



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CLAIM NO. 190 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JEREMIAH OKOTH OLALEPLAINTIFF

-Versus-

KIBOS SUGAR & ALLIED INDUSTRIES LTDRESPONDENT

JUDGEMENT

The Claimant filed this Claim against the Respondent alleging that he was unlawfully terminated by the Respondent. He seeks payment of unpaid salary, pay in lieu of notice, leave and leave allowance, severance pay, underpayments of both salary and house allowance and compensation, all totalling Shs.1,501,427.00.

The Respondent filed a response denying that it terminated the employment of the Claimant. It avers that the Claimant absconded duty and is not entitled to any of the prayers.

The case was heard on 28th July and 23rd November, 2015. The parties thereafter filed and exchanged written submissions. At the hearing, the Claimant testified on his behalf while the Respondent called Winnie Asuri, the Assistant Human Resource Manager (RW1) and David Moli Odongo the Human Resource Manager (RW2).

Facts

The Respondent is a Limited Company that manufactures sugar. Its factory and offices are situated in Kibos on the outskirts of Kisumu City. The Claimant who is a holder of Artisan Grade 3 trade test certificate was employed by the Respondent as a fitter/welder on 28th March, 2008.

The circumstances leading to the termination of the Claimant's employment are that on 29th October, 2013 the Claimant left his duty station and went to buy airtime from the reception. While leaving the reception to go back to the factory at around 11.30 am the company chairman who was just arriving called and asked him why he was not at his place of work. The Chairman directed him to go and see the Human Resource Manager who also happened to appear at the scene at that same time.

The Claimant went with the Human Resource Manager Mr. David Otieno Moli (RW2) to his office where he was issued with a show cause letter. The letter required the Claimant to show cause within three (3) hours why disciplinary action should not be taken against him for leaving his work station from 10.00 am to 11.30 am without permission of his supervisor. The Claimant responded to the letter on the same day but was not allowed to resume duty.

RW2 instructed the Claimant to report to his office the following day. When the Claimant went to the Human Resource Office the following day as instructed, he was served with a letter of suspension. The letter stated that the Claimant had been suspended for not more than 21 days.

The Claimant testified that when he reported back to work upon expiry of the 21 days suspension on 20th November 2013, RW2 told him that the chairman who was to decide on his fate was away.

The Claimant testified that he went to report at the Labour Office and a Labour Officer called and talked to RW2 then instructed him to report to RW2 after 7 days wearing his uniform. However when he reported to work on 28th November 2013 he was turned away. RW2 later called him on his cellphone on 1st March 2014 and instructed him to report to the Human Resource Office on 4th March, 2014. When he reported he was issued with a letter which had been served on the shop steward on his behalf inviting him for a disciplinary hearing on 4th March 2016. The letter is dated 28th February, 2014 and was received in the Union Office on 1st March, 2016.

The Claimant objected to the hearing as he had not been given adequate notice and wished to be represented at the disciplinary hearing by a Union Official from the Union's Head Office. He was thereafter not called for any hearing or served with a letter of termination or dismissal.

The Respondent on the other hand stated through its two witnesses that the Claimant absconded duty after storming out of the disciplinary hearing at which he refused to sign the attendance register.

Issues for Determination

The issues arising for determination are therefore whether the Claimant absconded duty as alleged by the Respondent, or he was dismissed/terminated as he alleges. The other issue is whether the Claimant is entitled to the prayers sought.

Disciplinary Procedure

Section 12 of the Employment Act (the Act) provides that an employer with more than 50 employees must have a statement of disciplinary rules. The section provides as follows -

12. Statement on disciplinary rules

(1) A statement under section 10 shall—

(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

(b) specify the person to whom the employee may apply—

(i) if dissatisfied with any disciplinary decision relating to the employee; and

(ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and

(c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.

(2) Subsection (1) shall not apply to rules, disciplinary decisions, grievances, or procedures relating to health or safety at work.

(3) This section shall not apply where as at the date the employee starts work the employer has employed less than fifty employees.

The procedure for termination of employment is provided for in section 41 of the Act and provides that an employee must be given a hearing before a decision is made to terminate his employment. Section 43 provides that the employer must prove valid reason for termination.

In the present case the Claimant was suspended from duty for a period of "not more than 21 days." He was not informed of the date on which he was to report back. The suspension letter does not state whether or not he would be entitled to salary during the period of suspension.

Prior to suspension he was issued with a letter to show cause why disciplinary action should be taken against him to which he was required to respond within 3 hours.

The Act does not provide for suspension. For it to be valid, suspension should be provided for under a statement of disciplinary rules referred to in section 12. Otherwise such suspension, if without pay, is unlawful.

With regard to the disciplinary hearing, section 41 specifically requires that an employer explains to the employee in the presence of either another employee or a union shop floor official of the employee's choice, the reasons why the employer contemplates to terminate his employment. The employer is then required to hear representations by both the employee and the person accompanying him to the disciplinary hearing. Thereafter the employer must make a determination which must be communicated to the employee in writing.

In the present case, the claimant was called on telephone on 1st March 2014 and directed to report to the office on 4th March, 2014. He was not aware that he was going for a disciplinary hearing. He had the right to demand to be given time to get a union representative of his choice from the union's head office if he was not comfortable with the shop floor union representative.

RW1 stated that she was taking minutes of the disciplinary hearing but she did not submit a copy of the same to the court.

I find that the disciplinary process was flawed right from the notice to show cause, to the suspension, and the aborted disciplinary hearing.

On the grounds for which the Claimant was being disciplined, I find that the Claimant was not absent. He had only left his work station at the factory to go and buy airtime for his cellphone from the Respondent's reception where airtime was sold as admitted by RW1. That does not constitute absenteeism for which an employee should be made to respond to a show cause letter then be suspended without pay for 21 days, which in this case eventually turned out to be a suspension for more than 4 months. The treatment of the Claimant amounts to bad labour practice and inhuman treatment.

The claimant's immediate supervisor was never called upon to confirm if he indeed did not give permission to the Claimant to go and buy airtime from the reception. No statement was prepared from the supervisor nor was he called to give evidence at the hearing in court. RW2 further testified that the people present at the Claimant's disciplinary hearing did not include the claimant's supervisor.

I find that there was no valid reason to warrant the suspension of the Claimant. The worst that should have been done in the circumstances should have been a warning and a deduction of time not worked if indeed the claimant was found to have been away without permission.

Remedies

The Claimant prayed for the following remedies:-

- (a) Salary from October 2013 to 15th April, 2014 and at old rate i.e. Kshs.11,500/- per month

[11,500 x 6 months + 15 days]

Kshs. 74,750.00

(b) Two month's salary in lieu of notice	Kshs. 45,000.00
(c) Leave allowance @2250 x 6 years	Kshs. 13,500.00
(d) Pending/Accrued leave for the year 2012 to 2013	Kshs. 22,674.00
(e) Severance pay @20days for each completed year i.e. 15,320 x 6 years	Kshs. 91,920.00
(f) Underpayment of salary between March 2008 to 15th April, 2014 @ Kshs.11,174/- per month 12 x 6 + 15 days[11,337/-]	Kshs. 815,865.00
(g) Housing allowance underpayment @ Kshs.2,298 per month [2,298 x 12 x 6]	Kshs. 615,456.00
(h) One year's salary for unlawful and wrongful termination of employment @ Kshs.22,674 x 12	Kshs. 272,088.00

Grand Total	Kshs.1,501,427.00
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The Claimant earned his salary for October 2013 as evidenced from the payslip attached to his bundle of documents. Having been on suspension up to the date he was called for a disciplinary hearing on 4th March, 2014, and having found that the suspension was illegal, I find that the Claimant is entitled to salary and house allowance up to 4th March, 2014.

I have noted from appendix 1 of Respondents Further List of Documents dated 1st September 2015 that Kibos was by letter dated 10th November 2014 realigned and now falls under Muhoroni for electoral and administrative purposes. However the date of the letter is after the termination of the Claimant and for purposes of this case I will use the rates of pay applicable to Kisumu City.

The Claimant was therefore entitled to a basic salary of Shs.16,602.85 and house allowance of Shs.2490.45. The salary for November, December 2013, January, February 2014 and 1st to 4th March 2014 is therefore payable at the rate of Shs.19,093.30 per month. For the period the Claimant was on suspension without pay he is entitled to Shs.78,918.90. I award the Claimant the said sum on account of salary withheld during suspension.

The Claimant is entitled to one month's salary in lieu of notice in accordance with section 35 of the Act and not 2 months' salary that he claimed. I award him Shs.19,093.30 on account of one month's pay in lieu of notice.

The Claimant is also entitled to annual leave for 2012/13. His leave form for the leave taken in 2013 clearly indicates it was leave for 2011-2012. The Respondent did not disprove this by producing a schedule of leave entitlement sufficient to enable the Claimant's entitlement to be precisely calculated as provided under section 10(3) (a) (i) and 74(1) (f) of the Act. I therefore award the claimant accrued leave of 26 days based on basic salary of Shs.16,602.85. This amounts to Shs.14,389.10.

The Claimant is not entitled to leave allowance as he did not prove his terms of employment provided for the same. He is also not entitled to severance pay as he was not declared redundant.

On underpayments the Claimant testified that when he was employed his salary was Shs.7,000 which was increased to Shs.11,500 in May 2011. The Respondent did not contest this but produced copies of claimant's payslips for November, 2013 only which reflects a salary of Shs.11,750 and house allowance of Shs.1,762.50. The payslips produced by the Claimant for the months January to September 2013 reflect a basic salary of Shs.11,500 and house allowance of shs.1,103 while the payslip for October reflects a basic salary of Shs.11,750 and house allowance of Shs.1,762.50. The Respondent did not deny the claimant's allegations or produce records to controvert the same. I therefore find that the Claimant was underpaid as follows for both basic salary and house allowance ;

May 2010 to April 2011@kshs. 13,160.60 less 12,603 paid	kshs. 6,691.20
May 2011 to April 2012@kshs. 14,808.55 less 12,603 paid	kshs. 26,466.00
May 2012 to April 2013@kshs. 16,748.50 less 12,603 paid	kshs. 49,746.00
May 2013 to October 2013@kshs. 19,093.30 less 12,603 paid	kshs. 38941.80

TOTAL UNDERPAYMENTS **Kshs. 121,845.00**

Having been unfairly terminated and taking into account all relevant circumstances of the case, I award the claimant 6 months' salary as compensation for unfair termination in the sum of Shs.114,559.80.

The Respondent shall pay the Claimant's costs for this suit and the decretal sum shall attract interest from date of judgement.

Dated and signed and delivered this 15th day of September, 2016

MAUREEN ONYANGO

JUDGE