



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 44'A'/2013

(formerly Nrb 292/2012)

(Before Hon. Justice Hellen Wasilwa on 18th September, 2013)

ERICK ACHOLA OMBUORO CLAIMANT

-VERSUS-

CHEMILIL SUGAR CO. LTD RESPONDENT

J U D G M E N T

The claimant herein Erick Achola Ombuoro filed his claim against the respondent Chemilil Sugar Co. Ltd on 23.2.2012 through the firm of K'opot & Co. Advocates. From the affidavit of service filed in court on 20.5.2013, the respondents were served with a copy of the statement of claim and verifying affidavit on 5th March 2012. The respondents never filed their response as expected.

The claimants proceeded to set this case for hearing on 10.6.2013 and proceeded with the hearing on formal proof. The claimant's case is that he was an employee of the respondent having been employed on 1st March 2006 as an accountant in charge of Planning and Performance Management. This entailed coordinating performance planning. He was later promoted in 2008 to Financial Accountant I, a section head position. He was also appointed to be secretary to Chemilil Football Club which was a welfare activity of the company wholly owned by the respondent. The position of the club secretary was not an earning position but it enabled him preside over the club then playing in the Kenya Premier League and subject to FIFA Rules and Regulations. As secretary to the club, he used to register players and deal with their welfare and also participate in meetings of the Kenya Premier League. As Financial Accountant on the other hand, he used to keep records of accounting and did all financial duties and used to report to head of Finance.

He told court that on 30.1.2010, they realized in one of their meetings that one of the players had not reported to work and therefore had breached his duty to the company. They advised Human Resource Manager to terminate his contract. They relayed this advise to the Public Relations Officer and released the player from the club.

On 9.3.2010, he received a letter from the Human Resource Manager that he did not act properly by releasing the player and therefore he was suspended from work. He was given a show cause letter and asked to write a statement with the Security Officer. He wrote a statement. On 16.6.2010, he was summarily dismissed. The decision to terminate him had been made by the head of Human Resource and the board never ratified that decision. He was also never given any reason for the summary dismissal. It was just termed as gross misconduct.

The claimant contends that the respondent who are a government parastatal were not justified in terminating him and there was no link between his substantive appointment as accountant to the welfare issues of the football club. He was not paid his June 2010 salary. The claimant further submitted before court his appointment letter as Appendix 1 and his other employment documents as appendices. He was confirmed in employment on 1st November 2006 and this implies that his salary was to be Kshs 37,950/= as per App. 7. He started receiving this salary in July 2007 and was therefore underpaid between November 2006 to June 2007 as per his payslips. This was an underpayment of 6,950/= per month for 8 months totaling Kshs 56,600/=. His June 2010 salary was also not paid an amount, of Ksh 20,000/=.

In October 2009 there was also an increment of salary from Ksh 45,585 to Ksh 47,346/= basic. This was as per the letter dated 30th October 2009 (App 20). As Financial Accountant, his house allowance was raised to Ksh 15,000/= as per Appendix 17. This brought his gross pay to Ksh 74,346/=. He was put on half pay salary from March 2010 to June 2010 i. e Ksh 37,173. He was not given any notice before being dismissed. His leave allowance was Ksh 8,000/= which he was not paid as per his appointment letter. According to his termination letter, he was to be paid leave days accrued i.e 28 days. He produced his schedule of work App. 25 as evidence to show his leave entitlement. He had also paid Ksh 63,810 to the company as per App. 22 which was also recovered from his last pay App. 21.

According to the claimant he was underpaid on leave by Ksh 74,324.08 and his total claim is Ksh 246,438.48 as per his Memorandum of Claim. The claimant seeks a declaration that his termination was unjustified and that he be paid the said amount.

Upon hearing the claimant, the issues for determination are:-

1. Whether the dismissal of the claimant was justified
2. What are the remedies if any that the claimant is entitled to.

On the 1st issue, the claimant has proved to this court that he was employed by the respondent in 2006. The circumstances surrounding his dismissal relate to welfare matters related to his responsibilities in a football club which was not his key appointment. The process of dismissal also comes into question given the process that was adopted before the dismissal. The claimant has told court that he was dismissed by the Human Resource Manager and was never given any hearing.

S. 41(1) of the Employment Act 2007, states that:-

“Subject to Section 42(1) an employer shall before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason 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.”

Section 41(2) states:-

“Notwithstanding any other provision of this part, the employer shall before terminating the employment of an employee or summarily dismissing an employee under S.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 subsection (1) make.”

It is apparent that the provisions of this law was flouted by the respondents who did not accord the claimant any notice or even a hearing. This also contravenes the provision of Article 50(1) of the Kenyan Constitution which provides that:-

“Every person has a 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 or body.”

ILO Convention 158, Termination of Employment Convention states at Article 7 that:-

“The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”

Kenya has not ratified ILO Con. 158 but the wording of the treaty are well domesticated in our domestic law which gives prudence and the force of law to this requirement to be heard before a worker is dismissed. The claimant herein having been dismissed without any hearing, I make a finding that his dismissal was unfair and justified.

What remedies then is he entitled to? He has only sought before this court payment of his dues which he has explained to court in his evidence. At the time of dismissal, he was informed that he would be paid 1 month's salary in lieu of notice which he has told court that he was never paid. He has also told court that he was underpaid during some months whereas others were paid higher as he has demonstrated. He has established he was entitled to Ksh 246,236/= he is claiming. I find for him and order as follows:-

1. The termination of claimant by respondents was unfair and unjustified.
2. The respondents to pay him the said Ksh 246,236/= claimed for.
3. The respondent to pay claimant 6 months salary as compensation for unfair termination. This amounts to $Ksh\ 74,346 \times 6 = 446,076$.

Total awarded **Ksh 692,312/=** – less statutory deductions.

4. I also order the respondent to issue him with a certificate of service. The respondents shall pay costs of this suit.

HELLEN WASILWA

JUDGE

18/09/2013

Appearances:-

Both parties absent

CC. Sammy Wamache.