



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Civil Appeal 230 of 2008

#### Editorial Summary

#### 1. *Civil Appeal*

#### 2. *Subject of Subordinate Court case*

#### LABOUR LAW:

##### 2.1 *Employment*

*Employee/employer relationship*

##### 2.2 *Employee opts out for early retirement*

2.3 *Condition of employment: There be an increment of salary every 1<sup>st</sup> day of the month of October.*

##### 2.4 *Employee gives 3 months notice to retire.*

##### 2.5 *Notice accepted.*

##### 2.6 *Pension packages/salary omits the annual increment pay as of 1<sup>st</sup> October.*

##### 2.7 *Employee sues for difference in salary namely:*

a) *Ksh. 166,591/- being the difference in pension.*

b) *Ksh. 12,625/- unpaid salary increment 2001/2002 plus 7 days.*

c) *Refund of Ksh. 1,767/40 statutory deductions made but not paid total sum of Ksh. 346,593.40*

2.7 *Defence – employment contract subject to the Coffee Research Foundation regulations.*

ii) *Subject to letter of employment.*

iii) *Subject to trade, usage and customs*

2.8 Trial magistrate dismisses claim 10<sup>th</sup> April 2008.

2.9 Original plaintiff appeals to High Court 8<sup>th</sup> May 2008.

### **3. Appeal**

*The learned magistrate erred in fact and in law:*

3.1 ...in finding and holding the appellant did not prove any or all of prayers sought in his amended plaint.

3.2 ...in dismissing the plaintiff's suit.

3.3 ...in disregarding the appellant's evidence in proof of his claim.

### **4. Arguments by appellant**

a) Employment of appellant governed by the terms and conditions of service for research foundation (CRF) Senior Staff Revised October 1992.

b) Increment payment for 1<sup>st</sup> October 2000 not effected.

c) Increment not effect due to financial problems but "if and when the increments for 2000/2001 are approved

*...appellant will be paid together with others.*

d) Increments ... due but reviews in 2006.

e) Appellant not paid.

f) Increment would have entitled employee to pension of Ksh. 52,500/- per month instead of Ksh. 50,292/- per month.

g) Trial magistrate erred in holding if awarded effect other employees.

### **IN REPLY:**

aa) Claim based on employment contract governed by Terms and Conditions of Service for Research Foundation (CRF) Senior Staff Rev October 1992.

bb) Admits review of increment made but appellant not proved, entitlement but there was no funds.

cc) Informed in writing, no increment

dd) No valid contract existed in 2006.

ee) Increment not approved for all expenses.

ff) No proof that statutory deductions not paid to rebut organizations

gg) Suspension of salary provided for

hh) *Matter for foundation on increment.*

**5. Held:**

i) *The appellant entitled to increment.*

ii) *Fundamental right.*

iii) *Worked diligently for 33 years.*

**6. Case Law:**

*J.N. Wafubwa – Vs – Attorney General & 2 Others*

*2006 eKLR*

*(Tunoi, Waki, Onyango Otieno JJA)*

**7. Advocates :**

i) *M/s R.W. Mbanya instructed by R.W. Mbanya & Co Advocates for appellant/original plaintiff*

ii) *M/s J.W. Majiwa instructed by J.M. Magiwa & Co Advocates for respondent /original defendant– absent*

*(under Order 42 r 16 Civil Procedure Rules.)*

**STEPHEN NGARUIYA**

**KANYANJA.....APPELLANT/ORIGINAL  
PLAINTIFF**

**VERSUS**

**COFFEE RESEARCH FOUNDATION Thro THE BOARD OF  
DIRECTORS.....RESPONDENT/ORIGINAL DEFENDANT**

***(Being an appeal against a Ruling delivered by Hon. Joseph Malobe Were, Senior Resident Magistrate dated and***

***delivered on 10<sup>th</sup> April 2008 in CMCC No. 13558 of 2004 in Milimani Commercial Courts)***

**J U D G M E N T**

**I. INTRODUCTION**

1. The relationship between the appellant/original plaintiff Stephen Ngaruiya Kanyanya and the respondent/original defendant M/s Coffee Research Foundation through the Board of Directors is that of employee/employer.

2. In brief, the appellant was employed by the employer at the age of 22 years old in the year 1968 as a Lab Technician. He worked diligently for 33 years when he opted for early retirement as the Chief

Laboratory Technician. He tendered a 3 months' notice with effect from October 2001 for retirement, leaving the service of his employer on 11<sup>th</sup> January 2002. This retirement was accepted by the employer.

3. The employee noticed that whereas in the month of October of each year he would get an increment, in the year 2000, he did not get this increment. This alarmed him as he wished to base the terms of his retirement at the new increment level. Thus if he could leave and obtained his petition, he would be paid Ksh. 50,292/- instead of Ksh. 52,500/-

4. Whereas he was allegedly informed that the board failed to approve the increment for the year 2000, that as soon as the approval is made, he would be considered.

5. (This approval came 6 years later in the year 2006.) The appellant was never paid his increment. He then filed suit in the Milimani Commercial Courts Nairobi on the 8<sup>th</sup> December 2004. He prayed in an amended plaint that:-

**a) A sum of Ksh. 166,591/- be paid to him being the pension dues paid to him and the pension dues he is entitled to as at December 2004.**

**b) Ksh. 12,625/-, the unpaid differences in increment salary for 3 months 2001 to 7 days worked in January 2002**

**c) Refund of Ksh. 1,767/40 being unlawful deductions made to the January 2002 salary.**

**d) The court's declaration that 2000/2001 salary increment due to plaintiff be paid in computing the defence**

**e) Costs**

**f) Interest**

6. In total, the employee wanted to be paid a sum of Ksh. 180,963.40 and a declaration that he is entitled to the increase of salary.

7. The defence opposed the suit and filed defence whereby their contention had always been that the employment was subject to the conditions contained in the letter of employment and subject to the trade usage and customs.

8. It was not automatic that funds were available to the employee.

9. Upon hearing the trial between the parties the Hon. Magistrate dismissed the whole suit as having not been proved with the exception to prayer "c" in the plaint. This concerned statutory deduction made by the employer for the 7 days worked in January 2001 but deductions never remitted to the relevant bodies.

10. Being dissatisfied with the dismissal of the said decision, the appellant filed appeal to this High Court on the 8<sup>th</sup> May 2008.

## **II APPEAL**

11. The appellant stated in his memorandum of appeal that the learned magistrate erred in fact and law:

**11.1 ... in finding and holding the appellant did not prove any or all of the prayers sought in his amended plaint.**

**11.2 ... in dismissing the plaintiff's suit.**

**11.3 ...in disregarding the appellant's evidence in proof of his claim.**

12. The appellant prayed that his appeal be allowed. The trial magistrate's case decision be set aside and substituted with prayers allowing the plaintiff's prayers in his amended plaint.

13. In reply, the employer respondent argued that it was not amicable for the appellant to claim the increment as he had already retired from the respondent's service.

Namely;

13.1 The issue of the claim of the increment was based on the letter of appointment and the "terms and conditions of service for research foundation CRF service staff REV October 1992."

13.2 The appellant failed to prove he was entitled to the increment.

13.3 He was told in writing that he would not receive the increment due to the situation the respondent was financially in.

13.4 There was no valid contract that existed between the parties after retirement of the appellant. The increment unavailable in the year 2006 could not apply to him.

13.4 The increase was not approved for all the employees.

13.5 As to statutory deduction, no proof was shown that this was not paid to the relevant organization.

13.6 The suspension of the increments are provided for.

13.7 the issue of interest was a matter for the foundation.

13.8 Reliance was made on the case law of

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An Air Force captain, due to lack of promotion, he would be forced to retire. He was later to be convicted of three serious breaches. He was found guilty convicted to suffer loss of seniority, salary deduction and service reprimand and finally served with a notice of retirement from 82 Air Force 22<sup>nd</sup> May 1992.

13.9 He filed suit for unlawful termination and was awarded compensation by the High Court (Hayanga J).

13.10 The Court of Appeal held the award was unlawful and illegal. Judgment was set aside and case dismissed.

13.11 The allegation in the above case, the appellant's notice to retire was unlawful but only the military could decide this.

13.12 The respondent, asked the notice of increment be decided by the Foundation alone. The respondent prayed that the appeal be dismissed.

**III OPINION**

14. In the subordinate court case, an exhibit was provided being circular No. 76 Reft 1142, so produced by the respondent on the issue of

***“Eligibility for back dated revisions in salaries and benefits: Officers who have left the service by date of implication of decision.”***

15. This concerns the new terms of service for officers not in service at the time decision or agreement is reached. That the circular points out that at the time an increase of wage and house allowance are negotiated and after the termination of the employee’s service

***“such an employee is not entitled to benefit ... because at the new terms and conditions of employment are agreed – such employees had no valid contract of employment in force.”***

16. “With effect from 1<sup>st</sup> August 1982 ...changes to salary would apply only to employees with contract that are valid and in existence.”

17. It was in this clause, that the Hon. Trial Magistrate relied on. That as the appellant/original plaintiff had already retired from employment, the implementation of the increment would not be considered for the appellant.

18. The board took decision on 27<sup>th</sup> December 2001 – not to implement any increment for its employees due to the hardship that the organization was facing at the time. Thus where there was no increment to be accorded the appellant would not be so entitled.

19. The appellant argued that a promise had been made to him. An argument arose that he cannot be selectively chosen alone for this implementation. The appellant argued further, that in the past it had been happening, where payments were made pending the approval of the increment. This increment having now come in 2006 he ought to be paid.

20. Under the administrative circular 9/06 attached to the Terms and Conditions of service for Coffee Research Foundation (CRF) Senior Staff – the issue of increment being deferred, withheld or stopped was documented and applied to the staff unconditionally.

21. In this appeal, the issue of increment was taken up whilst the appellant was still in service of the respondent. He was reassured once the increment was approved he would be paid. He did not therefore fall under the category of staff who had left the service, then pursued his dues. He in fact pursued his dues whilst still in the employment of the respondent.

22. The letter of appointment had the words:

“Your initial salary will be at the rate of £ 309 a year in the salary scale £ 279 – 417 EB £ 435-720 EB:750-012

22.2 Your first incremental date will be 1<sup>st</sup> October 1969 and annually thereafter.

22.3 You will be subject to the Foundation’s general conditions of employment and administrative circulars and any amendments thereto.

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Signed

For Director of Research

26<sup>th</sup> November 1968

22.4 The terms and conditions of service for Coffee Research Foundation (CRF) Senior Staff.

23. The terms and conditions of service for Coffee Research Foundation (CRF) Senior Staff para 1.10

Dealing with increment date and first annual increments stated

***“The incremental date for all offices in the foundation is 1<sup>st</sup> October of each year. Awarding of increment to an employee will depend on performance and conduct during the year immediately preceding incremental date.”***

***23.2 the annual increment is earned over a 12 month period starting 1<sup>st</sup> October and ending 30<sup>th</sup> September of the following year.***

23.3 \_\_\_\_\_

23.4 \_\_\_\_\_”

24. It was the Board’s finding that the appellant was a diligent worker for 33 years having faithfully served the organization. He had no misconduct as would be distinguished from the case law of

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which case law saw the Hon. Judges term the benefits awarded by the High Court and the wish for compelling the military to promote him, as illegal and unlawful.

25. The prayers by the appellant were lawful and were his entitlement. This is what he had worked for in years

26. Increment of salary per annum are available to the staff of the respondent. This though may be withheld when there is poor performance or misconduct. This, as stated earlier, did not apply to the appellant.

27. The clause used was the issue of there being no funds to pay the increment. When funds became due, the applicant had been promised in writing that he would be availed with the increment. This nonetheless was communicated by a letter of 26<sup>th</sup> March 2002 that, whereas the increment would be suspended that if and when the increment are approved

***“you will be paid together with others, kindly therefore give us your forwarding address or confirm that one indicated in your letter is appropriate.”***

28. The other aspect to be noted as that the appellant’s services had not been terminated. If he had been so terminated, then under circular 76 he would not be entitled to the increment.

29. I would only conclude that an employee having worked from 1968 to 2001 faithfully and diligently rising to the rank of Chief Lab Technician and spending 33 years in one career, looked forward to his retirement. His basic rights have been contravened by withholding the increment when they became due. This was due to him before retirement and affected his retirement benefits.

30. I would find that the appeal herein succeeds. The decision of the Hon. Magistrate be set aside. The judgment as prayed in the amended plaint be and herein is allowed.

31. There will be costs to the appellant to be paid by the respondent in this appeal. There will be costs to the plaintiff to be paid by the respondent original defendant in the subordinate court.

DATED THIS 3<sup>RD</sup> DAY OF JULY 2012 AT NAIROBI

**M.A. ANG'AWA**  
**JUDGE**

*Advocates :*

- i) M/s R.W. Mbanya instructed by R.W. Mbanya & Co Advocates for appellant/original plaintiff*
- ii) M/s J.W. Majiwa instructed by J.M. Magiwa & Co Advocates for respondent /original defendant–absent*

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