



Wanyonyi v Nzoia Sugar Company Limited (Employment and Labour Relations Cause 12 of 2019) [2023] KEELRC 897 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 897 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 12 OF 2019**

JW KELI, J

APRIL 14, 2023

BETWEEN

GODFREY SIFUNA WANYONYI CLAIMANT

AND

NZOIA SUGAR COMPANY LIMITED DEFENDANT

JUDGMENT

1. The Claimant vide amended statement of claim dated February 2, 2021 and received in court on the February 7, 2021 sought the following reliefs against the Defendant:-
 - a. Terminal dues totalling Kshs 7,601,400/-
 - b. Interest thereon at court rates from date of the suit till payment in full.
 - c. Costs of the suit herein
 - d. Any other ad further relief that this court may deem appropriate.
2. In addition, the claimant under the original statement of claim dated November 9, 2019, had filed list of witnesses, his witness statement and list of exhibits all dated November 9, 2019 and the bundle of documents. The Claimant further on April 28, 2022 filed claimant's list of exhibits dated April 4, 2022 together with the bundle of documents and a further witness statement of even date.
3. The defendant entered appearance and filed memorandum of reply dated February 5, together with witness statement by Rita Mukhonga and defendant's list of documents of even date together with the bundle of documents.



Hearing

4. The claimant's case was heard by the court on September 21, 2022 with the claimant testifying on oath as a witness of fact in his case and was cross examined by counsel for defence. The claimant adopted as his evidence in chief his witness statement dated April 4, 2022 and produced 11 exhibits as his evidence.
5. The Respondent's case was heard on November 17, 2022 with one witness of fact for defence Rita Nagila Mukhongo who adopted his witness of fact dated February 5, 2020 as evidence in chief. The witness produced as defence evidence all documents under defence list of documents filed in court on February 6, 2020 as defence exhibits 1 to 3. The witness was cross -examined by Counsel for the Claimant.

Claimant's case in summary as per witness statement

6. The Claimant, an ex employee of the defendant, sought payment of terminal dues as a managing director. The claimant's case was that he was initially employed a finance manager of the respondent. That the claimant served as a managing director from may 2016 to may 2019 when the contract of service came to an end and was not renewed. That during service he continued to earn the same remuneration as he used as finance manager denying him rightful remuneration as a managing director. The claimant seeks payment of terminal dues of kes 7,601,400/ comprising of kes 4,243,900 as gratuity and kes 3,357,500 being underpayment of salary which amounts he stated were confirmed as payable by the respondent's Board of directors.

Defence case in summary as per witness statement

7. The defendant's case was that the claimant was employed as its finance manager and later in Board Meeting held on July 29, 2016 recommended to the Ministry of Agriculture, Livestock and Fisheries to be appointed as managing director through letter dated August 5, 2016. That the said recommendation of appointment as managing director was never approved by the said Ministry and the claimant never signed a contract of employment as a managing director as the terms of employment were never approved. That the claimant was on January 20, 2017 charged in court under *Corruption and Economic Crimes Act* No 3 of 2003 leading to his suspension by the Defendants, before his appointment as a Managing director was approved by the Ministry of Agriculture, Livestock and Fisheries, to date of conclusion of the case. The claimant earned half salary under contract terms as finance manager awaiting end of the corruption case from January 2017 to his retirement. The defendant denied owing the claimant any money.

Submissions

8. After the close of defence case the court issued directions on filing of written submissions. The parties complied. The claimant's written submissions drawn by Anwar & Company Advocates were dated February 6, 2023 and received in court on February 7, 2023. The defence written submissions drawn by Lumatete Muchai & Company advocates were dated February 15, 2023 and received in court on February 16, 2023.

Determination

Issues for determination

9. The Claimant in their written submissions identified the following as issues for determination:-
 - a. Whether the claimant is entitled to terminal dues and to what extent



- b. Whether the claimant has proved his claim on a balance of probabilities and what orders should thus be granted.
10. The Respondent in its submissions identified the following issues for determination:-
 - a. Whether the claimant is entitled to the salary as claimed though not approved by the parent ministry
 - b. whether the claimant was discriminated and or underpaid.
 - c. whether the claimant is entitled to payment of gratuity.
11. The court having heard the case and considered the issues identified by the parties for determination and was of the considered opinion that the issues placed before it for consideration in determination of the dispute by the parties were as follows:-
 - a. Whether the claimant was appointed as a managing director and if he was underpaid and to what extend?
 - b. Whether the claimant was entitled to gratuity and how much?
 - c. Whether claimant is entitled to reliefs sought

Whether the claimant was appointed as a managing director and if he was underpaid and to what extend?

The Claimant's case

12. The Claimant pleaded that at all material times before the expiry of his contract he was the managing director of the respondent under stipulated terms and conditions(C-exhibit 2 Board Resolution) having previously served as its finance manager. The claimant in his written statement indicated that he was serving as a managing director having been employed in May 2016 and gazetted on August 12, 2016(c- exhibit 1 Gazette indicates the claimant was appointed managing director Nzoia Sugar Company for a period of 3 years effective May 17, 2016).The claimant was suspended on January 17, 2017. That he served to end of contract but was paid half pay as finance manager and not managing director(C- Exhibits 5-7).
13. During cross examination the claimant confirmed he was employed as a finance manager. That he was gazetted as a managing director. That his letter of appointment was sent to the parent ministry on employment terms. That the ministry had not approved his payment. The claimant confirmed he was charged under the Corruption and Economic Crimes Act and suspended. That he received half salary while on suspension and that his contract expired in May 2019 while on suspension. That the case was not concluded hence not acquitted. That his salary as managing director was as per guidelines.

The Respondent's case

14. The Respondent relied on witness statement of Ritah Mukhonga dated March 3, 2020 where it was stated that the claimant was employed as the respondent's finance manager and the Board in meeting of July 29, 2016 recommended him for position of the Managing Director. That the terms of employment as agreed in the Board meeting held on July 29, 2016 were forwarded to the Cabinet Secretary of Agriculture, Livestock and Fisheries through a letter dated August 5, 2013 for approval. That the claimant was charged with allegations of corruption leading to his suspension vide letter dated January 13, 2017 and was paid half salary all through the suspension as agreed in letter of employment



as a finance manager as approval for terms as managing director had not been approved before the suspension. That the case is still pending. That all his dues were paid.

15. During cross examination Ritah Mukhongo (RW1) confirmed that the claimant had been employed by the respondent as a finance manager and later proposed as a managing director but his proposed terms by the Board were never approved by the Board. That he was paid as a finance manager all through and was under permanent and pensionable terms. That the claimant was appointed by the Board on July 29, 2016 (in response to question as to when the claimant's service as managing director commenced), that when appointed as managing director one ought to be gazetted, that the claimant was gazetted as the managing director to take effect on May 17, 2016. RW 1 confirmed that by the gazette the claimant was appointed as the managing director on May 17, 2017. That it was a transition from the Finance Manager. RW1 confirmed that the claimant earned salary of the finance manager. RW1 confirmed that there was a resolution of the board for the claimant to earn more(C-Exhibit 2 being the Board Minutes) that the proposals by the Board were within the guidelines. RW1 confirmed they did not implement the proposal since there was no approval noting there was no response to their letter to the ministry. RW1 confirmed there was budgetary allocation to accommodate the Managing director's proposed salary. RW1 stated that the Managing Director was entitled to gratuity at end of three years if there was a contract. That there was no contract as the same is signed by the permanent secretary. That no contract was issued to the claimant to sign. RW1 confirmed there was legitimate expectation from the resolution of the Board on the earning by the Claimant as the Managing Director.
16. RW1 told the court that the Claimant ceased to be a managing director on the date of suspension(D-Exhibit 2). RW1 told the court that the term of the claimant as Managing Director expired end of July 2019. RW1 confirmed that that the letter of suspension D-Exhibit 2 did not state the claimant had ceased to be the managing director. That the last pay of the claimant was on May 17, 2019 when he retired under pay of finance manager. RW1 confirmed that the last salary was paid to May 17, 2019 after 3 years as per the gazette after which salary was stopped as he had retired. RW1 told the court there was evidence that the letter to the parent ministry was received and they were verbally informed no approval would be issued due to the corruption case.
17. RW1 told the court that after May 17, 2019 they wrote to the parent ministry (C-EXHIBIT 10 letter of July 17, 2020) referring to the proposed salary and were informally informed that the payment was held due to the pending corruption case.
18. RW1 on re-exam informed the court it was just 4 months after they sought approval that the corruption arose. That vide letter of 2020 they sought guidance of the parent ministry as they did not have approval to pay and that the Parent Ministry was not a party to the suit.

Decision

Issues not in dispute

19. There was no dispute that the claimant was initially employed as a finance manager of the respondent and that the Board approved his appointment as a managing director and he was gazetted as managing director of the respondent effective May 17, 2016(C-exhibit 2 the Gazette notice). There was further no dispute that the Respondent sought approval of the claimant's terms of employment as a managing director (D-exhibit 1 letter dated August 5, 2016) from the cabinet secretary Ministry of Agriculture, Livestock and Fisheries (the parent ministry) and the approval was not responded to in writing.

There was further no dispute that the claimant started work as a Managing Director on gazettelement but continued earning salary of his previous position as finance manager. There was further no dispute that the claimant was suspended from service on January 23, 2017 (D-exhibit 2) following charge in



court under Corruption and Economic Crimes Act No 3 of 2002 on half salary until the case was concluded. It was not in dispute the case was yet to be concluded. It was not in dispute the claimant was retired on May 17, 2017.

20. Findings

The court finds that the first question to be answered would be whether the claimant was appointed as managing director of the respondent.

The Gazette notice of August 12, 2016 (c- Exhibit 1) reads:- ‘Gazette Notice No 6312

The *State Corporations Act* (Cap 446)

Nzoia Sugar Company Limited

Appointment

In the Exercise of the powers conferred by section 6(1)(b) of the *State Corporations Act*, the Cabinet Secretary of the Agriculture, Livestock and Fisheries appoints-

Godfrey Wanyonyi

To be the managing director of the Nzoia Sugar Company Limited for a period of three (3) years with effect from the 17th May 2016 .

Dated 25th may 2016

Willy Bett, Cabinet Secretary for Agriculture Livestock and Fisheries.”

21. The court holds that vide the foregoing Gazette the Claimant was appointed/employed as the managing director of the respondent effective May 17, 2016 for a period of 3 years.

22. Terms of service of the claimant as Managing Director

The Board of the Respondent vide the 24th meeting of the Director’s meeting held on July 29, 2016 (C- exhibit 2) resolved and recommended that having appointed the claimant for a 3 year term on May 17, 2016 he be paid basic salary of Kes 370,000, house allowance of Kes 80000 and other remunerative allowance of Kes 60000 making gross salary of Kes 510,000/- . The court finds that this resolution was sent to the Cabinet secretary of the parent ministry vide letter dated August 5, 2016 stating the proposed remuneration was within the current budget.

23. The Respondent’s case was that that the claimant was not paid salary as a managing director but under his previous position of finance manager as the parent ministry did not give approval of the proposed remuneration.

24. The Claimant submits that the Respondent acknowledged he was entitled to salary as managing director as per C-exhibit 2 (Board Minutes). The claimant submits that it was not true the salary was not approved as it was budgeted under as per his exhibits 3 and 6. The court looked at the said exhibits and found that no. 3 was the guidelines and terms and conditions of service for state corporations chief executive officers and 6 was payslip for October 2017. The court did not find the said documents as proof of the budget or approval. The claimant submits that he was underpaid as he was paid basic salary of Kes 305000 which was less than what was budgeted for being Kes 370000 (Deficit of Kes 65000) House allowance paid was Kes 25000 less than the budgeted amount of Kes 80,000(deficit of Kes 55000). That there was no contention on other remunerative allowance hence the underpayment for the 3 years was 65000 plus 55000 x 3 years x12 totals Kes 4,320,000/-



25. The Respondent submits that it is a state corporation under a parent ministry specifically Agriculture. That the prescribed guidelines on terms and conditions of service for state corporations' chief executive officers, chairmen and board members, management staff and unionisable staff. That the guidelines guide the board to administer the scale in consultation with parent ministry and that any entry point beyond midpoint has to be approved only in exceptional cases in consultation with the parent ministry. That the basic salary midpoint for the claimant categorised under PC7B was Kes 305,000/- (page 26 of the guidelines) and the proposed basic salary was Kes 370000 hence requiring approval by the parent ministry. That the letter dated August 5, 2016 sought approval on payment of the proposed terms of employment which approval was not received and same with letter of July 17, 2020(The said letter was not filed in court though under the list of documents) The respondent submits that during cross examination the claimant acknowledged it was a requirement for approval to be sought and no approval though sought was issued. That the claimant confirmed that the parent ministry approval was required for the respondent to act on any terms of employment above the basic salary midpoint. That the claimant acknowledged he was earning Kes 287736 while employed as the managing director of the respondent which was within the minimum and maximum range as prescribed by the Guidelines. That the parent ministry are the custodian's of the budgetary planning for the respondent's financial muscle hence the respondent cannot act without the approval of the parent ministry.
26. The court already found the claimant was employment vide the gazette notice as managing director (C-exhibits 1) effective May 17, 2016. The court finds that effective that date the claimant was entitled to remuneration as a managing director of the respondent. The Board did make resolution on the remuneration but RW1 stated that they were unable to effect the proposed salary as the parent ministry did not give its approvals of the recommended remuneration hence they continued to pay the claimant as though he was still a finance manager.
27. The court finds that the guidelines are meant to guide negotiations of terms with candidates. Guideline no 10 annexure 111A which provides for range of salaries was to be used as negotiating tool for the appointing authority. The court found evidence that the claimant took office upon appointment. Section 5(5) of the Employment Act reads:- (5) An employer shall pay his employees equal remuneration for work of equal value. The claimant having been appointed as managing director he was entitled to be paid as such and hence the payment as a finance manager (previous position) was irregular and contrary to the law that he not remunerated for work of equal value. RW1 confirmed that the Claimant performed extra work than that of a finance manager where his basic salary was Kes 287,736/- (SEE c-EXHBT 2 PAGE 1). As per evidence before court (payslip of May 2017) the claimant was paid basic salary of Kes 305,000.16 which RW1 stated was the midpoint. The court noted from the payslip the claimant was paid other remunerative allowance totals Kes 75000 above what was recommended under that item. The court was of the opinion that the Board of Directors was the employer of the Claimant and hence its resolution on the recommended salary for the claimant was binding on itself. The respondent benefited from the services of the claimant as its managing director, in its resolutions the Board justified the proposed remuneration and the court found no basis why the claimant could not be paid the justified money for the job he was appointed to.
28. The court finds that the act of the parent ministry to gazette the claimant as a managing director and the subsequent failure to approve the recommended remuneration by the Board when the claimant was already in office was tantamount to unfair labour practice which the court cannot condone. The claimant was entitled to benefit of legitimate expectation that he would receive remuneration as a managing director as recommended by his employer the Board. The claimant having sat in the meeting was aware of the recommended terms of his position. The court finds and holds that the claimant's remuneration was presumed approved as per letter to the Cabinet Secretary by the Board. The court



finds that the Board and not the Cabinet Secretary was the employer of the claimant and had budgeted for his remuneration as recommended. The recommendation on terms of remuneration was made when the claimant had already been appointed to the office. The court found that to be bad labour practice as the claimant was entitled to wages for work done at end of the month under section 18 (2) of the *Employment Act*:- '(c) in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;’ The court finds and holds that the claimant’s gross salary effective May 17, 2017 was Kes 510,000/- as recommended by the Board.

29. The Claimant was suspended from office on half basic salary plus all allowances on January 23, 2017. The court finds that any other allowance beyond the 30000 approved was paid irregularly and will be factored as part of the housing allowance and thus award as follows :- House allowance and other allowance total was recommended by the Board for 140,000. The claimant was paid total allowances of Kes 100000 leaving a deficit of Kes 40000 which is awarded for 3 years thus 40000x12x3 total Kes 1,440,000/-. The claimant produced as C- exhibit 11 the tabulation of his underpayment. The document was not contested by the respondent save to say it was not approved by the parent ministry. According to the document which the claimant produced adopted as his evidence in the first year as managing director for 8 months (May 2016 To December 2016) he was underpaid monthly by Kes 105,000 total Kes 840,000/-. In the 2nd year (January 2017- January 2018) while under suspension he was underpaid for total sum of Kes 812,500 and in the third year February 2018 to April 2019)for total sum of Kes 1575000/- The court finds that to be the claimant’s uncontroverted evidence on underpayment of recommended salary by the Board for total sum of Kes 3,227,500/ of which I accordingly award.

Whether the claimant was entitled to gratuity and how much?

30. The Claimant sought and pleaded that he was entitled to gratuity calculated to scale according to terms of contract. The claimant submits that since he transited form permanent and pensionable to contractual of 3 years he was entitled to gratuity at 31% for period served.
31. The Respondent submits that the *Employment Act* does not make it mandatory for employer to pay gratuity. That for a court to grant gratuity it ought to be an express term of employment contract and to buttress this submission relied on the decision of the Court of Appeal in Civil Appeal No 167 of 2014 *Moses Kiplagat Changwony v Tana and Athi Rivers Development Authority* (2013)eKLR where a 3 judge bench held”:- ‘On the claim for gratuity, the evidence shows that the appellant received gratuity for the initial period of employment, November 14, 2002 to November 14, 2005. As did the learned judge, we have been through the record, and can find no computation or authorization for payment of gratuity for the second contractual period. Without this, there is no rationale upon which to award gratuity for this period, and on that basis this ground fails.

Finally, we turn to consider whether the trial court analysed the documentary evidence. It was the appellant’s submission that a comprehensive list of documents were submitted to support his claim for constructive dismissal which he claimed the trial court did not take into account. In particular, the appellant took issue with the court’s finding that:

“With respect to the claim for gratuity for six years at the rate of 31% per every year worked, no sufficient material has been placed before me to determine the matter in favour of the claimant particularly with respect to the contract that had already been served. The pleadings do not disclose the basis of the claim and since no viva voce evidence was adduced at all in the matter, the court finds that the claimant has failed to prove he is entitled to payment of the gratuity and the prayer is dismissed accordingly.”(emphasis ours)”



32. In the instant case the claimant relied on the recommendations of the Board on his terms. As stated before the Guidelines are basis for negotiations and cannot form basis of the rights of employment by the claimant. The resolutions of the Board were found to have been presumed to be terms of the employment of the claimant hence the award for underpayment. The court agrees with submission by the respondent that gratuity is founded on employment contract. The claimant had no other basis for his claim outside what the Board resolutions on his terms of employment. The court looked into the said resolutions (C-exhibit 2) and found that gratuity was not recommended. The court finds that gratuity is not a statutory right and is based on contract of employment. There being no contract of employment and the Board having not provided for the same in its resolutions (C-exhibit 2) the prayer for gratuity is denied.

Whether Claimant is entitled to reliefs sought

33. The court finds that the claimant is entitled to the award on underpayment as stated above of total sum of Kes 3,227,500/ with interest at court rate from judgment date and costs of the suit.

Conclusion And Disposition

34. The Court enters judgment for the claimant against the Respondent as follows;-

- a. Award of underpayment of salary of Kes 3,227,500/- subject to statutory deductions.
- b. Interest on (a) at court rate from date of judgment until payment in full.
- c. Costs of the suit

35. It is so ordered

DATED SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 14TH DAY OF APRIL 2023.

JEMIMAH KELI,

JUDGE.

In the presence of :-

Court Assistant: Lucy Macheso

For Claimant:-Anwar

For Respondent:-Walubengo – We pray for stay of 30 days.

Court Order:-

Stay of 30 days granted.

It is so ordered.

JEMIMAH KELI,

JUDGE

