



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**APPEAL NO. 2 OF 2014**

*(formerly Bungoma HCA No. 31/2007)*

(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2014)

JOSEPH BENARD NENGO ..... CLAIMANT

**-VERSUS-**

NZOIA SUGAR CO. LTD ..... RESPONDENT

**JUDGMENT**

This is an appeal against the judgment of Hon. C. Sogomo, RM Bungoma in CMCC No. 122 of 2003. The judgment arises out of a suit filed by the appellant herein Joseph Benard Nengo against the respondent Nzoia Sugar Co. Ltd for wrongful termination.

The appellant filed his plaint in the Chief Magistrate's Court on 4.2.2003. His contention was that his services had been wrongfully termination by the respondent who had been his employer on 21.12.2000.

The respondent aver that the appellant was found asleep on duty on 7.11.2000 at 3 pm where he was expected to be manning dangerous machinery. He was served with a notice to show cause to explain his conduct and why he should not be summarily dismissed. He replied to the show cause letter stating that he had been sick on 5.11.2000 and was treated with drugs which caused him to be drowsy. This explanation was not acceptable to the respondent who stated that the general conduct of the appellant had been unbecoming and he had received several warnings before for offences of absconding duty, lateness and general neglect of duty.

The main contention by the appellant was that he was not given any hearing before he was terminated. The respondent's human resource personnel manager who testified before the lower court told court that the appellant was in the cadre of middle staff and not unionisable ones and so could not have been summoned for a hearing before the Board. He could however been called to appear before the management committee.

Having considered the averments of the parties, the records of appeal and submissions filed by the parties, the issue for determination is; whether the appellant was subjected to due process before he was dismissed. Due process involves having valid reasons for dismissal and according the appellant a hearing as stipulated under the respondent's staff regulations.

The appellant was terminated in 2003 under the dispensation of the Employment Act Cap 226 (now repealed). Under S. 17 of the said Act, reasons for summarily dismissal are enumerated and these range from absenteeism, intoxication, neglect to perform work, abusiveness and refusal to obey lawful instructions. The respondent stated that they terminated the appellant's services because he was found sleeping on duty whereas he was expected to be handling dangerous machinery. The appellant admitted he was drowsy as he had been sick and was on treatment. If that is anything to go by, the proper place to take a nap at 3 pm was not within the machine room as this was a danger not only to the appellant but also to the entire plant. The appellant had told the lower court that he had asked for sick off at the company clinic and was denied the same. This evidence was however not proved as records from the clinic were not produced nor the clinical officer called as a witness. The lower court found the appellant had not proved his case as expected and dismissed it accordingly. Sleeping on duty was an act punishable by dismissal. The respondents therefore had a valid reason to dismiss the appellant.

However, the respondents admitted that they did not accord the appellant any hearing before the staff management committee. This was an infringement on the appellant's right to be heard which is against the tenets of natural justice.

I therefore find that though, the respondents may have had valid reasons to dismiss the appellant, they failed to give him a proper hearing. The dismissal was therefore unfair and unjustified in the circumstances. In the premise, I award him compensation equivalent to 12 months salary;

$$= 14,000 \times 12 = \text{Ksh } 168,000/=$$

**Plus costs of this suit.**

The upshot is that the appeal is allowed. The lower court's decision is set aside.

**HELLEN S. WASILWA**

**JUDGE**

**17/9/2014**

**Appearances:-**

Kweyu for claimant present

Murunga for respondents present

CC. Wamache