



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1902 OF 2011**

PATRICK NYAKUNDI.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF TEACHERS HEADQUARTERS.....1<sup>ST</sup> RESPONDENT

KENYA NATIONAL UNION OF TEACHERS KISII BRANCH.....2<sup>ND</sup> RESPONDENT

**REVIEW**

1. The Claimant herein Patrick Nyakundi successfully sought review of the decision of this Court. He testified that he was born 15<sup>th</sup> July, 1941 and employed on 1<sup>st</sup> October 1978 by KNUT Kisii Branch as an Executive Officer. He was to retire after 60 years as per regulations. He was employed on 1<sup>st</sup> October 1978 and retired in December 2001 and was an Executive Officer at KNUT Kisii Branch when he retired. The basic salary at the time he started was 2,090/= per month. He testified that Kisii Branch was split in 1997 into Gucha and Kisii Branch. The split led to some workers leaving to join Gucha branch and some workers left in Kisii branch. He testified that the salary would be reduced to half as KNUT did not have enough funds. The salaries were reduced from April 1998 but the Secretary increased his salary and their allowances and the Claimant wrote to headquarters complaining. He wrote to Mr. Francis Ng'ang'a the Acting Secretary General. From April 1998 till retirement in 2001 the Claimant was paid half salary. He now seeks the balance to be paid. He testified that in 1998 the balance was Kshs. 415,628.25, in 1999 the balance was Kshs. 584,882.40 and in 2000 it was Kshs. 549,131.40. The total balance unpaid for all these years was Kshs. 2,117,127.75. He also sought the terminal benefits due being Kshs. 2,071,559.70 from the terminal benefits scheme. The terminal benefits are calculated as the total monthly emoluments multiplied by the months of service divided by 10. He also sought pay for leave not taken totaling 42 days amounting to Kshs. 285,487.86, gratuity arrears Kshs. 100,222.10, unpaid service gratuity Kshs. 271,879.20, Gratuity arrears from Headquarters of Kshs. 108,734.70, salary arrears Kshs. 104,552.85. He thus prayed that he be paid balance of unpaid salary, leave payments, balance of unpaid salaries, unpaid gratuity, salary arrears, notice for 6 months, unpaid service gratuity and staff terminal benefits scheme all totaling to 566,854.06.
2. He was cross-examined by Mr. Ameyo and stated that he is Patrick Nyakundi and has annexed ID to the case. He conceded that the names on ID are Nyakundi Osiemo and the name Patrick is not indicated on the ID. He testified that he was employed in 1978 as Executive Officer. He testified that he did not use the National ID card when he applied and had used his certificates to give his name when he got employed. He however did not have the certificate in his document bundle. He admitted that the certificate does not show when he was born. He testified that he worked as

Executive Officer and he received a Notice that ran from 1<sup>st</sup> January 1998 to 31<sup>st</sup> March 1998 and termination took effect in March 1998. He testified that he was forced to sign the re-employment letter and as per the letter he was to earn 22,571/-. He stated that he lodged the case in High Court in 2006 and admitted that since receipt of the letter of 1998 March he only lodged complaint in High Court in 2006. He testified that he understood the Staff Terminal Benefits Scheme paragraph 5.3(a) which provided that for staff to qualify for Staff Terminal Benefits the service is to be “continuous service” and Para 5.3(c) which provides that the Terminal Benefits will be limited to 5 years or 60 months. He testified that he was staff at Branch and according to Staff Terminal Benefits he was to be entitled to 5 years. Regarding the unpaid salary for January and February 1998, he admitted that there is no letter here to show he was assigned to go to Gucha. He testified that when he retired he could not remember what he was earning. He agreed that the ID indicates date of birth as 1941 and as of when he received the letter in 2001 he had attained 60 years of age.

3. In re-exam by Mr. Osoro he testified that the letter is addressed to Patrick Osiemo Nyakundi. He stated that the ID was issued on 15<sup>th</sup> March 2010 and was not available when he was applying for his job. He stated that the redundancy letter told the staff to re-apply. He testified that he signed because he feared he would be sent away and he complained still to Ministry of Labour Kisii and Provincial Labour office. He stated that it is not true that he only lodged complaint in 2006. He testified that the employment was not interrupted till he retired in 2001. That marked the end of the Claimants case.
4. The Respondents called Peter Riang’a who testified that he was a teacher and Chairman of Kisii Central Branch of KNUT. He stated that at the time of giving testimony he was the Chairman while in 1997 he was Branch Committee Member attended meetings of the KNUT Branch. He stated that Patrick Nyakundi was a worker of the KNUT Kisii Branch and in 1997 there was a split of Kisii Branch and Gucha Branch. It was split and the number of teachers were fewer than before and what was coming from headquarters was reduced due to the fewer teachers. As a Branch, they realized money was not enough to pay workers and officials and it was decided that there be fewer workers or there would be redundancies declared and then employ afresh with new terms and conditions. A letter was issued to the Claimant. The Claimant was asked to re-apply in accordance with redundancy declared and he applied. He was called to meeting and told why the redundancy was necessary and he accepted and the terms and conditions were agreed to and that is why he continued with his work. He worked from 1998 to 2001 when he retired. It was a compulsory retirement and he did not complain and he was paid his dues.
5. In Cross-Exam by Mr. Osoro, the witness stated that the Claimant was an organizing secretary of the union. He occupied that position till he left the union and he did not occupy the office of Executive Officer. The Executive Officer is elected while organizing secretary is appointed. However, when he was referred to page 17 of the Amended Memorandum of Claim the witness stated that he knew the second Claimant as an organizing secretary but according to what was on the letter he was a Senior Executive Officer. He testified that he was aware there was a 2% increase of deduction at Kisii Branch and it was effected around 1998. He conceded that the Branch had declared the second Claimant redundant. The payment was to be Kshs. 22,771 per month to be increased in January of each year and the Claimant was given an opportunity to look at the new terms which he accepted. When he was called, he was given an explanation as to why he was to earn that sum and he accepted. He stated that the Claimant left employment on compulsory retirement in December 2001. He stated that the financial situation could not sustain employees.
6. The second defence witness was Aron Risa G’woma who testified that he is a teacher by profession and an official of KNUT as Treasurer Kisii Branch. He stated that he joined the union in April 2001 and was elected as a Treasurer. The duties of a treasurer are to prepare budgets, receive commission from Headquarters and pay per budget prepared. He testified that he knew the Claimant who was working in the Branch as Executive Officer and in the year the witness joined the second Claimant reached compulsory retirement age, was retired and his dues on retirement paid. He testified that unfortunately when the Claimant left the Claimant was in custody of all the

documents and when the witness checked he found the documents had disappeared. He stated that he is familiar with Staff Terminal Benefits and that the Claimant was not entitled to the payment as the Claimant was not in continuous service as his services were interrupted. For staff of branches and Executive Committee members it is limited to 60 months. When Claimant retired the witness calculated the amount he was entitled to the dues were all paid.

7. In Cross-Exam by Mr. Osoro he stated that payment was to be made and the payment were made in cash, workers were paid by cash and payslips given to workers. He testified that the Claimant was given cash and as indicated when the Claimant left all the records disappeared. He could not however remember how much the Claimant was paid. He maintained that the service by Claimant was interrupted. He stated that he joined the Union in April 2001 and the records for Claimant are not on record but the minutes that were there showed the Claimant was interrupted in 1997. There is the Minute of 3<sup>rd</sup> December 2001 on page 3 of the witnesses' statement.
8. In re-exam by Mr. Ameyo he reiterated that there were no records to support the payments as the Claimant left with all the documents touching on their service.
9. In the case, the Claimant testified that he received less than what he was entitled to. However, he signed a new contract with reduced pay after the split of the Kisii Branch of KNUT in Gucha and Kisii Branch.
10. The letter of redundancy addressed to the Claimant and dated 6<sup>th</sup> January 1998 provided as follows-

In reference to min/6/11/97 of November 1997 and the joint discussion by the Kisii and Gucha Branch Officials on 22<sup>nd</sup> October 1997 and 23<sup>rd</sup> December 1997 on the above issue, it was finally resolved that:-

- i. Due to the split of Kisii larger Branch of KNUT into two, that is Kisii and Gucha Branches, it was and will prove absolutely difficult for the Branches to keep the present number of workers as also the work in this offices has been fairly lessened.
- ii. That because of the No. (i) above, the Branches are in and are going to experience serious financial crisis, as the number of contributors has been tremendously reduced.
- iii. Because of the prevailing circumstances therefore All the Employees of the Union be given notice to terminate their jobs. This is on the strength of article X (4) on the Branch's power to employ.
- iv. That the Employees will be at liberty, if interested, to re-apply for employment at the time of the expiry of the said notice, on new terms and conditions.

Before conclusion, I am on behalf of the Branch Executive Committee and the entire teaching fraternity whom you have for quite some time served devotedly and =with a lot of honesty thank you most sincerely for a good service rendered by you as EXECUTIVE OFFICER of the Union, during your tenure of Office.

Finally, I am informing you therefore that your notice of termination of employment runs from the 1<sup>st</sup> of January 1998 to 31<sup>st</sup> March 1998, the date you will be required to leave office. You will however be required to re-apply for employment as per No. (iv) above if interested.

May I then wish you best of luck in your future ventures.

Thank you.

Sincerely Yours,

(signed)

FRED ONTERE

Executive Secretary KNUT – Kisii

For Branch Executive Committee

KISII/GUCHA.

c.c. The Secretary General,

KNUT HQ,

P.O. Box 30407

NAIROBI.

11. The Claimant accepted new terms of service as evidenced by the letter of 27<sup>th</sup> March 1998. The letter confirmed that the Claimant met the Branch Executive Committee at a meeting held on 25<sup>th</sup> March 1998 and agreed to the new terms which were Kshs. 22,571/- per month. He signed the letter in acceptance. On 17<sup>th</sup> January 2001 the Claimant wrote a letter addressed to the Treasurer KNUT Kisii Branch through the Executive Secretary KNUT Kisii Branch in which he demanded the payment of the balance of Kshs. 27,167/- as salary dues because of delayed payment of salaries of January, February and March 1998 in bits. He sought payment of this sum as he was proceeding on retirement.
12. In view of the fact that the Claimant accepted new terms and was paid his dues, there is no claim competent for him to make on the so-called underpayments. If the salary was reduced and he accepted a new position at half the pay there is no recovery he can make whatsoever. The terms applicable to his new employment was contained in his letter of employment dated 27<sup>th</sup> March 1998. Notably, in the letter he wrote seeking payment of unpaid dues in his 17<sup>th</sup> of January 2001 letter there was no claim for any other sums alleged to be due to the Claimant other than the 27,167/-. It would seem the other claims made were an afterthought. He claims gratuity that was not paid by KNUT HQ the 2<sup>nd</sup> Respondent. The Respondents denied being indebted to the Claimant and put him to strict proof. He was given a retirement notice and advised his last date of service was 31<sup>st</sup> December 2001. His own testimony is that he was born on 15<sup>th</sup> July 1941. Reckoning the years from then he was due to retire on 15<sup>th</sup> July 2001. He even was aware of his impending retirement when he wrote his letter of 17<sup>th</sup> January 2001 seeking pay of unpaid dues relating to the year 1998. He cannot turn around and say that he did not receive any notice of his impending retirement. The alleged failure to give notice did not prejudice the Claimant in any way. He knew he was approaching retirement and even said so in a letter penned 6 months before the date of retirement.
13. As regards his terminal dues it is not proved that he was not paid his terminal dues by the 1<sup>st</sup> Respondent. The gratuity for the final period of service was stated to be due from the 2<sup>nd</sup> Respondent. The letter of 28<sup>th</sup> November 2003 Ref. KNUT/KISII/5/53/2003 was clear. The gratuity for Mr. Patrick Nyakundi was Kshs. 93,294/35. He is entitled to collect that sum if he did not collect or receive the cheque from KNUT Headquarters.
14. The Claimant was deceitful and unnecessarily sought remedies he was not entitled to. The Claimant used his position as Executive Officer and concealed records thus prolonging the dispute and making it difficult for the 1<sup>st</sup> Respondent to adequately respond to his claim. The termination of his services was proper and in keeping with the provisions of the law as he had attained the

maximum age of 60 in July 2001 when he was compulsorily retired. The only claim that seems competent though very little evidence was adduced on it is the claim for Kshs. 93,294/35 from the 2<sup>nd</sup> Respondent as gratuity. If the cheque for gratuity or cash equivalent was not received from KNUT HQ the Claimant is entitled to collect it.

15. The suit is therefore dismissed with costs as the Claimant has not proved on a balance of probability his claims contained in his Plaint, Statement of Claim or Amended Claim filed before the High Court and this Court.

Orders accordingly.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of June 2014**

**Nzioki wa Makau**

**JUDGE**