



REPUBLIC OF KENYA



Nyandiago & 3 others v Sibowater & Sanitation Co Ltd (Cause 57 of 2020) [2023] KEELRC 1482 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1482 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 57 OF 2020**

**S RADIDO, J
JUNE 21, 2023**

BETWEEN

**JULIUS JOMO BENJAMIN NYANDIAGO 1ST CLAIMANT
EDWIN OMONDI OWUOR 2ND CLAIMANT
KEVIN MBOYA AGALLO 3RD CLAIMANT
VICTOR CHARLES OCHIENG 4TH CLAIMANT**

AND

SIBO WATER & SANITATION CO LTD RESPONDENT

JUDGMENT

1. Julius Jomo Benjamin Nyandiago (1st Claimant) was appointed as the Managing Director of Sibowater & Sanitation Co Ltd (the Respondent) through a letter dated December 7, 2012.
2. On 8 February 2016, the Respondent renewed the contract for 3-years.
3. Edwin Omondi Owuor (2nd Claimant) was appointed/designated as Assistant Commercial Manager with effect from September 22, 2012 and on June 28, 2013, he was deployed as Finance and Accounts Manager.
4. On April 29, 2013, the Respondent appointed the 2nd Claimant as the Commercial and Customer Manager on a 3-year renewable contract but the term was converted to permanent and terms with effect from November 1, 2014.
5. Kevin Mboya Agallo (3rd Claimant) on his part was initially engaged as an Audit Assistant on December 2, 2013 and was placed on permanent terms from November 1, 2014.
6. Victor Charles Ochieng (4th Claimant) was appointed to an undisclosed position sometime in 2010. He was placed on permanent terms with effect from November 1, 2014.



7. On August 22, 2017, the Respondent sent to the Claimants letters in identical terms informing them that:

I write to inform you that the Board of Directors during the meeting on August 22, 2017 resolved that, due to the prevailing hostile working environment which has not been conducive to allow you execute your mandate as (.....), you be released from the company with immediate effect.

It was further resolved that you will be paid all your dues as provided for in law.

In arriving at the decision, the Board considered a number of factors among them, your security at work place and continued external political interference in the company.

8. Aggrieved with the action of the Respondent, the 1st and 2nd Claimants sued the Respondent on July 24, 2020, alleging:

- (i) Wrongful and/or unfair termination of the Claimants employment with the Respondent and refusal to pay their dues.
- (ii) Breach of procedure and the rules of natural justice in illegally and/or unfairly terminating the Claimants employment.

9. On August 21, 2020, the Statement of Claim was amended to include the 3rd and 4th Claimants, and the Respondent filed a Response on November 9, 2020.

10. The 3rd and 4th Claimants filed written authority to the 1st and 2nd Claimants to testify on their behalf.

11. The Cause was heard on January 24, 2023, April 17, 2023 and May 23, 2023.

12. The 1st and 2nd Claimants and a Human Resource Manager with the Respondent testified.

13. The Claimants filed joint submissions on June 7, 2023, (should have been filed and served before June 2, 2023 and it was explained that the advocate conducting the case was taken ill).

14. The Claimants identified the Issues for adjudication as:

- (i) What is the relevant employment period for each of the 2nd to 4th Claimants and their length of service till date of termination?
- (ii) Was the termination (sic) of each of the Claimants unfair under the law?
- (iii) Is each of the Claimants entitle to the remedies they have sought?

15. The Respondent filed its submissions on June 14, 2023 and it isolated the Issues in contention as:

- (i) Whether the termination of the Claimants' employment was unfair and wrongful?
- (ii) Whether the Respondent breached procedure in the termination (sic) of the Claimants?

16. The Court has considered the pleadings, evidence and submissions.

Wrongful/unfair termination of employment

17. Although the Respondent advanced a case of misconduct and poor performance in Court to justify terminating the Claimants' contracts, the contention(s) was not supported by any evidence or the termination letters.



18. The real reasons given by the Respondent for bringing the contracts to an end were a hostile working environment coupled with inability to ensure the personal security and safety of the Claimants, and external interference.
19. These grounds are not those contemplated by section 41 of the [Employment Act, 2007](#) and, therefore, the Court must look outside the procedural confines of the section in determining whether there was wrongful termination of employment.
20. The Claimants individually had contracts of employment. The contracts were subject to the Respondent's terms and conditions of service as espoused in the Human Resource Policy Manual.
21. The contracts were subject to the giving of written notice or pay *in lieu of* notice.
22. The Respondent did not give any of the Claimants written notice as envisaged under their respective contracts of employment.
23. Further, the Respondent did not accord the Claimants an opportunity to be heard in response to the grounds for contemplated termination of their contracts.
24. In other words, the Respondent's decision in respect of each of the Claimants did not accord with the rules of natural justice and the individual contracts (in contradistinction to the tenets of procedural fairness within the context of section 41 of the [Employment Act, 2007](#)).
25. Not only was the decision by the Respondent not aligned with the contractual termination clause but the letters conveying the separation(s) to the 2nd to 4th Claimants did not explicitly indicate whether pay in lieu of notice was part of the dues.
26. The Court finds that the Respondent wrongfully and in breach of contract terminated the Claimants' contracts.

Pay in lieu of notice

27. For the wrongful termination, the Court holds that each of the Claimants is entitled to the equivalent of salary for the notice period(s).
28. The Court notes that the Respondent did not dispute the pleaded rates of monthly salaries.

Compensation

29. Section 49 of the [Employment Act, 2007](#) envisages an award of compensation without qualification as to the nature of separation, whether unfair termination or wrongful termination of employment (in breach of contract).
30. The Court will, therefore, allow the equivalent of 3 months' gross salary as compensation to each of the Claimants (pleaded salaries not disputed).

Breach of contract

Salary to end of contract/Lost income

31. The Respondent offered to pay the 1st Claimant the remuneration he would have earned up to the end of his 3-year contract but by the time he moved to Court payment had not been made.
32. The 1st Claimant computed the remuneration as Kshs 2,340,000/-.



33. The Respondent did not challenge the computation and the Court will allow the head of the claim.

Salary for days worked in August 2017

34. Each of the Claimants is entitled as of right to earned salaries for the month of August 2017.

35. The Respondent did not question the tabulations by the Claimants and the Court will allow these heads of the claim as pleaded.

Service pay/Gratuity

36. The Claimants computed what they felt they were entitled to as service pay/gratuity.

37. The 1st and 2nd Claimants' contracts provided for gratuity at the rate of 31% of annual basic salary and the Respondent offered to pay the same.

38. However, the 2nd Claimant's contract was converted to permanent terms effective 1 November 2014. He would thus not be eligible for gratuity.

39. The 3rd and 4th Respondents were on permanent terms of employment.

40. Under clause 14.4 of the Human Resource Policies and Procedures Manual, management staff in grades 6 and 7 were eligible for gratuity, but at the discretion of the Respondent.

41. Under Appendix 1, permanent staff (not on contract) were eligible to join the pension scheme after confirmation.

42. Consequently, save for the 1st Claimant, the Court finds that the other Claimants are not entitled to an award of gratuity.

Certificate of Service

43. A Certificate of Service is a statutory entitlement and the Respondent should issue to each Claimant a Certificate of Service within 30 days.

Conclusion and orders

44. In consideration of the above, the Court finds and declares that the termination of the Claimants' contracts was wrongful.

45. The Court also finds the Respondent in breach of contract.

46. The Court makes the following awards:

1st Claimant

- i. Pay in lieu of notice Kshs 198,000/-
- ii. Compensation Kshs 390,000/-
- iii. Lost income Kshs 2,340,000/-
- iv. Earned wages Kshs 110,000/-
- v. Gratuity Kshs 736,560/-

Total Kshs 3,774,560/-



2nd Claimant

- i. Pay in lieu of notice Kshs 186,750/-
 - ii. Compensation Kshs 186,750/-
 - iii. Earned wages Kshs 52,673/-
- Total Kshs 426,173/-

3rd Claimant

- i. Pay in lieu of notice Kshs 85,350/-
 - ii. Compensation Kshs 85,350/-
 - iii. Earned wages Kshs 24,073/-
- TotalKshs 194,773/-

4th Claimant

- i. Pay in lieu of notice Kshs 51,000/-
 - ii. Compensation Kshs 51,000/-
 - iii. Earned wages Kshs 14,384/-
- TotalKshs 116,384/-

47. The awards to attract interest at court rates from date of judgment if not paid within 60 days.
48. The Respondent to issue Certificates of Service within 30 days.
49. The Claimants to have costs.

Delivered virtually, dated and signed in Kisumu on this 21st day of June 2023.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimants Waithaka & Partners Advocates

For Respondent Mugoye & Associates

Court Assistant Chrispo Aura

