



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 44 OF 2013

(previously NRB No. 1052 of 2012)

(Before Hon. Justice Hellen Wasilwa on 28th November, 2013)

ANDREW O. DULO

..... CLAIMANT

-VERSUS-

CHEMILIL SUGAR COMPANY LTD

..... RESPONDENTS

JUDGMENT

The claimant Andrew O. Dulo filed his Memorandum of Claim on 20.6.2012 through the firm of Rakoro & Co. Advocates. The issue in contention relates to his unfair termination and non – payment of terminal dues. The claimant's case is that he was employed by the respondents on 26.5.2003 as an office messenger grade UG3 on a salary of Ksh 5,933 per month as per his letter of appointment marked App1. On 12.3.2008 he was promoted to the grade of a clerk on salary scale UG 02 of Ksh 13,321 per month but he eventually rose to clerk grade UG 02 at gross pay of Ksh 17,160 per month as per his appendix App2. He avers that on 21.10.2008 he was arrested on suspicion and allegation of having participated in an alleged theft of some copper wires valued at Ksh 137,907.75 belonging to the respondents. He was then charged before the Nyando PM's Court – Cr. Case No. 1295 of 2008. At the end of the hearing, he was acquitted under Section 210 of CPC on 21.3.2011. He attached a copy of the ruling dated 21.3.2011 as App 3.

In the meantime, it is the claimant's case that he was suspended on half pay on 24.10.2008 upto 23.6.2009 when he was terminated despite him showing good cause why he should not be terminated. He told court that he was terminated on 23.6.2009 without any reason at all and without payment of his terminal dues. Copy of letter of termination was annexed as App 5. The claimant avers that he was a member of the Kenya Union of Sugar Plantation and Allied Workers Union (KUSPAW) Chemelil branch and the Union had signed a Collective Bargaining Agreement with the respondents on 2.11.2011 which was to run from 1.5.2009 till 30.11.2011 and/on till it's termination or amendment. The Collective Bargaining Agreement was annexed as App 6. The claimant contends that in terminating his services the respondents violated the provisions of Clause 9 of the Collective Bargaining Agreement and also provisions of the Employment Act 2007.

The claimant now seeks payment as follows:-

1. **2 months salary in lieu of notice Ksh 34,320/=.**
2. **Unpaid ½ salary from October 2008 to June 2009.**

3. **Unpaid salary from July 2009 – March 2011 - Ksh 360,360/=.**
4. **Accrued leave – 240 days - Ksh 137,280/=.**
5. **Leave travelling allowance – Ksh 1,930 X 8 years – Ksh 15,440/=.**
6. **Service – 20 years X 7 days – Ksh 80,080.40/=.**
7. **Maximum compensation - Ksh 205,920/=.**

TOTAL = 910,620.40

He also prays for reinstatement to his job without loss of benefits and a declaration that his termination was wrongful, unlawful and unfair. He seeks costs of this suit. The claimant also gave evidence in court and in cross examination by the respondents, he told court that the police arrested him saying they had intercepted copper wires outside the factory but he was never shown any copper wires and even in court nothing was produced. He said that in his store, no copper wires were missing. He says he was asked to show cause why he should not be dismissed. He however responded after 48 hours as he was given the show cause letter on Friday 24th and he couldn't hand in his response over the weekend and so he handed it over on Monday.

The respondents on the other hand filed their Memorandum of Response on 27.3.2013, through the Federation of Kenya Employers. Their evidence was that indeed the complainant was seen loading the copper wires on a tractor reg. no. KWS833 which was later intercepted by police. That evidence showed that he stole the wires in question. He was later suspended and eventually terminated. He was eventually paid his terminal benefits upto 23rd June 2009 including salary, leave, 2 months salary in lieu of notice and severance pay at the rate of 20 days for each completed year of service.

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

1. **Whether the dismissal of claimant by respondent was justified.**
2. **Whether claimant was paid any dues by the respondents as alleged.**
3. **Whether the claimant is entitled to the prayers he has sought.**

On 1st issue there is evidence that indeed the claimant was an employee of the respondent and he was assigned duties in the store. Some copper wires apparently were traced on a tractor outside the Company premises and since the claimant was on duty then it was alleged he was the one who had stolen them. A look at the ruling in the Criminal Court indicates that it was alleged one Wycliff Sigani said the claimant loaded the wires on the tractor and this witness was never called in court even as respondents herein insist the claimant indeed stole, no witness was called to confirm this fact. The claimant was acquitted of the criminal charges under S. 210 of CPC as the prosecution evidence that would have linked the claimant to the charge was merely hearsay.

It is also clear that during the pendency of this Criminal Case, the respondents went ahead and terminated the claimant's services. The claimant informed court that he is a member of a Union – which has signed a Collective Bargaining Agreement with respondents. Under clause 9(ii)(c) of this Collective Bargaining Agreement:-

“All suspension/show cause letters shall be copied to the Union Branch Secretary and Human Resource Manager within seven days. Where such letters may not be copied for whatever reasons as provided, the union shall take up the matter in accordance with the grievance handling procedures”

In the claimant's case, the suspension letter to the claimant was not copied to the union which was in breach of clause 9 of the Collective Bargaining Agreement. Other than this breach of the Collective Bargaining Agreement, the Employment Act 2007 is clear on pre-dismissal procedures. The claimant must be accorded a right to be heard. This procedure is explained under S. 41 of Employment Act 2007 which states as follows:-

“Subject to Section 42(1) an employer shall before terminating the employment of an

employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language he employee understands, the reasons 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.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may have on the grounds of misconduct or poor performance, and the person if any chosen by the employee within sub – section (1) make.”

Article 50 of the Constitution makes this also mandatory and states as follows:-

“Every person has the 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 and body.”

Kenya is a member of the ILO and the ILO's Committee of Experts in the General Survey on Termination of Employment Convention No. 158 and Recommendation No. 166, of 1982 para 150 has had to expand on these requirement of a hearing before termination as follows:-

“It should be noted that the opportunity for a worker to defend himself must be given before employment is terminated. Even if the worker is entitled to procedures after the termination of employment, and even if the termination is not considered as final until the appeals procedures are exhausted, it is necessary for the application of Article 7 that the worker be given an opportunity to defend himself before his employment is considered to have been terminated ”

It is clear that the respondent failed in terminating the claimant without according him a hearing and therefore they were not justified in their action.

On the 2nd issue, the termination letter addressed to claimant by respondents dated 23.6.2009 had indicated that the claimant would be paid certain terminal dues as follows:-

1. **Salary upto and including June 23, 2009.**
2. **159.79 days accumulated annual leave days earned upto June 23, 2009.**
3. **Two months salary in lieu of notice.**
4. **20 days' pay for every completed year of service since he joined the company on June 16, 2003.**

The claimant was asked to arrange to collect these dues subject to clearance of liabilities owing to the company. The respondents have alleged that the claimant was paid all the dues. However, the claimant insists that he was never paid. It is the duty of the respondents to prove this payment which they have not and I find that the claimant was never paid any of these dues by the respondents.

Is the claimant then entitled to any dues as prayed? I have already made a finding that the claimant's termination was not justified. He is therefore entitled to payment of certain dues which I award as follows:-

1. **2 months salary in lieu of notice as provided under clause 10(c) of the Collective Bargaining Agreement = Ksh 17,160 X 2 = 34,320.00**
2. **Unpaid ½ salary from October 2008 to June 2009**
= Ksh 77,220.00
3. **Accrued leave as admitted by respondents of 159.79 days = Ksh 91,399.80**
4. **Service pay of 20 days per year for 7 years = Ksh 80,080.00**
5. **Damages for unlawful termination – 12 months salary = Ksh 17,160 X 12 = 205,920**

TOTALS = KSH 488,939.80

The claimant will also be issued with a certificate of service. The respondents will meet costs of this suit.

HELLEN WASILWA

JUDGE

28/11/2013

Appearances:-

Claimant present in person

Gideon Atito from FKE present

cc. Sammy Wamache.