REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 40/2013

(formerly Nrb 252/2011)

(Before Hon. Justice Hellen Wasilwa on 9th October, 2013)

KENYA UNION OF SUGAR PLANTATIONS &

ALLIED WORKERS .... CLAIMANT

-VERSUS-

KIBOS SUGAR & ALLIED INDUSTRIES LTD .... RESPONDENTS

JUDGMENT

The claimant herein Kenya Union of Sugar Plantation and Allied Workers filed this claim on 23.2.2011 through the firm of Ombito and Co. Advocates. The claim was filed on behalf of one Reuben Opara Indika a member of the claimant Union against the respondents Kibos Sugar and Allied Industries Limited and Channan Agricultural Contractor. The claimants case is that the greviant Reuben Opara Indika was employed as a mechanic with Channan Agricultural Contractors Limited Mumias – a sister Company with Kibos Sugar and Allied Industries Limited in 2008, the greviant is now employed with Kibos Sugar and Allied Industries Limited as a mechanic.

It is the claimant's contention that the respondents are employers and millers within the Sugar Act Laws of Kenya. The 2nd respondent is a sugar cane transporter company for the purposes of sugarcane transportation and now carrying on such business in Mumias Sugar and Kibos Sugar Zones. That for all practical purposes and intents, the 2nd respondent is a subsidiary to the 1st respondent company and the 2nd respondent has had frequent transfer policy of workers to the 1st respondent company in the recent period. The greviants evidence is that he was a member of the claimant Union at all times.

At the time of employment the greviant earned Ksh 10,800/= but this amount was reduced to Ksh 6,000/= upon his transfer to Kibos Sugar by the 2nd respondent herein. It is the greviant's contention that he was a shop steward and by virtue of this position, his relationship with the respondent deteriorated hence his verbal transfer to Kibos on 2.12.2008. He told court that the two respondents have a relationship and share the same managers. In May 2009, the services of greviant were terminated. He reported to his union and later to the labour officer. Labour officer attempted a conciliation process which failed. He advised that the respondent pay greviant as per their recommendation. The claimant called one witness the labour officer who gave evidence and told court that she handled the case between the greviant and respondent Channan Agricultural Contractors. The

labour officer informed court that the greviant had a payslip for Channan Agricultural Contractors to show he had been employed there but there was no appointment letter. The 1st respondent called one witness who told court that he does not know the greviant and that the greviant had no employment contract with them.

The 2nd respondent despite service, never called any evidence but had their lawyer in court. In their reply to memo, filed on 31.7.2012 through the firm of Otieno, Yogo, Ojuro & Co. Advocates had stated that the greviant was employed by them but left employment voluntarily and therefore his claim of unfair termination are baseless.

Having heard the parties herein, the issues for determination are:-

1. Whether there was an employment relationship between the greviant and respondents.
2. Whether the greviant was unfairly terminated by the respondents.
3. What remedies if any, the greviant is entitled to.

On 1st issue, the 2nd respondent have agreed in their reply to their memorandum of Claim that the greviant had been their employee. In the pleadings by the counsel for 1st respondents dated the 1st July 2011, the 1st respondent stated that indeed the greviant was an employee of the 2nd respondent, who is contracted by the 1st respondent as a transporter. There is no written letter of employment from the 2nd respondent conceding to this employer – employee relationship. This is in breach of the provisions of the Employment Act 2007, Section 9(1) (b) which states that:-

"A contract of service which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in aggregate to the equivalent of three months, shall be in writing".

The greviant cannot therefore be vilified for failure to produce the employment letter as it is the duty of the 2nd respondent employer to provide one. The 2nd respondent contends that the greviant left his work on his own volition. The 2nd respondent does not state when this occurred.

In the absence of an employment contract letter for which 2nd respondent should have provided, the contention by 2nd respondent becomes a mere ascertain. It is this employment letter that would have shed light on the workings between 2nd respondent and greviant. I find that there was an employment relationship between greviant and 2nd respondent but there is no such evidence as between greviant and 1st respondent.

On 2nd issue is how the relationship between greviant and 2nd respondent was terminated. Without knowledge of how the relationship started through an employment contract, what is left is greviant's word against 2nd respondents. The 1st respondent have told court that they had contracted the services of the 2nd respondent as sugar transporters. The greviant's case is that indeed he was a mechanic and worked for 1st respondent where 2nd respondent send him. This ascertain is fortified by the documents on the file marked FW1 – attached to the Notice of Motion application dated 3.11.2011 showing that the 2nd respondent used to transfer to their site at Kibos to work there.

In the same way the 2nd respondents verbally employed greviant, it is the same way then that they terminated his services and I agree with him. The labour officer gives prudence to this fact following her own investigations. I therefore find that the greviant was unfairly dismissed and the dismissal was not justified.

Are there any remedies then that the greviant is entitled to" I find indeed the greviant is entitled to the following remedies which I now award:-

1. 1 month's salary in lieu of notice Ksh 10,800/=
2. Six months salary as compensation for loss of employment – Ksh 10,800 X 6 = Ksh 65,400/=
3. Costs of this suit.

TOTAL AWARDED = KSH 76,200/=

HELLEN WASILWA

JUDGE

9.10.2013

Appearances:

Miss Odumba Advocate for respondents present

Claimant present

CC. Wamache

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