



Naburi v County Assembly Service Board Busia County & another (Employment and Labour Relations Cause 94 of 2021) [2023] KEELRC 2057 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 2057 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 94 OF 2021**

**JW KELI, J
JULY 27, 2023**

BETWEEN

NAMENYA DANIEL NABURI CLAIMANT

AND

COUNTY ASSEMBLY SERVICE BOARD BUSIA COUNTY ... 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

JUDGMENT

1. The Claimant vide Statement of Claim dated 25th August 2020 and amended on the 16th June 2022 sued the Respondents concerning the termination of his employment and sought the following reliefs:-
 - a. A declaration that the 1st respondent unfairly and unlawfully terminated the claimant's employment.
 - b. Kshs, 1,284,000.00 being compensation equivalent to 12 months gross salary for unprocedural and unfair termination of the claimant's employment
 - c. Kshs 321,000.00 being 3 months' salary for termination without notice.
 - d. a declaration that the 1st respondent wrongfully withheld the claimant's salary from 1st April, 2017 to 30th June, 2019
 - e. Kshs, 2,889,000.00 being the claimant's total withheld salary from 1st April 2017 to 30th June 2019
 - f. Kshs. 17,833.33 being prorated salary payment for five days worked at the 1st respondent from 1st to 5th July 2019.
 - g. Kshs. 321,000.00 being payment in lieu of three years accrued leave days, equivalent to his three months gross salaries.



- h. Kshs. 137,244.94 being the Claimant's total withheld HELB deductions for 50 months(May 2015 to June 2019)
 - i. An Order compelling the 1st Respondent to pay all accrued penalties at HELB due to failure to remit deductions from May 2015 until payment in full.
 - j. An order compelling the 1st respondent to remit all unpaid NSSF and NHIF deductions
 - k. An Order compelling the 1st respondent to pay the Claimant's LAP Fund contributions and all the employer's contributions from February 2014 to June 2019 to LAP Fund amounting to Kshs. 1,531,170.00
 - l. An Order compelling the issuance of certificate of service to the claimant by the 1st respondent for the period served.
 - m. A declaration that the 1st and 2nd respondents breached the claimant's constitutional rights to a fair hearing, fair labour practices and administrative action.
 - n. General damages for breach of the claimant's constitutional rights to fair labour practices and fair administrative action and fair hearing by the 1st and 2nd respondents
 - o. General damages for mental suffering and anguish
 - p. Costs of this cause.
 - q. Interest accrued from the due date until payment in full;
and
 - r. Any other relief that this Honourable court may deem fit and just to award.
2. The Claimant in addition filed his witness statement, list of documents and the bundle with the initial Statement of Claim dated 25th August 2020; Reply filed in court on 25th October 2022 to the 1st Respondent's unamended Statement of Response; The Claimant's supplementary witness statement dated 13th March 2023 and supplementary list of documents dated 21st December 2022 and another dated 14th March 2022 which were all produced as a bundle.
 3. The claim was opposed. The 1st respondent who was the employer filed response as amended on the 29th September 2022 and received in court on the 3rd September 2023. On 26th October 2022 Filed amended witness statement of Allan Wafula Mabuka.
 4. The 2nd Respondent entered appearance and filed its replying affidavit to the claim sworn by Simon K. Rotich on the 4th October 2022 and filed in court on the 1st November 2022. The 2nd Respondent on the 20th March 2023 filed its reply to the amended claim and a supplementary witness statement of John Kimani Njoro.

Hearing

5. The Claimant's case was heard on the 31st January 2023 and 20th March 2023 with Claimant testifying on oath and producing all his filed documents as his exhibits. The Claimant was cross-examined by the counsel for the Respondents.
6. The 1st Respondent's defence was heard on the 20th March 2023 with one witness of fact Allan Wafula Mabuka who testified on oath and adopted his witness statement and produced the document of the 1st Respondent. He was cross-examined by counsel for the Claimant.



7. On even date the 2nd Respondent defence was heard with one witness of fact John Kimani Njoro who adopted his witness of statement and produced documents filed by the 2nd Respondent and was cross-examined by counsel for the Claimant.

The Claimant's case in summary

8. Further to pleadings and documents outlined above, the Claimant's case is summarised to be that: he had been employed by the 1st Respondent as a Research Officer on 1st February 2014 and was later promoted to Principal Research Officer, a position he held until the termination of his employment on the 5th July 2019. That as at the time of dismissal, his gross salary was Kshs. 107,000/- and he was entitled to a salary increment from 1st February 2015 until 1st February 2019. The reasons given for the termination were unauthorised absenteeism; use of abusive language; holding an unauthorised press conference in the 1st Respondent's precincts; unauthorised disclosure of confidential information and participation in an unauthorised gatherings within the 1st Respondent's precincts. Additionally, that the disciplinary hearing scheduled by the 1st Respondent never materialised prior to the termination; he was denied copies of documents and information he asked for and thus was never given opportunity to adequately defend himself; that the 2nd Respondent, on his appeal never convened a hearing within the statutory timelines and dismissed his appeal without due process and that his salary was withheld and statutory deductions not remitted to NSSF, NHIF, LAP FUND and HELB.
9. In conclusion, the Claimant's case was that he was suspended and terminated from employment unfairly for lack of valid reasons and his appeal was unfairly dismissed.

1st Respondent's response in summary** —

10. Further to the outlined pleadings and evidence above the 1st Respondent's defence was that the Claimant in their employment was never promoted from Research Officer; his salary at the time of dismissal was Kshs. 58,325/- and that he had notice of one month; that they did not withhold any salary or statutory dues; that the process of secondment was procedural, that the disciplinary process mounted against the Claimant was fair and justified based on disclosed acts of gross misconduct; that the Claimant was accorded fair hearing in terms of the law and fair labour practice before the dismissal; that the claim was Res judicata; an abuse of the due process of the court, the claim having been adjudicated by the court in Kisumu Petition No. 23 of 2017(consolidated with No. 42 of 2017) and further by the Public Service Commission and a decision delivered over which the Claimant never sought review.

The 2nd Respondent's position

11. The 2nd respondent position was that the Claimant's appeal to the 2nd Respondent, the Public Service Commission, was rightfully disallowed as the 2nd Respondent's decision was reasonable and within the parameters of law.

Written Submissions

12. After the hearing, the court issued directions on filing of written submissions. All parties complied. The Claimant's written submissions were drawn by Oundo Muriuki Company Advocates and dated 26th April 2023. The Claimant also filed Supplementary submissions dated 30th May 2023. The 1st Respondent's written submissions were drawn by J. Ouma & Company Advocates and dated 16th May 2023 and The 2nd Respondent's written submissions were drawn by Wangeci Gichangi, the Principal Legal Counsel for the 2nd Respondent and dated 22nd May 2023.



Determination

Issues for determination

The Claimant's issues

13. The Claimant in his submissions addressed the following issues :-
- a. Whether the suspension and termination of the Claimant's employment was substantially and procedurally fair, lawful and for valid reasons.
 - b. Whether the disallowing of the Claimant's appeal by the 2nd Respondent was fair in substance and procedure
 - c. Whether the 1st Respondent unfairly and unlawfully withheld the claimant's salary, dues and statutory deductions and ;
 - d. Whether the Claimant is entitled to reliefs sought.

The 1st Respondent's issues

14. The 1st respondent in their submissions addressed:-
- a. Whether the claim was Res judicata
 - b. Alleged unfair dismissal and reasons for the dismissal
 - c. The reliefs sought

The 2nd Respondent's issues

15. The 2nd Respondent addressed the following issues:-
- a. Whether the decision of the Public Service Commission disallowing the Claimant's appeal was fair in substance and procedure.
 - b. Whether the Claimant was entitled to the reliefs sought
16. The court having considered the issues addressed by the parties was of the considered opinion that the issues placed by the parties for determination in the dispute were as follows:-
1. Whether the Claimant was promoted to the position of Principal Research Officer.
 2. Whether the claim was Res judicata.
 3. Whether the dismissal of claimant from employment was lawful and fair.
 4. Whether the Claimant was entitled to reliefs sought.

Issue i). Whether the Claimant was promoted to the position of Principal Research Officer

17. The court identified the issue for determination, as it was the Claimant's case that he had been promoted from Research Officer to Principal Research officer and alluded to correspondence and the pay slips. It was the 1st Respondent's case that the Claimant was confirmed to the position of Research Officer vide letter dated 1st August, 2014; salary scale 10 (NDN2). The salary scale 10 under the letter was Basic salary- Kshs.48,190/- -Kshs.65,290 p.m with his entry given at Kshs. 48,190/-.



His incremental date was 1st February every year. The Claimant was further paid Kshs. 24,000/- p.m housing and Kshs. 8,000 as commuter allowance. The 1st Respondent denied the promotion.

18. The Claimant did not avail to court any further contract of service with employer. The Claimant relied on his pay slip indicating Principal Research Officer. The 1st Respondent explained this was caused by the Public Service System, which had a different ranking from the County ranking in the pay roll system. In the absence of proof of promotion and contract of service, the court finds the Claimant was never promoted. There was no evidence of any interview or assessment to lead to the promotion or any other relevant process. The pay slip rank was explained.

Issue ii). Whether the claim was Res judicata

19. The issue was identified by the 1st Respondent being that the claim was Res judicata and an abuse of the due process of the court, the claim having been adjudicated by the court in Kisumu Petition No. 23 of 2017(consolidated with No. 42 of 2017) and further by the Public Service Commission; and a decision delivered over which the Claimant never sought review.
20. The Claimant filed supplementary submissions to address the 1st Respondent’s submissions. The Claimant did submit on the question whether the claim was Res judicata. The 1st Respondent had also pleaded the claim as having been determined in paragraph 2(ii) of its amended response dated 29th September 2022. In Reply dated 24th October 2022, the Claimant stated that the said decision in Kisumu ELRC Petition No, 23 of 2017 concerned the secondment process and not the termination which had not materialised.
21. The court looked into the judgment in Kisumu Petition No. 23 of 2017 as consolidated with petition No. 42 of 2017 (annexure JKN 12 by the 2nd Respondent). At page 11 to 13 of the judgment the court outlined the prayers sought in the petition by the Claimant (1st petitioner then) and others and sought declaration that the suspension of 60 days without pay and valid reason was illegal, that the show cause without charge sheet and documents violated their constitutional rights, an order stopping the intended illegal and discriminatory disciplinary process among others. The parties submitted on the issue and the court notes same issues and defence was raised.
22. At page 30 of the judgment(Kisumu) is the decision on the disciplinary process. The judge held, “I find no basis on the evidence and material currently before the court to warrant interference with the disciplinary process against the petitioners” and in conclusion, the court stated it did not find the secondment and disciplinary process unconstitutional and unlawful.
23. The court then finds that the court having considered the same issues raised by the Claimant on allegation of no valid reasons or the show cause leading to the hearing lacking charge sheet and document in detail then that issue is Res judicata. The issue of validity of the suspension was also before that court and is thus Res judicata. The only outstanding issue then was to consider whether there were valid reasons for the dismissal and whether there was compliance with Section 41 of the [Employment Act](#), post the decision in Kisumu which was before the termination but while the Claimant was on suspension.

Issue iii). Whether the dismissal of Claimant from employment was lawful and fair

24. The court in determination of the issue was guided by the provisions of section 45 of the [Employment Act](#) which states:- ‘Unfair termination 45(1) No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason— (i) related to the employee’s conduct, capacity or compatibility; or (ii) based on the



operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.”

On substantial fairness (whether the reason for the dismissal were valid as under section 43 above.)

25. The court in Kisumu No. 23 addressed its mind on the show cause leading to the hearing and found the same constitutional. The question then was whether the reasons were valid and reasonable.
26. The Claimant submits that he denied the accusations and put the 1st Respondent to strict proof. The Claimant submits on the issues to challenge the validity of the reasons on basis of lack of documents among others.
27. The 1st Respondent led evidence that:- vide letter dated 21st April 2017, they provided particulars to the Claimant and a follow-up show cause letter issued on the 19th April 2017 detailing the accusations against the Claimant and requiring the Claimant to show cause, to which letter the Claimant failed to show cause. The Claimant obtained an Order of 10th May 2017, which preserved the status quo but on the 16th May 2019, the court held the disciplinary process was lawful.
28. The 1st Respondent submitted that the Disciplinary hearing of 13th June, 2019 was adjourned to 27th June, 2019 at the behest of the Claimant and no proceedings took place on 13th June, 2019. Documents were supplied to the Claimant vide a letter dated 21st April, 2017 and the Claimant refused to collect the same and 13th June 2019 had been the only opportunity the Claimant would have been served with the documents.
29. The 1st Respondent reiterated that the Claimant knew of the charges against him as per paragraph 39 of his amended Statement of Claim, alleging one of the members of the disciplinary committee was James Wanyonyi, a complainant in his 2nd charge.
30. The 1st Respondent submitted that the Claimant’s letter of 27th June 2019 ,having being written and sent on the day of the scheduled hearing adjourned on 13th June 2019; the employer saw the same as a delay tactic, hence no response was given. That on said 27th June, 2019, the Claimant came up with an excuse not to proceed; and having been granted time to prepare and having been furnished with documents, the disciplinary committee deliberated and dismissed the Claimant from employment and that the 1st Respondent was the complainant and not James Wanyonyi.
31. The 1st Respondent submitted that the disciplinary committee was a standing committee and not ad hoc and that it discussed various issues not just disciplinary.

Decision

32. Vide a letter dated 5th July, 2019 the Claimant was issued with dismissal letter for gross misconduct with respect to show cause dated 7th November, 2017 and 19th April, 2017; for reasons of absence from duty without lawful authority on various dates from 8th December, 2016 to 9th March 2019; use of abusive language against the Sergeant at Arms on 31st October, 2016, holding unauthorized press conference within the County Assembly precinct on 31st October 2016 and 16th March, 2017; unauthorized use and disclosure of confidential information on 31st October, 2016 by issuing a public statement addressed to the media; and participating in unauthorized gatherings, within the County Assembly precincts on 31st October 2016 and 16th March, 2017 (NDN 24).
33. The show cause letter dated 19th April, 2017 (NDN – 17) was additional charges to show cause dated 31st March, 2017, which attached the report of unruly conduct by members of staff and the County Assembly of Busia Human Resource Manual and discipline Manual for the Public Service. Prior to



that was a notice to show cause dated 7th November 2016 for gross misconduct of abusive and insulting language against the Sergeant at Arms on 31st October, 2018, unauthorized press conference at the County Assembly's precincts on 31st October, 2016, unauthorized use and disclosure of confidential information on 31st October 2016. On receipt of the letter dated 7th November, 2016, the claimant wrote to the employer and stated there were court orders of 31st October, 2016, 3rd November, 2016 and 11th November 2016 staying the intended disciplinary process and further stated he put on abeyance his substantive response to the letter during the subsistence of the said court orders. The Claimant annexed NDN11a,11b as orders issued to him. I did not find any stay of ongoing or intended disciplinary process save for the order of 10th May 2017 by Hon. Justice Wasilwa. The order of 31st October, 2016 maintained status quo on secondment only.

34. The Claimant further vide a letter dated 23rd November, 2016 stated to the employer he was unable to respond to the show cause of 7th November 2016, for copies of documents were not availed to him and particulars of complainants, witnesses and copies of documents on the press conference and documents were not disclosed. The court found this issue res judicata having been canvassed in Kisumu ELRC No. 23 of 2017 Judgment, holding the disciplinary process not unconstitutional despite the pleading on the notice show cause as indicated above.
35. On 31st March, 2017, the claimant was suspended on the basis that the employer found his response unsatisfactory and further was availed a report on the unruly conduct by members of staff and the County Assembly Busia Human Resource Manual and discipline Manual for the Public Service.
36. On the 13th June, 2019, on being invited for disciplinary hearing the claimant reiterated he had not been supplied with documents and further since 19th October 2016 to date 13th June 2019 he had not received any details whether he was an employee of the County Government Busia (Executive) or the County Assembly. He stated that he denied all allegations.
37. The Claimant was invited for a further hearing date of 27th June, 2019 and vide a letter of even date indicated he would not proceed with the hearing for lack of a charge sheet and documents requested in his earlier letter, again an issue in Kisumu ELRC No. 23 of 2017.
38. The Court noted that the letter dated 13th June, 2019 addressed issues raised by the Claimant. The letter was written by Gabriel Erambo, Chair Staff Advisory Committee and further informed of the hearing of 27th June, 2019, the employer having responded to all concerns by the Claimant.
39. Vide letter dated 21st April 2017, by the Clerk of County Assembly, the Claimant was availed documents and informed of what the charges were as per the show cause(page 59 of supporting affidavit of 23rd November 2022). The burden to prove reasons as valid lies with the employer under Section 43 of the *Employment Act* as read with Section 45 (2) of the Act to extent that the reason must be valid and one which employer believed to exist at time of dismissal. What the court needs to determine is whether the dismissal decision met the reasonable test where Lord Denning in *British Leyland UK Limited v Swift*(1981)I.R.L.R 91 held that:-

‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view...’



40. During cross- examination the Claimant told the court his name was missing from the biometric register as his name had been removed and relied on the Affidavit of the Clerk (page 33-99) of the 1st Respondent's bundle). He admitted the system showed he was absent.
41. The Claimant admitted his contest for secondment was dismissed but stated he did not report thereafter as he was on suspension. The Claimant admitted he received documents under the suspension letter, that the accusation details were disclosed to the union after the first hearing. On re-examination, the Claimant stated they protested removal from the biometrics vide letter of 12th December, 2016 and he was accused of being absent on 8th December, 2016. He stated the register before court was a forgery. He relied on affidavit by Clerk of the Assembly in Petition No. 42 of 2017. Paragraph 44 where he stated from 8th December 2017, his access to the County Assembly had been restricted.
42. Defence witness was the Clerk of the County Assembly. The defence witness stated as per the letter enumerated above the claimant was issued with documents or the charges but the same were not before court. He admitted at the hearing the claimant came with a letter alleging he was not supplied with documents. That the claimant was acquitted on the charge of disclosure of minutes and documents of the County Assembly, the witness disclosed the claimant abused Wanyonyi and evidence was given. He denied that the said Wanyonyi sat in the committee. They relied on press cutting (page 104 of Respondent's documents) as evidence the claimant was at the press conference. The said cutting did not have the name of the claimant. He relied on the biometric register print out on the absenteeism and letter of the Chief Officer. He was aware of complaint on removal from the register.
43. The court holds that the burden of prove of reasons as per section 43 is on a balance of probabilities. The court noted that the Claimant at no time did he respond substantially to the notices to show cause. He relied on a non- existent order of stay of disciplinary hearing as the order issued on 3rd October, 2016 was only on the secondment.
44. Indeed the court sitting at Kisumu(supra) later found the disciplinary process was legal . The court finds that it was probable the claimant was absent from duty on the dates stated taking into consideration his belated introduction of leave form (N D N 26) indicating leave of 15 days from 6th February 2017 to 24th February 2017 a document or information which he could have availed as his defence on the accusation of absenteeism in show case and at the disciplinary hearing. Indeed in previous accusation of absenteeism he produced medical notes though the employer stated he did not justify the absence then. The said leave was not pleaded as defence. The employer denied the leave document (NON 26) stating it was not on the authorized application for leave. On the other hand the court finds that the reasons under the show cause letters and the dismissal would have led any reasonable employer to terminate the employment services of the claimant. The court noted that the Public Service Commission considered the reasons on appeal and found the claimant was guilty as convicted by employer.

On procedural fairness

45. It was not in dispute that the claimant was invited two times for disciplinary hearing, but failed to take up the opportunity for reason of lack of documents. The court finds that full particulars were given and the Claimant failed to respond to the issues and was evasive in his responses leading to the conclusion by the court that it was more probable than not that the allegations were true. The court noted there was prior notice to show cause of absence without authorization dated 10th August 2016 (ND106) before the secondment . The court applying the test of a reasonable employer finds that, the Claimant having failed to report to the new station of work on a secondment; having been invited for hearing two times;



having failed to defend himself and having refused to show cause; any reasonable employer would have terminated his services. The Respondent produced minutes of the disciplinary proceedings indicating the absence of the Claimant. The court noted there were other staff facing similar charges especially of the unauthorized press conference and they appeared for the hearing. The claimant opted out despite admitting at cross examination he was availed documents after adjournment of the 1st hearing and accorded time to prepare for his defence.

46. The Claimant got a second opportunity of appeal at Public Service Commission which considered the case on merit. The court was satisfied the process followed by Public Service Commission was in accordance with their regulations and the Claimant under the said regulation could have filed for review even after the 6 months but chose not to.
47. The court having reviewed the process followed by the employer, the County Assembly, was satisfied that the Claimant was afforded opportunity to be heard but out of stubbornness, chose not to cooperate. The employer met the threshold of Section 41 of the *Employment Act*. The Claimant could only challenge the proceedings if he had sat at the hearing. Having opted out, the issue of representation could not arise. The court finds and determines the termination was lawful and fair.

Issue (iv). Whether Claimant is entitled to reliefs sought.

HELB.

48. The Claimant produced a statement of HELB (NDN 35 (a). The statement disclosed that the County made payments until June 2019 but the remittances were not regular. The court noted up to the pay slip of June 2019, the claimant was deducted Kshs. 5,023.30 monthly for HELB. As at August 2019, in the statement before court due to penalties, the amount had accrued to Kshs.61,861.38/-. There is a credit of Kshs. 173,529.81 (page 237 of Claimant's documents).
49. The court finds that the Claimant is only entitled to Kshs. 61,861.38 on HELB deductions unremitted.

Claim for withheld salary

50. On the claim for withheld salary, there was a letter that the Claimant was to receive half salary as per the advisory of February 2019. Defence witness relied on pay slips for the payment . Defence witness admitted on cross-examination he had no pay slip for the claimant from months April, 2017 to December 2017, and January to June 2018. The Claimant did not produce pay slips for October to December though he produced from July to September 2018 and January to June 2019 (NDN4). The court looked into the NSSF statement. There was no remittance from April, to December 2017 and the entire of 2018. The court found the Respondent produced the said pay slips at pages 43 to 45 of their supporting affidavit filed in court on the 27th November, 2020 for the entire period. The claimant was on half salary. The court finds that the Claimant was not entitled to full salary while on suspension. The payment of half salary and full house allowance was legal. The Claimant having been dismissed from service on reasons upheld by the court he was not entitled to any further salary payment.

Notice Pay.

51. The court holds that the claimant having been dismissed fairly for gross misconduct he was not entitled to notice pay.



LAP Fund contribution

52. The court holds that the claim ought to be pursued with the Fund's trustees as per the law. The court has no jurisdiction over pension claims.

Pro rata salary for 5 days worked in July 2019

53. The 1st Respondent in the submissions conceded to the prayer by the Claimant. The court holds the claimant was confirmed to position of Research Officer scale 10 vide letter dated 1st August 2014 and there was no evidence of having been promoted to any higher position. The reference to Principal Research Officer in the pay slip was explained to be as a result of the public service system with different scales as the counties. Any promotion in Public Service would be competitive and the Claimant did not prove the alleged promotion. The 1st Respondent having conceded to the prayer, the salary is awarded at Kshs. 17,833.33.

NSSF Deduction and NHIF

54. These are statutory bodies. They have their own mechanisms under the enabling statutes to recover monies not remitted. The NSSF deductions are incurred income due to the Claimant and as per the pay slip was deducted. The 1st Respondent should remit the monies for the unremitted months to the statutory bodies. The court has declined in several decisions to order refund of unremitted statutory dues to the employees. The opinion of this court is divided on the issue of unremitted statutory dues. In the past I have held the employee ought to pursue the matter with the statutory body. In Simiyu – Vs Nzoia Sugar Company Limited (2022) e KLR I held that NHIF and NSSF were statutory bodies with powers under the enabling statutes to recover unremitted monies including imposition on penalties and the claimant should lodge claims with those statutory bodies on his remittances. In Lawrence Ngula Kakilingi -vs Bobs Sandwich Bar Limited (2018) e KLR justice Rika held that NSSF deductions should revert to the employee if unremitted. That the employee ought to pursue enforcement with the NSSF under the statutory mechanism granted under the NSSF Act No. 45 of 2023 in rejecting the claim for refund of NSSF contribution . The court has noted there other decisions where NSSF dues were ordered to be refunded or the court availed service pay. The court is persuaded by its earlier position in Simiyu case (supra) as there exists alternative statutory remedies for the Claimant to pursue the NSSF and NHIF dues.

Lap Trust Claim

55. The court takes the same position as in NSSF, the FUND being a pension which is under the Retirement Benefits Authority jurisdiction has clear redress mechanisms.

On Leave Claim

56. The Claimant was on suspension and hence not working from 2017 to 2019 thus not entitled to annual leave.

Summary of decision

57. In summary, the dismissal is held to have been lawful and fair. The Claimant is thus not entitled to compensation for the termination and that includes notice pay. The Claimant was never promoted hence no salary increment as alleged. The Claimant was on suspension on half pay (Basic salary) and housing allowance and having been eventually dismissed was not entitled to the withheld salary as claimed. The court holds that there was evidence of unremitted HELB deductions with balance of



Kshs. 61,861 .38 /- as per the statement as at time of dismissal which is awarded to the Claimant for clearance with HELB.

58. The 1st Respondent conceded to the 5 days' pay claim of Kshs. 17,833.30 and the same is awarded . All other claims on LAP TRUST, NSSF, & NHIF failed on basis that they ought to be pursued with the relevant statutory bodies mandated under the enabling laws. In the upshot, the Claimant's dismissal is held as lawful and fair.

Conclusion

The Claimant has partially succeeded in his claim. The court enters Judgement for the Claimant against the 1st Respondent as follows:-

- a. Payment of unremitted HELB deduction of Kshs. 61,861.30
- b. Prorated 5 days worked in July, 2019 salary of Kshs. 17,833.30
- c. Certificate of service to issue under section 51 of the *Employment Act*
- d. Interest at court rate from date of judgement until payment in full.
- e. Costs of the suit against the 1st Respondent only.

Right of appeal in 30 days.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF JULY 2023.

JEMIMAH KELI

JUDGE

In the presence of: -

Court Assistant: Brenda

Claimant :- Oundo

1st Respondent: Gakuya James

2nd respondent: Wangeci

Application by 1st Respondent

We seek for stay of 30 days

Claimant

We pray to be issued with typed and certified proceedings, judgment and decree.

Court Order.

Stay of 30 days is granted, the Claimant to be availed typed and certified copies of proceedings as well as the judgment and decree in the usual court process.

It is so ordered

JEMIMAH KELI

JUDGE



27/07/2023

