



**Onyango v Kibos Sugar & Allied Industries Ltd (Cause 340 of 2017)  
[2023] KEELRC 523 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 523 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 340 OF 2017  
CN BAARI, J  
MARCH 2, 2023**

**BETWEEN**

**STEPHEN ONYANGO ..... CLAIMANT**

**AND**

**KIBOS SUGAR & ALLIED INDUSTRIES LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant's Memorandum of Claim is dated 27<sup>th</sup> July, 2017, and filed on 31<sup>st</sup> July, 2017. The Claimant further filed an amended Memorandum of Claim on 19<sup>th</sup> February, 2021. The Claimant seeks a declaration that the Respondent's action is illegal, unconstitutional and highly unprofessional, a declaration that the Claimant's services be deemed to have been terminated as at the date of filing suit, payment of unpaid salary, terminal benefits; including service pay, leave allowance and accrued leave not paid, one month's salary in lieu of notice, damages, a certificate of service, interest and costs.
2. The Respondent entered appearance on 22<sup>nd</sup> August, 2017, and subsequently filed a Response to the Memorandum of Claim on 13<sup>th</sup> October, 2017.
3. Parties attempted mediating the matter, but which mediation did not bear fruits, and the Mediator filed a mediation report on 13<sup>th</sup> November, 2019, indicating that parties did not reach a settlement.
4. The suit was first heard on the 21<sup>st</sup> September, 2022, where the Claimant testified in support of his case. Mr. Onyango adopted his witness statement and produced a bundle of documents filed in support of his case. The Claimant also presented one Ms. Maureen Odumba to testify in the case.
5. The Respondent's case was heard on 29<sup>th</sup> November, 2022, when the Respondent presented a Mr. David Modi, their Human Resources Manager to testify on its behalf. Mr. Modi adopted his statement, and produced a bundle of documents in support of the Respondent's case.
6. Both parties filed submissions in the matter.



### **The Claimant's Case**

7. The Claimant's case is that he was an employee of the Respondent having been employed on 31<sup>st</sup> December, 2005, earning a progressive salary of Kshs.90,000.00 – 105,000.00.
8. The Claimant avers that sometimes in January, 2014, the Respondent verbally informed him to “step aside” from his duties to allow an Audit Team to carry out a “Forensic Audit” into the financial position of the company. The Claimant further states that there was no time frame communicated to him as to when his ‘stepping aside’ was to lapse.
9. The Claimant further states that from February, 2014, to November, 2014, the Respondent illegally but consciously and deliberately remitted to the Claimant his half salary without any reason or justifiable cause.
10. The Claimant further avers that he was never summoned to answer to any Audit queries by the Auditors, and neither has he been supplied with a copy of the Audit Report.
11. It is the Claimant's further case that in spite of several reminders by letters and frequent visits to the Respondent's management offices, the Respondent has totally failed to communicate with him since December, 2014, up to and including 31<sup>st</sup> July, 2017, when the matter was lodged in court.
12. The Claimant states that the Respondent has deliberately ignored to pay his salary and to which he now claims. The Claimant further states that he is entitled to payment of the equivalent of one month's salary in lieu of Notice since it is the Claimant who has prompted this matter to be filed in Court.
13. The Claimant avers that he never went on leave and neither was he paid in lieu thereof, and further that the Respondent never paid him any leave allowances.
14. The Claimant further states that the Respondent as an employer of the Claimant has subjected the Claimant to untold suffering both financially, socially and mentally.
15. The Claimant states that he is entitled to payment of one year's salary as damages for unlawfully subjecting him to an illegal “stepping aside” and for failure to determine the status of his service.
16. The Claimant further states that he is entitled to terminal benefits for the period he dutifully served the Claimant.

### **The Respondent's Case**

17. The Respondent's case is that it employed the Claimant as an Out-growers accountant in 2007. It is the Respondent's further case that on or about 6<sup>th</sup> February, 2014, their management stopped the Claimant from working, and suspended him to pave way for investigations on suspicion of being involved in fraudulent activities, which led to the Respondent Company losing money.
18. The Respondent further states that investigations were conducted and the auditor's report revealed that the Claimant was responsible, resulting in a disciplinary hearing that was set to take place on 08/08/2014, 11/09/2014 and 9/10/10/2014.
19. The Respondent states that the Claimant was served with the letters for the hearings through his postal address but he failed to respond to all the letters and neither did he show up for the hearings.
20. It is the Respondent's case that on 3/11/2014, having failed to respond to the invitation letters, the Claimant was served with a termination letter through his postal address, and further given 14 days to



appeal the decision which he did not. The Respondent further states that after the termination, it did not hear from the Claimant until when the court issued summons on this claim in 2017.

21. It is the Respondent's case that the Claimant claims amounts that he already was paid, such as leave pay which he was paid and he signed for as indicated by the leave application forms dated 7/12/2010 and 27/11/2011 produced in Court.
22. It is the Respondent's further case that according to records held at their offices on the employee encashment details, the Claimant did not sign leave application forms for some years, yet he fixed his name in the system hence he was paid for all the leaves. The Respondent states that the Claimant is not entitled to any of the reliefs under his claim.

### **The Claimant's Submissions**

23. The Claimant submits that he was unfairly and prematurely terminated. He sought to rely in [\*Walter Ogal Anuro v Teachers Service Commission\*](#) [2013] eKLR to support this position.
24. It is the Claimant's Submission that even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural processes to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee.
25. The Claimant submits that his services had not been terminated by the Respondent at the time he was asked to step aside, and neither had he been put on suspension. It is the Claimant's further submission that the reasons given by the Respondent for the payment of half salary had not been communicated to him, hence he was entitled to full pay until he was officially terminated by the Respondent.
26. The Claimant submits that having established that his termination was illegal and unfair, he is entitled to an award of unpaid salary for the period December, 2014 to May, 2017.

### **The Respondent's Submissions**

27. It is submitted for the Respondent that the limitation period for any claim based on a contract of employment is three years from the time the cause of action arose and accordingly, this Court can only address itself to the Claimant's claims that fall within the period delineated by the law.
28. The Respondent further states that this cause of action was filed on 31/7/2017, hence the court can only go as far back as July, 2014, and any of the Claimant's claims that goes beyond July, 2014, are statutorily time barred.
29. The Respondent submits that for constructive dismissal to hold, the employee must demonstrate the intolerable work conditions he was subjected to by the employer, and which conditions led him to resign from his employment. The Respondent had reliance in [\*Cola Cola East Africa Limited v Maria Kagai Ligaga\*](#), [2015] eKLR, where the Court held that there must be resignation from employment forced by the employer due to the intolerable work conditions.
30. The Respondent further submits that constructive dismissal is a novel remedy for harassed employees, yet the Claimant did not resign from his employment.
31. The Respondent submits that the Claimant cannot be awarded remuneration for the unserved period as he cannot enjoy remuneration for services not rendered. To buttress this position, the Respondent cited the case of [\*Elizabeth Wakanyi Kibe v Telkom Kenya Limited\*](#) [2014] eKLR.



32. The Respondent submits that the Claimant is not entitled to service pay on the basis that he produced several pay-slips including that of February, 2014, which show that he was a member of the National Social Security Fund (NSSF) which renders him ineligible for service pay as provided by Section 35(6) of the *Employment Act*.
33. The Respondent submits that the claim on annual leave are premised on an allegation that the Claimant did not take his annual leave for the entire duration of his employment with the Respondent. The Respondent further submits that the duty is on the employer to submit records before the court as stipulated under Section 10(6) of the *Employment Act*, 2007, and which it did through availing the Leave application forms dated 7/12/2010 and 27/12/2011, and the leave encashment details.
34. The Respondent submits that the documents availed demonstrate that the Claimant was paid in lieu of leave, and that he did not deny signing the leave application forms and his only contention was that the forms were not signed by the Sectional Heads. The Respondent further submits that it has discharged the burden of proof vested in it. It places reliance in *Mbutbia Macharia v Annah Mutua Ndwiga & Another* [2017] eKLR, where the Court of Appeal observed: -
 

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”
35. The Respondent submits that it conceded that the Claimant was/is entitled to one month’s salary in lieu of notice and Payment for accrued annual leave for year 2012 – 2013, and which is due and payable to the Claimant subject to his clearing with the Respondent.
36. The Respondent finally submits that the Claimant is not entitled to the costs of the suit.

### **Analysis and Determination**

37. I have considered the pleadings, the witnesses’ testimonies and the Parties’ written submissions. The issues that fall for determination are:
  - i. Whether the Claimant was unfairly terminated.
  - ii. Whether the Claimant is entitled to the reliefs sought

### **Whether the Claimant was unfairly terminated**

38. A termination is fair where the employer adheres to the twin tenets of procedural fairness and the substantive justification for a termination. To achieve the procedural and the substantive fairness threshold, the employer must meticulously comply with the provisions of Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007.
39. Section 41 of the *Employment Act*, requires that an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity, explains to the employee, in a language the employee understands, the reasons for which termination is being considered. (See *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR).



40. The *employment Act* further demands that the employer proves that the reasons for termination are fair, valid and justified. In *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR the Supreme court stated:
- “Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair”
41. Further, in *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR, the Court stated,
- “It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.”
42. In determining whether or not the Claimant herein was fairly terminated, the Court has to interrogate both the procedure adopted during the termination and the reasons upon which the termination is premised.
43. The Claimant contends that he was suspended from duty without being accorded reasons for the suspension and subsequently terminated without a hearing. The Respondent on its part asserts that the Claimant was sent on suspension to allow for investigations on suspicion of fraud involving client accounts that resulted in the Respondent losing colossal sums of money.
44. Parties did not dispute that the Claimant was suspended or that he stepped aside to allow for investigations on allegations of fraud allegedly perpetrated by him, and that he was on half salary during the period. The Claimant stated that the decision to have him step aside to allow for investigations, was mutually agreed between himself and his employer.
45. The Respondent further told the Court that at the completion of the investigation exercise, the Claimant was invited for a disciplinary hearing, the investigations having found him culpable of fraudulent acts in his capacity as an accountant of the Respondent.
46. The Claimant denies receipt of the letters inviting him to the disciplinary hearing. Documents produced by both parties in evidence include a letter of suspension addressed to the Claimant and dated 6<sup>th</sup> February, 2014, a notice to show cause dated 6<sup>th</sup> August, 2014, an invitation to the disciplinary hearing dated 25<sup>th</sup> August, 2014, a second invitation to the disciplinary hearing dated 18<sup>th</sup> September, 2014, and a termination letter dated 3<sup>rd</sup> November, 2014.
47. The Claimant told the court that upon suspension/stepping aside, he was put on half salary from February, 2014 to November, 2014. This in my view, confirms that the Claimant was terminated in November, 2014 as indicated by the termination letter produced in evidence, being the last month he received the half salary.
48. The evidence before court is enough to prove that the Respondent made effort to accord the Claimant a fair process, but which he declined by not attending the scheduled hearing.
49. Further, the Claimant half salary was stopped in November, 2014, but he files this suit in July, 2017, three months short of the lapse of statutory period for filing of employment claims. Although the case is not time barred, this is an indication that the suit herein is an after thought for reason that the Claimant had a cause of action against the Respondent immediately his salary was stopped.



50. Further, although the Claimant claims to have written to the Respondent demanding for his salary, the only letters on record are with respect to the half salary that was withheld, and which demands were made before November, 2014 when the Claimant was terminated.
51. In the upshot, I find and hold that the Claimant's termination is not unfair.

**Whether the Claimant is entitled to the reliefs sought.**

52. The Claimant prays to this Court are for a declaration that the Respondent's action is illegal, unconstitutional and highly unprofessional, a declaration that the Claimant's services be deemed to have been terminated as at the date of filing suit, payment of unpaid salary, terminal benefits; including service pay, leave allowance and accrued leave not paid, one month's salary in lieu of notice, damages, a certificate of service, interest and costs.
53. On the first claim, the holding that the Claimant's termination is fair, means that the prayer seeking a declaration that the Claimant's termination is unfair fails and is dismissed.
54. The Claimant was admittedly placed on suspension on half salary to allow for investigation and did not present himself when invited for disciplinary hearing. Half salary that is withheld during interdiction or suspension, is only recoverable upon the employee being cleared of any misconduct. The Claimant did not attend the disciplinary hearing to defend the charges against him and the half salaries withheld is thus not recoverable.
55. Further, the evidence before Court show that the Claimant was a member of the NSSF and hence the claim for service pay fails and is dismissed.
56. The claims for one month's salary in lieu of notice and accrued leave were admitted by the Respondent and are hereby awarded.
57. In whole the Court makes orders as follows: -
- i. That the Claimant's termination is not unfair
  - ii. An order that the Claimant be paid one month's salary in lieu of notice and his accrued leave pay for the year 2012 – 2013.
  - iii. That the Claimant be issued with a Certificate of Service unconditionally
  - iv. Parties shall bear their own costs of the suit.
58. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS  
2ND DAY OF MARCH, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Anyul present for the Claimant

Ms. Onsongo present for the Respondent

Christine Omolo- C/A

