



REPUBLIC OF KENYA



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**Namasake & 2 others v Nzoia Sugar Co. Ltd (Cause 77, 76 & 78 of 2017
(Consolidated)) [2022] KEELRC 50 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 50 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 77, 76 & 78 OF 2017 (CONSOLIDATED)**

**JW KELI, J
APRIL 28, 2022**

BETWEEN

**PHILIP WAMALWA NAMASAKE 1ST CLAIMANT
SHABAN SIMIYU 2ND CLAIMANT
JOSEPH SIFUNA 3RD CLAIMANT**

AND

NZOIA SUGAR CO. LTD RESPONDENT

JUDGMENT

1. Cause No. 77 of 2017 was identified as the test case whose decision will apply in No. 76 of 2017 and 78 of 2017.
2. The Claimant in No. 77 of 2017 by way of a claim dated 11th January, 2017 sought the following reliefs:-
 - a. A declaration that his termination was unfair and/or unlawful.
 - b. An order that the Respondent pays the Claimant the following sums:-Kshs. 380,928/- being 12 months' salary as compensation for unfair and unlawful termination.Kshs. 659,298.46/- being service pay.Kshs.95,232/- being 3 months salary in lieu of Notice.Kshs.472,963/- being unpaid Monday pay.Kshs.2,054,400 being the sum of money under paid to the Claimant for 16 years.Costs of the suitAny other relief the Honourable court may deem just and fit to grant to meet the ends of justice.
3. The 2nd Claimant in No. 76/2017 by statement of Claim dated 11th January 2017 sought the following reliefs:-
 - a. A declaration that this termination was unfair and unlawful.



- b. An order that the Respondent pays the Claimant the following sums:-Kshs. 517,030.20/- being 12 months salary compensation for unfair and unlawful termination.Kshs.497,144.42/- being service pay.Kshs.129,257.55 being 3 months salary in lieu of notice.Kshs.242,367/- being unpaid holiday pay.Kshs.72,000/- being unpaid commuter allowance.Kshs. 72,817.20 being unpaid house allowanceCosts of the suit.Any other relief the court be deem just to grant to meet ends of justice.
4. The 3rd Claimant (Case No. 78/2017) vide a statement of claim dated 11th January, 2017 sought the following reliefs:-
 - a. A declaration that his termination was unfair and unlawful.
 - b. An order that the Respondent pays the Claimant the following sums:-Kshs.517,030.20/- being 12 months' salary as compensation for unfair and unlawful termination.Kshs.497,144.42 being service pay.Kshs. 129,257.33 being 3 months' salary in lieu of noticeKshs. 321,692.54 being unpaid holiday .Kshs.72,000/- being 12 month's unpaid house allowanceKshs.81,828/- being 12 months unpaid house allowance.Costs of this suitAny other relief this Honourable court may deem just to grant to meet the ends of justice.
5. The Claimants filed their statements and documents together with the claims.
6. The Respondent entered appearance and appointed the law firm of Makokha Wattanga & Luyali Associates Advocates to represent it in the 3 claims.
7. The Respondent filed defence, list of witnesses and documents in all the claims and all pleadings dated 1st March 2017.
8. The Claims were consolidated and Claim No. 77 /2017 agreed as the test suit whose outcome would apply in determination of Causes Nos. 76/2017 and 78/2018.

The Claimant's Case No. 77/2017

9. The Claimant Philip Wamalwa Namasake (CWI) told the court he formerly worked for the Respondent and adopted his witness statement dated 11th January, 2017 as his evidence in chief. CWI produced as his evidence list of documents dated 11th January 2017 and filed in court on same date-as exhibits 1-11). CWI told the court that the investigation report dated 26th July, 2016 found there was no conclusive investigation and recommended disciplinary action. That disciplinary hearing was conducted and verdict was to be reinstated with a warning. That he was instead terminated. CWI stated he was paid Kshs.12,000 pending other issues. He was paid NSSF and Provident fund 2011 to 2014 and was not paid provident fund for 2015 – 2016. CWI said he was not paid service pay. That they used to work on holiday. That he had accrued 30 days annual leave by time he was terminated for employment.
10. CWI on Cross examination confirmed he was employed by the Respondent in 1981. That he was going on leave for these years. That he was paid overtime, that he was summoned with others as suspects for causing inatement to transporters to boycott delivery of sugarcane to the factory as per the investigations report. CWI confirmed it was not the first time he had faced disciplinary process and he had faced several.
11. CWI confirmed he was given a fair hearing to appear before the disciplinary committees.



12. CWI confirmed receipt of Kshs.12,348/-. That the total final dues were Kshs.832,088.97. CWI confirmed that he had an outstanding bank loan of Kshs. 548,591/- . CWI confirmed he had no letter from the bank demanding the money 5 years since he left. He told the court he only received messages.
13. CWI confirmed date of termination letter was 18th November, 2016 and only payment under the termination letter not paid was provident fund, 88 days of leave earned plus one month salary. CWI denied that from his contract of employment he could be dismissed with 1 month salary without any explanation.
14. On re-examination Confirmed that out of Kshs. 832,088.97 final dues he was paid Kshs.12,348/-, that the said employer did not inform him of payment to the bank with respect to the loan and that the disciplinary committee did not recommend termination.

Claimant In No. 78/2017

15. Joseph Sifuna Wamalwa (CW2). CW2 told the court he had worked for Respondent from 1991 in security. That he was promoted to Senior Clerk in Human Resource Department from where he was terminated. CW2 adopted his witness statement dated 17th January, 2017 as his evidence in chief. CW2 produced as his evidence list of documents dated 17th January 2017 and marked as exhibits Nos 12-25.
16. CW3 referred to exhibit No e (investigation report) and said no statement was recorded from him. Like CWI, CW2 attended disciplinary hearing after which the committee recommended return to work with a warning. That he was not given a warning letter. After verdict while at home he received a termination letter dated 18th November, 2016.
17. CW2 told the court he was paid Kshs.15,950 but was not paid Kshs. 313,976 said to have been paid to the bank with respect to outstanding loan but the kept on getting notices from the bank.
18. CW2 told the court he worked on holidays and got overtime and during Public holidays when on duty he was paid.

Cross Examination

19. CW2 confirmed payment dues of Kshs. 763,776/- was paid on date , he could not recall. CW2 told the court he did not comment about the PAYE paid of Kshs.213,182/-. CW2 confirmed he had a loan with Miriwa of Ksh. 42,346/- which the company settled, that he had taken goods at super market worth Kshs.72,69/-which was settled by the company, Kshs. 15,950/- benevolent sum remitted to the Sawo Gasha loan of Kshs. 31,081/- .settled by the company. All these items were settled out of his final dues.
20. CW2 confirmed he used to proceed on leave, that salary overtime was paid, he was invited to disciplinary hearing and gave representations that this was not his first time before the disciplinary committee, that he had received several show cause letters. CW2 denied receipt of warning letters but said he had only received cautions.
21. In re-examination, CW2, noted that the last disciplinary Committee had recommended his reinstatements to duty, that on dues only National Bank Loan was not paid.

Shaban Simiyu (CW3) Claim No. 76/2017.

22. CW3 told the court he had worked for the Respondent for 21 years since 2005 to date of termination and started at security then driver. CW3 adopted his witness statement dated 11th January,2017 as



his evidence in chief. CW3 produced list of documents dated 11th January 2017 as exhibits 26-41 . CW3 told the court he was not paid provident fund 2015- 2016. CW3, told the court the disciplinary Committee said he returns to duty with a warning. That he was terminated from service by letter dated 17th November, 2016.

Cross Examination

23. CW3 confirmed that when employed he had been advanced kshs. 76,425/- , CW3 told the court he was not aware Kshs. 85,599 was paid to KRA . CW3 confirmed he had a loan with family bank of kshs.600,000/- which he had been paying, CW3 told the court he had no document to show loan was outstanding but had been receiving messages. CW3 confirmed that since termination the bank had not summoned him for the loan.
24. CW3 confirmed he used to take leave and was paid overtime.
25. CW3 confirmed he was called for disciplinary hearing before termination and had only received one warning before.
26. CW3 confirmed that on 15th July 2013 he had a Notice to show Cause (NTSC) dated 18th July 2013, he got a warning letter on 25th June 2007, on 19th June 2007 he had another warning letter of absenteeism and insubordination . On the last warning letter CW3 told the court he was sick and defended himself before the disciplinary Committee which recommended he be returned to court.
27. CW3 denied the assertion by the Respondent that the Management recommended he be removed from work because of his previous record.
28. The CW3 in re- examination stated that from 18th November 2016 onwards he had not been paid any money or dues.

Defence Case

29. The defence called one witness of fact whose evidence in the lead file applies in all the claims.

Shadrack Nyongesa Masinde (DW)

30. DW told the court that he worked with the Respondent as industrial Relations Manager having joined the company in 2002. DW adopted his 2 statements dated 11th March 2017 and 15th January 2022 as his evidence in chief and produced documents filed by the Respondent as evidence for Respondent.

Claim No.77/2017

31. DW told the court the Claimant was paid Kshs. 607,788.45 as final dues . DW gave the breakdown as follows:-Kshs.12,348.42 paid to account of Claimant by cheque.Kshs.25,095.00 paid to Tranzoia Kabras vide Cheque No. 106029Kshs. 21,751 to Nzoia investment Society vide Cheque No. 106030 .Kshs.548,591 /- paid to Family Bank to clear outstanding loans vide cheque No. 106031.

DW told the court he had annexed cheque scheduled and bank statements indicating the payment.

Claim 76/2017

32. DW told the court Shabaan Makokha the Claimant was paid kshs.295, 064.40/- as final dues with breakdown as follows:-Kshs. 31,222 to Nzoia Kabras vide Cheque No. 106040Kshs.86,067 paid to



Mariwa Self Help Group vide cheque No.106041Kshs.16,500/- to Nzoia Investment vide Cheque No. 106 042Kshs.159,275.40 to family bank vide cheque No. 106043

Claim No. 78/2017

33. DW told the court that the claimant, Joseph Sifuna Wamalwa, was paid total dues of sum of Kshs. 500,593/- and gave breakdown as follows:-Kshs.31,088 to Nzoia Kabras vide cheque No. 106035Kshs.15,950 to Nzoia employees benevolent societyKshs. 42,3666 paid to Mariwa Self Help group vide Cheque No. 106037Kshs. 7,268/- paid to Nzoia investment vide cheque No. 106038Kshs. 453,948.90/- vide cheque No. 106 033

On Claim For Unfair Termination,

34. DW told the court there was fair hearing, that it was true the disciplinary Committee recommended return to work with a warning. The Management did not abide by the disciplinary committee having invoked chapter of the human resource policy and made a decision to terminate the Claimants' services. That there were previous issues.

Cross Examination

35. DW confirmed the Claimants were all issued with show cause letters and there was disciplinary hearing after which it was recommended the Claimants be reinstated but they were instead terminated from work.
36. DW confirmed that the alleged previous issues relied on to terminate their services were not discussed at the said disciplinary hearings. DW told the court they had paid dues and relied on the cheque register and bank statement. DW said he had not produced copies of the cheques. He stated that payment of dues was done.
37. The court gave directions on filing of submissions. The Claimants submissions are dated 5th February 2022 drawn by the law firm of M.A Ochanji – Opondo & Co. Advocates. The Respondent's submissions drawn for the 3 claims separately are all dated 16th February 2022.

Determination

Issues For Determination

38. The Claimant addressed following issues:-
- i. Whether the termination was lawful.
 - ii. Whether the Claimants are entitled to reliefs sought
- The Respondent addressed the following issues:-
- i. Whether the summary dismissal was justified
 - ii. Whether the Claimants are entitled to reliefs sought.
- The court finds both parties issues proper for determination and consolidates the same for purposes of this judgment as follows:-
- a. Whether the termination of employment was lawful
 - b. Whether the Claimants are entitled to reliefs sought.



39. The Claimant (CW1) (lead file) letter of termination of service is dated 18th November 2016. In the letter it is stated that the Claimant had been suspended from the company services after his unsatisfactory rejoinder in letter dated 19th May 2010 and referred to the subsequent disciplinary meeting of 4th August 2016 where he was facing a case of colluding with cane haulage contractor drivers causing the company to lose in down time and money. It is stated that ‘the action contravened obligation to the employer and duty on contract an offence punishable by summary dismissal as stipulated under the Employment Act 2001 Clause 44 (3), Staff Administrative Clause 10 (g) and code of conduct and ethics clause 53 (b) 57 & 87 (i). That the committee in their deliberations and having considered your case -vs- - avis- your response and presentation concluded that you were not remorseful and has lost trust in you as a worker. It is on this ground the Management has decided to terminate your services with effect from 18th November, 2018.’
40. The letter states that the Claimant was to be duly paid as follows:-
- i. Salary for the days worked up to and including 18th November, 2016.
 - ii. One month’s salary in lieu for termination of notice
 - iii. Eight eight (88)days pay in lieu of leave earned and not taken
 - iv. Leave travelling allowance Kshs. 5000/-
 - v. Provident fund dues as per the KBA rules
- The above benefit (i-iv) will be paid to you less any company indebtness and upon successful clearance. A certificate of service will be issued on request”.
41. The minutes of the disciplinary Committee were not produced. However, it was not in dispute the Claimants attended hearing by junior disciplinary Committee and the said Committee recommended they be returned to work with a warning.
42. DW in his statement adopted as evidence at paragraph 10 stated ‘after consideration of services issued and his past records recommended for his dismissal for employment with effect from 20th December 2016”. At paragraph 11 DW stated that ‘the Claimant herein was involved in several disciplinary issues that made it unattainable to continue working for the company”. DW produced defence (exhibits 1 to 16) of warning and show causes letters ending with a reinstatement. DW said the decision to terminated the services of the Claimant was consistent with the law and their Human resources Manual .
43. The Claimant submits that the disciplinary hearing report was not availed to them so they can appeal. That the Claimants were terminated over issues not before the disciplinary committees, that the letters of termination for all the claimants state they were not remorseful. That even if the decision terminate was based on proper reasons, the Claimants records of warnings could not be used based on Article 8 of the CBA which required all previous warnings of over 1 year to be disregarded at the hearing.
44. The defence in submissions submit that the Committee found the Claimants to have participated in incitement of other workers and working against employers obligation but the disciplinary Committee recommended that they be reinstated(returned to work) with a warning . This court finds that this underlined part of the submission that there was a finding of the disciplinary committee of incitement misleading. There was no such evidence by DW either in testimony or statement. Counsel should desist introducing new evidence in submissions. This is an attempt to mislead the court. Indeed the said report of the Junior disciplinary committee was not produced and DW was clear the decision to



terminate the services of the Claimants was based on prior issues of disciplinary which issues were not discussed at the disciplinary Committee.

45. It is the finding of this court that the termination on ground of not being remorseful was not founded. The investigation report dated 26th July, 2016 was inconclusive and did not find who was culpable for the incitement. The disciplinary Committee report having not been produced, and the parties having been in agreement that the disciplinary committee recommended the Claimants be returned to work with a warning the court finds the reasons given in the letter of termination not justified or valid. The Claimants would not have been expected to be remorseful over the alleged incident over which the investigation report did not find them culpable. Whereas the management has authority to terminate services of employees, it must only do so for valid and justifiable reasons. The termination of the Claimants was not lawful. The court is guided by the provisions of Section 43 of the *Employment Act* that the reasons for termination should be valid and justifiable even in the cases of summary dismissal. The court's position is supported by decision cited by the Claimant of Court of Appeal in *Kenya Revenue Authority-vs- Reuwel Waituaka Gitahi & 2 others* (2019) eKLR cited in *Joseph Irungu Kimani -vs Kensalt Limited* by Justice Ndolo J adhere the employer's burden under Section 43 was defined in following terms:- " the standard of proof is one on balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it genuinely believed to exist, causing it to terminate the employee's services."
46. The court having found the termination was unlawful will proceed to consider reliefs sought for each Claimant.
47. The Claimant's submit that they had all been in employment for over 12 years and according to Article 9 of the CBA (exhibit No. 11) yet the termination letter mentions only one month pay in lieu of the said Notice and even this was not paid. DW produced evidence on payment of dues of all claimants. The Claimants admitted to knowing about debts cleared and admitted they got payment of remaining amount about deductions into their accounts. They all admitted that the banks had not sued them 5 years down the line over the said loans. They alleged to have received messages but none was produced in court. On a balance of probability the Responded proved payment of the stated final dues to the Claimants. The termination having been found to be unlawful the court proceeds to consider remedies.

Notice pay

48. The court considered the CBA (exhibit 11) produced by CW1. Article 9 (d) states:- " if an employee has been in employment for 12 years and above consequently and the employees services are to be terminated, the employee shall be served with a notice of 3 months or be paid a sum of money equivalent to 3 months wages in lieu of notice." There was no notice but letter of termination referred to one month notice. The CW1 had worked for 36 years as Field Assistant of the Respondent. CW2 had served from 1991 to 2016 making it approximately 25 years, CW3 worked from 2005 making 21 years. They were all entitled to 3 months Service Pay. The document produced as computation of dues reflects one month notice in lieu. The claimant is awarded 2 months salary notice in lieu.

Service pay

49. The Claimants claim service pay under Section 35 (b) of the *Employment Act*, 2007 an employee who is under a registered provident fund is not entitled to service pay. The Claimants were under Provident Fund hence not entitled to Service pay. Any disputes they have with the fund should be raised with the relevant authority.



Compensation for unlawful termination

50. On the compensation for unlawful termination. Section 49 proves for criteria the court considered the Claimants past record with employer, the fact that there was a disciplinary hearing, the long period of service. The amount award will be considered in case to case basis.
51. Philip Namasake Claimant in 77/2018 Notice pay - awarded unpaid 2 months @42,519.60 total = Kshs.85,039.20 Service pay – Not awarded for given reasons Unpaid holiday pay – The Claimant told the court he was paid Claim for underpayment – the claimant seeks Kshs.2,054,400/- being the sum of money underpaid to the Claimant in 16 years. No evidence was adduced on that claim. The court also notes that any such claim is limited to 3 years under Section 90 of the Employment Act. The claim is dismissed.
- Compensation for unlawful termination. The Claimant served for 36 years, the Claimant is unlikely to get a similar employment . the Claimant admitted he had failed several disciplinary proceedings before . The court considering all the above factors finds 6 months salary compensation adequate. Last payslip being kshs. 42519 60x6 = 255,117.60. the court determines and awards Kshs. 255,117.60 as compensation for unlawful termination.
52. Total awards to Philip Namasake
- 2 months Notice pay $42519.60 \times 2 = 85,039.20$
- 6 months salary $42,519.60 \times 6 = 255,117.60/-$.
53. Shaban Simiyu
- Notice pay is awarded for 2 months as per September 2016 pay slip @61601.97x2 = 121,203.94.
- Compensation for unlawful termination- The claimant had served for approximately 25 years before dismissal, considering length of service, previous warnings in employment and fact that he may not get similar or equivalent employment, the court consider 6 months compensation adequate calculated @ September 2016 salary of Kshs.61,601-97x6 = 369,611.82. the court determines and awards kshs.369,611.82 as compensation for unlawful termination.
54. Claimant in 78/2017 Joseph Sifuna Wamalwa
- Notice pay – awarded equivalent of 2 months salary of October 2016 pay slip @ 58,283. 36x2 = Kshs.116,566.72/-
- Compensation for unlawful termination . The claimant served 21 years in employment; Respondent produced evidence of provisions several disciplinary issues. He with his co-claimants were taken through the disciplinary hearing which had recommended a warning. The Claimant is unlikely to get a similar or equivalent job. The court finds compensation of 6 months salary adequate . thus Kshs. 58,283.36x6= 349,700.16. the court determines and awards 349,700.16 as compensation for unlawful termination.

Conclusion and Disposition

55. The court found the termination of employment of the Claimant to have been unlawful and makes awards as follows:-
- Philip Namasake (77/2017)
- a. Notice pay for 2 months (@ 42519.60 x2) awarded for the sum of 85,039.20/-



- b. Compensation for unlawful termination equivalent of 6 months salary ($42519.60 \times 6 = 255,117.60/-$) awarded for the total sum of kshs. 255,117.60/-
Shaban Simiyu (76/2017)
- a. Notice pay for 2 months (@ $61601.97 \times 2 =$) awarded for the sum of 121,203.95/-
- b. Compensation for unlawful termination equivalent of 6 months salary is awarded for the sum of ($62601.97 \times 6 =$) kshs. 369,611.82/-
Joseph Sifuna Wamalwa (78/2017)
(a) Notice pay of equivalent of 2 months last salary(@ $58\,283.3 \times 2 =$) is awarded at the sum of kshs. 116,566.72/-
- c. Compensation for unlawful termination equivalent of monthly salary of 6 months (@ $58,283.36 \times 6$) is awarded at total sum of kshs. 349, 700.16/-.
56. (Above award amount for the 3 claimants subject to statutory deductions of PAYE only)
57. The Respondents to pay costs of suit to Claimants.
58. Interest awarded at court rate from date of this judgment until payment in full if amount is not settled with 30 days from today.

DATED, SIGNED AND DELIVERED BUNGOMA THIS 28TH DAY OF APRIL 2022

J. W. KELI,

JUDGE.

IN THE PRESENCE OF :-

Court Assistant : Brenda

Claimants: Present in person and in absence of their advocate

Respondent: Absent

