



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kairu v Kenya National Union of Teachers (KNUT) (Employment and Labour Relations Cause E029 of 2022) [2024] KEELRC 69 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 69 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E029 OF 2022**

**HS WASILWA, J  
JANUARY 30, 2024**

**BETWEEN**

**SIMON MAINA KAIRU ..... CLAIMANT**

**AND**

**KENYA NATIONAL UNION OF TEACHERS (KNUT) ..... RESPONDENT**

**JUDGMENT**

1. By an Amended memorandum of claim dated 25<sup>th</sup> October, 2022 and filed on 20<sup>th</sup> October, 2022, the claimant sued the Respondent, seeking to be paid his terminal dues, owing and due. He claimed for the following reliefs; -
  1. A declaration that the claimant is entitled to unpaid terminal benefits.
  2. A declaration that the claimant is entitled to unpaid salaries.
  3. A declaration that the claimant is entitled to service gratuity/arrear.
  4. A declaration that the claimant is entitled to notice pay.
  5. A declaration that the claimant is entitled to unpaid monthly remuneration.
  6. A declaration that the claimant is entitled to unpaid pension contributions.
  7. A declaration that the costs of the suit shall be borne by the Respondent.

**Claimant's case**

2. The summary of the claimant's case is that, he was employed by the Respondent as an executive secretary on contract for a period of five years commencing 1<sup>st</sup> February, 2016 till July, 2021.



3. While on employment, the claimant was entitled to be paid Kshs 30,920 per month from April, 2016 till April, 2019. From May, 2019 to December, 2019 he was paid Kshs 122,398, From January 2020 to December, 2020 he was paid Kshs 128,113 per month and Kshs 129, 685 from January, 2021 to December, 2021.
4. It is stated that he was not paid as agreed and the Respondent run in arrears of Kshs 3,066, 639. Also that he was not paid 12 months' salary for the entire year 2021, which he prayed for the Respondent to be compelled to pay him.
5. It is his case that he was entitled to salaries and allowances till 31<sup>st</sup> July, 2021 as per the Respondent's letter dated 26<sup>th</sup> February, 2018, but that the Respondent has not paid him to date.
6. He stated that upon the lapse of the contract, the Respondent paid him gratuity of Kshs 165,719, leaving a balance of Kshs 619,194.
7. The claimant avers that he was also entitled to three months' gross salary notice pay of Kshs 389,055. Together with emoluments arrears of Kshs . 123,660.
8. He states that he is entitled to pension from 1<sup>st</sup> April, 2016 to 31<sup>st</sup> July, 2021 amounting Kshs 970,602.60.
9. It is his case that he had secured a loan with Tower Sacco, and secured by Four guarantors who are now forced to pay the said loan because of the delay by the Respondent to remit the claimant's terminal dues.
10. He maintained that the head office was the one that paid him as such any claim against the Respondent should be directed to the head office in Nairobi and not the Nyandarua North Branch office, which the claimant was serving.
11. The claimant stated that due to failure by the Respondent to pay his terminal dues, he has been subjected to unnecessary suffering. Further that he is under great pressure from the guarantors to clear his loan and offset the loan that they are currently paying for.
12. During hearing the claimant testified as CW-1 and adopted his witness statement dated 25.10.2022 and in summary stated that he is a retired teacher living in Nakuru. That he was employed by the Respondent as KNUT Executive secretary, Nyandarua North Branch upon successful election in February, 2016. He adopted his list of documents dated 25.10.2022 and a further list dated 29.9.2023 as his exhibits.
13. The witness stated that the claim before court is for non-payment of salaries and benefits. he added that his salaries were paid from national office as per the letter of January, 2017.
14. Upon cross examination by Otieno Advocate, the claimant testified that the letter of 8<sup>th</sup> February, 2017, indicated that the National treasurer was taking over the payroll management of all branches and from that period, it took over the payment of their salaries and he always received his pay from the National office.
15. He admitted that he lost the re-election of February, 2021 to Ndung'u J who became the Executive secretary of the Branch, however that he was given other duties by the Headquarters throughout the year till December, 2021, when the Respondent released him.
16. He testified that as much as the Respondent has produced payslips, the same does not confirmed payment of salaries and in fact that he was not paid his salaries from June, 2019 till December, 2021. While in the year 2016, he was paid half of his salary.



17. He maintained that his salary was not paid from June, 2019, however that there is a petty cash voucher dated 3.7.2019 which indicates that his salary was paid but that even though he signature looks like his, he was not paid the said money because he was always paid from headquarters and not through petty cash Vouchers.
18. On pension claim, he stated that the Respondent used to deduct pension money but failed to remit to TSC, he however admitted that he has not sought for payment of that pension from RBA.
19. On Notice pay, he stated that as much as he left the Respondent's employ upon election of another Executive secretary, he was entitled to Notice pay as per the Constitution of the Respondent, which grant all its executive secretaries notice pay.
20. On gratuity, he stated that he was only paid Kshs 160,000 as gratuity and nothing was paid to him through M-pesa as alleged.
21. On re-examination, the witness testified and maintained that he was released by the Secretary General Mr. Oyugi on 15<sup>th</sup> December, 2021.

### **Respondent's Case**

22. The Respondent entered appearance and filed a response to claim on the 29<sup>th</sup> March, 2023 denying the entire claim.
23. The Respondent stated that initially in 2016, the claimant was elected and appointed as an Executive Secretary of the Union, Nyandarua North Branch from February, 2016 till March, 2021 and upon lapse of his term and re-election, he lost his seat to one Ndun'gu in February, 2021, a fact which the claimant admitted in his letter of 25<sup>th</sup> May, 2022 that he left the office in March, 2021 and affirmed by the Respondent in the letter of 15<sup>th</sup> November, 2021.
24. The Respondent maintained that the claimant's salary was paid by Nyandarua North Branch and not the national office as alleged. Therefore, any claim against the Respondent ought to be directed to the Respondent's Nyandarua North Branch.
25. The Respondent stated that even if any money is owed by Nyandarua Branch, it ought to be for the period between February, 2016 and March, 2021, since the contract was to lapse in March, 2021 and indeed the claimant admitted to leaving the office in March, 2021 upon failure to secure re-election, thus any claim for the month of April, 2021 to December, 2021 is unfounded.
26. It is averred that any terminal benefits were shared prorated between the Branch and Respondent. Further that the claimant was paid all his gratuity as such nothing is owing with regard to Gratuity.
27. On the notice pay, the Respondent stated that the claimant was elected into the said position for a period of five years and upon seeking re-election, he was not re-elected as such notice pay claim is not founded.
28. The Respondent stated that the claimant was paid all his pension in full as such nothing is owing to him.
29. The Respondent avers that it is a stranger to any loan secured by the claimant and subsequent re-payment agreements between him and any third parties.
30. The Respondent thus prayed for the claim to be dismissed with costs to the Respondent.



31. During hearing the Respondent called Virginia Wairimu Muhiu, the Respondent's Administrative officer, Nyandarua Branch as its RW-1 who adopted her witness statement and produced the Respondent's documents.
32. Upon cross examination by Ndichu Advocate, the witness testified that he was employed in 2001 as a Clerk and promoted to be the Office Administrator in 2016. He stated that the claimant was the Executive Secretary Nyandarua North Branch and that all Executive Secretaries were paid from the Branch till 2017 when a circular was issued that the Executive secretaries would be paid from the headquarters.
33. However, in 2020, the headquarters send another circular stating that they are no longer able to pay Executive secretaries and handed over the Responsibility to the Branch, who took over the payment of the claimant, whom they used to pay through petty Cash vouchers.
34. On pension claim, she stated that the said deductions were remitted to the relevant office but did not have any documents in support of that fact. She also admitted that the letter of the Secretary General of the Respondent stated that the claimant was released in December, 2021.
35. Upon re-examination, the witness clarified that the headquarters paid the claimant from 2017 to 2019 but from February, 2020 to 2021, payments were done by the Branch. She maintained that the claimant was released from employment upon election in February, 2021, where Ndun'gu took over the office of the Executive Secretary on 6<sup>th</sup> March, 2021. She told this Court that the claimant was paid through Petty Cash Vouchers from 2020 till release in March, 2020.

#### **Claimant's Submissions.**

36. The claimant submitted on three issues; whether the claimant's length of service ended when he was officially released, whether the claimant is entitled to the reliefs sought and whether the claimant is entitled to costs of this suit.
37. On the first issue, it was submitted that the claimant was employed on 26<sup>th</sup> February, 2016 and worked for five years, however upon contesting for re-election, he was unsuccessful but that he was given some duties to carry out until December, 2021 when he received official communication by the letter of 15<sup>th</sup> December, 2021 releasing him from employment. Therefore, that his employment ended on 15<sup>th</sup> December, 2021 and thus entitled to salaries and allowance till December, 2021.
38. Having submitted that his last month of Employment was in December, 2021, the claimant submitted on the reliefs sought that he is entitled to terminal dues of Kshs 642,735 as tabulated at page 18 of the Amended memorandum of claim.
39. On the claim for unpaid salaries, the claimant submitted that he was not paid for the duration between February, 2016 to July, 2016, July, 2019, August 2019 and December, 2019, January, 2020 to December, 2020, January, 2021 to March, 2021 and April, 2021 to December, 2021 as tabulated at page 5 and 17 of the Amended claim. He argued that the documents produced by the Respondent are for the period between 2017 and November, 2019, which are not claimed. That it is evident that the failure by the Respondent to table evidence for payment of the periods in question is a confirmation that the claimant was not paid his salaries and allowances for all the periods claimed herein.
40. On the claim for gratuity arrears, it was submitted that it has made tabulation of his gratuity at page 21 of the Amended claim and since the same is admitted by the Respondent in its response to claim at page 10, the same is due and owing and urged this Court to allow it as prayed. He added that the Respondent alleged to have paid Kshs 243,003.85 as gratuity and attached a KCB letter and even if



the said money was indeed paid, it was for the period till March, 2021 not December, 2021 when the claimant was in employment.

41. On the claim for notice pay, the claimant submitted that the Respondent admitted to gratuity pay without any presentation of any documents, similarly that the claim for notice pay, should not be denied on the basis that the claimant has not produced any documents, in any event that the Respondent is the custodian of Employment records as per Section 74 of the *Employment Act* and is thus the one tasked with producing evidence to support its position.
42. The claimant also prayed for payment of monthly emoluments of Kshs 123,660 as calculated at page 22 of the Amended claim. He argued that the allegations that the said money was paid via petty cash is unjustified because payments of any kind had been stopped by a directive from the National Secretary General.
43. The claimant submitted also that he is entitled to pension claimed because the same was not challenged by the Respondent. Further that the allegation that the claimant was paid via Petty cash vouchers does not hold water because all employees' salaries were paid through bank and not petty cash vouchers.
44. On the confirmation letter dated 25<sup>th</sup> July, 2023, the claimant submitted that the said letter did not indicate what was paid, neither did it annexed deposit slip or M-Pesa statement to prove the alleged payments.
45. In conclusion, the claimant submitted that the claim has been proved and urged this Court to allow it as prayed.

#### **Respondent's Submissions.**

46. The Respondent centralized its submission on whether the reliefs sought should be granted and who should bear costs of this suit.
47. On the first claim of unpaid salaries, the Respondent submitted that the the allegations that the said said tabulation emanated from the Respondent is not true because, the tabulations are not in the Respondent's letter head or signed as required. Nevertheless, that it has adduced evidence in support of its position that it paid the claimant all his dues from 2016 till 2020.
48. It was argued with regard to the year 2016 that the Respondent referred the Court to its Bundle at page 14 to 18 and submitted that it paid the claimant all its salaries when they fell due. He argued further that the claimant is not truthful because in its Amended claim it sought for salaries from October, 2017 to March, 2021, however in his Submission he moved the goal post and sought for more claim from February, 2016 to July, 2016 changing the claim, which this Court should take notice of and decided against him, because the Respondent were not given time to mount a proper defence on that claim. In this he relied on the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR where the Court held that; -

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made.”



49. They also cited the case of *Daniel Otieno v South Nyanza Sugar Co. Ltd* [2018] eKLR where the Court held that;-

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”

50. On the salary for the year 2017, it was submitted that the claimant alleged that he was not paid from October, 2017 to March, 2021, however during hearing he changed that position and admitted to receiving a salary from 2017 to June, 2019, thus any claim for payment of salaries for the year 2017 to 2019 should be disregarded. Furthermore, that the payslips at the Respondent’s bundle from pages 28-42 evidence such payment of salaries.

51. On the claim for salaries from June, 2019 to 2021, the Respondent submitted that the allegations is factually incorrect because the payslips at page 48 to 51 affirms that the claimant received his salary from June to November, 2019. In any event that the claimant admitted on cross examination that he received his salary on 3<sup>rd</sup> July, 2019 as evidenced by bank statement. Further that the claimant only provided bank statement of May and July, 2019 to the exclusion of other months, making the Respondent to infer that indeed the claimant was hiding the other payments received in his account and thus should be construed against him. In this they cited the case of *Kenya Akiba Micro Finance Limited v Ezekiel Chebii & 14 others* [2012] eKLR where the Court held that; -

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:-“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him...Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

52. With regard to pay for 2020, the Respondent submitted that the claimant was paid all his salary as evidenced by petty cash vouchers at page 52-57 of the Respondent’s bundle, which vouchers were signed by the Claimant in acknowledgement of receipt of the said money.

53. On the claim for salaries for the year 2021, it was submitted that the claimant’s services automatically lapsed in March, 2021 upon election of another executive secretary and the claim to be made, if any, should be for the period between January to March, 2021 and not till December, 2021. Additionally, that the claimant admitted to that fact by producing judgement in ELRC Cause No. E014 of 2021, affirming that the Claimant’s services lapsed in March, 2021. Further that the allegations that the claimant was retained in the headquarters by the Secretary General is not backed up with any evidence.

54. On the claim for notice pay, it was submitted that the claimant is not entitled to the notice pay because, he was not terminated or resigned from his position rather that his employment came to an end upon election of the new Executive secretary on 6<sup>th</sup> March, 2021.

55. On the claim for pension pay, the Respondent submitted that since the claimant was TSC’s former employee, he was paid all his gross pay and it was his duty to remit his pension to TSC. This he argued is evidence by the payslip, which clearly showed that the claimant received his pension as his net pay.



In any event that this Court lacks jurisdiction to handle the claim for pension as was stated in the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 Others* [2019] eKLR where the Supreme Court held that:-

“In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the *Retirement Benefits Act*, Trustee Act Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the *Employment and Labour Relations Court Act* is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).”

56. On the claim for terminal benefits of Kshs 642,735, the Respondent submitted that the claim is not substantiated as the said calculations have not been signed or done in the Respondent’s letter head.
57. On the claim for service gratuity, it was submitted that the claimant was paid Kshs 243,003.85 for the period between October, 2018 to March, 2021 as confirmed by certified bank statement produced in evidence at page 58. Further that the claim for Kshs . 619,194 and Kshs . 123,660 lack probative value and authentication.
58. On costs of suit, it was submitted that costs follow event as provided for under section 27 of the *Civil Procedure Act* as such, the Respondent prayed to be awarded costs of this Suit.
59. In conclusion, the Respondent submitted that the claimant has not discharged his legal and evidential burden to warrant the granting of the reliefs sought and its is therefore in the interest of justice that the suit be dismissed with costs to the Respondents.
60. I have examined all the evidence and submissions of the parties herein.
61. The main contention by the claimant is that he was never paid his salaries and terminal dues as explained in his evidence.
62. He has sought to be paid his dues over a period of time.
63. The respondents on their part have averred that they paid the claimant all his dues.
64. Indeed the claimant is entitled to his terminal dues if at all but he must prove the same through evidence.
65. The claimant prayed for payment of unpaid salaries which he avers were salary arrears as he was not paid as agreed and the arrears amounted to Kshs .3,066,639/=.
66. The claimant has averred that from February to July 2016 he was paid only 587,480/= when he was to be paid 1,360,514/= and there was a balance of 773,034/=.
67. The claimant had indicated that his salary was 30,920/= from April 2016 to April 2019.
68. The claimant exhibited a letter dated 27<sup>th</sup> April 2016 by the TSC releasing him from the TSC to the respondent with effect from 1/4/2016.
69. Despite this position, the claimant has not exhibited any document to show how much salary he was to be paid by the respondent.



70. He has not exhibited any pay slip either.
71. However there are payslips exhibited by the respondent showing how the claimant was paid which in my view do not also tally with what the claimant avers that he was paid.
72. Indeed these payslips are not proof of payment of salary and neither are they proof of the requisite salary the claimant was entitled to.
73. The claimant however exhibited vide his further documents his bank statement showing some moneys paid to him but there is no indication as to whether this was his salary or not.
74. The omission by the claimant is to produce his letter of appointment indicating what his salary was.
75. He has indicated that he was underpaid the same salary but there is also no document which is the basis of his assertion.
76. The issue of salary underpayments therefore remains unproved and not established.
77. On the same vein, there is no document to show that the claimant was entitled to any gratuity given that he was a member of a pension scheme as per the letter releasing him from the TSC to the respondent.
78. The claim for service gratuity does not therefore have any basis.
79. The claimant was to serve until re-elected or upon failing to be re-elected. The contract was therefore pre-determined upon the occurrence of certain factors.
80. The issue of notice pay does not therefore arise.
81. All these claims laid out by the claimant lack evidential backing.
82. The claim by the claimant as set is not backed by proper evidence and must therefore fail.
83. I therefore dismiss this claim accordingly with no order of costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF JANUARY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:

Nyaga holding brief for Ndichu for Claimant – present

Otieno holding brief for Mbaluto for Respondent – present

Court Assistant - Fred

