



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 242/2013

(Before Hon. Justice Hellen Wasilwa on 30th April, 2014)

KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS CLAIMANTS

-VERSUS-

WEST KENYA SUGAR COMPANY LTD RESPONDENTS

JUDGMENT

The claimant herein Kenya Union of Sugar Plantation and Allied Workers Union filed their Memo of Claim on 26.8.2013. The issue in dispute was the alleged illegal, unfair and wrongful termination of the employment contract of Godfrey Mukangai, Reuben Waiti and Jacob Wanjala Were, the grievants herein. The claim concerning the 1st and 2nd grievants herein was however withdrawn by the claimants due to the said grievants non availability. The court therefore proceeded with the aspects involving the 3rd grievant Jacob Wanjala Were.

Mr. Wanjala testified before this court and contents that he was employed to work for the respondents herein on 5th May 1995. however on 14.7.2011 without any reason, the respondent unlawfully terminated his employment. He was not given any show cause letter nor any hearing. He wants this court to order his reinstatement or in the alternative he be paid his terminal dues. In cross examination, the grievant Mr. Wanjala told court that he is not a farmer and he never supported the respondents rivals.

The respondents on the other hand filed their memo of response on 26.11.2013 through the firm of Ogejo Olendo and Co. Advocates. They also called one witness, the respondent Human Resource Manager and Administrative Manager. It is the respondents case that by the time the grievant Jacob Wanjala was terminated, the company was experiencing shortage of cane. It was then reported that the grievant who had been given cane development funds to develop cane for the respondents had sold his cane to a rival firm. This was viewed as lack of trust on his part and that is the reason as to why he was terminated. In respondents view, the grievant's action constituted a reason for summary dismissal and therefore the grievant was summarily dismissed.

At the close of the case, the parties filed their respective submissions. The claimants in their submissions, aver that the action of respondents in terminating the grievant was wrongful, illegal and unfair and is violation of the provisions of Article 41 (1) of the Constitution and Sections 41 (1), 43 (1)

and 45 of the Employment Act 2007. They also referred court to Clause 8 of the parties Collective Bargaining Agreement (CBA) that deals with disciplinary procedures on termination and summary dismissal which they contend that the respondents flouted. It is therefore their submission that the action of respondent was illegal and unfair and constituted as unfair termination. They therefore pray that the court makes an order in those terms and orders the respondents to reinstate the grievant back to work without any loss of benefits.

The respondents in their submission aver that it is true they didn't give the grievant any notice but are willing to pay him one month's salary in lieu of notice as provided for under Article 9 of the Collective Bargaining Agreement. They also submitted that the grievant was given reasons for his termination in the termination letter.

Having considered the evidence of the parties plus their respective submissions, issues for determination are as follows:-

- 1. Whether the action of the respondent in terminating the services of the grievant was justified in the circumstances.**
- 2. What remedies if any, is the grievant entitled to.**

From the evidence adduced in court, the grievant was employed in 1995. No employment letter was exhibited in court. It is the duty of the respondent to supply such a letter. The grievant worked until 14.7.2011 when he was served with a termination letter. From this letter, it was indicated:-

“In the recent past, you were involved in a conflict of interest situation that undermined the commitment and trust required to sustain a successful and mutually beneficial employee – employer relationship. In this regard, the trust that the company had in you as its employee has been irreversibly damaged. Consequently, it has been decided that your employment contract be terminated with effect from July 14, 2011 ---.”

From this letter therefore, reason for the termination is conflict of interest which reason has not been proved by the respondents. The respondents in their evidence alluded to an occurrence where the grievant is alleged to have supplied sugarcane to respondents' rivals. Evidence that this occurred is not adduced by the respondents.

In any case and assuming that the allegation was true, the grievant was still entitled to be given a hearing provided under Section 41 of the Employment Act 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.”

This was never done. Article 50 (1) of the Constitution of Kenya also states that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal and body.”

It is clear that the rights of the grievants were flouted by him not being given a hearing.

Article 9(b) of the Collective Bargaining Agreement between the claimants and respondents also has similar provisions which are in the nature of rule – termination procedures. These include, being given 3 months salary in lieu of notice where an employee has been in continuous employment for 10 years and above as in the case of the grievant herein who had been in employment for 11 years with effect from 1995 to 2011.

Under Article 8 of Collective Bargaining Agreement, disciplinary measures includes warnings and suspension (pending investigation). None of these procedures were followed. It is therefore the finding of this court that since the grievant was denied a hearing and given that there is no evidence of any misconduct on his part, his termination by the respondent was unfair, unlawful and unjustified in the circumstances.

The grievant had sought before this court an order for reinstatement. Under Section 12 (3) of the Industrial Court Act 2011

“In exercise of it's jurisdiction under this Act, the court shall have power to make any of the following order:-

(i)

(ii)

(iii)

(iv)

(v)

(vi)

(vii) An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or

(viii) -----.”

It is therefore apparent that this court has powers to grant orders for reinstatement contrary to the respondents submissions based on the Court of Appeal decision in **Peter Otieno Opolo VS The Board of Governors Kisumu Polytechnic College - in KSM CA 136/2010** which was a decision based on the old employment law before 2007, when a comprehensive review of the Employment Laws was carried out.

The respondents had averred that their relationship with the grievant had been irreversibly been damaged but there is no such proof. In considering whether to reinstate the grievant or not, this court is alive to the provisions of the Employment Act 2007, Section 49 (4). Given the circumstances under which the grievant's services were terminated with the feeling that the grievant was involved with their rival, it would be impracticable to order reinstatement of the grievant. I would therefore decline to order a reinstatement. I however find for the grievant and make the following orders:-

- 1. That the termination of the grievant by the respondents was unfair and unjustified and I treat it to a normal termination of contract.**
- 2. I order the respondent to pay the grievant as follows:-**

(a) 3 months salary in lieu of notice.

(b) 12 months salary as compensation for unlawful termination.

(c) 15 days salary for each year worked as terminal benefits.

(d) Respondents to issue grievant with a certificate of service.

All figures in (2) above to be computed by this court upon the grievant supplying the court with proof or evidence of his monthly salary.

The respondent to pay costs of this suit.

HELLEN WASILWA

JUDGE

30/4/2014

Appearances:-

Ogutu for claimant present

Olendo for respondent present

CC. Wamache