



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 35 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

STEVEN OMOLLO KITAI.....CLAIMANT

-Versus-

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

J U D G E M E N T

The Claimant filed the suit herein alleging unlawful termination of employment by the Respondent. He seeks the following orders:-

- a) Three months notice in lieu.
- b) Underpayment from the period of employment to the date of termination.
- c) Overtime and house allowances.
- d) Accumulated leave days and public holidays.
- e) Saturday 3 hours extra of basic hourly @ the rate of Kshs.60.57 per hour X (208x3)=Kshs.37,795/-.
- f) Sunday 8 hours excluded from salary @60.57 per hour 60.57x(208x8)=Kshs.100,788/-.
- g) Night shift allowance arrears for Kshs.16,300/-.
- h) Severance allowance for 4 years.
- i) 10 public holidays.
- J) General damages for unfair termination.
- k) Costs of the suit and Interest at court rate.
- l) Any other relief that the court may deem just and fit to grant.

The suit was originally filed through the Memorandum of Claim dated 1st October, 2012 and filed on 3rd October 2012 by the Claimant in person. The Claimant filed an Amended Statement of Claim on 25th May, 2015 through M/s. D. A. Oluoch and Associate Advocates.

The Respondent filed a reply to the Memorandum of Claim denying that the Claimant was dismissed or entitled to the prayers sought.

The case was heard on 14th October, 2015 when the Claimant testimony was taken and on 24th February, 2016. Parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant's case is that he was employed by the Respondent as an electrician in July, 2007. On 1st February, 2011 he had worked in the night shift and in the morning of 2nd February, 2011 his reliever did not turn up at 6am as expected. At around 7am the workers were summoned by the chairman. He met other employees gathers at the gate. The employees were excited and chanting. The employees were later addressed by the chairman who told them that those who want to work should report to their duty stations immediately and those who did not want to work should leave the premises. Since the claimant had worked in the night shift he went home. When he reported for work in the evening he was not allowed in by the security at the gate.

On 4th February, 2011 he was called to a meeting to investigate the strike that happened on 2nd February 2011. At the end of the meeting the employees who included the claimant were told to go home and wait to be called. They were also directed to write and explain what they knew about the strike which the claimant did. He was however never called. He did not receive any letter calling him to another meeting. He was not aware of a meeting held on 9th February 2011. He denied deserting duty as alleged by the Respondent. On 9th February, the claimant together with 4 other employees wrote to the Branch Secretary of the Union of Kenya Sugar Plantation and Allied Workers requesting the Union to intervene on their behalf so that they could go back to work. The Respondent did not respond to the letter.

He testified that he worked overtime but was not paid. He also worked on public holidays but was not paid. He never took annual leave for the period he worked. He worked 7 days a week without a rest day.

Respondent's Case

Mr. David Moli Odongo, the Human Resources Manager of the Respondent (RW1) testified that the Claimant was employed on 7th December 2007 as an electrician and left employment in February, 2011. The Claimant participated in a strike on 2nd February, 2011. During the strike the workers did not allow anybody to get in or out of the factory. He testified that the Claimant was one of the ring leaders of the strike. The strike was resolved when the Respondent's Chairman addressed the workers. The Chairman asked the employees who wished to report to work to do so and those who did not want to report to work to go away. The majority of the workers reported to work but the Claimant was among those who went home. The claimant did not report for work in the evening or on subsequent days.

After the strike the Respondent carried out investigations and on 4th February, 2011 organised a meeting in the boardroom which was attended by the claimant among others. The meeting was adjourned to 9th February, 2011 as no agreement had been reached. On 9th February, 2011 the Claimant did not attend the meeting. The Claimant reported to work on 11th February, 2011 following up on what happened at the meeting of 9th February 2011. He was with other employees who did not attend the meeting of 9th February, 2011. The chairman was not available on that day and they were asked to go back on 14th February, 2011 when none of them turned up. All employees who attended the meeting of 9th February 2011 had their issues resolved and they reported back to work. The Claimant did not go back to the factory after 11th February, 2011.

RW1 denied that the Claimant was terminated. He stated that the Claimant deserted duty. He denied that the claimant is entitled to termination notice. He stated that the claimant was paid house allowance

as is evident from his payslip. He denied knowledge of the claimant working overtime or over weekends, as the claimant had not filed any claims for the same. He stated he was not aware about shift allowance.

Under cross-examination RW1 stated that he did not bring records on overtime to court. He also stated there were minutes of the meetings held on 9th, 11th and 14th which he did not submit to the court.

Determination

From the facts of the case the issues that emerge from determination are whether the claimant deserted duty or was terminated and what reliefs he is entitled to.

Was the Claimant terminated or he deserted duty

The Claimant has stated that he reported for night duty on 2nd February 2011 but was denied entry at the gate. He however attended the meeting of 4th February 2011 where there were discussions regarding the strike.

The copy of minutes of the meeting of 4th February, 2011 that is attached to the Respondent's documents is not signed. The minutes are not conclusive on the fate of the Claimant. There were no minutes of the meeting that is alleged to have been held on 9th February 2011 which reinstated the employees who attended it. The Claimant has denied awareness of the meeting. The minutes that have been produced were authored by RW1 and there is no independent confirmation that at the meeting held on 4th February 2011 there was agreement that another meeting would be held on 9th February, 2011 or that such information was in the claimant's knowledge.

There is no letter from the Respondent charging the claimant with desertion of duty. There is also no letter terminating the employment of the Claimant for desertion of duty.

The Claimant testified that the Respondent was aware of his contacts a fact that the Respondent did not deny. Indeed both parties agree that the claimant was called for the meeting of 4th February 2011 which RW1 referred to as an investigative meeting.

Section 41 of the Employment Act is explicit on the procedure an employer should use where it intends to terminate the employment of an employee. In the present case there is evidence that after the meeting of 4th February 2011 the Claimant made several attempts to find out his fate. RW1 testified that the claimant was at the office on 11th February 2011 to find out what happened on 9th February, 2011. It is alleged the claimant was advised by RW1 to go back to the office on 14th February, 2011 but did not. This issue was never put to the Claimant during cross-examination and therefore the Claimant was not given an opportunity to confirm or refute whether or not he was at the office on 11th February and was advised to go back on 14th February but failed to do so.

Termination of employment cannot be presumed by either an employer or employee. It is the responsibility of the employer to inform the employee of any misconduct, including desertion of duty, and to invite the employee to a hearing. It is also the duty of an employer to formally inform the employee of the termination of his employment giving reasons for such termination. Section 12 of the Employment Act requires, nay, makes it mandatory, for an employer with more than 50 employees, as is the case of the Respondent, to have a statement of disciplinary rules which must provide for both the grievance and disciplinary procedures. The claimant cannot therefore take blame for not having attended a disciplinary meeting whose procedure was not set down anywhere and to which he never received any formal invitation.

For the foregoing reasons, I find that the claimant was unfairly terminated by the Respondent.

Remedies

Having found that the Claimant was unfairly terminated by the Respondent, he is entitled to notice. The

Claimant prayed for 4 months notice but did not explain whether there was any contractual basis for the same. He made reference to a collective bargaining agreement (CBA) of the Sugar Industry which was not produced in court. He also did not adduce any evidence to show that if such CBA existed, it applied to him.

I therefore find that the claimant is entitled to one month's gross pay as notice as provided by law.

The Claimant testified that he never took annual leave for the entire period he worked for the Respondent, a fact that was not denied by the Respondent. I therefore award him pay in lieu of annual leave for 3 and a half years, assuming that he was employed in July, 2007 as pleaded in the Memorandum of Claim.

The Claimant prayed for overtime and house allowance. However his payslip attached to the Memorandum of Claim show that he was paid both.

The Claimant further prayed for overtime of 3 hours worked on Saturdays, 8 hours worked on Sundays, and work performed on public holidays. RW1 stated that the employees clocked in but he did not bring the records to court. He further stated that the Claimant did not make any claim for overtime. Section 10 and 74 of the Employment Act provides for records to be kept by an employer including;

"entitlement to annual leave, including public holidays, and holiday pay, (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),"

Section 10(7) provides that where the employer fails to produce the prescribed particulars it will be the burden of the employer to prove or disprove an alleged term of employment. The Respondent's failure to produce records during the hearing of this case is proof that it failed to disprove the burden placed upon it by law. For this reason I will allow the Claimant's claim for 3 hours overtime for Saturdays, 8 hours overtime on Sundays and 10 days Public Holidays. I will however allow the prayers only for 12 months as in my opinion these are continuing wrongs under section 90.

The prayer for night shift allowance was not proved and is rejected. The prayer for severance pay is also rejected as it is only available for an employee who is declared redundant and the Claimant was not declared redundant. The Respondent will issue a certificate of service to the Claimant.

The Claimant also prayed for underpayments and for compensation for unfair termination. The Claimant did not prove whether or not he was a graded artisan and if so what grade. I can therefore only presume he was an ungraded artisan. According to the Regulation of Wages (General) Order 2010 which was applicable at the time of termination of the Claimant, the minimum wage for an ungraded artisan was Shs.9,101 while Artisan Grade 3 was Shs.11,446. The Claimant's Salary of Shs.12,600 was therefore not below statutory minimum wage. I accordingly find that the claimant has not proved underpayment of his wages.

On compensation, having found that he was unfairly terminated and taking into account all circumstances of the case, I award the Claimant 6 months gross salary as compensation for unfair termination.

Conclusion

In conclusion therefore, I find and declare the termination of the Claimant's employment unfair and award him the following:-

1. Notice of 1 month's gross Salary Kshs.14,490.00
2. Pay in lieu of annual leave for 42 months at
1.75 days per month Kshs.35,500.50

3. 3 Saturdays Overtime for 52 weeks at 1.5 times

hourly rate Kshs.14,129.00

4. Sundays Overtime at double hourly rate Kshs.50,236.15

NOTE: For overtime rates refer to Regulation of

Wages (General) Order Rule 6 which provides for overtime at one and a half times hourly rate of pay on working days and double the hourly rate on rest days and public holidays.

5. Public Holidays Kshs. 4,830.40

6. Compensation 6 months gross salary Kshs.86,940.00

7. The Respondent shall also pay Claimant's Cost and Interest from date of Judgement.

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

MAUREEN ONYANGO

JUDGE