



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1632 of 2011

MOSES MUKHWANA SITATI

CLAIMANT

v

MUMIAS SUGAR COMPANY LIMITED

RESPONDENT

JUDGMENT

1. I must apologise for the delay in the preparation and delivery of this Judgment. The reasons being that after conclusion of the hearing on 20 November 2012 I had to move to my new station Mombasa and leave the file behind in Nairobi to enable the parties file and exchange submissions. The Claimant filed his submissions in time. The Respondent never bothered to appear in Court on 11 December 2012 when the matter was placed before my brother Justice Nzioki wa Makau to confirm filing of the submissions. The parties did not attend a further mention on 6 March 2013 when Justice Nzioki directed that the file be transmitted to me. The file was finally placed on my desk on 21 March 2013 by the Deputy Registrar, Mombasa but without the Respondent's submissions.

2. Moses Mukhwana Sitati (the Claimant) filed the Claim herein on 23 September 2011 against Mumias Sugar Company Ltd (the Respondent). The Memorandum of Claim was some 29 paragraphs long over some 10 or so pages seeking a declaration that his dismissal from employment was wrongful, reinstatement and payment of unpaid salaries arrears and in the alternative a cumulative sum of Kshs 1,682,789.56 stated to comprise two months' salary in lieu of notice and 12 months compensation. There was also a prayer for general and punitive damages for unfair dismissal.

3. The Respondent filed a Response and List of Documents on 15 November 2011.

4. I heard the parties on 28 September 2012 and 20 November 2012 during which each side called 2 witnesses.

Case for the Claimant

5. I will only allude to the case for the Claimant as is germane to the determination of whether his termination through redundancy was unfair and what would be the appropriate remedies.

6. The Claimant pleaded and testified that he was employed by the Respondent as a teacher at Booker Academy, a school operated by the Respondent through a letter of appointment dated 22 January 1996 and that he taught there for 14 around years.

7. The Claimant testified that he served the Respondent faithfully with dedication and had an

industrious career thus earning salary increments and bonuses until his unfair termination on 24 December 2009. At the time of termination, the Claimant was earning a gross salary of Kshs 130,400/-.

8. Regarding the issue of termination, it was pleaded and testified to that around 21 December 2009, a meeting was held between the Respondents' representatives and staff of Booker Academy where the staff were informed that the Respondent would relinquish operating Booker Academy and transfer its control to a trust known as Mumias Elimu Trust with effect from 1 January 2010.

9. As a result of the meeting of 21 December 2009, the Respondent wrote to the Claimant informing him of the termination of his employment through redundancy and payment of two months' salary in lieu of notice, salary and benefits up to 31 December 2009 and severance pay for the years served.

10. It was the further case of the Claimant and this is confirmed in the letter of termination that Mumias Elimu Trust would be able to take him and other staff on board under terms and conditions to be communicated and that all the other staff were taken by the Trust except him despite his writing an application letter expressing his desire to be engaged by the Trust. The letter declining his application was signed by one Maria Ligaga as a trustee. The said person had also signed the termination letter but in her capacity as the Respondent's Human Resources Manager.

11. The Claimant pleaded that an advertisement to replace him was put up in the daily newspapers on 27 January 2010 and that in May 2010 two teachers were employed to replace him.

Case for the Respondent

12. The first witness on behalf of the Respondent was Fidelis Imamai who served it as the Human Resources Manager. He testified that the Respondent initially owned Booker Academy until 1 January 2010 when it was taken over by Mumias Elimu Trust and that the Claimant was a teacher at the Academy. The witness testified that the process to delink the Respondent from running the operations of Booker Academy started around the year 2001.

13. According to the witness the Respondent called a meeting with all staff of Booker Academy around 19 December 2009 and the staff were informed the school would be placed under the Trust and all the staff were issued with letters terminating their services through redundancy and advising on payments due to each staff.

14. In this regard, the Claimant was paid two months' salary in lieu of notice, severance pay for years worked less any loans, outstanding leave and pension and provident funds according to the Retirement Benefits Authority rules. The Claimant acknowledged receipt of his terminal benefits.

15. According to the witness, there was a Committee which dealt with the delinking process and all the staff were to apply afresh to the Trust and if the Trust did not offer the Claimant an opportunity, it had nothing to do with the Respondent.

16. The witness also testified that Mumias Elimu Trust was registered on 24 January 2012 long after the Cause had been filed.

17. The Respondent's second witness was John Mark Wandera, the Principal of Booker Academy since 2005. He stated that the Respondent owned Booker Academy until 2010 when Mumias Elimu Trust took over. He confirmed that a meeting was held on 21 December 2009 and that all teachers who were at Booker Academy were declared redundant in December 2009 and paid their benefits.

18. After receiving his termination letter, the witness stated that he wrote an application letter to the Trust and he was engaged to run the school but under new terms of employment.

19. The witness insisted that between 2009 and 2012 the proprietor of the school was Mumias Elimu Trust and not the Respondent.

Issues for determination

20. I have already mentioned the fact that the Memorandum of Claim runs into nearly 10 pages. The gravamen of the Claimant's grouse or cause of action is set out at paragraph 4 and 26 of the Memorandum of Claim. My study of the pleadings, evidence and submissions is that the Claimant contests his termination through redundancy by the Respondent through letter dated 22 December 2009.

21. To my mind the issue therefore that I have to confront is whether the termination of the Claimant through the declaration of redundancy, in law amounted to unfair dismissal/termination or put another way whether termination through redundancy is subject to proof of reason for termination under section 43 of the Employment Act or the unfair termination provisions of section 45 of the Employment Act.

22. Closely intertwined with the issue mentioned in the preceding paragraph is the legal status of Mumias Elimu Trust in 2010, and how it affects the case of the Claimant.

23. I will make reference in my evaluation to a few decided cases from other jurisdictions but I must state that these decisions are not binding upon me but I only draw upon them for the legal principles which emerge from them which may be sound in law under Kenyan circumstances.

Legal Status of Mumias Elimu Trust

24. Evidence before the Court is that Mumias Elimu Trust was registered on 24 January 2012 under the hand of the then Minister for Lands James Orengo. A copy of its certificate of incorporation was filed with leave of Court on 5 November 2012.

25. In 2009 or 2010, the Trust did not exist. It did not have any juristic personality. The relevant law had not breathed life into it. It was just an idea, may be on paper as far as the law was concerned. Legally the person known as Mumias Elimu Trust was not a definite person capable of entering into any valid contracts.

26. I therefore do reach an inescapable legal conclusion that the Mumias Elimu Trust, lacking legal personality could not take over and operate Booker Academy. The Respondent being the person that caused the setting up and eventual registration of Mumias Elimu Trust on 24 January 2012 must bear the burden of answering the question of the unfairness of the termination of the Claimant through redundancy.

27. I reach this conclusion because the minds that came up with the delinking of the Respondent from the running and operations of Booker Academy and the need to register the trust were all within the heart and soul of the Respondent.

Whether the termination through redundancy amounted to unfair dismissal

28. Redundancy has been defined in section 2 of the Employment Act as

the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

29. Section 40 of the Employment Act on its part sets out the conditions applicable to termination of employment on account of redundancy.

30. In my considered view termination on account of redundancy is subject to the provisions of sections 43 and 45(2)(b)(ii) of the Employment Act in that where an employee contests termination on account of redundancy an employer should prove the reason(s) for the termination and that the reason was related to an operational requirement of the employer. The consequence of this is that a termination on account of

redundancy can be challenged on the basis that it was unfair.

31. It is not disputed that the Claimant's loss of employment was involuntary and therefore the question which begs for an answer is whether the termination of the services of the Claimant was based on the operational requirements of the Respondent and whether the position of the Claimant had become superfluous.

32. Before discussing these questions I need to mention that the thread running throughout both parties cases is that the Respondent wanted to concentrate on its core business of sugar production hence the need to download non-core activities. It thus started working on the incorporation of a trust around 2001 and delinking of itself from the running of Booker Academy. The Respondent was going to transfer the running of the Academy to the Trust.

33. It was not established before me that at the time of the declaration of redundancy and termination of the Claimant there were any operational reasons which necessitated the termination before the legal processes involved in the delinking and incorporation of Mumias Elimu Trust had been completed with. The Trust was only registered in January 2012.

34. The Kenyan employment statutory regime does not have any provisions relating to protection of employees in cases of transfer of undertakings such as the Transfer of Undertakings (Protection of Employment) Regulations 2006 of the United Kingdom. The Transfer of Businesses Act is not of much help and in any case is not applicable as the evidence before me is that Booker Academy was not a for profit venture.

35. The declaration of redundancy and consequent termination of the Claimant in December 2009 was for a reason connected to the transfer of Booker Academy to Mumias Elimu Trust. In the circumstances therefore and based on the legal principle enunciated by the House of Lords in *Wilson & others v St Helens Borough Council* and *British Fuels Ltd v Baxendale and Meade* (1998) IRLR 706 the transferee could not be compelled to employ him.

36. In my view the termination of the Claimant as indeed all other staff of Booker Academy was not conducted in good faith. I say so because Booker Academy was going to and indeed survived the purported delinking. There is no evidence that the students were sent home. Booker Academy was not so completely closed down that the Trust was effectively starting a new business. The Respondent remained in control even though it may not have run the Academy on a day to day basis.

37. What was the true nature of the transaction between the Respondent and the Trust in relation to Booker Academy? Whatever the true nature of the transaction, it would not ordinarily be information available to an employee or a person in the place of the Claimant. What I can say is that the teaching position of the Claimant had not become superfluous.

38. Was there change in ownership of Booker Academy when no legal rights, shares or assets had been acquired notwithstanding that the day to day operations were being conducted by Trustees who were not strictly speaking legally trustees? When was the time of transfer/delinking? To my mind it covers period from December 2009 when the Respondent informed the Claimant and others up to the time that the legal formalities were completed in January 2012.

39. Apart from the good faith issue, I need to consider the issue of mutual trust and confidence between an employer and an employee. It is generally accepted that there is implied in a contract of employment a term that an employer and employee will not conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust. This implied term of trust and confidence was discussed, accepted and applied by the House of Lords in *Magnox Electric plc McCabe v Cornwall County Council* (2004) IRLR 733 and *Malik v BCCI* (1997) IRLR 462. An employer should act responsibly and in good faith. The Respondent was not acting responsibly and in good faith when it terminated the Claimant and purported to hand over Booker Academy to an entity without legal personality.

40. The reason given was not a valid reason because the Trust did not exist and the position of the Claimant had not become superfluous. The termination of the Claimant through redundancy was therefore substantially unfair, unjustified and unlawful.

Appropriate Relief

Declaration that the Claimant's dismissal was wrongful

41. At paragraph 26 of the Memorandum of Claim the Claimant pleaded that his cause of action was based on unfair termination/dismissal while at paragraph 29 he prays for a declaration that his dismissal was wrongful.

42. Just for the record I need to mention that a cause of action based on wrongful dismissal is different from a cause of action based on unfair termination. Wrongful dismissal is governed by the common law and is based on breach of contract but has now been given statutory underpinning in the Employment Act, 2007. Unfair dismissal/termination on the other hand is statutory based and was introduced by the Employment Act, 2007. The legal principles applicable in each case are not usually the same.

43. Part of the confusion regarding the two causes of action can be said to be the result of the draftsman untidy use of the terms *remedies for wrongful dismissal and unfair termination* in the side note to section 49(1) of the Employment Act and the use of the term **unjustified** in the body of the provision and the use of **unfair** in the body of section 49(3) of the Employment Act.

44. The untidiness has made it unclear as to whether the 3 remedies listed in section 49(1)(a)(b) and (c) relate only to **unjustified** summary dismissal or termination while the 2 remedies listed in section 49(3)(a) or (b) relate only to **unfair** summary dismissal or termination or indeed whether the remedies in section 49(1) and 49(3) are mutually exclusive.

45. The sections may need to be looked up and tidied to conform to the legal principles applicable to wrongful dismissal and unfair termination. But for purposes of my decision I take it that the question confronting me is one of unfair termination.

46. Considering my view that the dismissal of the Claimant was unjustified, carried out in bad faith and the Respondent breached an implied term of mutual trust and confidence I do declare that the termination of the Claimant through redundancy was unfair and unjustified.

Reinstatement

47. Mumias Elimu Trust was finally registered on 24 January 2012 and it was not a party to these proceedings. The Respondent is now not in control of Booker Academy and taking the principle set out by the House of Lords in *Wilson & others v St. Helens Borough Council and British Fuels Ltd v Baxendale and Meade* (1998) IRLR 706 it would not be in proper for me to order reinstatement or re-engagement of the Claimant by Mumias Elimu Trust.

Payment of damages

48. The Claimant sought as damages 2 months' salary in lieu of Notice and compensation equivalent to his 12 months gross salary. When he was terminated the Claimant was paid 2 months' salary in lieu of Notice and in my view he is not entitled to another payment under this head.

49. Regarding the prayer for 12 months' gross salary as compensation it is my considered view that the Claimant has established a case that his termination was substantially unfair and is entitled to compensation.

50. The Claimant was terminated effective 31 December 2009 and only secured alternative employment effective 2 May 2011 and at a much lower salary. At the time of termination the Claimants gross salary

was Kshs 130,394/80.

51. Considering that he was paid severance pay which is one of the factors to be considered under section 49(4) of the Employment Act, I would award him 2 months' gross salary in compensation and I assess the sum at Kshs 260,789/60.

52. The Claimant also sought punitive damages but the same are not merited and I need not say any more since the legal principles involved in awarding punitive damages are well known.

Conclusion and Orders

53. In the final result I do declare the termination of the Claimant was unfair and he is awarded

(i) 2 months gross salary compensation in the sum of Kshs 260,789/60

54. The Claimant to have costs of the Cause.

Dated and signed in Mombasa on the 24th day of April 2013.

**Justice Radido Stephen
Judge**

Dated, delivered and signed in open Court in Nairobi on the 10th day of May 2013.

**Justice Nzioki wa Makau
Judge**

Appearances

Mr. Chahenza instructed by Soita & Saende Advocates for Claimant

Mr. S.M. Onyango instructed by

S.M. Onyango & Associates Advocates for Respondent