



Sunguti v Kenya National Union of Teachers & another (Employment and Labour Relations Cause 1 of 2019) [2023] KEELRC 662 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 662 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1 OF 2019**

**JW KELI, J
MARCH 9, 2023**

BETWEEN

SEME SUNGUTI CLAIMANT

AND

KENYA NATIONAL UNION OF TEACHERS 1ST RESPONDENT

**KENYA NATIONAL UNION OF TEACHERS BUNGOMA NORTH
BRANCH 2ND RESPONDENT**

JUDGMENT

1. By statement of Claim dated 15th February, 2019 the Claimant, a retired branch executive secretary of the 2nd Respondent, sought the following reliefs against the respondents :-
 - a. Payment of KES.4,942.936/-.
 - b. Costs.
2. The Claimant together with the claim filed bundle of documents pages 3-46 Appendix 1-5) and verifying Affidavit (page 47 of Claimants bundles and Claimant's witness statement (49-50 Claimants documents).
3. The Claim was opposed. The 1st Respondent filed response dated 19th April, 2021 together with verifying affidavit by Chrispinus Sifuna dated 20th April 2021 and his witness statement dated 20th April 2021, Respondents list of documents dated 19th April, 2021, and the bundle of documents.
4. The Claimant filed reply dated 28th April 2021 to the Response together with supplementary list of witness and list of documents and the bundle.
5. The 1st Respondent further filed witness statement of John Wangila Kikechi dated 22nd September 2022 filed in court on the 23rd September 2022 and further list of documents dated 22nd September



2022. The 1st Respondent further filed notice to produce original document dated 23rd September, 2022.

Hearing

The Claimant's case

6. Two witnesses testified for the claimant. The Claimant as a witness of fact on the 23rd September 2022 where he adopted the witness statement dated 15th February, 2019 as his evidence and produced documents as follows:-
 1. Salary scales for all servants effective 1st July 2017 (exhibit 1).
 2. Minutes of 202nd NEC meeting held on 18th September 2007(exhibit 7) which he told the court were used to review the scheme of service of 2003 and in the minutes, the report of the *Ad Hoc* Committee was adopted (page 15 of Claimant's 1st bundle of documents).
 3. Minutes of NEC of September 19th 2007 (exhibit 7) which adopted the *Ad Hoc* Committee report which had proposed amendments of the scheme of service of 2003 including the formula for calculation of terminal benefits.
 4. The Ad hoc Committee report (exhibit 3).
 5. The KNUT staff terminal benefits Scheme of January 2003 (exhibit 4) used by the Respondent to pay terminal benefits which claim stated was amended as per exhibit (3).
 6. Letter of release by TSC which seconded him to the union (exhibit 5 & 6).
 7. Pension contribution form (exhibit 7).
 8. Letter dated 9th July, 2007 forwarding remuneration package for all employees of KNUT addressed to the Executive Secretaries (exhibit 8).
 9. KNUT remuneration package document volume II (exhibit No.9) which was forwarded *vide* exhibit 8, the letter.
 10. Exhibit 10 was schedule 6 Basic salaries by job category branches which was revising salaries implementation date 1st July 2010.
 11. Schedule & basic salary by job category implementation data of 1st January, 2013. (Exhibit 11).
 12. The claimant told the court that as at time of leaving service schedule x was applicable, staff terminal benefits was in place and when he got documents that this scheme had been amended through proposals of *Ad Hoc* Committee and NEC sitting 19th September 2019 (exhibit 12).
 13. Salary payslip for November 2008 gross salary of KES. 43,400 (exhibit 13).
 14. Payslip December 2008 (exhibit 14)
 15. Payslip January 2009 - (exhibit 15)
 16. Payslip February, 2009 (exhibit 16)
 17. Payslip December, 2009 – Exhibit 18)
 18. Payslip January 2010 – Exhibit 19
 19. Payslip November 2010 (Exhibit 20)



20. Payslip January, 2011 (exhibit 21)
 21. Payslip February 2011 (exhibit 22)
 22. Payslip July 2011 (exhibit 23)
 23. Payslip December 20213 (Exhibit 24)
 24. Payslip January, 2012 (exhibit 25)
 25. Payslip January 2013 (exhibit 26)
 26. Payslip December 2013 (exhibit 27)
 27. Payslip January 2014 (exhibit 28)
 28. Payslip February 2014 (exhibit 29)
 29. Payslip December, 2014 (exhibit 31)
 30. Payslip May 2015 (exhibit 32)
 31. Letter dated 5th November 2010 addressed to an executive Secretary on salary increment to all KNUT Branch employees for increment of salary effective 1st July 2010 (exhibit 33)
 32. Increment letter dated October 14, 2009 (exhibit No. 34) circular dated 25th March, 2006 addressed executive secretaries on terms and condition of services of secretaries and the document is important to enable me entry point based on membership.
 33. The claimant told the court at time of joining their membership at the branch was 1700 and he was entitled to Kshs. 20,400 as my basic salary(exhibit 35).
 34. Letter dated 15th January, 2020 by Kaxton Public Accountancy report which he had sought on realizing he was underpaid marked (DMF 36) for production. According to the report his underpayment was Kshs.4,942,936.00 which is the claimed amount.
 35. Claimant's supplementary list of document of 2nd November 2021 KNUT circular No. 122/7/2012 dated 5th November 2012 addressed to all executive secretaries meant to harmonize salaries by increments effective 1st January 2013 and referred to package Vol No. 12 (exhibit No. 37 and the attached document (exhibit 38)
 36. Schedule 6 basic salaries by job category branches of 1st July 2009 (exhibit 39).
7. The Claimant was cross examined by Counsel for Respondent CW2 -Kepha Mataya CPA .
 8. CW2Cwas a certified Public Accountant member No. 18787. He produced his report (C- exhibit 36) which he told the court had been requested by the Claimant through the law firm of R& E Nyamu representing the Claimant. The Report was based on Adhoc Committee report new scales effective 1st July, 2007, NEC minutes adopting the report of 19th September, 2007 which placed the Claimant in Job group M. That when the claimant entered employment of the respondent salary was based on the membership. The Report which had been marked by the Claimant was produced as exhibit 36.
 9. The Court noted several inconsistencies in documents relied on and witness being unable to justify some figures on cross -examination.



Defence Case

Witness of fact.

10. The Defence called one witness of fact John Wangili Kikechi who testified on oath and was cross-examined by counsel for Claimant. The witness adopted his witness statement dated 22nd September 2022 as his evidence in chief and produced documents filed by the Respondents in list of documents dated 19th April, 2021 and further list dated 22nd September 2022 namely:-
- a. Letter addressed to 1st Respondent dated 15th August, 2016 (R- exhibit 1)
 - b. Letter dated 22nd March 2017 (R- exhibit 2)
 - c. Terminal benefits payment statement (R- exhibit 3)
 - d. Claimant's letter addressed to 1st Respondent dated 4th July, 2016 (R- exhibit 4)
 - e. Claimant's letter addressed to 2nd Respondent dated 24th May, 2016 (R – exhibit 5)
 - f. KNUT (1st Respondent) Constitution (R- exhibit 6)

The witness was cross-examined by counsel for Claimant.

Written submissions

11. The Claimant's submissions drawn by RE Nyamu & Company Advocates were dated 28th November, 2022 and received in court on even date. The Respondents' written submissions drawn by SMS Advocates, LLP were dated 20th January 2023 and received in court on even date.

Determination

Issues for determination

12. The Claimant addressed the merit of the claim
13. The respondents addressed the merit of the claim and had issues framed as:-
- a. Whether the Claimant should be granted the orders sought and/or whether the Claimant's dues and allowances due and owing to him were tabulated in accordance with the relevant provisions of the Respondent's constitution and legal instruments or by-laws.
14. The court after hearing the case was of the considered opinion that the issue placed before the court for consideration was:-
- a. Whether the Claimant's benefits were properly tabulated .
 - b. Whether the Claimant was entitled to reliefs sought.

a. Whether the Claimant's benefits were properly tabulated.

15. The Claimant pleaded that he was underpaid salary and allowances as the 1st Respondent failed to comply with recommendation by the ADHOC Committee on the terms and conditions of staff terminal benefits scheme with new salary scales for civil servants in force as from 1st July, 2007.



16. The Claimant claimed that the said ADHOC Committee report amended the Kenya National Union of Teachers Staff Terminal Benefits Scheme of January 2003 and the said report was approved by 1st Respondents NEC on 19th September 2007.
17. That the Respondents continued to pay him based on the 2003 KNUT Staff Terminal Benefits Scheme as opposed to recommendation under NEC meeting of 19th September 2007. That his salary scale was supposed to be “M” and he was thus underpaid. During cross-examination the Claimant agreed that the Constitution of 1st Respondent Article 9 (c) required ADC to receive reports of NEC and no evidence of the minutes of NEC were ratified by ADC but stated that decisions of NEC were as good as ADC and ought to have been implemented in his favour. The Claimant in re- examination told the court his salary was increased during engagement but on wrong scale. He told the court that if salary had been placed under right scale as per ADHOC Committee report(exhibit 3) he would not be in court as his salary was increased as per increment packages issued by the 1st Respondent. The claimant relied on the tabulation by CW2 as his evidence for the claimed amount(exhibit 36).
18. The Respondents’ witnesses told the court that the Claimant was paid terminal dues and salary as per the 1st Respondent staff terminal benefits scheme of 2003 and his terminal benefits constituting 3 months salary arrears, 3 months payment in lieu of notice, district allowance for 7 months and terminal benefits were calculated using last salary and allowances of KES. 118,430/- for total sum of KES.1,551,820 which the claimant had been paid KES.1,265,000/- leaving balance of KES.286,820 payable in instalments of KES.30,000/- P.A and no complaint had been received earlier. The Respondents produced payment schedule which the Respondents claim was not controverted on service.

Decision

19. It is the finding of the court that the Claimant’s case lied heavily on the ADHOC Committee report(C-EXHIBIT 3) which he stated was adopted by NEC in September 2007 and the same amended the 2003 terms of service of the 1st respondent thus his salary scale rate increased but was not communicated during his tenure.
20. That he only learnt of the NEC meeting minutes adopting the *Ad Hoc* Committee on terms of service and new salary from someone after his exit from service in 2017. It was his evidence on re-examination that he was only in court based on the NEC minutes(C-EXHIBIT 7).
21. The Claimant relied on decision of Rika J in *George Wesonga Ojwang v Kenya National Union of Teachers* (2014)eKLR where a similar case was litigated. In that case the court upheld that the 2003 staff terminal Benefits Scheme Rules had been amended by *Ad Hoc* Committee of the Respondent on 5th July 2007 and that the NEC convened on 19th September 2007 and adopted the proposals by the ADHOC committee.
22. The Respondents submitted the case was without merit. That there was no evidence before the court of the NEC report and the *Ad Hoc* Committee report having been ratified by the ADC of the 1st Respondents under Article 1X(c) of the Respondents Constitution which provides in part 4 “ Any such steps taken by NEC must be duly reported to the Annual delegates conference of the union for ratification.”
23. The Respondents submitted that the Claimant had been paid terminal benefits and salary arrears based on its Constitution, KNUT staff Terminal Benefits Scheme 2000, public service salary scales for civil servants under Job group M as admitted in paragraph 9 of the statement of claim. That respondents had produced as R – exhibit 3 the statement on payment of the terminal benefits which the Claimant



had not controverted and that the only outstanding payment was KES.286,820/- which evidence was not challenged by Claimant.

24. The Respondent relied on decision in [Kenya National Union of Teachers -vs- George Wesonga Ojwang](#). (2017) eKLR where the court of Appeal determined the AD Hoc report was not promulgated as follows:- ‘It is common ground that an *ad hoc* committee of KNUT was formed to deal with amendments. Mrs. Kamar, learned counsel for the respondent, submitted that the capping of 15 years was amended by the ad hoc committee on 5th July 2007. Its terms of reference included the circular letter ref. No.KNUT/TERMS/69/2/96 dated February 19th, 1996 and Circular Letter Ref.NO.KNUT/TERMS/69/4/96 dated February 27th, 1996 which was amended by the former circular. The ad hoc committee “noted a lot of anomalies in the KNUT STBS (Staff Terminal Benefits Scheme) and resolved to amend it and propose for discussion and adoption by the Terms and Conditions of Service Committee”. No evidence was tendered by the respondent to establish and prove that the Terms and Conditions of Service Committee met, discussed and adopted the proposed amendments by the *ad hoc* committee. In absence of such evidence, the respondent’s claim remains unsupported and not proved. Moreover, the report of the ad-hoc committee does not appear to have been placed before KNUT’s relevant committee for approval of the proposed amendments. The agreement of 2nd February 2011, made by the respondent and the Acting Secretary General and the Acting National Treasurer, was not adopted by the Terms and Conditions of Service Committee of KNUT. In effect, there is no proof therefore that the amendment intended to substitute the 25 years of service with the 15 years of service was promulgated.”
25. This was a decision of court of Appeal in 2017 wherein the Court of Appeal took position that the said *ad hoc* Committee had not been approved by relevant Committee of KNUT . That was the case of the Respondents. The Claimant did not call any other witness like a former colleague to support his case that any other Branch Executive Secretary had been paid using the alleged new scales. The Claimant told the court he was only in court because of failure to be informed on new salary scale as recommended by the *ad hoc* Committee and be paid salary on the new scales.
26. The Claimant told the court he was the one implementing the circulars on salary increments. That his salary under job group M was increased as per all circulars but on wrong scale. The court read that the court of Appeal found the *Ad Hoc* proposals were never promulgated by the relevant committee of the 1st Respondent in [Kenya National Union of Teachers -vs George Wesonga Ojwang](#) (2017) eKLR. The court of Appeal allowed the appeal as follows:- ‘37. We find merit in the appeal. We allow it. We set aside the impugned judgment and the award of the lower court (Rika, J,) dated 20th December 2013 and grant an order in terms of prayer (C) of the appellant’s memorandum of appeal dated 6th January 2016. As costs normally follow the event, we award the same to the appellant.’ This court has no option but to find the Claimant’s terminal benefits were properly tabulated as the *Ad Hoc* report(exhibit 3) was found by the Court of Appeal in [Kenya National Union of Teachers -vs George Wesonga Ojwang](#) (2017) eKLR not have been promulgated by the relevant committee of the 1st respondent thus not applicable in tabulation of the claimant’s benefits upon retirement in 2016. The court holds the Claimant’s terminal benefits were properly tabulated.

b. Whether the Claimant is entitled to reliefs sought

27. The Claimant sought payment of KES.4,942,936 as per terms of salary scales of Civil Servants in force from 1st July, 2017 and as increased by NEC of 1st Respondent. The Court finds the entire claim was on alleged underpayment based on the proposals of the *ad hoc* Committee, taking into consideration the court of Appeal decision (*supra*) which found the said report of the *ad hoc* Committee was never approved by relevant committee of KNUT and without proof of ratification of the proposals as per the



1st Respondent's Constitution the court then finds, the Claimant having admitted on re-examination that the AD Hoc proposals creating new salary scales was the basis of his claim, the court finding the payment made fell within the salary scale of Job Group "M" of the terms of service of 2003 and the scales for Civil Servants, the Claimant having been a Civil Servant, the court further finds that the tabulation and payment of the terminal benefits was filed in court and served, the same was not controverted in response. The court then finds that the only outstanding payment due to the Claimant was as per that statement of payment (R – exhibit 3) being KES.286,820/-.

Conclusion

28. The Claim dated 15th February 2019 is found to be without merit. The same is dismissed.
29. On costs, the court has power to exercise discretion on costs. As the Respondents owe the Claimant outstanding dues of KES.286,820/-, the court orders each party to bear own costs in the claim.
30. Right of appeal in 30 days.
31. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT IN BUNGOMA THIS 9TH DAY OF MARCH, 2023.

JEMIMAH KELL,

JUDGE.

In the presence of :-

Court Assistant : Brenda Wesonga

Claimant: Imainata

Respondent : Tusiime appearing with Lerionka

