for salaries withheld during the period of interdiction and suspension. In the letters of termination, the Respondent stated that the Claimants would be paid "Salary earned upto and including 16th August, 2010. The evidence on record shows that the Claimants were not paid withheld salary for the period when they were under interdiction and suspension. This is a renege on the promise made in the letter of termination. In any event since they were terminated, and not dismissed, they are entitled to all monies withheld during the disciplinary process.

I find that the Claimants are entitled to payment of all salary to the date of termination. For the 1st Claimant, it is Shs.755,955 and for the 2nd Claimant Shs.826,695. I hereby award them the same.

There is a claim for discrimination. I would decline to grant any damages for discrimination on two grounds. 1st, it was not proved. For a claimant to prove discrimination he must show that he has been accorded less favourable treatment than other employees. The Claimants allege discrimination on age grounds, as they were singled out due to the fact that they were over 50 years of age. The Claimant's did not state the age of any of the other employees who were also subjected to similar disciplinary process but were retained in service. They also did not state the ages of the other employees whose employment was terminated.

I have also looked at both the KPMG Report and the minutes of the board at which the decision to terminate the claimants employment was made and I have not seen any suggestion of their termination on age grounds.

The second reason why the claim must fail is that it was not pleaded in the memorandum of claim. It is only stated in the verifying affidavit.

Lastly the Claimants prayed for payment of salary to date of retirement as an alternative prayer to reinstatement. In the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** which the Claimants have relied upon, the court declined to grant anticipatory salaries on grounds that an employment relationship is not a commercial relationship, but a special relationship, which must be insulated from greed associated with the profit-making motive interests in commercial contracts. The court stated as follows:-

'In fixing these limits on the amount of compensatory awards, Parliament expressed its view on how the interests of the Employers and the Employees, and the socio-economic interests of the country as a whole, can best be balanced in cases of unfair termination. It is not for the Court to extend further a common law implied term, when this could depart significantly from the balance set by legislature. To treat the legislature as creating the floor, and not the ceiling, would do just that.... it would be inconsistent with the purpose Parliament sought to achieve by imposing compensatory awards payable in respect of unfair dismissal.'

I would add that in the present case the claimants have not proved unfair termination and even if such remedy was available at law, which is not the case, they would not be entitled to anticipatory damages. No employment contract is intended to be binding until retirement. On the contrary, the law anticipates situations when parties to employment contracts may want to either voluntarily or involuntarily separate, and sections 35 provides for termination notice while section 49 provides for remedies where the termination results in breach of the employment contract.

Conclusion

The upshot is that all prayers fail except the prayer for payment of salary withheld during interdiction and

suspension as follows;

Grace Achieng Okanga Kshs.755,955/-

Acleus Okumu Kweya Shs.826,695/-

Each party shall bear its costs.

Dated and signed and delivered this 16th day of June, 2016

MAUREEN ONYANGO

JUDGE