



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

CAUSE NO. 148 OF 2015

(FORMERLY BUNGOMA CMCC.332/2013)

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

JOHN KISAKA MASONI.....CLAIMANT

-VERSUS-

NZOIA SUGAR CO. LIMITEDRESPONDENT

JUDGEMENT

This case was originally filed as Bungoma CMCC No.332 of 2013 but was transferred to this court by an order of the High Court in Misc. Appl. No.18 of 2014 on 24th April, 2013. In the plaint filed on 23rd July, 2013 the Plaintiff (now Claimant) alleges that he was unfairly, irregularly and unlawfully dismissed from employment by the Defendant (now Respondent) on 10th May, 2013.

He seeks the following reliefs:-

- (a) General damages for unlawful termination and dismissal of employment.
- (b) Costs of the suit.
- (c) Interest thereon at contracts.
- (d) Any other relief this Honourable Court may deem fit to grant.

The Respondent filed a statement of Defence on 18th September, 2013 denying the allegations in the plaint.

At the hearing of the case the Claimant testified on his behalf while Mr. Calistus Okumu Sanja, the Respondent's Field Manager (RW1) who previously worked as Assistant Personnel Officer testified on its behalf. Thereafter the Respondent filed written submissions while the Claimant who was unrepresented made oral closing submissions in court.

Facts of the Case

The Claimant was employed by the Respondent as a shift clerk Grade UG. 02 in Sales and Marketing Department at a salary of Kshs.18,883 with house allowance of Shs.2,832 by a letter of offer of appointment dated 1st October, 2010. His appointment was confirmed by letter dated 3rd January, 2011 but effective 23rd December, 2010.

By letter dated 14th August, 2012 the Permanent Secretary, Ministry of Agriculture wrote to the Respondent forwarding a copy of a circular from the Secretary, Public Service Commission requiring the authentication of academic and professional certificates for all officers in the Public Service, including state corporations. The Respondent being a state corporation was required to undertake the authentication and file a report of the authentication with the Public Service Commission by 1st September, 2012 and thereafter, file a report of authentication on 1st September every year.

Pursuant to the said directive the Respondent issued a circular to all its employees to submit their original copies of academic and professional certificates which were then sent for authentication to the relevant examination bodies.

The Claimant was among those whose certificates were found to be unauthentic by Kenya National Examinations Council (KNEC). A letter was issued to the Claimant requiring him to show cause why disciplinary action should not be taken against him for presenting forged certificates. He responded seeking more time to personally carry out verification of the certificates with KNEC. After verification by the claimant KNEC confirmed that the certificates were not genuine.

The Claimant was thereafter suspended by letter dated 17th April, 2013 and later summarily dismissed on 10th May, 2013.

At the hearing the Claimant stated that on 4th April, 2013 he was invited to the Human Resource Manager's office to discuss the results of verification of his certificates. He testified that when he was shown the file he was shocked to learn that the certificates in his file were not the ones he had presented when applying for employment. He testified that although he sat for the KCPE in 1998 the certificate in the file had an alteration on the year he sat for the examination. It showed that the Claimant sat in 1993 yet his year of birth is 1987 and he could not have sat for the examination then as he was only 6 years old. He testified that he did not use a KCSE certificate when he applied for the job. He used a copy of the certificate but in the file there was a results slip whose origin he did not understand. He stated that he realised then that his file had been manipulated and recalled a time when during a head count of staff he had been counted twice, 1st at Human Resource Department and later at the Factory.

The Claimant further testified that although he had applied for employment in September 2009 pursuant to an advertisement the documents in his file were dated 26th May, 2010. The documents in his file were also not stamped yet the ones he had submitted were stamped upon receipt.

The Claimant testified that he pointed out these anomalies to the Human Resource Manager who looked confused and told the claimant that he thought there was a problem with the Claimant's file but his hands were tied as the Claimant's name had already been listed among those whose records had anomalies that had been sent to the Ministry.

The Claimant testified that upon his request he was granted leave to go and sort out the issues with KNEC Headquarters in Nairobi. KNEC asked him to make a formal application. He did so and the documents were re-certified and sent directly to the Human Resource Manager by Currier on 12th April, 2013. He thereafter received the suspension letter on 17th April 2013 giving him up to 26th April, 2013 to clear with KNEC. On 10th May, 2013 he was served with the letter of summary dismissal while at home.

The Claimant testified that he was later called back and presented with a cheque of Shs.48,722 which he was told was a refund of his provident fund contributions but he was not paid dismissal dues. He prayed for payment of damages for unfair dismissal, terminal dues, service pay and costs.

During cross examination the claimant admitted that KNEC wrote to the Respondent stating that his documents were forged. He admitted that the code for his primary school certificate was incorrect. He also admitted that according to his KCSE certificate he attained a grade D+ (D plus) while the newspaper advertisement for the job he applied for and in which he was employed required a minimum grade of C- (Minus).

For the Respondents RW1 testified that after receiving the letter from the Ministry of Agriculture forwarding the circular from the Public Service Commission the Respondent used the certificates that were submitted by employees on initial recruitment from the Respondent's records for authentication. The certificates were sent to the examination bodies. Among the documents sent were the Claimant's certificates which KNEC stated were not genuine among 26 others. All employees whose documents were queried were issued with letters dated 21st March, 2013 to go and explain the anomalies to the Human Resource Department. The Claimant requested for and was given 9 days to clear with KNEC but failed to do so and as a result he was dismissed from service.

The Claimant was paid Shs.48,722 for days worked up to 10th May 2013 and his provident fund contributions excluding the company's contributions. He was also paid pro rata leave. He testified that the Claimant was not paid one month's salary in lieu of notice which the Respondent is willing to pay.

Determination

I have considered the pleadings and evidence on record as well as the submissions made by and on behalf of the parties. The issues for determination are whether the summary dismissal of the Claimant was fair and whether he is entitled to the prayers sought.

Section 41 of the Employment Act provides for fair procedure while section 43 provides for proof of reason for termination as follows:-

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (1) & (2) provides prohibits unfair termination. The section provides as follows:-

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

The grounds for summary dismissal in the claimants letter of summary dismissal as as extracted from his letter of summary dismissal are the following-

- (1) You neither registered nor sat for 1998 KCSE, [particulars withheld]
- (2) Centre Code 602119 and [particulars withheld] High School are non-existent.
- (3) You neither registered nor sat for 1993 KCPE.
- (4) Centre Code 602120 is non-existent - [particulars withheld].

Presentation of fake certificates is a criminal offence under the Laws of Kenya, penal code Cap 63 Chapter X abuse of Office, Section 102 and Chapter XXXV-punishment for forgery, section 349. This provides grounds for summary dismissal as provided in the Company Staff Administration Code (SAC) clause 8.10(g) and the employment Act 2007 clause 44 (4) g which states that '**an employee who commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employers property**' amounts to gross misconduct punishable by summary dismissal.

In view of the above offences, you are hereby summarily dismissed from company services as per Employment Act 2007 clause 44(4) g and our SAC clause 8.10(g).

There are two sets of certificates on the record. Those attached to the Claimant's application for employment as shift clerk are a results slip for KCSE for 1998 giving a mean grade of B-. It shows that the Claimant sat for his KCSE at [particulars withheld]HIGH SCHOOL. His index number is [particulars withheld]. The other is a KCPE certificate showing that the Claimant sat for his exams at [particulars withheld] in 1993 under index number 602120 and attained the following grades:-

ENGLISH LANGUAGE	A
KISWAHILI	B+
MATHEMATICS	A
SCIENCE AND AGRICULTURE	A-
GEOGRAPHY, HISTORY & CIVICS AND RELIGIOUS EDUCATION	A-
ART & CRAFT AND MUSIC	A
HOME SCIENCE AND BUSINESS EDUCATION	A-

There is also a certificate from [particulars withheld] University Business School stating that the Claimant was awarded a Diploma in Business Administration in the Academic Year 2002/2003. The certificate is dated 5th October, 2003 and states the claimant was first registered in the academic year 1999/2000. He also attached a Kenya School Secondary Leaving Certificate from SAMOYA Secondary School indicating that he joined the school in Form 3 and left on 14th November, 1998 after satisfactorily completing form four. The date of birth in the certificate is 8th April, 1982. There is also a transcript from Globe Link, Computer College for Computerised Accounting Certificate Course attained during 2007-2008 academic calendar. All the certificates were certified as true copies on 11th October, 2010.

While filing the plaint at Bungoma Chief Magistrates court, the Claimant attached a copy of his national identity card No.*[particulars withheld]* stating that he was born on 14th September, 1988, a KCPE Certificate from MUPELI DEB Index No.602120/003 for 1998 with the following grades;

<i>ENGLISH LANGUAGE</i>	<i>A</i>
<i>KISWAHILI</i>	<i>B+</i>
<i>MATHEMATICS</i>	<i>A</i>
<i>SCIENCE AND AGRICULTURE</i>	<i>A-</i>
<i>GEOGRAPHY, HISTORY & CIVICS</i>	<i>A-</i>

AND RELIGIOUS EDUCATION

<i>ART & CRAFT AND MUSIC</i>	<i>A</i>
<i>HOME SCIENCE AND BUSINESS</i>	<i>A-</i>

EDUCATION

He further attached a KCPE Certificate for *[particulars withheld]* SECONDARY SCHOOL Index No. *[particulars withheld]* for examination of November - December 2002 in which he attained a mean Grade of D+ (Plus).

The two sets of documents do not add up. The year of birth, the dates he sat for the exams and the grades attained are all different. The Claimant admitted in cross-examination that his proper form 4 grade was D+. The advertisement for the job in which he was employed required a minimum grade of C-(Minus). His explanation that someone manipulated his personal file in the Respondent's records is not convincing, as he was not qualified for the job according to what he alleges are his correct certificates. The only explanation for the apparent mix up of documents then is that at the time of recruitment the claimant's certificates were falsified to show that the Claimant was qualified for the job as advertised.

I observed on the record that the Claimant was evasive while responding to questions put to him during cross examination and had to be cautioned by the court to respond to questions as asked. The claimant was obviously uncomfortable with questions relating to his qualifications for the job. I believe that he was trying to avoid responding to questions because he was not telling the truth.

From the foregoing I find that the Respondent had valid and sufficient grounds to take disciplinary action against the Respondent.

It is however evident from the evidence on record that the Claimant was never subjected to a disciplinary hearing as provided in section 41 of the Employment Act. The Respondent attached excerpts of the Collective Bargaining Agreement but appears to have either deliberately or inadvertently omitted to attach the pages that contain the disciplinary process. Only the last portion of clause 8 which provides for suspension was included being on the same page with clause 9 that provides for termination notice which the Respondent wished to rely on.

Apart from the audience given to the claimant immediately after the report on authentication was received on 2nd April, 2013 and again on 3rd April, 2013 when he was discussing the results of the report, no hearing was given to the Claimant. He was suspended from employment on 17th April, 2013 and

dismissed on 10th May, 2013 without being subjected to a disciplinary hearing. For these reasons I find that the dismissal of the Claimant was procedurally unfair for failure to subject him to a disciplinary hearing as provided under section 41.

Both the Claimant and the Respondent referred the court to several authorities. The claimant relied on the following cases:-

(1) Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR

(2) Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014]eKLR

(3) Nancy Mwangi T/A Worthin Marketers v Airtel Networks (K) Limited [Formerly Celtel Kenya Limited] & 2 others [2014] eKLR.

(4) C. Mehta & Co. Limited v Standard Bank Limited [2014] eKLR.

I find the circumstances in all these cases not applicable to the present case as the claimants were all found to have been at no fault.

The Respondent relied on the following authorities;

(1) Nairobi Civil Appeal No.194 of 1991 Alfred J. Githinji v Mumias Sugar Company.

(2) Walter Musi Anyanje v Hilton International Kenya Limited & Another [2008]eKLR

(3) Mombasa Civil Appeal No. 120 of 1997 Kenya Ports Authority v Edward Otieno.

All the cases relied upon by the Respondent relate to the measure of damages for unlawful or unfair termination/dismissal. The cases were all decided based on common law which is that the measure of damages is limited to the period of notice that the employee would have been entitled to had he been terminated according to the provisions of his contract of employment. The cases were all determined before the enactment of the Employment Act, 2007 which introduced new provisions on termination and/or dismissal as well as on terminal benefits and compensation. The cases are therefore not applicable to this case.

Remedies

The Claimant prayed for several remedies during the hearing including some that were not pleaded in the plaint. Obviously those prayers that were not contained in the plaint cannot be considered by the court. The only prayers in the plaint which the court has considered are for general damages for unlawful dismissal, costs and interest.

Having found that the summary dismissal was procedurally unfair, I reduce the summary dismissal of the claimant to normal termination of employment so that the claimant will be entitled to payment of one month's salary in lieu of notice. This has already been admitted and offered by the respondent through its witness. The claimant is also entitled to pay in lieu of leave which has already been paid.

I therefore award the claimant one month's gross salary in lieu of notice in the sum of Shs.26,730 or whatever gross salary he was earning at the time of dismissal.

I however find the grounds for dismissal so grave that it would be a travesty to justice to award the claimant damages for unfair termination. The claimant was not qualified for the job and falsified his certificates in order to get employment with the Respondent. He is not entitled to any compensation. The Claimant is however entitled to a certificate of service.

Other than pay in lieu of notice and certificate of service, the rest of the claim is dismissed. Each party

shall bear its costs.

Judgement Dated, signed and delivered this 8th day of September, 2016

MAUREEN ONYANGO

JUDGE