



REPUBLIC OF KENYA



KENYA LAW
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**Malongo v Chemelil Sugar Company LTD (Cause 2 of 2019)
[2022] KEELRC 12860 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12860 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 2 OF 2019
S RADIDO, J
OCTOBER 12, 2022**

BETWEEN

ALBERT AKI MALONGO CLAIMANT

AND

CHEMELIL SUGAR COMPANY LTD RESPONDENT

JUDGMENT

1. On February 13, 2020, the court entered partial/preliminary judgment on admission in favour of Albert Aki Malongo (the claimant) in the following terms:
 - (a) Respondent to pay the claimant a sum of Kshs 3,935 354 in respect of unpaid salary for 5 months and 22 days; 3 months unpaid salary in lieu of notice, and gratuity payment calculated at the rate of 31% of annual basic salary for 1 year and 10 months.
 - (b) Interest at court rates from the date of filing till payment in full.
 - (c) The suit to proceed to trial in respect of the undetermined claims.
 - (d) Costs in the cause.
2. Chemelil Sugar Company Ltd (the respondent) did not comply, and on February 24, 2021, the court directed it to settle the preliminary order/decre.
3. The cause proceeded to a hearing on the outstanding issues on March 22, 2022 and May 31, 2022.
4. The claimant and an acting head of human resources with the respondent testified (the claimant had filed proposed Issues on September 13, 2021).
5. The claimant filed his submissions on July 25, 2022, and the respondent's submissions were not on record by the agreed date of September 9, 2022.



6. The court has considered the pleadings, evidence, and submissions.

Background

7. The Principal Secretary Ministry of Agriculture sent the respondent's Managing Director and other top managers on compulsory leave on or around May 5, 2017.
8. On the same day, the Managing Director allegedly sent the claimant on compulsory leave for 30 days.
9. The respondent thereafter served the claimant with a notice to show cause dated June 15, 2017, and the claimant responded on June 18, 2017.
10. The respondent's board considered the claimant's response and notified him through a letter dated September 22, 2017 of the termination of his contract.

Unfair termination of employment

Procedural fairness

11. The claimant challenged the procedural fairness of the termination of his contract on the ground that he was not afforded an oral opportunity to be heard as envisaged by the respondent's human resource policy and contrary to the requirements of section 41(2) of the *Employment Act* and section 4(3)(b) of the *Fair Administrative Action Act*.
12. The claimant also relied on the discipline manual for the public service, May 2016 (the court is of the view that it did not apply in the instant case since the claimant was not under the disciplinary control of the public service commission).
13. The court has looked at the extract of the respondent's disciplinary manual produced by the claimant. It is general and vague.
14. However, it refers to a disciplinary committee. The existence of a disciplinary committee presupposes an oral hearing.
15. The respondent did not demonstrate that the claimant's case was placed before the disciplinary committee.
16. It is also unclear whether the disciplinary committee recommended the termination of the claimant's contract as no minutes to that effect were placed before the court.
17. The court consequently finds that the termination of the claimant's contract fell short of the requirements of procedural fairness under the respondent's internal procedures.

Substantive fairness

18. Sections 43 and 45 of the *Employment Act*, 2007 demand that the employer proves the validity and fairness of the reasons leading to the termination of a contract.
19. The respondent gave three reasons for terminating the claimant's contract.
20. The first reason was a failure to develop cane in the nucleus estate.
21. The claimant explained that due to the failure of the rains leading to severe drought, there was depressed cane production. He also stated that there was limited machinery to facilitate cane development.



22. The respondent did not controvert or rebut these explanations. The court finds the claimant's explanation plausible.
23. The second reason for terminating the claimant's contract was a failure to coordinate properly with the factory team on cane delivery on January 16, 2016.
24. The claimant explained that 926 tonnes of cane were delivered (116 tractors). He produced a supplier summary to support the explanation.
25. The respondent did not dislodge the explanation, and the court can conclude this was not a valid or fair reason to terminate the claimant's employment.
26. The last reason given for the termination of the claimant's employment was the failure to put in place plans to develop cane within the nucleus estate.
27. The claimant demonstrated that the plan was incorporated in the capital budget 2016/2017, but the targets could not be attained due to inadequate funds.
28. The respondent's witness did not address the explanations and the court, again, finds this reason was not proved.
29. In the whole, the court finds that the respondent did not discharge the burden of establishing the validity and fairness of the reasons for the termination of the claimant's contract. The termination of the contract was not for valid or fair reasons.

Compensation

30. The claimant served the respondent on distinct (fixed-term) contracts from 2009. He had previously been engaged on permanent and pensionable terms in 1993.
31. The fixed-term contract was renewed in 2012 and 2015, and the last contract was to end in October 2018. The contract was terminated about 12 months to expiry. The claimant was paid terminal dues.
32. Considering the above factors, the court is of the view that the equivalent of 7 months' gross salary as compensation would be appropriate (gross salary according to the contract dated November 4, 2015 was Kshs 280,775/0).

Lost income

33. The claimant urged the court in the submissions to award him Kshs 3,650,088/- being the income he would have earned had the contract not been terminated prematurely.
34. However, the claimant did not plead the lost income nor provide an evidential or contractual foundation for this relief.
35. In rejecting this head of the claim, this court endorses the position outlined by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2008) UGSC 21 that:

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law

Conclusion and Orders

36. The court finds that the termination of the claimant's employment was unfair.



37. The claimant is awarded:
- i. Compensation Kshs 1,965,474/-
38. The claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 12TH DAY OF OCTOBER 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant AN-AN Associates Advocates

For Respondent Otieno, Yogo & Ojuro Advocates

Court Assistant Chrispo Aura

