



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 72/2013

(formerly Nai 1961/12)

(Before Hon. Justice Hellen Wasilwa on 24th February, 2014)

DAN AGUKO CLAIMANT

-VERSUS-

KIBOS SUGAR AND ALLIED

INDUSTRIES LTD RESPONDENT

JUDGMENT

The claimant herein filed his Memo of Claim dated 25.9.2012 on the 2.10.2012 in person. The issues claimant complain of his alleged unlawful termination, payment of severance pay, leave allowances underpayment of wages and damages for breach of employment.

The claimant's case is that he was employed by the respondents on 7.12.2007 in the Processing Department. He was not given a letter of appointment but he displayed his employment identity card to show he was employed by the respondents. He was further given a memo to show that he was an Ag. sugar packaging supervisor which work he started on 13.12.2007 (App 2). His salary was Ksh 11,000/= as per his payslip for January 2010 (App 3). He was employed on permanent basis and was an NSSF contributor as per his App 4. He was confirmed as supervisor after 1 month of employment but his salary was not increased.

According to the claimant he was underpaid because according to the Collective Bargaining Agreement his union entered into with his employer he was on the scale of charge hand whose salary was expected to be Ksh 25,245 (App 11) and he avers that a charge hand is another name for supervisor in factories. He therefore avers he was underpaid by Ksh 14,245/= per month for the period he worked for 2 ½ years.

On 7th April 2010, he contends that he was served with a suspension letter (App 10) alleging that he had committed some serious offences which were not explained to him. Letter informed him that he was to remain on suspension for 21 days and also keep away from the company premises. On 28.4.2010, he rung the Human Resource Manager to find out if he could come back to work and the manager told him to stay away until he communicated to him. After 4 months i.e 18.8.2010, he was told by the Human Resource Manager to report to the Labour Office. The manager rung the claimant and communicated this information. The claimant reported to the Labour Office Kisumu and found the Human Resource Manager who told him that he wanted to settle his dues at the Labour Office. On 2.8.2010, the Human Resource Manager had written a letter to the Labour Officer stating that the claimant's services had been

terminated and the respondents now wanted to settle claimant's dues with 4 others. The claimant informed the Labour Officer that he was on suspension and had not been given any termination letter and so it was premature to settle dues at that time. No settlement was therefore reached and the Labour Officer concurred with the claimant and wrote them a letter App 8 dated 23.8.2010.

While on suspension, the claimant had written a letter to the respondents through his advocate airing his grievances. The respondents had responded vide a letter dated 6.9.2012 through their advocates stating that the claimant had deserted duty after his 21 days suspension yet in their letter to Labour Officer they had said his services had been terminated.

The claimant's case is that during the suspension he was not paid any salary and had never been paid house allowance for the period he worked 33 months. He was never given any notice before termination and neither was he paid any salary in lieu of notice. The claimant also contends that he never went for annual leave except for compassionate leave and only once.

He contends that he was not given his terminal benefits. He prays that this court finds his termination unlawful and order he be paid damages for the same plus his other prayer plus costs of this suit. When cross examined however, the claimant agreed that on the Collective Bargaining Agreement pg 17, some people were being paid Ksh 10,694 and he agreed that his App 1 had no title. However his App 2 shows he was an Ag. sugar packaging supervisor a position he was confirmed to and which he says is equivalent to senior charge hand. He denies he deserted duty. He further avers that his letter of suspension informed him that he was forbidden to visit the place of work unless specifically required or sent for by the company. He states that he never received any communication after 21 days of suspension.

The respondents filed their memo of reply dated 15.10.2012 on 1.11.2012 through the firm of Otieno, Yogo, Ojuro and Co. Advocates. They also called one witness, their Human Resource Manager. The evidence of the respondents is that the claimant was their employee having been employed on 7.12.2007 to 5th April 2010. He was employed in sugar stores and was suspended on 6.4.2010 for 21 days because he leaked confidential information to some of their competitors. At the end of the 21 days suspension, he didn't come back to work. The respondents witness told court that he called the claimant on mobile phone No. 0734885670 and the claimant informed him that he had a job at JKIA in Nairobi and if there was a problem, his brother Jeff would sort it out.

Later the respondents received a demand notice from the claimant's advocate demanding payment of damages. It is then that respondents went to the labour office asking for their help to sort out the case. On 22.8.2010, they received another demand notice from the claimant's advocate. It is then that they served claimant with a termination letter as they considered him a deserter. The respondents also denied that they have signed any Collective Bargaining Agreement with Sugar Employers Group of Federation of Kenya Employers and they are not aware of this organization.

The respondents aver that the claimant is not entitled to the prayers sought as he deserted duty. They also contend that the claimant went on leave in December 2009 for 2008/2009 period and they annexed his leave application form and the approval thereof as proof of the same. They asked court to dismiss claimant's case.

In cross examination the respondents said that they suspended the claimant for leaking secrets to their competitors but the suspension letter didn't mention this. They also agree that after the 21 days suspension, they didn't write a letter to him recalling him back. They agree that the letter of termination is dated 2.8.2010 and addressed to the Labour Office (document No. 9). The letter indicated that the claimant and three others had already been terminated. The respondents also aver that the claimant was never paid any house allowance and that the respondent is a member of Federation of Kenya Employers. They admitted that in 2009/2010, the claimant didn't go for leave and so is entitled to 26 days leave in default 1 month salary.

I have considered the averments of both parties plus their respective submissions. Issues for

determination accordingly are as follows:-

1. **Whether the respondents terminated the services of the claimant.**
2. **If so whether the respondents were justified in doing so.**
3. **Whether the claimant is entitled to the prayers he sought from court.**

On 1st issue, the claimant stated and the respondent agreed that the claimant was suspended from work for 21 days vide a letter dated 6.4.2010. The suspension was for 21 days and during this period, the claimant was forbidden from visiting his place of work unless specifically required or sent for by the company. There is no indication that the respondents sent for him or wrote a letter lifting the suspension. The next communication from the respondents is their letter dated 2.8.2010 addressed to the Labour Officer Kisumu indicating that the claimant and others had been terminated. There was no communication of this to the claimant until the visit to the Labour Office on 18.8.2010. It appears that the respondents decided to terminate the claimant without informing him and without due process. Their contention that the claimant absconded duty after the 21 days suspension is therefore false.

On second issue is whether the termination was justified. In the suspension letter, reasons for suspension are not given. There is also no dismissal letter except the one addressed to the District Labour Officer indicating that the claimant's services have been terminated. Section 43 of the Employment Act 2007 states that:-

“43 (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”.

The respondents however never gave reasons as to why they terminated claimant services. The claimant was also not accorded an opportunity to be heard before the termination. This offends Section 41 of the Employment 2007 which states that:-

“(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 reasons 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 sub – section (1) make.”

Article 50(1) of the Constitution of Kenya also provides for this right to be heard.

Given that the claimant was terminated without due process and without a hearing, I find that his termination was not justified. What remedies then is the claimant entitled to? The claimant had told court that he was being underpaid as per the Collective Bargaining Agreement. There is no indication however that the post he held is equivalent to the one in the Collective Bargaining Agreement under the head of charge hand. Without this proof, I find no evidence that he was underpaid and so cannot be awarded anything on underpayment. He also stated that he never went for leave for the period he worked. The respondent however gave evidence that he went for leave in 2008/2009 and they annexed his leave application form showing that the leave was approved. There is no proof of his proceeding for leave in 2009/2010 and which fact the respondents admits. I therefore award him as follows:-

1. 1 month salary in lieu of notice = Ksh 11,000/=
 2. 1 month salary in lieu of leave for 2009/2010 Ksh 11,000/=
 3. 12 months salary as damage for unlawful termination Ksh 11,000 X 12 = Ksh 132,000/=
 4. House allowance never paid for 33 months = 15% of Salary X 33 = 11,000
- = 1650 x 33 = 54,450

TOTAL = KSH 219,450

As a contributor to NSSF, the claimant is not entitled to service pay as claimed as this offends the provision of Section 35(6) of Employment Act 2007 which states as follows:-

“This section shall not apply where an employee is a member of:-

- (a) a registered pension or provident fund scheme under the Retirement Benefits Act,**
- (b) a gratuity or service pay scheme established under a collective agreement,**
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and**
- (d) the National Social Security Fund.”**

The claimant should also be issued with a certificate of service. The respondents to meet costs of this suit.

HELLEN WASILWA

JUDGE

24/2/2014

Appearances:-

Omae h/b Anyul for Claimant present

Miss Odumba h/b Olel for respondents present

CC. Wamache