



**Saina v Kaimosi Tea Estates Ltd (Cause 30 of 2021)  
[2022] KEELRC 13034 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13034 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 30 OF 2021  
JW KELI, J  
OCTOBER 27, 2022**

**BETWEEN**

**JOSEPH KIPYEGO SAINA ..... CLAIMANT**

**AND**

**KAIMOSI TEA ESTATES LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant vide statement of claim dated 11<sup>th</sup> May, 2017 and received in court on the 17<sup>th</sup> May 2017 sought the following reliefs against the Respondent:-
  - a. A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated.
  - b. The sum of Kshs 5,389,205.40/- as set out in the Claim.
  - c. Certificate of Service.
  - d. Cost of this suit and interest at court rate from the time of filing suit until payment in full.
  - e. Any other further and better relief the Honourable court may deem just and fit to grant.
2. The Claimant filed together with the statement of claim Verifying Affidavit of Joseph Kipyego Saina sworn on the 11<sup>th</sup> May 2017, Claimant's issues for determination dated 11<sup>th</sup> May, 2017, Claimant's list of witnesses dated 11<sup>th</sup> May 2017, Claimant's witness statement dated 11<sup>th</sup> May 2017, Claimant's list of documents dated 11<sup>th</sup> May 2017 together with the bundle of documents.
3. The Respondent entered appearance through the law firm of Wachira Wanjiru & Co. Advocates and on 1<sup>st</sup> September 2017 filed Memorandum of Reply dated 31<sup>st</sup> August 2017 with Respondent's list of documents and the bundle of documents.



4. The Claimant on 20<sup>th</sup> September 2017 filed reply to the Respondent's Memorandum of Reply dated 19<sup>th</sup> September 2017.
5. On the 10<sup>th</sup> April 2018, the Respondent filed Notice of change of Advocates dated 10<sup>th</sup> April, 2018 replacing Wachira & Wanjiru Company Advocates with Wachira Wekhomba Aim & Company Advocates together with list of witnesses dated 10<sup>th</sup> April, 2019, witness statement of Isaac Origi dated 10<sup>th</sup> April 2018 and Joshua Kathini dated 10<sup>th</sup> April 2018.
6. On the 28<sup>th</sup> January 2022 the Claimant filed Notice to produce dated 24<sup>th</sup> January, 2022 .
7. The Respondent filed further list of documents dated 13<sup>th</sup> May 2022.

### **The Hearing**

8. The Claimant's case was heard on the 14<sup>th</sup> March 2022 with the Claimant, Joseph Kipyego Saina, testifying on oath as witness of fact and adopting his witness statement dated 11<sup>th</sup> May, 2017 as his evidence in chief. The witness (CW) produced as his evidence documents under list of documents dated 11<sup>th</sup> May 2017 as exhibits marked 1-4 . The witness was cross-examined by counsel for Respondent . The Claimant closed his case same day.
9. The defence case was heard on same date with Joshua Kathini (RW) testifying on oath as witness of fact for the Respondent RW adopted his witness statement dated 10<sup>th</sup> April, 2018 as his evidence in chief. RW amended his statement on date claimant left employment from 20<sup>th</sup> July 2018 to read 20<sup>th</sup> July 2015 and the amendment was allowed. RW produced as evidence of the Respondent documents under list of documents dated 31<sup>st</sup> August 2017 and the same were marked as exhibits 1-6 for the Respondent. RW was cross-examined by Counsel for Claimant and defence case closed same date.
10. After the close of hearing the court gave directions for filing of submissions.
11. The Claimant's written submissions drawn by Mwachio, Kirwa & Co. Advocates are dated 20<sup>th</sup> June 2022 and received in court on the 11<sup>th</sup> July 2022. The Respondent written submissions drawn by Wachira Wanjiru & Company Advocates are dated 19<sup>th</sup> September 2022 and received in court on the 22<sup>nd</sup> September 2022.

### **Claimant's Case in Summary.**

12. The Claimant's case was that he was employed by the Respondent on the 26<sup>th</sup> December 2001 as a Security Guard earning monthly salary of Kshs 10,348/-. That he served until 20<sup>th</sup> July, 2015 when the Respondent wrongfully unprocedurally and unlawfully terminated his services and refused to pay his terminal dues.
13. The Claimant statement filed in court stated that he was terminated from employment by the Respondent on allegation that on the 4<sup>th</sup> July 2015, a cow was stolen but, the same was found in possession of one Mr. Joshua Kijana Shenza. That the allegations were not true and he was not subjected to hearing. The Claimant tabulated his claim to total of Kshs 5,389,205.40/- which for terminal benefits which included 1 month pay lieu of notice, house allowance, leave allowances, leave prorated , unpaid public holiday, overtime dues, compensation for unfair termination and service pay for 13 years.



## **The Respondent's case in Summary.**

14. The Respondent's case was that the Claimant was employed on the 26<sup>th</sup> November 2001 as a general worker. That the claimant wrote a letter of resignation on 20<sup>th</sup> May, 2015 to the Respondent and asked to be allowed to resign . That on the 25<sup>th</sup> May, 2015, the Respondent wrote back to the Claimant and accepted his resignation with effect from 20<sup>th</sup> July 2015. That the Claimant was paid his terminal benefits that included his gratuity and he accepted payment of the same and left the company premises on the 20<sup>th</sup> July 2015 after lapse of 2 months' notice. That is his terminal benefits were paid on 14<sup>th</sup> August, 2015.

## **Determination**

### **Issues for determination**

15. The Claimant identified the following as issues for determination under his written submissions :-
- a. Whether the Claimant was unlawfully, unprocedurally and wrongfully terminated from employment by the Respondents.
  - b. Whether the Claimant is entitled to compensation for unlawfully, unprocedural and unfair termination from employment as prayed for in the statement of claim.
  - c. What other remedies are available for the Claimant in the circumstances.
  - d. Whether the Claimant is entitled to an award of Certificate of Service
  - e. Who should pay costs and interest of the suit.
16. The Respondent identified the following issues for determination under their submission namely:-
- a. Whether the Claimant's termination was fairly lawful?
  - b. Whether the Claimant is entitled to prayers sought.
17. The Court having heard the case, considered the issues identified by the parties and is of the considered opinion that the following are the issues by the parties for conclusive determination of the dispute before court.
- a. Whether the Claimant was unlawfully and unfairly dismissed from employment by the Respondent.
  - b. Whether the Claimant is entitled to reliefs sought.

The relevant law

1. Section 43 of the *Employment Act* addresses proof of termination as follows:-

- “(a) in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
- (b) The reasons or reasons for termination of contract are the matters that the employer at the time of



termination of the contract genuinely belief to exist and which caused the employer to terminate the services of the employee.”

2. Section 44 (4) of the *Employment Act* provides for justifiable and lawful grounds for dismissal from employment, inter alia if:-
  - (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
  - (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,
  - (c) an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”
3. Section 45 (2) of the *Employment Act* provides that a termination of Employment by an employer is unfair if the employer fails to prove:-
  - a. The reason for the termination is a fair reason:-
    - i. Related to the employees conduct, capacity or compatibility or
    - ii. Based on the operational requirements of the employer.
4. Section 46 of the *Employment Act* provides for reasons that do not constitute fair reasons for dismissal.
5. Section 47(5) of the *Employment Act* provides for burden of proof in claims for wrongful dismissal as follows:

“(5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of Employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
6. Thus the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.
7. Section 41 of the *Employment Act* provides for procedural fairness as follows:-

‘41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.’”



8. In the event the employer is contemplating termination of employment vide summary dismissal under section 44 of the Employment Act, the employee is entitled to hearing pursuant to the provisions of section 41(2) to wit: -“(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.” The court finds and determines this was the applicable law in the instant claim.

### **Whether the Claimant was unlawfully and unfairly dismissed from employment by the Respondent.**

18. The Claimant relied on his written witness statement dated 11<sup>th</sup> May 2017 and produced documents under list of documents of even date as exhibits 1-4.
19. During cross-examination the Claimant (CW) denied that he resigned from employment. He denied signing the resignation letter or being in the union. CW admitted that his payslip had deduction of fee of Kshs 100 to COTU (page 14). CW said he cannot write and does not know English. The Claimant admitted that the signature under the verifying Affidavits was his on being asked if he signed the resignation letter, CW responded he did not write. CW told the court he used thumb print for tea payment. That sometimes he signed . CW told the court he informed his advocate he can read. On further cross examination, CW told the court he had no union number for KUSPAW and that when he was sacked no union member called him. He did not know why COTU fee was deducted. That CBA did not concern him, that he did not know English. He confirmed the signature under verifying affidavit was his and not that under the resignation letter. On re-examination CW told the court that he did not understand the content of the resignation letter but the signature was his.

### **The Respondents Evidence**

20. The Respondent called as its witness of fact Joshua Kathini who testified on oath and adopted his witness statement dated 10<sup>th</sup> April, 2018 as the Respondent’s evidence in chief. RW amended his witness statement on the date the Claimant left their employment to read 20<sup>th</sup> July 2015. RW produced as evidence of the Respondent documents under list of documents dated 31<sup>st</sup> August, 2017 August 2017 as exhibits 1-6. The witness also produced the retirement benefits document under list of 13<sup>th</sup> May, 2022.
21. During cross-examination by Counsel for the Claimant RW told the court the CBA was effective 1<sup>st</sup> January 2012 to run for 2 years (pages 34 & 35 of Respondent’s bundle of documents).  
That the CBA expired on 31<sup>st</sup> December 2013 and the Claimant’s employment terminated in 2015. By that time the CBA had expired. RW told the court that the CBA was still applicable as there was a dispute and no other CBA. RW told the court that the letter of resignation dated 20<sup>th</sup> May 2015 was addressed to the filed Manager and he was the field Manager as at that time. RW said he did not have evidence of the same in court. RW confirmed the duties of field Manager included dispute Management. RW told the court he did not witness the Claimant signing the resignation letter and that his signature was on the document. RW confirmed the letter of resignation did not have date of receipt. RW confirmed the Respondent does hire illiterate people sometimes and confirmed they can thumb print documents. On whether the illiterate workers ought to be assisted, RW told the court that depends on the employee. RW told the court the Claimant at time of employment did not present education documents and that it was not a requirement.



22. On the notice of resignation letter dated 25<sup>th</sup> May 2015 (exhibit 4, Respondent's bundle ) RW told the court Isaac Orindi and Nicholas Mutai who signed the letter were shop stewards. RW confirmed as at 20<sup>th</sup> May, 2015 he was both the Field Manager and the Senior Divisional Manager. RW confirmed he presented the letter dated 25<sup>th</sup> May 2015 (Document 3 of Respondent's bundle) of resignation acceptance to the Claimant in the presence of Isaac and Nicholas the shop stewards on 21<sup>st</sup> May, 2015.
23. On re-examination on the issue of resignation RW told the court that the CBA dated 6<sup>th</sup> June 2012 was applicable on basis of a dispute for if there is a dispute and current CBA expired where no new CBA is signed, pending the new CBA, the expired CBA applies.
24. RW, confirmed there was a signature in the appointment letter of the Claimant that he was upgraded to permanent staff, that they use language the workers understand, the Claimant could understand Kiswahili. That the signature in the Appointment letters, the resignation letter and letter of reply to Resignation are on the face value of the Claimant. That at page 13 of Claimant's bundle was his copy of National Identity Card with same signature. That the same signature was on acceptance of dues by the Claimant.
25. The Claimant submits that his evidence was that he was sacked orally on allegation of stolen cow a fact not denied by the Respondent in evidence. That the Claimant distanced himself from the resignation letter as an illiterate person. That the Respondent did not deny the Claimant was illiterate hence did not author the letter.
26. The Claimant's submits that being illiterate was protected under provision of Section 2 (5) ( 3) (A) , of the Employment Act and was entitled to appropriate communication under Article 54 (i) (d) of the Constitution . That Section 9 (3) (4) of the Employment Act protects illiterate employees. To buttress his submissions the Claimant relies on the decision of the court in Industrial Court of Kenya at Nakuru Cause No. 346 of 2013. Stephen Miheso v Kaimosi Tea Estate Limited where the court found that the employee who as illiterate and using thump print and had done so consistently ought to have imprinted his thump in presence of a person other than the Respondent supervisor who asked the Claimant to sign the letter. The Court found no valid resignation in the circumstances in that case.

## Decision

27. The Court made the following findings on the issue of resignation. That the Claimant during cross-examination agreed he sometimes thump prints and other times he signs his documents. The Claimant admitted he signed his Appointment letter and the signature was the same as under the handwritten letter dated 20<sup>th</sup> May, 2015 under his name, the same under the Acceptance of resignation letter by employer of 25<sup>th</sup> May 2015, and the same under his National Identification Card ( at page 13 of Claimant's documents). On re-examination the Claimant admitted the signature under letter of resignation was his but denied having authored the letter.
28. The Court found on balance of probabilities that the said signature reflected in the outlined documents above are similar. The Court found that under the Claimant's pay slip (page 14 of Claimant's documents) the Claimant was deducted COTU fee of Kshs 100 and agency fee of Kshs 206.96. The Letter of Acceptance of resignation is signed by two shop stewards Isaac Origi and Nicholas Mutai who are independent of employer and under the Labour Relations Act and Section 41 of the Employment Act empowered to be present when termination of employment of a unionsable employee is being done.



29. The Court further found same signature under the Verifying Affidavit of the Claimant and under the acceptance of terminal dues. The Claimant during cross-examination admitted that he had told his Advocate he can read.
30. The Court finds that the submission that the Claimant was sacked on basis of stolen cow was sufficiently rebutted by the evidence of the Claimant's resignation from employment. The Court further finds the Claimant was not candid for failure to disclose the issue of resignation letters in his witness statement before the court.
31. The Court finds and determines the facts under Industrial Court of Kenya at Nakuru Case No 346 of 2013 *Stephen Miheso v Kaimosi Tea Estate Limited* are different from the instant case as in that case the resignation was initiated by employer and the employee demonstrated illiteracy by consistently thump printing his documents. In the instant case the Claimant told the court he had told his advocate he could read, he signed same signature in all documents before the court including the Verifying Affidavit and signed the acceptance of resignation letter in presence of 2 shop stewards. The court finds that the acceptance of the resignation letter was safe and with protection of the employee by the union representative. The Court finds no reason to question the acceptance of the resignation letter by the employer.
32. The court then finds and determines the Claimant terminated his employment with the Respondent lawfully.

#### **Whether the Claimant is entitled to reliefs sought.**

##### **Pay in lieu of Notice.**

33. The Court having found evidence of voluntary resignation finds the Claim for notice pay is not due. The same is dismissed.

##### **Compensation for unfair termination**

34. The Court found the Claimant voluntarily resigned. The Claim is disallowed as there was no unfair termination.

##### **Unpaid Leave days.**

35. The Claimant was paid *pro rata* leave in July 2015. The Claimant claims leave for all years worked. During-cross examination RW told the court that the Claimant went on leave and that he had not produced the record. The Claimant relies on the decision in *Edwin Kabogo Munene v Equity Bank Limited* Industrial Cause Number 1123 of 2012 (21 March, 2012) where the honourable court held that:-

“ Under Section 74 (1) (f) of the *Employment Act*, 2007 a duty is cast on the employer to keep records in respect of leave days, nothing is easier than availing these records which the employer is by law required to keep for years. If the employer fails to produce, an adverse inference can be drawn that the Claimant's assertions on the point were spot on”.

36. The Claimant left employment in 2015. In July, 2015 he was paid *pro rata* leave (page 14 of Claimant's bundle of documents).
37. On a balance of probabilities the Court finds that the Claimant was paid for the untaken leave days. Under Section 47 (5) of the *Employment Act* it is envisaged the Claimant will lay basis of their claim



for the burden to proof to shift to the Respondent. In *Janet Katali Kalani v East African Growers Limited*, ELRC Cause No. 2181 of 2015 Justice Linet Ndolo, stated as follows:-

“ .....the Claimant in her final attempt to shift the burden of proving the existence of an employment relationship to the Respondent, by stating that the Respondent, being the custodian of employment record, ought to have availed them. The only thing to say is that the fact that the Respondent was the custodian of employment records did not discharge the Claimant from the burden of proving her case. If the Claimant believed that the Respondent was in possession of any records that would have supported her case, she ought to have served a production notice”.

38. The Court having found evidence of payment of leave in July 2015 when the Claimant left employment the court finds on balance of probabilities the claim for leave is not proved.

#### **House Allowance.**

39. The Claimant under paragraph 12 (ii) claimed for house allowance for years worked. The Claimant produced his pay slip of July, 2015 which reflects only basic pay. RW told the court that the Claimant was housed hence allowance was not payable. RW, told the court he knew of claim on housing allowance and did not have difficulty in presenting the housing book for every village. The Court finds and determines that the Claimant discharged his burden that he was not paid housing allowance and the burden shifted to the Respondent on production of pay slip indicating basic salary only to prove the provision of housing. The failure to do so leads the court to find that the Claimant discharged his burden. On the period to apply the Respondent had filed a Preliminary Objection stating the claims were beyond 12 months under Section 90 of the *Employment Act* and leave should be allowed on the interpretation of meaning of continuous injury the court is guide by the court of Appeal decision in *Mary Kitsao Ngowa & 36 others v Krystallino Limited* (2015) eKLR where the court held that continuous injury in context of Employment relationship presumes the parties are still on a continuous engagement at the time of claim. The court noted that any claims after termination of employment could no longer be termed as continuing injury. Applying above decision of court of Appeal the Preliminary Objection dated 28<sup>th</sup> September 2021 by the Respondent is disallowed. The Court of Appeal in the said decision allowed the award limited to 3 years of filing the claim by the trial court. The court is duly guided. The Court finds that the claims for unpaid salaries and allowance benefits is limited to 3 years. Thus for housing allowance claim under paragraph 12 (ii) of the statement claim is awarded for 3 years.

Thus 15/100x10,348x12x3 total award Kshs 55,879.20/-. The Claimant is awarded housing allowance capped at 3 years for Kshs 55,879.20/-.

#### **Unpaid Public holiday and overtime dues.**

40. The Claimant submits that RW acknowledged the Claimant worked overtime without pay. The Respondent submits that the Claimant's pay slip for month of May 2015 shows he was paid overtime for that particular month. That the Claimant did not produce documents to justify non-payment for the entire period indicates concealment of the contrary. The Respondent to buttress their claim relies on the decision in *Janet Katali Kalani v East African Growers Limited*(2015) eKLR to the extend that the fact that the Respondent was custodian of employment records did not discharge the claimant from the burden of proving her case. The court noted in the said decision the finding would have been otherwise had the production notice been served. The court finds that a notice to produce documents dated 24<sup>th</sup> May, 2022 was filed in court to produce overtime records. The RW told the court he had no difficulty in providing records. The Respondent submitted that under Clause 5 of the CBA the



ungraded worker like the Claimant was to work 39 hours performed 6 days of 6 and ½ hours. The Court is persuaded that the isolated payment of May 2015 is prove of working overtime by Claimant. The Respondent is the one who was evasive . Once the allegation was done and the pay slips produced the burden shifted to the Respondent to prove payment of overtime or justify the non -payment. The Respondent filed only one pay slip of May 2015.

41. The court awards overtime capped at 3 years less the May 2015 overtime paid of Kshs 467.19. The court without further evidence then applies the 467.19 per month for the 3 years capped under Section 90 of the Employment Act. 467.19x12x3-467.19 total award of overtime Kshs 16,818.84-467.19. Total award of unpaid overtime Kshs 16,401.65/-.

### **Unpaid Public Holidays**

42. The court finds that the Claimant discharged his burden by testifying of having worked throughout and the burden shifted to the Respondent who failed to produce evidence to rebut the claim. The court awards public holiday payment capped at 3 years claim under Section 90 of the Employment Act thus 10,348/30x10daysx3years. Total Kshs 10348/- awarded.

### **Service pay**

43. The Claimant abandoned claim for service pay as indicated in submissions.

### **Conclusion and disposition**

44. The court found the Claimant voluntarily resigned from employment. The court awarded underpayment claims and enters judgment for the Claimant against the Respondent as follows:-
- a. Award of unpaid Housing allowance Kshs 55,879.20/-.
  - b. Award for unpaid overtime pay Kshs 16,401.65/-.
  - c. Award for unpaid Public holiday pay Kshs 10,348/-.
  - d. Awards a to c subject of statutory deductions)
  - e. Certificate of service to issue pursuant to Section 51 of the Employment Act.
  - f. Claimant is awarded costs of suit and interest at court rate from date of judgment.

45. It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 27<sup>TH</sup> DAY OF OCTOBER 2022.**

**J. W. KELI,**

**JUDGE.**

In the Presence of:-

Court Assistant : Brenda Wesonga

Claimant:- Kirwa (Mr.)

Respondent:- Wachira (Ms)

