



Simiyu v Nzoia Sugar Company Limited (Employment and Labour Relations Claim E005 of 2021) [2022] KEELRC 1758 (KLR) (12 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1758 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CLAIM E005 OF 2021**

**JW KELI, J
MAY 12, 2022**

BETWEEN

STEPHEN BUKHEBI SIMIYU CLAIMANT

AND

NZOIA SUGAR COMPANY LIMITED RESPONDENT

No claim for a refund of the un-remitted deductions made on one’s payslip that are owed to statutory bodies (e.g. NHIF, NSSF and the RBA).

Claimants that sought a refund of un-remitted funds to statutory bodies made on their payslips ought to lodge a claim with the statutory body which had the mandate and powers to levy the appropriate penalties.

Reported by John Ribia

***Labour Law** - employment – employer & employee relationship - claim for payslip deductions that were unremitted to statutory bodies - whether a claimant had the power to claim for a refund of funds that were deducted from their payslip payable to statutory bodies such as NHIF, NSSF and RBA but were unremitted to those bodies.*

***Labour Law** - employment –employer and employee relationship - claim for deductions that were unremitted to discharge the claimant’s bank loans - claim for deductions that were unremitted to a community based organisation - whether a claimant had the power to claim for a refund of funds that were deducted from their payslip that were payable to banks as a discharge of loans but were not remitted to the banks - whether in an employment claim a claimant had the power to claim for a refund of funds that were deducted from their payslip that were payable to a community based organisation (CBO) but were unremitted to the CBO.*

Brief facts

The claimant, a retired employee, filed claim against the respondent, his former employer. The claimant sought refund of unremitted deductions with interest and salary arrears and unpaid gratuity. It was the claimant’s case that he was entitled to gratuity that was not paid, a 6% salary increment and a 6% pension increment which was not paid.



The claimant contended that the respondent never remitted the deductions made to his pay to the various organisations and as a result sought the refund of the deductions. He contended that he respondent deducted from the claimant's salary totaling to KES. 23,800/- which they failed to remit to NHIF; and KES. 30,600 which the respondent failed to remit to NSSF; and KES.119,100, deducted at KES.1,000/- per month, which was never remitted to the Bumula Nzoia Employee Bunze Contribution (CBO). The claimant also sought payment of unremitted loan deductions and the interest accrued on the same.

Issues

- i. Whether an employee had the power to claim for a refund of funds that were deducted from their payslip that were payable to statutory bodies such as NHIF, NSSF and RBA but were not remitted to those bodies.
- ii. Whether an employee had the power to claim for a refund of funds that were deducted from their payslip that were payable to banks as a discharge of loans but were unremitted to the banks.
- iii. Whether an employee had the power to claim for a refund of funds that were deducted from their payslip that were payable to a community based organisation (CBO) but were unremitted to the CBO.
- iv. Whether based on the facts of the instant case the claimant was entitled to receive damages for a salary increment that was not effected.

Held

1. There was no specific mention of salary increment. The proposed increment was not automatic but subject to the respondent's financial status improving. The respondent's board approved payment of annual increment to management staff from July 1, 2017 when finances allowed. The Collective Bargaining Agreement of 2018 provided for the salary increment but only for unionisable staff and the claimant was not among them. He was in management.
2. The claimant retired voluntarily. The increment was subject to the financial situation of the company improving. There was no evidence before the court that other management staff benefited for the said increment excluding the claimant. The claim for 6% salary increment was not proved and the same was dismissed. The claim for 6% pension arrears also failed.
3. The claimant confirmed that he was paid pension by the Trustee. The claimant's final dues and gratuity was KES.56,836 and was held by the respondent. The final dues gross was KES.59,063.50, less tax, a total KES.56,836.05. Gratuity and final due was subject to statutory deductions and amount payable was KES.56,836.05.
4. NHIF was a statutory body with powers to recover unremitted dues from the respondent if not remitted. It was not for the court to recover NHIF dues in a claim by the employee.
5. The claimant ought to have lodged a claim with the statutory body which the mandate and powers to even levy penalty under section 14 of the NSSF Act (Cap 258). The court had no basis of interfering with the work of the statutory body on its mandate. Only the NSSF could impose penalties for non-remittance. The claim for NSSF contribution and the penalty should have been pursued with the statutory body. The entire claim for unremitted NSSF dues and penalties were declined.
6. Like NSSF, the Retirement Benefits Authority regulated affairs of pension including disputes on payable pension and any penalties. The claimant ought to pursue his claim under pension with the authority. The court had no basis for interfering with statutory duties of the Authority. The court dismissed all the claims on pension. The claimant had remedy under the Retirement Benefits Authority of Kenya pursuant to the provisions of the Retirement Benefits Act.
7. On basis of an admission by the respondent of having never remitted the deducted monies to the Bumula Nzoia Employee Bunze Contribution (CBO). The claimant was entitled to a refund of Kshs. 119,100 by the respondent.
8. The respondent had an MOU with the National Bank of Kenya and Family Bank. The respondent failed to remit deducted loan amounts. It was the obligation of employer to keep records and produce them in court. By failing to produce entire payroll on recoveries the employer failed in its obligation.



- The claim for National Bank outstanding loan and accrued interest was provided on balance of probabilities and it was awarded as prayed.
9. The respondent had an obligation to produce a payroll indicating recoveries and remittances. It was aware of the claim from the demand letters and at time of filing response to the claim. The tabulations of unremitted loan deduction were secondary evidence having been extracted. The claim by the claimant for unremitted loan and interest of KES. 4,350,000 was not rebutted.
 10. The claimant was entitled to payment of Kshs.1,412,614/- due to National Bank of Kenya and KES.4,350,000 due to Family Bank being unremitted deductions and accrued interest on the loans at time of filing the suit.

Claim partly allowed.

Orders

- i. *The respondent was ordered to pay*
 1. *gratuity and final dues payment Kshs.56,836;*
 2. *unremitted National Bank of Kenya loan deductions and accrued interest of Kshs.1,412,614;*
 3. *unremitted Family Bank deductions plus interest accrued on the bank loan for the sum of Kshs. 4,350,000; and*
 4. *Interest on a, b, and c above from date of filing suit at court rate until payment in full.*
 5. *The respondent was to bear costs of the suit.*

Citations

Statutes

Kenya

1. National Social Security Fund Act, 2013 (Act No 45 of 2013) section 14 - (Interpreted)
2. Retirement Benefits Act, 1997 (Act No 3 of 1997) In general - (Cited)

Advocates

None mentioned

JUDGMENT

1. The claimant, a retired employee, through the law firm of Onyando & Co Advocates filed a claim dated September 16, 2021 against the Respondent his former employer seeking Refund of unremitted deductions with interest and salary arrears and unpaid gratuity.
2. The claimant in addition filed his witness statement dated September 16, 2021, list of documents dated September 16, 2021 and bundle of documents.
3. The respondent entered appearance through the law firm of Arunga Risper & Co Advocates, filed response dated October 28, 2021 to the statement of claim. The respondent further filed witness statement of Geoffrey Wafula Juma dated November 15, 2021 and list of documents dated November 15, 2021 together with the bundle of documents .

The Hearing.

4. The claimant was the only witness of fact in his case. He testified on oath, adopted his witness statement as his evidence in chief and produced his evidence of documents marked exhibits 1 to 11 and was cross examined by counsel for the respondent.



5. The respondent called one witness of fact Geoffrey Wafula Juma who testified on oath, adopted his witness statement as evidence in chief, produced the respondent's evidence of documents as exhibits 1-6 under list of documents dated November 15, 2021

Claimant evidence under Cross examination

6. The claimant confirmed that the mode of salary payment in 1991 was always through the bank. The claimant did not have prove that NHIF deductions had not been remitted. The claimant relied on the NSSF statement (exhibit 6).
7. The claimant said his evidence of the outstanding loan he had was the produced loan statements for Family Bank and National Bank though not updated.
8. On claim for salary increment by 6% the claimant relied on Board Resolution dated September 11, 2017 and October 6, 2017. The claimant agreed there was no specific mention of salary increment. The claimant agreed that the increment was not automatic but was to effect when the financial status of the company improves.
9. The claimant produced a check off loans agreement between Family Bank and the respondent when asked about the memorandum of understanding on the loan (MOU) check off. The claimant did not produce agreement between the respondent and National Bank.
10. The claimant told the court that the respondent did not do remittances for March 2017 . He said the MOU requires that when one leaves the company the respondent continues payment on behalf of retired staff. He said the MOU had obligations of employer to offer administrative support to the bank by deducting and remitting monies to the bank. On whether the obligation ceased on retire the claimant said under the MOU they were supposed to notify the bank and also make payment.
11. The claimant confirmed that his retirement was early and voluntary. The claimant received monies from trustees upon retirement. He received Kenya Shillings Two million and Five Hundred from the Trustees of the employer retirement benefits scheme. He said that the respondent was yet to pay him anything. The claimant told the court he had evidence of being listed under RBA. The claimant left employment on November 1, 2019.

Respondent's evidence on Cross-Examination

12. Witness of fact – Geoffrey Wafula Juma (DW 2). He adopted his witness statement dated November 15, 2022 as evidence in chief and produced documents under list of documents for the respondents.
13. During cross examination by counsel for claimant, DW confirmed he was aware the company was to deduct on behalf of employees and remit to the Bumula Nzoia Employee (CBO) and further confirmed he was aware the deducted monies was not forwarded to the CBO .DW stated that the CBO tabulates moneys and pays members and he was not aware if the claimant made claim to CBO and was not paid.
14. DW confirmed the statement he had given for family Bank and National Bank was their workout and not from the bank. DW also agreed the statement on NSSF was their tabulations and not NSSF. DW agreed that the amount retained on behalf of the Family Bank was deducted from the claimant's salary and confirmed they still retained the money. This was the same position with National Bank.
15. DW confirmed they had MOU with the banks on how the money was to be deducted. DW said that the MOU stated that the employer act on behalf of the bank to deduct money and remit. DW confirmed that on deductions the money was to be remitted. DW confirmed on non-remittance the employer was



- to notify the bank. DW confirmed that he was aware the bank on issuance of loans it charges interest and on default .
16. DW confirmed that in event of non- remittance interest charged on loans it would be a mistake of employer. DW confirmed that the bank on several occasions reminded the respondent to pay remittance . DW confirmed there were several demand letters Even before the claimant retired. DW could not confirm from what period the banks had started making demands for money from the respondent. DW was referred to the Family Bank statement to the claimant of August 3, 2017 at Kshs 2,943,901 and currently at Kshs 4,350,000 and agreed that was the fault of the respondent. He also took responsibility on behalf of the respondent from National Bank loans increase from 1,168,322.46 as at 2017 and as at time of filing claim at Kshs 1,412,614/-.
 17. DW agreed that if the respondent had paid the retained amounts the interest would not accruing.
 18. DW said they manage payroll and that is where he got the figures presented in court.
 19. DW confirmed that the claimant was in employment in the period of October 2019 to November 1, 2019 and said he relied on payroll and it indicated that the claimant was not deducted monies in the period. DW said as per records of payroll they tabulate amounts recovered and supported to their end.
 20. DW confirmed there was a MOU with the banks to deduct as long as employee was in employment and the employer was deducting in the period DW said the claimant was in better position to know when the loans were taken. On being asked why the respondent had left out the periods 2011-2017 and October 2018 to November 1, 2019 in its tabulation presented to court , DW said they had done tabulation for the period of unremitted amounts. DW confirmed he had not produced payroll of recoveries not remitted. DW confirmed the remittance had led to the claimant being listed to CRB.
 21. DW confirmed the claimant is not entitled to 6% salary arrears on pension. DW confirmed he had no document for the Board concerning the increment as per letter of September 11, 2017. DW said he had no document concerning memo of October 6, 2017.
 22. DW confirmed he was aware the CBA of 2018 had increment of salary which was after the increment of 2017. DW confirmed the CBA was implemented and staff paid salaries . DW said the CBA was for unionisable employees and not management who did not get increment. DW said claimant would have been entitled if increment was implemented for management. DW confirmed it was the Board of Directors who decides on salary increment. DW denied that the document emanated from the Board hence claimant was entitled to the increment of 6%.
 23. On NSSF claim the witness said they had since done remittances and the document was not in court. DW confirmed he was aware of NSSF penalty of 5% and confirmed the same was to the employer. DW could not confirm what happens on interest for unremitted monies to NSSF. Counsel for the claimant was referred to section 14 of *NSSF Act* on Penalty for non- remittance. DW confirmed that it was not oversight to have left out month of April 2017 in pension tabulation amounting to Kshs 34,466.00/-. The witness admitted 12% interest on unremitted pension under section 53A of CBA Act is applicable.
 24. DW confirmed they got a demand notice before the claim was filed. DW confirmed they have not paid the admitted amount . DW confirmed he was aware the banks were charging interest on defaulted loans. DW said this was because the matter was in court.
 25. DW said claimant voluntarily retired and ought to have made arrangements on finances before retirement. DW said they retained the money because the financial position of the company was poor. DW confirmed the respondent was recently paid Kshs. 500 million and added it was for farmers.DW



said the respondent's unable to pay salaries for January 2021 to date. DW had no evidence of the non-payment of salaries.

26. DW said the claimant was entitled to interest relative to items stated and left issue of costs to its advocates.

Submissions

27. The claimant filed written submissions through its Advocates Onyando & Co Advocates dated February 10, 2022.
28. The respondent filed written submissions drawn by Risper Arunga & Co Advocates and dated March 15, 2022.

Determination

29. There is only one issue for determination in the instant dispute being whether the claimant is entitled to the Reliefs sought of :-
- a. Gratuity and final due payment of Kshs 59,063.53/-
 - b. Unremitted NSSF contribution for 13 months.
 - c. Unremitted NHIF contribution for 14 months at 6% salary arrears for 28 months.
 - d. 6 pension arrears for 28 months.
 - e. 12 pension arrears an employer contribution for 12 months.
 - f. Unremitted voluntary pension contribution for 30 months
 - g. Unremitted pension
 - h. Unremitted Bumula Nzioa employee Bunze (CBD) contribution of Kshs 119,100/-
 - i. unremitted National Bank of Kenya deductions Kshs 1,412,614/-
 - j. Unremitted Family Bank Ltd deductions Kshs 4,350,00/-
 - k. interest on pension not paid at 12.5%.
 - l. Interest on NSSF not paid at 5%.
 - m. Cost and interest
 - n. general damages for harassment.

Decisions

30. On claim for 6% salary arrears of Kshs 32,496/- . During cross examination the Claimant relied on the Board Resolution dated September 11, 2017 and October 6, 2017. The claimant agreed there was no specific mention of salary increment. The claimant agreed the proposed increment was not automatic but subject to the respondent's financial status improving.
31. DW confirmed he had no document cancelling the Board Memo of October 6, 2017. The said Memo stated that the Board in its 149th sitting approved payment of annual increment to management staff from July 1, 2017 when finances allow. DW confirmed the CBA of 2018 had increment but for only unionisable staff and the Claimant was not among them. He was in management.



32. The court notes the claimant retired voluntarily as indicated in letter dated October 15, 2019 (DOC No 1 on claimant's document). This issue of voluntary retirement was not dispute. In the two documents Memo dated September 11, 2017 and October 6, 2017 it is apparent the increment was subject to financial situation of the company improving. There was no evidence before the court that other management staff benefited for the said increment excluding the claimant.
33. The court finds and determines that the claim for 6% salary increment is not proved and the same is dismissed.

Claim for 6% pension arrears

34. In view of the finding that the claim for salary increment was not proved this claim for 6% Pension Arrears fails.

Claim for gratuity and final dues payment for Kshs 59,063.50/-

35. The claimant told the court he was entitled to gratuity of Kshs59,063,.50 not paid. The claimant confirmed he was paid pension by Trustee. The respondent is witness (DW) told the court that the claimant's final dues and gratuity was Kshs56,836/- and is held by the respondent. The respondent produced the working out of the final dues (document No 5 of the respondent's documents). The working out indicates the final dues gross is Kshs59,063.50 less tax total Kshs56,836.05.
36. The court finds and determines that gratuity and final due is subject to statutory deductions and amount payable is Kshs56,836.05/-.

Claim for Unremitted NHIF Contribution.

37. The claimant submits that the respondent in its tabulation have technically left out deductions made from the claimant's salary totaling to Kshs 23,800/- which they failed to remit to NHIF. The respondent did not submit on this issue but stated deductions to NHIF were remitted.

The court finds that NHIF is a statutory body with powers to recover unremitted dues from the respondent if not remitted. It is not for the court to recover NHIF dues on claim by the employee. The claim is dismissed on that ground.

On Unremitted NSSF Contributions for 13 Months and Penalties.

38. The respondent told the court that the unremitted amount is for the sum of Kshs.30,600/- while the claimant said it was Kshs 44,200/- .
39. The court find that NSSF is a statutory body with powers to recover unremitted monies from the employer. The claimant ought to have lodged a claim with the statutory body with the mandate and powers to even levy penalty under section 14 of the NSSF Act (cap 258) as cited by the claimant. The court has no basis of interfering with the work of the statutory body on its mandate. Only the NSSF can impose the said penalty for non-remittance.
40. Consequently the claim for NSSF contribution and the said penalty should be pursued with the said statutory body. The entire claim for unremitted NSSF dues and penalties are declined on that ground.



Claims Under Pension

41. Just like NSSF, the retirement Benefits Authority regulates affairs of pension including disputes on payable pension and any penalties. The claimant ought to pursue his claim under pension with the said authority. The court has no basis for interfering with statutory duties of the Authority.

42. The court hereby dismisses all the claims on pension on basis of the foregoing reasons. The claimant has remedy under the Retirement Benefits Authority of Kenya pursuant to the provisions of the *Retirement Benefits Act*.

Claim for unremitted Bumula Nzioa Employee (Bunze) (CBO) Contribution of Kshs119,100/-

43. DW told the court the claimant ought to pursue claim with the CBO. The Claimant said he was deducted Kshs1,000/- per month for the CBO total Kshs119,100 but the same was never remitted. During cross -examination the respondent's witness admitted that he was aware the amount was deducted and not remitted to the CBO.

44. On basis of that admission by DW of the respondent of having never remitted the deducted monies to the said CBO, the court finds that the claimant is entitled to refund of Ksh 119,100/- by the respondent.

Claim for unremitted National Bank of Kenya and Family Bank loan deductions with accrued interest

45. The respondent's witness admitted there existed MOU with the bank to deduct and remit money for staff for issued loans. The respondent in its statement calculates the unremitted amount at Kshs270,000/- (exhibit No 1). The claimant during cross-examination told the court remittances to the bank was not done for 2017. That on retirement of the employee, the employer ought to have notified the bank. The respondent produced (exhibit No 2) as amount owed to Family Finance Bank. The respondent confirmed the amounts stated under exhibits (1) and (2) were there own workings and not from the bank. The respondent admitted they continue holding the monies due to the banks. The respondents admitted they had MOU with the banks where obligations of employer is deduct money on behalf of the bank and remit.

46. The witness told the court in event of non-deductions they communicate to the bank. He confirmed he had no such communication. The witness confirmed that the bank had sent reminder to respondent to remit the payments .

47. The respondent's witness was shown the statement of Family Bank as at August 3, 2017 at Kshs 2,943,901/- and as time of filing suit at Kshs4,350,000 and admitted that the interest accrued was the fault of respondent. Similarly outstanding loan balance of National Bank of Kenya at Kshs 1,168,323.4 as at time of filing claim at Kshs1,412,614 and again the witness said Respondent was to blame for accrued interest.

48. Respondent's witness said he got the outstanding figures from the payroll which they manage. It was indicated the deductions from Family Bank were for October 2017 to October 2018. Respondent's witness confirmed the claimant was in employment in the period October 2018 to 1st November 2019. DW confirmed he had payroll for the period and said according to them the Claimant was not deducted in the period.

49. DW did not produce payroll for recoveries not remitted. The claimant produced letter dated June 25, 2020 indicating arrears outstanding as at that date for Kshs 1,309,898.15 from National Bank. The claimant produced Family Bank Statement dated August 3, 2017 indicating balance of Kshs 2,943,901. The claimant produced payroll code report of November 8, 2013. Family Finance Bank Loan recovery



for Kshs70,096. As per payslip of July 2019 then Family Bank Loan Balance Kshs 1,923,941.00. The claimant submits that the respondent selectively tabulated for only nine months (in 2019) and failed to tabulate for period 2015 to 2018 with National Bank of Kenya loan.

50. The court finds and determines the respondent had MOU with the National Bank of Kenya and Family Bank as admitted by DW and also from documents produced by the claimant. That the respondent failed to remit deducted loan amounts. It is the obligation of employer to keep records and produce them in court. By failing to produce entire payroll on recoveries the employer failed in its obligation.
51. The court find and determines that the claim for National Bank outstanding loan and accrued interest is provided on balance of probabilities and the same is awarded as prayed of Kshs 1,412,614/- being outstanding loan arrears inclusive of the charged interest.
52. On the claim for Family Bank again the respondent had an MOU with the Bank on deductions by check off. The respondent indicated the tabulation at Kshs780,000 as unremitted amounts. Evidence was produced by the claimant that as at August 3, 2017 the outstanding loan balance was Kshs2,943,99. The claimant submits that due to non-remittances of deducted monies, the bank has added interest and the outstanding loan arrears as at September 16, 2021 was Kshs4,350,00/- . Again the respondent had obligation to produce payroll indicating recoveries and remittances. It was aware of this claim from the demand letters and at time of filing response to the claim. The court finds and determines that the tabulations out unremitted loan deduction are secondary evidence having been extracted. The court finds the claim by the claimant for unremitted loan and interest of kshs 4,350,000/- is not rebutted.
53. The court finds and determines that the claimant is entitled to payment of Kshs1,412,614/- due to National Bank of Kenya and Kshs4,350,000 due to Family Bank being unremitted deductions and accrued interest on the loans at time of filing suit.

Conclusion and Disposal

54. The court having made findings for the unremitted bank loans and the CBO contributions and gratuity monies the following awards are now made for the claimant against the respondent :-
 - a. Gratuity and final dues payment Kshs56,836/-.
 - b. Payment of unremitted National Bank of Kenya loan deductions and accrued interest of Kshs1,412,614/-.
 - c. Payment of unremitted Family Bank deductions plus interest accrued on the bank loan for the sum of Kshs 4,350,000/-.
 - d. Interest on above(a,b,c) sums of money from date of filing suit at court rate until payment in full.
 - e. The respondent to bear costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF MAY, 2022

J.W. KELI,

JUDGE.

In the presence of:-

Court Assistant : Brenda Wesonga



Claimant: Present

Respondent : Absent

