



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 1278 OF 1996

DANIEL MUSILI NYEKI PLAINTIFF

VERSUS

KENYA WILDLIFE SERVICES.....DEFENDANT

JUDGMENT

By a plaint filed in court on 24th May, 1996, the plaintiff Daniel Musili Nyeki sued the Kenya Wildlife Services claiming that the defendant treated him in a discriminatory manner which, “violated the Constitution of Kenya and was wrongful, unlawful and unfair”.

The plaintiff therefore prayed for

- (i) “A declaration that the defendant’s treatment of the plaintiff was and is wrongful, unlawful and contrary to the Constitution of Kenya and amounts to discrimination,”**
- (ii) “A declaration that the plaintiff was and is entitled to the same treatment and terms of employment as other employees in the same category as he served”**
- (iii) “A declaration that the plaintiff was and is entitled to the salary paid to the other officers in the job categories approved by the World Bank in which he served”,**
- (iv) “An order directing the defendant to pay the plaintiff his total emoluments as approved for the services rendered as acting Principal at Naivasha and Acting Assistant Director Conservation Education”.**

The plaintiff amended his plaint, vide amended plaint which I have found in the court file. I have not been able to find what date it was filed in court but I believe that it is properly on record.

At para 15 of the amended plaint, the plaintiff complained that whilst acting as Principal at the defendant’s school in Naivasha, he was entitled to a salary of Kshs.180,000/= per month. The plaintiff contended that he was given discriminatory treatment by the defendant and the Director on account of racial discrimination.

The plaintiff further complained at para 16 that in January 1995, he was appointed to act as Assistant Director, Education, a position which carried a World Bank salary of Kshs.150,000/= per month but he was instead paid Kshs.19,420/= per month well below the salary paid to other offices of non-African descent in the same rank. It is for this reason that he (plaintiff) complained that the defendant’s treatment of him was discriminatory and violated the Constitution of Kenya, and is wrongful unlawful and unfair.

He asserted that because of his persistent fights for his rights, charges were filed against him in the defendant's Armed Wing, Disciplinary Panel, but during the pendency of the proceedings, he was compelled to apply for early retirement on 20.11.1995, or be summarily dismissed.

The plaintiff gave particulars of malice and discrimination in para 20. In para 21, the plaintiff gave particular of the Special Damages he suffered. He calculated the same and gave a figure of Kshs.588,220/=. Apart from this prayer for special damages, the other prayers remained the same as in the original plaint.

The defendant denied the plaintiff's claim and in a statement of defence filed on 112th August, 1996, stated as follows specifically in para 5

"In further response to allegations contained in paras 7 and 8 of the plaint, the defendant states that it was established by statute in 1990 and the plaintiff was employed by the defendant in June 1991 as a Warden with specific terms and conditions of employment, including salary which the plaintiff accepted and served under for 5 years".

In answering the allegations contained in the plaintiff's plaint, the defendant stated at para 6 of the defence,

"The defendant further states that the plaintiff was employed by the defendant upto 1996, by which time he had been promoted to the substantive rank of Senior Warden and had been given the opportunity of serving in an acting capacity as Assistant Director in charge of Education. All the substantive and acting appointments given to the plaintiff by the defendant were governed by specified terms and conditions of employment including salary and allowances such as acting allowance which were paid in full to the plaintiff during the term of his employment....."

According to the defendant further at para 9 of the defence,

"..... its policies and programmes are and have always been initiated and developed at a corporate level and denies the plaintiff's wild and baseless allegations that he individually developed the programmes, which in any event, he could only have contributed to during the course of his employment....."

The defendant subsequently amended its statement of defence on 24th February, 2000 and added the following 3 paragraphs,

(14a) **"Paragraph 18 of the plaint is misconceived and the contents thereon are to the extent that they are relevant, denied"**

(14b) **"The contents of paragraph 19 of the plaint are not understood and so far as they are material and denied,"**

and finally

para 14(c)

"The defendant specifically denies the contents of paragraph 20 of the plaint and particulars of malice and discrimination enumerated in sub-paragraphs (a-f) thereof are denied as if the same had been herein set out and traversed seriatim".

This case was heard in full by Hon. Justice Kasanga Mulwa who retired before he wrote and delivered the judgment. The court file was sent to him in Meru High Court where he had been transferred to before retirement. This process took a rather long time. Upon his retirement the file took an equally long time and process to be returned to the High Court, Civil Division, Nairobi.

When the matter was referred to me for finalization the plaintiff chose to give evidence a fresh to supplement what he had already said before Mulwa, J. Nevertheless, I had the record of Justice Mulwa typed out and the plaintiff had a chance to compare the 2 records.

The plaintiff testified in court, both before me and before the retired Judge that he started working with the Kenya National Parks in July 1969, upto 1976 when the Kenya National Parks was merged with the Game Department. He then became Assistant Warden I for 15 years. He arose from that rank to Warden II and to Warden I. That all this was under the Ministry of Tourism. That from 1984 to 1994, he became a Senior Warden in charge of Conservation Education Division. That during the period, 1987 – 1990 he developed a project jointly with Adult Education Department, a project to integrate Conservation into adult Education Learners Programme.

According to the plaintiff, the project succeeded and they published books such as Learners books to teach adult learners how to preserve environment. He produced the book, plus its English Version plus the teachers guide as Exh. 7. The plaintiff prepared posters, teaching aids and brochures. He produced all this in court as exhibits. He also produced his letter of appointment, dated 27.7.69 as an exhibit, and the one for confirmation as Exh. 4. Its dated 12th April, 1972.

The plaintiff produced his bundle of Certificates in Court. He testified further that after the success of the project, he wrote to the Director of Kenya Institute of Education asking them to do the same project. He produced the letter in court. It is dated 26th April, 1990.

He testified further that together they produced a proposal, a copy of which he produced in court as an exhibit.

By 1991, the Wildlife Conservation Management was transformed into a parastatal, the Kenya Wildlife Services.

The plaintiff joined Kenya Wildlife Services in 1991, as Warden I. By that time, the World Bank sponsored the KWS activities. The plaintiff worked with the Consultant and produced a policy framework programme – 1991 – 1996. This inco-operated his 2 projects, and from the document he compiled with consultants, the World Bank entered into agreement with the Kenya Government. The plaintiff produced the agreement as an exhibit.

The plaintiff explained that during the period of this project certain positions were created and advertised. He was short listed and appeared for interviews for 2 positions but unfortunately he was not successful, but by this time he had developed a book for schools and tourists. He wanted to publish it, but the Director, KWS refused to fund it. He approached the USAID, who directed him to a publisher Susan. That together the 2 approached the Director of KWS, who again refused to grant permission for publishing the book. The plaintiff went ahead and published the book privately. He produced a letter from a student confirming that the book was useful.

In July 1993, the plaintiff was transferred to Naivasha Wildlife Training Institute. He was still a Senior Warden. He was transferred in an acting capacity.

He said the principal's salary was Kshs.180,000/=. That he was paid acting allowance as per the parastatal scale contained in the letter dated 18th October, 1993. He contended that he was not paid the correct amount of salary.

The plaintiff was transferred back to Nairobi in 1994 vide a letter dated 18th October, 1994. He was still serving in the same rank of Senior Warden and in January 1995, he was appointed acting Director of Education. He produced his letter of appointment, dated 19th January, 1995. Here again, he complained that he was paid acting allowance on parastatal scale and not the World Bank scale.

The plaintiff produced his 6 payslips for the months of July 1992 to July 1993 again July 1994 to July

1995 and again December 1995 to January 1996. He complained that during all this period he was paid parastatal salary and parastatal acting allowance. His terms of employment were permanent and pensionable.

The plaintiff had some payslips which he got from the Kenya Commercial Bank, as the defendant declined to produce them. He had pay slips of Patrick Hamilton employed as Assistant Director, in 1975, terms were permanent and pensionable.

He also had payslip of Simon Makalla, who was Senior Warden and later promoted to Assistant Director in 1993. Again his terms were permanent and pensionable.

He also had payslip on Anderson Koyo, then Assistant Director who is still in employment to date.

There was also John Mahanga Assistant Director. The others were Joseph Mburugi and Ali Kake. All were on permanent and pensionable terms, but the plaintiff did not have their letters of appointment.

An attempt by the plaintiff to produce the “**credit advise schedules**”, of the 6 employees was objected to by counsel for the defendant on the basis that the plaintiff was not the maker of the documents he wanted to produce.

Secondly, that the documents were not certified true copies of the original, nor were the documents addressed to him.

Further, it was contended by the advocate that though the plaintiff served a Notice on the defendant to admit the documents, the defendant served on the plaintiff notice of non-admission of documents and in accordance with Order 12 R 2 of the Civil Procedure Rules, it was incumbent upon the Plaintiff to prove the authenticity of the documents relating to the 6 employees. That further, he was at liberty to call them in court to talk about their salaries. The advocate asked the court to expunge the documents from the records because the correct procedure in producing such documents had not been complied with.

The plaintiff on his part expressed his difficulty in getting the 6 persons he named to come to court and testify because some of them were still in the employment of the defendant. At first the plaintiff asked the court to order the bank to produce the documents, but he subsequently changed his mind and asked for time to get the documents certified by the bank.

Though I granted adjournment for further hearing for this purpose, no further evidence was adduced by the plaintiff. This meant that the documents were not formally produced as evidence before me but the record shows that Mulwa, J allowed their production.

By the time of the hearing, the original court file which had been transferred to Meru to be finalized by Hon. Justice Kasanga Mulwa was returned to this court and consolidated with this one where the hearing was proceeding before me.

The defendant's evidence was recorded by Hon. Justice Mulwa. This was the evidence of Richard Lisiande, the Head of Human Resources at the Kenya Wildlife Services, since March 2000.

He got acquitted with the plaintiff, who was a Warden between 1991 – 1993.

He recalled that the plaintiff was invited for an interview in 1992, the position of Head of Education and Visitor Services.

According to him, the plaintiff did not have the relevant qualifications and experience, so he was not appointed to the position, but confirmed that at some point, the plaintiff reached the position of acting Principal.

In the plaintiff's file he found a letter dated 4th December, 1996 written by the plaintiff about his

retirement. The letter was replied and the plaintiff's request was accepted.

In answering questions put to him, Rotich said that there were salary structures for employees of KWS but there was no specific salary structure for World Bank employees. He was shown a document which he referred to as, "**a World Bank**" document. He confirmed the names of officers appearing the bundle and pointed out which once still work for KWS.

The court records show that on 4th April, 2002, the parties recorded a consent to the effect that, "**the evidence on record for and on behalf of the respective parties herein be and is hereby closed,**"

that

"the parties do file and serve written submissions in the matter within the next three weeks of the filing hereof or as the Hon. Mr. Justice Mulwa may direct,"

and finally,

"the matter be mentioned before the said Judge for directions and/or a date for judgment".

In compliance with the consent order above, both advocates filed written submissions, which now form part of the record of this case. The submissions of the plaintiff repeated more or less his evidence in court and the conclusion of the submission by the plaintiff's counsel reads,

"My Lord the plaintiff's case depicts discrimination, malice, oppression, callousness and caprice more than any other case referred to herein. The plaintiff developed a programme for World Bank, funding for the defendant which was approved. He was refused the opportunity to oversee the implementation thereof. When in the end he was appointed to act in a position he could do so, he was informed that his position would be formalized. Rather than formalize his position, the defendant repeatedly overlooked his 3 applications to the same position and in the end forced him into early retirement. All this time the plaintiff was denied the applicable World Bank salary awarded to those of equal rank who were involved in the implementation of the World Bank projects.... To add insult in injury even after the plaintiff offered to retire, his clearance papers were delayed for 16 months till this court intervened.....". The plaintiff's counsel then calculated damages payable to his claim for malice, callousness and oppression and discrimination.

The defendant's counsel also filed written submissions in which he stated that the plaintiff's terms of employment with the defendant were governed by the terms in the letter of offer of Employment dated 14th May 1991 which the plaintiff duly accepted on 7th June 1991 by voluntarily appending his signature to signify acceptance.

That the letter shows that the plaintiff was employed as a Warden I grade 7 with effect from 1st July 1990. That his post was within salary scale K\$4770 x 186 – 5514 x 216 – 6694 p.a., with his entry point being \$5142. That the appointment could be terminated by either party giving one month's salary in lieu of notice. This offer of appointment, according to the defendant's counsel did not refer to any "**World Bank rates**".

On the issue of acting capacity, the defendant's counsel said,

"At different periods during his employment with the defendant, the plaintiff was appointed in acting capacity to the positions of Principal – Wildlife and Fisheries Training Institute, Naivasha and Assistant Director of Education. He referred to the letters dated 27th July, 1993, and 19th January, 1995 to the defendant, by the plaintiff. That the defendant's regulations stipulated that an employee posted to a higher grade on an acting capacity would be entitled to payment of an acting allowance at the rate of the full difference between the salary of his/her grade and the minimum salary of higher grade. That in compliance with the regulation, the defendant paid to the plaintiff

the acting allowances due to the plaintiff calculated as set out above. That the plaintiff was notified of the effectuation of the acting allowance payments by letters dated 18th October, 1993 and 1st February, 1995 from the defendant”.

About the plaintiff's application for the post of Assistant Director Education, the defendant said he was found not to be qualified.

About the development of the Education and Visitor Service Department programme, the defendant said this was, “a team effort managed and implemented at management level”, as the plaintiff could not have done it alone and could not take any credit for it.

On the matter of the plaintiff's resignation, the defendant stated that the plaintiff was charged and prosecuted before the defendant's Disciplinary Tribunal on six counts of various offences of contravening the KWS (armed wing) (Disciplinary) Code 1990. That the plaintiff voluntarily participated in the disciplinary proceedings and pleaded not guilty to the charges and after the full hearing, he was found guilty as charged. That after that, he opted for early retirement vide his Memo dated 4th December, 1995 addressed to the Director. His application was allowed and accepted vide the Directors letters of 31.1.96, and he was paid his benefits in full.

The defendant therefore maintained that the plaintiff did not adduce any evidence to show that the World Bank rates existed and that he was entitled to the same. He submitted further that the plaintiff failed to adduce evidence to show that he was entitled to any salary or allowance other than what was due to him by virtue of his appointment as per his letter of appointment, or acting appointments.

The defendant denied that it was liable to pay the plaintiff “**special damages**” in relation to loss of his MWITO SACCO allowances and insurance cover. That the plaintiff's claim is based on a contract of employment, and he cannot therefore introduce claims not forming part of the contract of employment.

On the 2 cases quoted by the plaintiff's counsel, the defendant said they were not relevant here as the plaintiff was paid all his benefits under his contract of employment when he opted to retire.

The plaintiff replied to the submissions personally, vide his response dated 16th November, 2005. He clarified that he was appointed on permanent and pensionable terms of employment.

The plaintiff went at great length under item 2 of his submissions to give details of how he was denied the correct “acting allowance on the job he was doing”. He brought in the issue of the Ruling of Mulwa, J which allowed him to produce a newspaper cutting (press release) and some documents showing names of some of his colleagues who were being paid “World Bank salaries”.

The plaintiff gave his qualifications in court and these are on record. The plaintiff maintained that he single-handedly conceived the idea of developing the project which attracted donor funding, yet he was not paid the World Bank salary as the other officers were. This is why he is complaining of discrimination.

On the prosecution by KWS, the plaintiff said it was rendered null and void because the Director “refused” to confirm the judgment.

The plaintiff also made submissions on the Constitution of Kenya, to show that Section 82 was breached in handling his matter of employment with the defendant which discriminated against him.

The plaintiff's terminal dues was not released for a period of 16 months. He has land a claim for special damages for the 16 months he suffered without his benefits because of what was described as a notice to show cause letter written to him by the Director. The plaintiff said that he lost his Mwito Sacco Society Chairmanship because of failure to make monthly payments because his benefits were withheld by the defendant for 16 months. He calculated what according to him he was entitled to under this head.

Having gone through the oral evidence recorded by me and Justice Mulwa (now retired), and again, having read through the written submissions prepared by consent, I am now in a position to consider the issues which came out in the evidence, particularly the issue of “**discrimination**” as testified and submitted by the plaintiff that he was deliberately denied “**the correct acting allowance**” paid to some members of staff described as Senior staff. He termed this, “**World Bank Salaries**”, paid to officers implementing World Bank sponsored Development projects, detailed in the document which Judge Mulwa allowed him to produce as an exhibit, together with a newspaper cutting.

I found the document of the World Bank, in the court file. It is for official use and is headed “**Staff Appraisal Report, Kenya Protected Areas and Wildlife Service Project**”. Its dated January 20th 1992.

Page 2 of the document is the Credit and Project Summary. It also shows Kenya Government as the borrower of the funds, and the Beneficiary, KWS, the defendant.

The project document has various headings, such as Wildlife Education and Visitor Services, where the plaintiff says he acted as the Assistant Director, but was not paid as per the World Bank rates.

I have not found specific salaries payable to officers undertaking this project though there is some reference to this in page 59.

The newspaper cutting which the plaintiff produced before Justice Mulwa reads in part,

“Employees in addition to David Western drawing tax-free International level salaries described as consulting fees from donors include...”

A list of names is then given plus the salaries they were drawing.

This is the basis of the plaintiff’s claim for discrimination. The plaintiff’s letter of appointment was produced as evidence in court. Further, letters appointing him to act specifically in 2 positions as shown by evidence were also produced.

As concerns these other employees whom the plaintiff is complaining about, I found in the court file, documents titled, “**Credit Advise Schedule**”, showing their names and pay point, KCB Nairobi Area, in City Centre Branch. Those documents too were produced by the plaintiff, following the Ruling of Mulwa, J. The offices are referred to as “**Senior Staff**”, and their salaries were paid directly to the bank as shown. The offices are Hamilton Patrick, Western David, Mukallah Simon, Koyo Anderson Muhanga John Mburu Joseph, Mburugu Joseph, Kaka Ali.

The plaintiff complained that these officers were like him, serving on permanent and pensionable terms, of employment yet he was not paid World Bank rates like them.

As already stated, no evidence in the form of Letters of Appointment in respect of the employees and or officers named by the plaintiff was produced in court, but the salaries they were drawing was confirmed by the evidence from the bank which was adduced by the plaintiff. That evidence referred to the named employees as Senior staff and according to further evidence on record, this was because they held positions of Assistant Directors and were being paid under the World Bank Project which I have already referred to.

The plaintiff was not in the category of Assistant Director but on 2 occasions, he was appointed to act as Assistant Director. First was on 19th January, 1995, when he was appointed to act as Assistant Director Education, and secondly by a letter dated 18th October, 1993, in which the management approved payment of acting allowance to him “**with effect from 27th July, 1993, for performing the duties of Principal grade 4**”.

On these 2 occasions therefore, I find that the plaintiff enjoyed the status of Assistant Director (though

in an acting capacity) and was therefore a Senior Staff.

The letters appointing him to act in the 2 positions also spelt out how his acting allowance was to be calculated and on what salary it was based. This is what the plaintiff referred to as the parastatal salary.

Given the fact that the plaintiff's acting position in 2 instances raised his status to that of Assistant Director, and the duties he performed fell within the World Bank Project, as the document shows, the question I would pose at this stage is, why was the plaintiff treated differently from the other Assistant Directors in terms of payment of allowance for the period he acted as Assistant Director?

The period when the plaintiff acted as Principal is known because he was later called upon to hand over to a Mr. Khan who was appointed the Principal.

Even when he was appointed Acting Assistant Manager – Education, this was for a limited period as the post was subsequently advertised, and unfortunately he was not successful at the interview.

The plaintiff complained that he was discriminated against and that is why he was not successful in securing the positions of Assistant Director Education, and again, Assistant Director, Principal at Naivasha.

I have not found evidence of this complainant so I cannot make any findings on.

The plaintiff's claim for Special Damages is based on what he called the 16 months when the defendant withheld his dues. The evidence on record is that an article appeared in the Kenya Times Newspaper about his retirement, presumably written by him, and he was asked to show cause why he should not be disciplined because of that article of complaint. This matter was also reported to the police who visited the plaintiff's house and took the letter of complaint in question. It took sometime before this issue was sorted out. This prompted the plaintiff to come to court and get an order directing the defendant to pay him his terminal immediately. He claims damages based on unpaid salary and allowances for 16 months, and again loss of his monthly sitting allowance as Chairman of Mwito Sacco which suspended him.

I find this head of damages to be far fetched and not flowing directly from the plaintiff's retirement and I do not allow it.

Because of the plaintiff's letters in the file asking to be allowed to retire I am unable to find that the plaintiff was forced to retire.

All in all, I find that the defendant's treatment of the plaintiff as far as payment of acting allowance was concerned was wrongful.

I am unable to declare that the plaintiff was and is entitled to salary paid to other officers in the job categories approved by the World Bank, because the evidence on record shows that only the Senior staff drew such salaries and the plaintiff was not one of them, however, when the plaintiff was appointed to act as Principal and again as Assistant Director – Education, the plaintiff did for that period join the ranks of senior staff who were drawing World Bank salaries under the aforementioned project. For that reason, I direct the defendant to calculate and pay the plaintiff his emoluments for the period he acted as Principal and Assistant Director, Education, respectively basing it on the World Bank salary applicable at the time, under the Project.

I find that the plaintiff's case succeeds to this extent and I grant him costs of the and interest of the suit, at court rates.

Dated at Nairobi this 19th day of October, 2005.

JOYCE ALUOCH

JUDGE