



**Maningi & 2 others v Kwale International Sugar Co Ltd (Cause 872 of 2017) [2024] KEELRC 2043 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2043 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 872 OF 2017**

**AK NZEI, J  
JULY 25, 2024**

**BETWEEN**

**NAOMI SYOKAU MANINGI ..... 1<sup>ST</sup> CLAIMANT  
SELEMAN OMARI ROJOJO ..... 2<sup>ND</sup> CLAIMANT  
AMANI ABDALLA MWASUPI ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**KWALE INTERNATIONAL SUGAR CO LTD ..... RESPONDENT**

**JUDGMENT**

1. The three Claimants, Naomi Syokau Maningi, Selemani Omari Rajojo and Amani Abdalla Mwasupi, sued the Respondent herein vide a memorandum of claim dated 30/10/2017 and filed in this Court on 20/11/2017 and pleaded:-

2.

**1<sup>st</sup> Claimant [Naomi Syokau Maningi]**

- a. that she was employed by the Respondent on 1/12/2014 and worked until 18/3/2016, earning a weekly salary of Kshs 3,300.
- b. that on 18/3/2016 the Respondent, through its agents and/or servants, unjustifiably and unfairly terminated the Claimant's employment without following the laid down procedure and without payment of the 1<sup>st</sup> Claimant's terminal and contractual dues.
- c. that the decision to terminate the 1<sup>st</sup> Claimant's employment was unfair, and contravened Sections 35,43 and 45 of the [Employment Act](#) 2007.



- d. that failure by the Respondent to accord the 1<sup>st</sup> Claimant right to fair administrative action through observance of rules of natural justice, as envisaged in Section 45(5) of the Employment Act, was unfair and a breach of Articles 41 and 47(1) of the Constitution of Kenya and ILO Convention 158 on termination of employment.
- e. that the 1<sup>st</sup> Claimant was not issued with a certificate of service.
- f. The 1<sup>st</sup> Claimant sought the following reliefs against the Respondent:-
  - i. One month salary in lieu of notice.....Kshs 13,200
  - ii. Leave pay for 15 months.....Kshs 14,224
  - iii. 12 months' compensation for unfair termination of employment (12 monthsx13,200).....Kshs 158,400
  - iv. A declaration that termination of the 1<sup>st</sup> Claimant's employment was unfair.
  - v. Certificate of service
  - vi. Costs and interest at Court rates.
  - vii. Any other relief that the Court may deem fit and just to grant.

3.

**2<sup>nd</sup> Claimant (Selemani Omar Rojojo)**

- a. that the 2<sup>nd</sup> Claimant was employed by the Respondent on 30/10/2012 upto 18/3/2016, earning a weekly salary of Kshs 1,400
- b. that on 18/3/2016 the Respondent, through its agents and/or servants, unjustifiably and unfairly terminated the Claimant's employment without following the laid down procedure and without payment of the 1<sup>st</sup> Claimant's terminal and contractual dues.
- c. that the decision to terminate the 1<sup>st</sup> Claimant's employment was unfair, and contravened Sections 35,43 and 45 of the Employment Act 2007.
- d. that failure by the Respondent to accord the 2<sup>nd</sup> Claimant right to fair administrative action through observance of rules of natural justice, as envisaged in Section 45(5) of the Employment Act, was unfair and a breach of Articles 41 and 47(1) of the Constitution of Kenya and ILO Convention 158 on termination of employment.
- e. that the 2<sup>nd</sup> Claimant was not issued with a certificate of service.
- f. the 2<sup>nd</sup> Claimant sought the following reliefs against the Respondent:-
  - i. One month salary on lieu of notice.....Kshs 10,954
  - ii. Leave pay for 15 months .....Kshs 30,206
  - iii. Underpayments:-For the year 2013 -2015 (ksh. 4020x24 months) .....Kshs 96,480For the year 2015 – 2016 (Kshs 5,194x10 months).....Kshs 51,940



- iv. Compensation for unfair termination of employment (12 months x kshs 10,954) .....Kshs 131,448
- v. A declaration that the 2<sup>nd</sup> Claimant's termination was unfair.
- vi. Certificate of service.
- vii. Costs and interest at Court rates.
- viii. Any other relief that the Court may deem fit and just to grant.

4.

**3<sup>rd</sup> Claimant (Amani Abdalla Mwasupi)**

- a. that the 3<sup>rd</sup> Claimant was employed by the Respondent on 24/11/2014 and worked upto 18/3/2016, earning a weekly salary of Kshs 1,410.
  - b. that on 18/3/2016 the Respondent, through its agents and/or servants, unjustifiably and unfairly terminated the Claimant's employment without following the laid down procedure and without payment of the 1st Claimant's terminal and contractual dues.
  - c. that the decision to terminate the 1st Claimant's employment was unfair, and contravened Sections 35,43 and 45 of the Employment Act 2007.
  - d. that failure by the Respondent to accord the 3<sup>rd</sup> Claimant right to fair administrative action through observance of rules of natural justice, as envisaged in Section 45(5) of the Employment Act, was unfair and a breach of Articles 41 and 47(1) of the Constitution of Kenya and ILO Convention 158 on termination of employment.
  - e. that the 3<sup>rd</sup> Claimant was not issued with a certificate of service.
  - f. The 3<sup>rd</sup> Claimant sought the following reliefs against the Respondent:-
    - i. One month salary in lieu of notice.....Kshs 10,954
    - ii. Leave pay for 16 months.....Kshs 11,788
    - iii. 12 months' compensation for unfair termination of employment (12 monthsx10,954) .....Kshs 131,448.
    - iv. A declaration that termination of the 3<sup>rd</sup> Claimant's employment was unfair.
    - v. Certificate of service.
    - vi. Costs and interest at Court rates.
    - vii. Any other reliefs that the Court may deem fit and just to grant.
5. Documents filed alongside the memorandum of claim included written witness statements by each of the three Claimants and a list of documents dated 30/10/2017, listing 4 (sets of) documents. The listed documents were copies of each of the Claimant's national identification card, the Claimants' staff identification cards and Wage Order (Regulation of Wages (General) (Amendments) Order 2015).
6. The Respondent entered appearance on 11/12/2017 and filed response to the Claimant's claim on 22/2/2018, denying the same. The Respondent further pleaded:-



- a. that due to the nature of the Respondent's operations (growing and processing of sugarcane for production of sugar, ethanol and electricity), its human resource needs vary greatly from time to time, necessitating recruitment of casual labourers on temporary basis as and when work is available.
  - b. that casual workers report to work on days suitable to them and are only paid for the individual days worked.
  - c. that the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were engaged by the Respondent from time to time in the factory department while the 3<sup>rd</sup> Claimant was engaged in the agriculture department as casual labourers at a daily rate of Kshs 210 upto April 2015, that the said amount was reviewed to Kshs 235 as from May 2015.
  - d. that the Claimants were paid weekly in arrears without fail for days worked until March 2016 when they left work on their own accord, and were not terminated.
  - e. that the Claimants' daily wages were in accordance with the minimum wage orders applicable to the agriculture industry.
7. Documents filed alongside the Respondent's response included a written witness statement of David Kulecho, the Respondent's Legal Officer, and a list of documents dated 16/2/2018, listing 3 documents. The listed documents are Regulation of Wages (Agricultural Industry) (Amendment) Orders for the years 2010, 2011 and 2013.
  8. On 16/12/2019, the Respondent filed a witness statement of Rhoda Thuo and 14/12/2020 filed a witness statement of Kevin Mapesa Wamaya.
  9. Trial opened on 15/12/2020 before Ndolo, J. On the said date, the Court was informed by Counsel for the Claimants that the 1<sup>st</sup> Claimant was deceased. The 3<sup>rd</sup> Claimant testified as CW1 and adopted the filed witness statement as her testimony. She also produced in evidence the documents referred to in paragraph 5 of this judgment. CW1 further testified that she was employed on 24/11/2014 as a casual, and worked continuously until 18/3/2016 when she was terminated by her Supervisor (one Barasa) without any notice or reason. That she did not take leave during the employment period, was not issued with a show cause letter and that she did not resign. That she was being paid in cash.
  10. Cross- examined, the 3<sup>rd</sup> Claimant (CW1) testified that she was not given a termination letter. That she worked continuously, even on Sundays, seven days a week.
  11. A person by the name Nderu Suleiman Mwangi is shown to have testified on 15/3/2021, and to have told the Court that he was testifying on behalf of the 2<sup>nd</sup> Claimant. The said person is, however, not named as a party to the suit herein, and was not listed by the Claimants as their witness. Indeed, I have not seen the said person's witness statement on record. The 2<sup>nd</sup> Claimant never appeared in Court to testify, and his case was closed by the Court on 18/5/2023.
  12. The Respondent's case opened before me on 18/5/2023. The Respondent's witness, Kevin Mapesa Wamaya (RW1), testified that the 3<sup>rd</sup> Claimant was employed by the Respondent as a general labourer on casual terms on 24/11/2014 and that her initial daily wage was Kshs 210, which was subsequently enhanced to Kshs 235 as from 2015. RW1 did not outrightly deny that the 3<sup>rd</sup> Claimant's employment was terminated by the Respondent. He appeared to suggest in his evidence in Court that the Respondent had a reason for terminating the 3<sup>rd</sup> Claimant's employment.



13. Cross-examined, RW1 admitted that the Respondent did not have records on how regularly the Respondent employed the 3<sup>rd</sup> Claimant on casual basis as alleged by the Respondent, and on how much the Claimants were being paid. He further testified that the Respondent did not have any leave records on the Claimants' leave applications, and did not have any record on any follow-up done by the Respondent on the Claimants after they allegedly absconded duty. That the Respondent did not have any documents showing that the 3<sup>rd</sup> Claimant was a casual employee. RW1 further testified/confirmed that he had not previously testified regarding the Claimants herein.
14. It is to be noted that although documents filed by the Respondent showed that there had been a previous suit, ELRC Cause No 707 of 2016, in which the Claimants herein were the Claimants alongside 5 others, evidence presented herein shows that the said suit was withdrawn vide a Notice of Withdrawal of Suit filed in this Court on 15/5/2017. The said suit is not shown to have been either heard or concluded. The suit is therefore of no legal impact to the suit and proceedings herein.
15. From the proceedings herein, and as already stated in this judgment, this Court was on 15/12/2020 informed by Counsel for the Claimants that the 1<sup>st</sup> Claimant is deceased. The record does not show when the 1<sup>st</sup> Claimant died. The record is however clear that the 1<sup>st</sup> Claimant was never substituted. Her claim has, therefore, since abated. The 2<sup>nd</sup> Claimant never appeared in Court to prosecute his claim, and his case was on 18/5/2023 closed by the Court. The evidence presented by one Nderu Suleiman Mwangi on 15/3/2021 cannot be said to have been in prosecution of the 2<sup>nd</sup> Claimant's case. It is not clear, from the proceedings and documents filed herein, how he was allowed to testify and on what basis. From the proceedings taken on 15/12/2020, it is clear that the 3<sup>rd</sup> Claimant testified in prosecution of her own claim only. The 2<sup>nd</sup> Claimant's claim is hereby dismissed.
16. I will, therefore, proceed to determine the 3<sup>rd</sup> Claimant's claim only. Issues that fall for determination, in my view, are as follows:-
  - a. whether the 3<sup>rd</sup> Claimant's employment was terminated by the Respondent, and if so
  - b. whether the termination was unfair.
  - c. whether the 3<sup>rd</sup> Claimant is entitled to the reliefs sought.
17. Before delving into the aforesaid issues for determination, it is worthy noting that the 3<sup>rd</sup> Claimant's pleaded period of employment, which is not disputed (24/11/2014 to March 2016), covers a period of approximately sixteen (16) months. Although the Respondent alleged that the 3<sup>rd</sup> Claimant was, during this period, engaged by the Respondent as a casual if and when work was available, the Respondent did not produce in evidence any records on when the 3<sup>rd</sup> Claimant worked and when she did not work. By dint of Section 37 of the Employment Act, the Respondent's allegation of the 3<sup>rd</sup> Claimant having been a casual worker must fall by the way side.
18. On the first issue, it was a common ground that the 3<sup>rd</sup> Claimant was employed by the Respondent on 24/11/2014 and that her employment terminated on 18/3/2016. What is in dispute is how the employment terminated or was terminated. Whereas the 3<sup>rd</sup> Claimant pleaded and testified that her employment was terminated by her supervisor, the Respondent (RW1) pleaded and testified that the 3<sup>rd</sup> Claimant and his co-Claimants left employment in their own accord. In other words, that they absconded duty.
19. It is to be noted that absconding duty by an employee, or failure by an employee to report on duty at the place appointed for performance of his work is, by dint of Section 44(4) (a), a gross misconduct by such employee. An employer alleging that an employee absconded duty or absented himself without lawful



cause, leave or permission must, therefore, demonstrate what action, disciplinary or otherwise, he took against the employee. Section 41 of the Employment Act elaborately sets out a mandatory disciplinary procedure to be followed by an employer whose employee grossly misconducts himself. An employer cannot be permitted to just allege that an employee absconded duty. Action taken by the employer must be demonstrated.

20. In the persuasive case of Stanley Omwoyo Onchweri v BOM Nakuru YMCA Secondary School [2015] eKLR (cited in Jane Ashimbina Mayi v Menengai Oil Refineries Limited [2016] eKLR), the Court stated as follows:-

“The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances.”

21. In the present case, the 3<sup>rd</sup> Claimant testified that her employment was terminated by her supervisor. The Respondent did not rebut this evidence, in view of the forgoing. I find and hold that the 3<sup>rd</sup> Claimant’s employment was terminated by the Respondent.
22. On the second issue, the 3<sup>rd</sup> Claimant pleaded and testified that her employment was terminated without notice. This evidence was not rebutted by the Respondent. It was not demonstrated that the 3<sup>rd</sup> Claimant was either issued with a termination notice pursuant to Section 35(1) (c) of the Employment Act or paid in lieu thereof. Failure to issue a termination notice rendered the termination unfair. Further, the Respondent did not demonstrate that it had a valid reason for terminating the 3<sup>rd</sup> Claimant’s employment as provided in Section 45(2) (a) of the Employment Act. I find and hold that termination of the 3<sup>rd</sup> Claimant’s employment by the Respondent was unfair, and I so declare.
23. On the third issue, I award the 3<sup>rd</sup> Claimant the claimed sum of Kshs 10,954 being payment in lieu of notice.
24. The claim for Kshs 11,788 being unpaid leave days is allowed. The Respondent did not dispute the computation of the said sum, and did not demonstrate that the 3<sup>rd</sup> Claimant had taken annual leave pursuant to Section 28(1) of the Employment Act during the 16 months of employment. Section 74(g) of the Employment Act obligates an employer to keep records of all his employees’ leave entitlement, days taken and days due.
25. The claim for Kshs 81,206 being underpayment during the period of employment is allowed. The 3<sup>rd</sup> Claimant pleaded and testified that her weekly salary was Kshs 1,410. The Respondent pleaded that the 3<sup>rd</sup> Claimant was being paid at the daily rate of Kshs 210, which was in May 2015 reviewed to Kshs 215. No evidence was, however, adduced by the Respondent in support of these allegations. Further, it was not demonstrated that the 3<sup>rd</sup> Claimant had been given a written contract by the Respondent. Indeed, RW1 testified, under cross-examination, that he did not have records on amounts paid by the Respondent to the Claimants. By dint of Section 10(7) of the Employment Act, the burden of proving the 3<sup>rd</sup> Claimant’s earnings was on the Respondent.
26. RW1 testified that the Claimants herein were engaged by the Respondent as labourers. I have noted from the 2015 Regulation of Wages (General) (Amendment) Order that the minimum monthly salary/wage of a General Labourer was Kshs 10,954.
27. On the claim for compensation for unfair termination of employment, and having made a finding that the 3<sup>rd</sup> Claimant was unfairly terminated, I award her the equivalent of eight months’ salary, which is



Kshs 10,954x8 = Kshs 87,632. I have taken into account the fact that the 3<sup>rd</sup> Claimant was not shown to have in any way contributed to termination of her employment.

28. In sum, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the 3<sup>rd</sup> Claimant against the Respondent as follows:-
- a. One month salary in lieu of notice...Kshs 10,954
  - b. Unpaid leave.....Kshs 11,788
  - c. Underpayment.....Kshs 81,206
  - d. Compensation for unfair termination of employment .....Kshs 87,632
- Total Kshs 191,580
29. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the employment Act.
30. The Respondent shall issue a certificate of service to the 3<sup>rd</sup> Claimant pursuant to Section 51(1) of the Employment Act within 30 days of this judgment.
31. The 3<sup>rd</sup> Claimant is awarded costs of the suit and interest on the awarded sum at Court rates. Interest shall be calculated at Court rates from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> JULY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant

.....Respondent

