



**Mibei v Kenya Union of Post Primary Education Teachers Union (Cause E041 of 2022) [2023] KEELRC 1074 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1074 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E041 OF 2022**

**CN BAARI, J**

**MAY 4, 2023**

**BETWEEN**

**JULIUS KIPROB MIBEI ..... CLAIMANT**

**AND**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS  
UNION ..... RESPONDENT**

**JUDGMENT**

1. The Claimant's Memorandum of Claim is dated September 23, 2022, and filed in Court on 26<sup>th</sup> September, 2022. The Claimant seeks a declaration that the actions of the Respondent violated his rights, payment of damages for breach of contract, unpaid salaries, pension benefits, gratuity, unpaid leave, repayment of defaulted loan, general damages for embarrassment, a certificate of service and costs of the suit.
2. The Respondent appointed the Firm of Otieno C.O. Yogo & Co. Advocates on October 31, 2022, to act for them in the matter, who filed a statement of defence on 11<sup>th</sup> November, 2022. Vide a Notice of Change of Advocates filed on January 30, 2023, the Respondent appointed the Firm of Emmah Mawinda & Co. Advocates to act for them in place of Otieno C.O. Yogo & Co. Advocates.
3. The Claimant's case was heard on January 18, 2023, with the taking of the Claimant's testimony. The Claimant adopted his witness statement and produced his list and bundle of documents and a further bundle of documents filed as exhibits 1-54, in support of his case.
4. The Respondent's case was heard on January 30, 2023. The Respondent presented the evidence of Mr. Akelo M. T. Misori, their General Secretary in support of its case. Mr. Misori adopted his statement and produced documents filed in support of the Respondent's case. The Respondent closed its case on the same date, paving way for filing of submissions.
5. Both parties filed submissions in the matter.



## The Claimant's Case

6. The Claimant was an employee of the Respondent having been seconded from the Teachers Service Commission (TSC) on account of a Recognition Agreement signed on June 2, 2010, between the Respondent and the TSC.
7. The Claimant states that his secondment to the service of the Respondent resulted from union elections, where he was elected Executive Secretary of the Respondent's branch at Kericho on 26<sup>th</sup> February, 2011.
8. It is the Claimant's case that the Respondent offered him a five-year employment contract as Executive Secretary, which offer, he accepted on July 12, 2011, and that the contract took effect from September 27, 2011, upon release from teaching service by the TSC vide the letter dated January 12, 2012.
9. The Claimant states that he worked for the Respondent for 10 years with a re-election on February 25, 2016. It is his case that he was not re-elected in the union elections held on 27<sup>th</sup> February, 2021.
10. The Claimant further states that he continued performing his duties as per the offer of employment but the Respondent on April 1, 2021, stopped his salary, before the expiry of his 10-year contract, an act he claims amounted to a fundamental breach of contract by the Respondent.
11. It is the Claimant's case that the Respondent did not pay him salaries for the months of April, May, June, July and August and September, 2021, and neither did it make any effort to clear, release, update the Claimant and hand-over the Claimant to its former employer despite several reminders.
12. The Claimant states that he suffered psychological torture and embarrassment as a result of loan defaults and loan arrears, Credit Card default, non-payment of financial obligations and a listing by the CRB, which forced him to sell his land to meet the financial obligations occasioned by non-payment of salary by the Respondent.
13. The Claimant states that he wrote a letter on September 2, 2021, to the Respondent to demand full compliance with the TSC'S letter dated January 12, 2012, on 31% pension contribution to the TSC and 2% WCPS payment to KRA effective from, September 27, 2011, which the Respondent did not reply.
14. It is the Claimant's position that on August 11, 2022, he wrote an email to the TSC requesting for an updated pension status report and WCPS payments made by the Respondent but, to his surprise the Respondent had not made any payments.
15. The Claimant states that he did not in the 10 years he was in the employment of the Respondent go for any annual leave, and that he worked during weekends and public holidays and the Respondent did not pay him for leave not taken and the public holidays and weekends worked.
16. The Claimant further states that for the period he worked for the Respondent, he was not paid his gratuity despite having been budgeted for.
17. It is the Claimant's assertion that he was not issued a certificate of service and neither was he given a clearance certificate upon exit from the service of the Respondent.
18. The Claimant finally states that the Respondent's action was unfair, wrongful, unlawful and illegal, and that despite demand being made, the Respondent has refused, failed or ignored the demand thus rendering this claim necessary.



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

19. The Respondent states that the Claimant was a Branch Executive Secretary for their Kericho branch from 2011 – March, 2021, which position is elective, and on secondment from the Teachers' Service Commission. It is the Respondent's assertion that the Claimant was serving in the position on full time basis, and earned allowances based on the strength of the branch.
20. It is the Respondent's case that when the Claimant lost the position in the union elections held in 2021, it wrote to TSC to post him back to the teaching service, and was posted to Oginga Odinga Tamu Mixed Secondary School in Kisumu where he serves as a teacher to date.
21. The Respondent states that the union has no influence on how and when TSC chooses to deal with staffing of her teachers, and does not owe the Claimant any salary arrears having been paid up to the month of March, 2021. The Respondent further states that the Claimant earned other allowances and continued to receive money to run the branch operations in the period between 2011 and February, 2021.
22. It is the Respondent's position that besides the payment due to the Claimant, he received Kshs 147,480.00 as operations money for the month of May, 2019, and Kshs 208,188.00 for the month of March, 2021, and that the pay slip attached to this claim is alien to the Respondent.
23. The Respondent states that the Claimant was paid all his dues up to March, 2021, when he lost in the elections and gratuity dues were paid through Britam Insurance, for the period 2016 – 2021.
24. The Respondent states that the Claimant did not disclose to the union that he also served as a member of the County Public Service Board of Kericho for six years, while he was the Branch Executive Secretary, which position he held on full time basis.
25. The Respondent prays that the Claimant's suit be dismissed.

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

26. The Claimant submits that though he held an elective position, his term of office was not tied to him being re-elected for reason that he had a contract that was in force up to September, 2021.
27. It is the Claimant's submission that he was released to the service of the Respondent on secondment by the TSC with effect from September 27, 2011, through a letter dated January 12, 2012, and hence the assertion that his ten-year contract of service was to lapse in September, 2021 and not immediately after he lost election.
28. It is his further submission that from the bank statement presented in evidence, no salary payment was made to him after the March, 2021 salary of Kshs 139,873/- and another Kshs 68,315/- both on account of March, 2021 salary. It is his submission that the Respondent's assertion that his salary for March, 2021, was Kshs 9,263/- is not true.
29. The Claimant submits that his letter of secondment clearly stated that it was the responsibility of the Respondent to pay him salary and to additionally remit 31% pension contribution to the TSC.

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

30. The Respondent submits that it employed the Claimant but his employment was tied to him winning the elections, which he lost in February, 2021. It is its submission that in April, 2021, new union



officials came into office and as such, the Claimant could not continue to be paid for the duration he was not an employee of the Respondent.

31. The Respondent submits that the Union made all the requisite contributions on behalf of the Claimant, and that he was paid all terminal dues and gratuity due to him.
32. It is the Respondent's submission that it wrote a letter to the TSC and which is listed in the Respondent's list of documents after the February, 2021 elections, requesting that the Claimant be posted back to teaching after losing his seat in the elections.
33. It is the Respondent's further submission that the Claimant admitted at the hearing that he was not issued with a contract of employment in his entire period in the service of the Respondent. The Respondent submits that a party does not need a written contract to prove the existence of an employment relationship. It sought to rely in the case of *Simon Wycliffe Ouma v Bulsho Trading Company* [2018] eKLR where J. Kiarie to buttress this position.
34. The Respondent submits that gratuity payments for Union staff started being made in 2016, and as such, the Claimant is not entitled to any payments for the period worked before 2016. It is the union's further submission that gratuity payment was made to the Claimant through Britam Insurance Company to the tune of Kshs 587,308.
35. The Respondent submits that the Claimant has not shown the exact holidays he worked for the Respondent, and that he is not entitled to compensation. The Respondent had reliance in *Fancy Jeruto Cherop & Another vs Hotel Cahay Limited* [2018] eKLR to support this position.
36. The Respondent submits that it is not responsible for the payment of the Claimant's personal debts, and as such, should not be held liable for the Claimant's irresponsibility. It had reliance in the Court of Appeal's decision in *Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike* [2017] eKLR for the holding that justice is a two-way highway and the court must endeavor to render just decisions to employees in as much the same way as it does to employers.
37. It is the Respondent's position that the Claimant has not proved his case on a balance of probability and urges that the Court dismisses the claim.

### **Analysis and Determination**

38. I have considered the pleadings, the witnesses' oral testimonies and the parties' submissions. The issues for determination are:
  - i. Whether the Claimant had a valid contract of service with the Respondent after February 27, 2021.
  - ii. Whether the Claimant is entitled to the remedies sought?

### **Whether the Claimant had a valid contract of service with the Respondent after February 27, 2021**

39. It is not disputed that the Claimant herein was elected to the position of Executive Secretary of the Respondent's branch at Kericho on February 26, 2011. It is further not in contention that the Claimant was again re-elected in the year 2016, to the same position, and it is only in February, 2021, during the Respondent union's next elections cycle that the Claimant lost the elections.
40. The Claimant contends that the Respondent offered him a ten year offer of employment, which offer he accepted and for reason of the acceptance, he holds the believe that the Respondent owes him salary up to September, 2021, which is the month his contract would have lapsed.



41. The Respondent has exhibited prove that they communicated to the TSC in a letter dated 29<sup>th</sup> March, 2021, that the Claimant had lost the position he held at their Kericho branch on account of union elections, and that his services with it would lapse effective 1<sup>st</sup> April, 2021.
42. That the TSC only posted the Claimant in September, 2021, does not in my view translate to extension of his services with the Respondent. The Respondent already had a new Executive Secretary and indeed other new officials, who had assumed office as shown by letters produced in evidence communicating change of signatories to the Respondent's Bank accounts.
43. It is also noteworthy that clause 4.8 of the Memorandum of Agreement between the TSC and the Respondent/union, regulates the employment of teachers who are elected into union offices in the following words: -

“The Commission undertakes to release without pay, teachers elected as National Officials and Branch Executive Secretaries and do undertake to redeploy such teachers when they cease being officials.”
44. It is thus clear that it was the obligation of the TSC to redeploy the Claimant immediately he lost the election, and the delay and/or failure to do so cannot be construed as an extension of his contract with the Respondent.
45. Further, the Claimant in a letter dated 9<sup>th</sup> March, 2021, to the TSC, sought to be posted to one of four Secondary Schools that he had chosen, with the reason for seeking the posting, being that he was not re-elected to the post of Executive Secretary. By yet another letter dated 3<sup>rd</sup> June, 2021, the Claimant sought that the union/Respondent do follow up on his posting with the TSC for not having been posted since his earlier request to be posted.
46. This in my opinion, confirms that the Claimant was clear in his mind that he no longer was in the service of the Respondent.
47. Further, the Claimant's assertion of an offer and its acceptance thereof, only applies to an appointive position. The Claimant held the position of Executive Secretary, by virtue of an election. The term of an elective post in my view, is dictated by the electoral cycle and not a written contract of service, in any event, no such contract was produced in evidence before this Court.
48. Where one is not re-elected, the elective position held lapses immediately elections are concluded and resulted announced.
49. It is therefore my view, that the Claimant's assertion that the Respondent owed him salary for the period after he had lost the election (April to September, 2021) is untenable.
50. The Claimant held an elective position and which he could only have continued to hold if re-elected.
51. I conclude by holding that immediately the Claimant lost the elections, the employment relationship between himself and the Respondent union automatically terminated.
52. Consequently, the Claimant's claim for payment of salary for the months of April to September, 2021, fails and is dismissed.
53. On the claim for payment of gratuity, the Respondent told the Court that it has in place an arrangement for payment of gratuity through Britam insurance, and that the Claimant was paid an amount of Kshs 587,308.00 on account of gratuity.



54. The Court record confirms that the Claimant held Policy No. 169-463 with Britam and by a letter dated December 15, 2022, to the Respondent, Britam confirmed having paid the Claimant an amount of Kshs 587,308.00. The letter further confirms that premiums on the policy were made through the Respondent's check-off system and further that the premiums date back to 2016.
55. The Respondent through RW1 told the court in his testimony, that their gratuity arrangement begun in 2016 and which evidence is corroborated by the letter from the insurer.
56. Although the Claimant disputed that the amount related to gratuity, he did not confirm the basis upon which the payment was made to him. I thus conclude that the Claimant did not on a balance of probability prove that he is owed by the Respondent on account of gratuity.
57. On the Claimant's claim for un remitted pension, the letter seconding the Claimant to the Respondent clearly stated that the Respondent would remit 31% of the Claimant salary to the TSC on account of pension.
58. The Claimant's pay slips produced before Court did not show the deductions of the 31% which was to be remitted to the TSC. The Court has however found that the Claimant was paid a gratuity through Britam Insurance.
59. In my view, the moment the Claimant agreed to be placed under a gratuity arrangement, he lost the right to the remission of the 31% pension contribution, as to require the Respondent to remit 31% and pay gratuity at the same time, would in my opinion amount to a double charge on the Respondent union.
60. The claim for pension remission is not merited and is dismissed.
61. The claims for leave allowances, public holidays and weekend worked, were not proved. The Claimant did not show the particular holidays and weekends that he worked, and why he did not pay himself having been the Executive Secretary and fully responsible for the day to day operations of the Respondent's branch. The claims fail and are dismissed.
62. On the claims for compensation for land he sold, repayment of defaulted loans and general damages for embarrassment and psychological torture, the Court has found that in the period these defaults occurred, the Claimant was not an employee of the Respondent. The Respondent cannot thus be held responsible for the Claimant's woes occurring under this period.
63. In the upshot, I find the Claimant's claim lacking in merit and is hereby dismissed in its entirety.
64. The Claimant being a member of the Respondent Union, I make no orders on costs.
65. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4<sup>TH</sup> DAY OF MAY, 2023.**

**C. N. BAARI**

**JUDGE**

**Appearance:**

**Mr. Julius Mibei Claimant present in person.**

**Ms. Mawinda present for the Respondent**

**Christine Omolo- C/A**

