



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO 366 Of 2010

(Before: D.K.N.Marete)

PETER AKIDAH OMBUORO.....CLAIMANT

VERSUS

SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGEMENT

By a memorandum of claim dated the 22nd March, 2010 and filed on 9th April, 2010 this matter was brought to court. The issue in dispute is cited as:

Unlawful termination of employment of the claimant Peter Akidah Ombuoro by the respondent.

The respondent in defence thereof dismisses the claim and prays that the same be dismissed with costs for lack of merit.

The claimant's case is that on 1st January, 1986 he was employed by the respondent as an Accounts Clerk-Expenditure and that two months later he was transferred to Internal Audit as Audit Supervisor grade SC3. He continued to work diligently until the 1st November, 2006 when the respondent issued him a show cause letter as to why severe disciplinary action should not be taken against him. In this letter, the respondent accused the claimant of having engaged in fraudulent activities like;

- a. The claimant applied for authority from the company to self-harvest cane vide TC No. 823946 measuring 0.2 ha at Odongo Her in Kakmasia Location.
- b. The claimant undertook to associate with one Janet (claimant's wife) in trading in non-contracted cane(NCC) some of which were purportedly delivered by tractors Reg. Nos. KAR 716Z, KAG 637G and KAL 640S under suspicious circumstances thereby compromised the claimant's loyalty to the company.
- c. You subordinated your official duties to your private interest in dealing in NCC hence displayed serious conflict of interest contrary to the provisions of the Public Officer Ethics Act, 2003 and Staff Administrative Code (SAC) Clause 12.

The claimant vide a letter dated 7th November, 2006 responded comprehensively as follows:-

- i. TC 823946 measuring 0.8 Ha at Kamresi Sublocation belongs to Janet Akinyi Akidah (not Peter Akidah) and was acquired rightfully by her, in her own capacity as an adult of sound mind and on her own constitutional right of association with other persons including Sony.
- ii. Janet is a full grown up with all her constitutional right. She does not need necessarily to associate with Peter Akidah because he is the husband to trade in non-contracted cane; she can do it all alone as has been the case like any other person as it is legal. Again, a thousand dollar question, how can you differentiate a suspicious cane loaded on a tractor from non suspicious? If it was suspicious as alleged, why were they allowed to weigh the cane?
- iii. The trading of Janet Akidah with Sony (Respondent) does not subordinate the claimant's official duties and is not against Public Officers Ethics.

No response on this was made from the Respondent.

On 26th April, 2007, the claimant received another show cause letter giving him forty eight (48) hours to show cause why severe disciplinary action should not be taken against him for misconduct totally unrelated to the previous one. He replied by a letter dated 2nd May, 2007 and stated that he never caused any unnecessary commotion at the weigh bridge as alleged and that the same show cause notice should have instead gone to the weigh bridge people to awaken them of their inefficiency. Again, the claimant never received any communication from the respondent on this thus assuming that the matter had settled.

On 20th August, 2007 the claimant yet received another show cause letter on the following allegations of misconduct;

- i. You hired a trailer Reg. 2278 belonging to one Mrs. Mary A. Oyugi with whom you entered into an agreement to pay Ksh.10,000/= on or before 5th of every month, an agreement which you have failed to honour. Despite an earlier letter addressed to you by the CEO you have failed to respond.
- ii. You have engaged in business with the Company in contravention of the SAC clause 12 (2-6) and the declaration of conflict of interest which you duly signed on engagement.

The claimant issued a defence on this dated 21st July, 2007 and stated that any agreement between Mrs. Oyugi and him is strictly private and any dealings in the same are not at the province of the respondent.

Despite detailed answers on the show cause notices, on 29th August, 2007 the claimant was issued with a letter of termination of employment. The grounds for termination were that the respondent had found the explanation offered by the claimant as totally inadmissible. He was being terminated for loss of faith, trust, indiscipline and gross misconduct and in breach of company rules, regulations and the law. The claimant thereupon appealed against the termination and prayed that the same be set aside. He therefore prays that the dismissal be declared unlawful and an order issued for payment of terminal benefits and for full compensation for unlawful termination as follows:-

- i. The Claimant be reinstated to his employment without loss of benefits
- ii. The claimant be paid his full salary and allowances during the period he has been out of employment suspension
- iii. The Claimant be paid his terminal benefits as set out in paragraph 22 hereinabove
- iv. The Respondent be ordered to compensate the claimant for unfair termination/dismissal at the equivalent of twelve(2) months gross salary
- v. The Honourable Court to issue such orders and give such directions as it may deem fit to me the ends of justice.
- vi. The Respondent to pay the costs of this claim
- vii. Interest on the above at Court rates.

The respondent in defence therefore states that the claimant's employment was terminated on 29th August, 2009 in accordance with company procedure. This was because of defrauding the company and

engaging in business and activities that were in conflict with his official duties and interests of the company as follows:-

- a. On or about March, 2006, the Company granted authority to self-harvest of Non-Contracted Cane (NCC) in respect of Plot No. 11A measuring about 0.2 hectares in Odongo Her, Kakmasia sub-location. The application for the authority was in fact made by the claimant, purportedly on behalf of Ms Janet Akinyi Akidah, the claimant's wife.
- b. The Claimant later led the Company's harvesting and extension supervisors Duncan Ochiago and Hellen Mululu to inspect the plot.
- c. Six stacks of cane were subsequently lifted from the plot with the Claimant's tractor, KAR 716Z lifting four of them and the other two being lifted by tractor registration KAG 637G.
- d. The delivery notes for the delivered cane were issued by James Kotiang,, an employee of the Company. However, the Claimant exerted undue influence upon Mr. Kotiang and prevailed upon him to issue additional delivery notes purportedly for cane delivered from the subject plot, when in fact no such deliveries had been made. In all, 10 fraudulent delivery notes were made.
- e. The Claimant subsequently applied for advance payment of Ksh.140,000 against the subject delivery notes, which advance was then irregularly paid to him vide a cheque dated 4th May, 2006 in the absence of all the necessary approvals, and which amount was well over the Forty Percent (40%) recommended by the Company on based of advance payment.
- f. The advance payment application form, debit advice and draft statement of account immediately went missing after the issuance of the cheque, an indication in itself that the transaction was not above board.
- g. It was to be later established that the Claimant himself, being the accountant in whose office the applications were lodged, prepared and processed the payment of the cheque.
- h. The Claimant's conduct was in clear breach of the Company's Standard Administrative Code and in particular section 12 thereof which provides in part that:
 - *No employee is allowed to deal in non-contrasted cane.*
 - *No employee shall subordinate his duties to his private interests nor put himself in a position where there is a conflict between his duties to the Company and his private interest.*
 - *The employee shall undertake not to associate outside his official duties with any activities where there could be a suspicion that his official position or official information available to him was being turned to his private gain.*

There was also a violation of S.12 of the Public Officers Ethics Act, Chapter 183, Laws of Kenya that restricts issues of conflict of interest for public officers. Moreover, he (claimant) had engaged in acts of fraud and dishonesty by processing false delivery notes for cane he knew had not been delivered.

Again, on the morning of 7th April, 2007, the claimant with one, Joseph Makong'ong'o caused serious commotion and disrupted the company's normal operations at the weigh bridge by demanding that the cane delivered by his tractor be weighed as a matter of priority and without delay whereas all tractors were required to queue for service at the weigh bridge.

The claimant had also misconducted himself by engaging in activities incompatible with his office by hiring a trailer Reg. No. 282278 for the purpose of transporting cane to the company but despite constant appeals from Mrs. Oyugi, he refused to pay for these services. This is not to mention his defiant nature as expressed in his conduct during his stint of service and particularly in his responses to the show cause

letters which was unsatisfactory and belligerent, and therefore the termination as earlier expressed.

The claimant's previous record of his conduct is as hereunder:-

- a. Lateness and loitering
- b. Absenteeism from duty without leave
- c. Fraud in the processing and making advance payment to one, Nelson Olwenyi, using fake correspondence and debit note then releasing the payment to Dede Girls High School in favour of one of their students.

The answer to this misconduct was unsatisfactory and therefore the respondent prays that the claim be dismissed with costs to himself.

The matter came for hearing severally but on 5th November, 2012 it was ultimately heard. Here, the claimant in his evidence in chief reiterated his claim as expressed in the memorandum of claim. He testified that he was not invited to any disciplinary hearings nor was he given particulars of the allegations made against him. Due to the untruthfulness of the grounds of termination, he made an appeal. In cross-examination, the claimant made a profile of himself, qualifications and nature of duty. He also admitted that Janet Akida is his wife, but denied knowledge of whether she traded with the respondent. He was also wavy on his relationship and business contract with Mary Ayugi and insisted on delinking the same with a conflict of interest situation with his employer. He squarely denies all allegations made against him by the respondent and claims unfair termination.

DW1, Peter Abuso testified on behalf of the respondent. He said he was the Weigh Bridge Officer in charge of Sonyaco/respondent and that he was aware of the matter in court. He further testified that he was the weigh bridge in charge on 7th April, 2007 and still is in charge of the said weigh bridge. On this date, cane was weighed as follows:-

- a. That belonging to the company and transported in company vehicles.
- b. Cane by farmers and transported by the farmer. It could be contracted or non contracted.

DW2, Paul Ojuok Ogutu also testified on behalf of the respondent. He said he worked as a Security Investigator with the respondent and indeed investigated the 7th April, 2007 incident. He established that the claimant and one, Makong'ong'o had created a commotion at the weigh bridge by insisting on a truck not leaving the weighing ramp. This truck had no authority for weighing its cargo. The claimant had applied for harvesting of cane from Odongo area. He was expected to indicate the registration numbers of tractors to be used in the transportation of cane. He had listed his wife, Janet Akidah as the owner of the cane to be harvested and transported. This was a clear case of conflict of interest as an employee for which he was served with a show cause letter. He had not declared interest from the human resource documents.

The issues for determination in this matter therefore are;

1. Was the termination of the claimant's employment unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The parties in their written submissions elaborately bring out their cases as expressed in their initial pleadings. On issue number 1 above, the respondent submits that the termination for the claimant was due to the following:

- a. Defrauding the Company and engaging in business and activities which were in conflict with his official duties and the interests of the company;
- b. Disrupting the business of the Company by engaging in riotous and disorderly behavior at the

company's weighbridge;

- c. Bringing the Company into disrepute and engaging in activities incompatible with his office.

In his further analysis of these grounds the respondent out rightly illustrates a case of termination that is wholly justified and lawful. In the matter of **Kenya Revenue Authority vs Menginya Salim Murgani, Civil appeal No. 108 of 2010**, the Court of Appeal held at page 5 that;

The fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.

The claimant was involved in an elongated process of show cause correspondence where he was afforded an opportunity to do this case but did not, only choosing to be rude and arrogant to his employer. Therefore, like is submitted by the respondent I agree that;

- a. The Respondent's reasons for terminating the Claimant's employment were justified and fair procedure was followed in reaching the decision to terminate.
- b. The Claimant's fraudulent actions, conflict of interest and his rude attitude towards the Respondent could no longer be tolerated.

The decision to terminate the claimant's contract of employment was tenable, justified and lawful. No claim to the contrary would be sustainable and this deals the claimant's case a fatal blow. The claimant's case is therefore dismissed for lack of merit and justification.

The 2nd issue is whether the claimant is entitled to the relief sought. Dismissal of this cause disentitles him to any relief, or at all. He is therefore not entitled to the relief sought. He is also in the circumstances ordered to meet the costs for the case.

I therefore dismiss this claim with costs to the respondent.

Dated, delivered and signed the 26th day of June, 2013.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocate for the claimant.
2. Mr. Oketche instructed by the Federation of Kenya Employers for the Respondent