



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 142 OF 2013

(BEFORE HON. JUSTICE HELLEN WASILWA ON 17TH JULY, 2014)

NYAATA MAKORI CLAIMANT

-VERSUS-

KIAMOKAMA TEA FACTORY CO. LTD RESPONDENTS

JUDGMENT

The claimant Nyaata Makori filed his memo of claim on 4.6.2013 through the firm of O. M. Otieno & Co. Advocates. He also gave oral evidence before court and called 2 witnesses. His case is that, he was employed by the respondents in a position of Food Technologist vide a letter of employment executed between the claimant and respondents. He was promoted to serve as supervisor Grade III which position he was serving in until his suspension. He stated that on 5.6.2012, the respondents wrote him a letter whereby it was purported that the claimant had been involved in acts of gross misconduct namely; being in possession of a poisonous substance i.e rat poison within the factory processing area. The claimant was asked to show cause within 48 hours why adverse action should not be taken against him for the same. It is claimant's position that the show cause letter was intentionally not delivered to him in time but was sent by registered post and received beyond the 48 hours period on 4.7.2012. The claimant told court the letter was posted on 7.6.2012 but he received it on 4.7.2012 and so he could not have responded to it.

On 11.6.2012 he was served with a letter of suspension without being given a notice to show cause contrary to the Collective Bargaining Agreement between his employer and his union. It is further claimant's evidence that on 5.6.2012 he reported on duty at 7 am and went to production area and found 11 sachets of poisonous substances scattered there. Security personnel were on duty and other staffs. He tried to get in touch with the management of the factory unit and even called some directors. The directors came 2 hours after he called them. He also reported the matter to Bacho Police Station under OB NO 8 of 6th June 2012. The police didn't take action immediately. He proceeded and lodged a complaint at the DCIO's Office Kisii as per **Appl 10**. The tea had been contaminated. He feared for the life of consumers so he wanted the tea intercepted and checked by **KEBS** before sale. His concern was neglected. Police came 1 month later and interrogated workers and culprits but took no action. It is claimant's case that he has been on suspension for one year and the management have refused to take action. It is further the claimant's case that he was a chief shop steward of the company for his union and it was the respondents way of silencing him that was suspended on false allegations. He had even been previously suspended and was reinstated as per **App 6**. He is also contending that he is not being paid his ½ salary as expected while on suspension and the disciplinary hearing expected within 6 months of suspension has not been held.

It is also the claimant's case that the company published defamatory words against him as he is being

perceived as a criminal. He wants the court to order him to be paid his salary arrears and he be reinstated. He seeks damages for defamation of character.

He told court in cross-examination that he was staying at the company staff quarters and using the company address 314 Keroka. He contends that he should not have been served through registered mail as he was staying in the company houses. He told court that during the day of contamination of tea, he was to take over from one supervisor Joyce Magoi but she was not on duty and he had no one to hand over to him. The management came in at 12 noon and they took away the sachets.

He told court that he received a suspension letter, a month after the date when he was barred from going to the factory and was staying at the staff quarters. He moved out of the premises in July 2012.

CW2 and CW3 employees of respondents gave evidence. They told court that they too worked with the claimant and they corroborated claimant's case on the fact that poisonous sachets were found in the tea. It is CW2's evidence that the substances were placed there by some staff before claimant arrived. CW4 also gave evidence and told court that he too saw the poisonous sachets and it was 1 minute after Joyce Magoi and Sylvester left the scene.

The respondents filed their memo of response on 2.7.2013 through the firm of Kimanga and Co. Advocates. They also called 2 witnesses whose evidence was that no tea was poisoned and that it was decided that claimant be suspended for jumping over the fence on 6.6.2012. It is their claim that claimant was not framed for his involvement in union matters. They further told court that claimant was served with a termination letter dated 14.6.2013. The parties also filed their respective submissions.

After considering the evidence of the parties and their submissions, the issues for determination are as follows:-

1. **Whether the claimant's suspension from employment was lawful.**
2. **Whether the claimant was defamed by the respondents.**
3. **Whether the dismissal of claimant was lawful being effected after filing this case on issues of suspension.**
4. **Whether claimant is entitled to prayers he has sought.**

From the chronology of events, the claimant was suspended from work on 11.6.2012 after failing to respond to a notice to show cause letter dated 5.6.2012 which he told court that he received a month later as it was sent by registered post to her home address in Kisii whereas he was staying in the company premises. He contends that this letter should have been served on him personally as per provision of the Collective Bargaining Agreement.

Under Article 4.6.5 of the respondents Human Resource Policies and Procedure Manual, formal disciplinary procedure starts with a show cause letter and the employer is expected to inform the employee of the nature of the complaint and the employee is expected to reply within 14 hours. The claimant told court that the show cause letter was sent to him to an address in Kisii. The letter was dated 5.6.2012 (**App 11**). However, it is claimant's contention that he received it on 4.7.2012 as the duplicate slip from EMS Kenya – attached to claimant's supplementary list of documents. As per that slip, the document reached Kisii post office on 7.6.2012 though dated 5.6.2012. Assuming that the claimant was notified of its arrival and went to pick it on the 7.6.2012, that would still have locked him out of the 48 hours window period within which he was expected to reply to the show cause letter. It was therefore impossible for the claimant to respond to the show cause letter as expected. Before the show cause letter could be received by the claimant, on 11.6.2012, the claimant was served with suspension letter.

Under the respondents Human Resource Manual, Article 4.6.5 (c) (i):-

“When a disciplinary case has been reported, investigations into the charges are instituted and if appropriate, a written notice suspending the employee from attendance for a specified period while the investigations take place will be issued. In this case the union

representatives will be notified.”

Indeed the union was notified of the suspension but this was still not adequate to right the wrong as the notice to show cause letter was already irregular as it was not served on the claimant as expected. It is also expected that the suspension will be in force pending investigations and under Article 4.6.9(c)(2) of the Human Resource Manual:-

“The FUM may suspend an employee at no pay for a period not exceeding one month, if the FUM has reasonable grounds for suspecting the employee of having committed a serious offence against the company.”

The claimant was suspended on 11.6.2012. As per the Human Resource Manual, this suspension should have lapsed by 11.7.2012. However, it is apparent that the claimant remained on suspension beyond the 1 month and at the time of filing suit on 4.6.2013, the claimant was still on suspension. It is therefore the finding of this court that the respondents suspension of the claimant for unindefinitely long period with no pay was unlawful and against the principles of natural justice and it is tantamount to condemning the claimant unheard.

The claimant further raised the issue of being defamed by the respondents. It is claimant's contention that this defamation emanates from a letter the respondents wrote to him and minutes of the meeting held at respondents premises where the claimant's case was discussed. The respondents did author the letter and minutes alluded to but this was the normal cause of disciplinary proceedings as expected by respondents and as provided for in their Human Resource Manual. This cannot amount to defamation of character and I find that the claimant was never defamed by the respondents.

After claimant filed this suit contending his suspension, the respondents went ahead and dismissed him vide a letter dated 26.3.2014 though not attached but alluded to. This was after the filing of this suit in July 2013. Any action taken against the claimant following the flawed disciplinary procedures was unlawful and wrongful and amounts to an unfair and wrongful termination and I declare it null and void.

What orders is the claimant then entitled to? The claimant has sought several prayers before this court and it is the finding of this court that;

1. **He is entitled to all his salary arrears from the time of suspension to-date pegged on his salary at the time,**

$$= 16,918.76 \times 25 \text{ months} = \text{Ksh } 422,969$$

2. **Salary arrears as agreed upon between union and respondents when claimant was previously suspended,**

$$= \text{Ksh } 253,960$$

3. **The claimant be reinstated to his position immediately with no loss of seniority or benefits and in any case within 1 month from the date of this judgment.**

The respondents will meet costs of this suit.

HELLEN WASILWA

JUDGE

17/7/2014

Appearances:-

Claimant present

Respondents absent

CC. Wamache