

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO E736 OF 2023

ALPHONCE
OGUTU.....CLAIMANT

VERSUS

KENYA POWER AND LIGHTING COMPANY LIMITED.....
.....RESPONDENT

JUDGMENT

Background

1. The Claimant has instituted the present suit to claim the sum of Ksh. 3,274,326.00 from the Respondent on account of alleged salary arrears and unpaid acting allowance. He avers that the Respondent has resisted efforts to amicably pay the amount thus necessitating these proceedings.
2. The Claimant contends that the Respondent deployed him to its South Nyanza regional office to take charge of its finance function before the position could be filled substantively but failed to pay him acting allowance. He contends that although the Respondent's policies provide for the allowance, the Respondent neglected to pay it to him. He avers that instead of the Respondent paying him the allowance, it advertised the position.
3. The Claimant further contends that on 16th March 2016, the Respondent appointed him to the position of Chief Financial

Officer for its South Nyanza office with a basic salary of Ksh. 249,079.00. He contends that whilst all his colleagues in the same job group were remunerated in accordance with the Respondent's salary structure which came into force in January 2016, his salary was not adjusted to be in tandem with the remuneration paid to his peers.

4. The Claimant contends that because of the Respondent's refusal to address his grievances relating to unpaid acting allowance and salary arrears, he resigned from employment. He contends that the Respondent's actions against him amounted to discrimination and unfair labour practice.
5. The Respondent does not admit the claim. It contends that the Claimant was deployed to the South Nyanza regional office on 10th September 2015 as the in-charge of the finance docket. It denies that the deployment was in acting capacity.
6. The Respondent avers that the functions which the Claimant was allocated on his transfer were in line with his Job Description. As such, it denies that he was entitled to draw acting allowance.
7. The Respondent contends that when the Claimant was transferred, he was paid disturbance allowance equivalent to his salary for two months. Further, it contends that arrangements were made to assist him to transport his personal effects to the new station.
8. The Respondent avers that the South Nyanza office was new and the Claimant was sent there to set up the administrative structures in the finance docket. As such, it contends that he

was fully in charge of the finance function and cannot be said to have been deployed in acting capacity.

9. The Respondent avers that the Claimant's salary as Senior Accountant, South Nyanza region, was adjusted to Ksh. 209,320.00. It avers that he was later recruited to the position of Chief Finance Officer for the same region after a competitive process with a new salary of Ksh. 242,079.00. It contends that the Claimant's new salary was within the band of basic salary for the position as recommended by the Salaries and Remuneration Commission (SRC).
10. The Respondent avers that the Claimant's salary was subsequently adjusted on 17th May 2017 to Ksh. 264,059.00. It contends that there was a further upward adjustment to the salary to Ksh. 282,361.00 and Ksh. 293,826.00 with effect from 7th January 2019 and 27th December 2019 respectively.
11. The Respondent contends that it paid the Claimant salary which was commensurate to his Job Group and Description. It further contends that the salary was adjusted in line with the salary structure which was provided by the SRC.
12. The Respondent denies that it discriminated the Claimant. It contends that the data which the Claimant has relied on to assert that he was discriminated does not emanate from it. The Respondent avers that the authenticity and credibility of the data cannot be vouched for and as such, it cannot be relied on to anchor the claim for discrimination.
13. The Respondent's witness stated that the variance between the Claimant's and his colleagues' salary was because they

were hired on different dates. He stated that the Claimant's colleagues were earning higher salary because they were employed earlier than him. As such, they had benefited from more upward salary reviews.

Issues for Determination

14. After evaluating the pleadings, evidence and submissions by the parties, the following issues present for determination:-
 - a) Whether the Claimant was deployed to the Respondent's South Nyanza office in acting or substantive capacity.
 - b) If the answer to the above question is in the affirmative, whether the Respondent failed to pay the Claimant acting allowance.
 - c) Whether the Respondent underpaid the Claimant salary for the position of Chief Financial Officer after he was appointed to the position from 16th March 2016.
 - d) Whether the Claimant is entitled to the reliefs which he seeks in the suit.

Analysis

15. The evidence on record shows that the Respondent hired the Claimant's services as Senior Accountant (Financial Accounting) with effect from 1st November 2011. The Claimant's entry salary was Ksh. 124,163.00 with a house allowance of Ksh. 41,680.00.
16. The record shows that on 10th September 2015, the Respondent transferred the Claimant from its Financial Division to the Regional Operations Section, South Nyanza Region. The letter of deployment and transfer stated in part as follows:-

“Alphonse Ogutu S/N 14838

Thro’

Manager, Financial Accounting

Dear Alphonse,

TRANSFER & DEPLOYMENT

This is to advise you that you have been transferred from the Finance Division, Financial Accounting Department, Regional Operations Section, Central Office, Stima Plaza to Regional Coordination Division, Finance Function, South Nyanza Region, Kisii with immediate effect.

You will be in charge of the Finance Function, South Nyanza Region until when the position is substantively filled.

As you will not be housed by the company in Kisii, the Paymaster is by a copy of this letter advised to pay you an equivalent of two months’ basic salary being disturbance allowance.

Please liaise with the Manager, Human Resource Services regarding transportation of your personal effects from Nairobi to Kisii.

Your Cost Centre has changed from 604080 to 404081.

All your other terms and conditions of service remain the same.

Yours faithfully,

For THE KENYA POWER & LIGHTING CO. LTD

KEN TARUS

GENERAL MANAGER, FINANCE

17. The issue in dispute is whether the Claimant's deployment was in acting or substantive capacity. The parties have taken contrasting positions on the subject. Whilst the Claimant asserts that the transfer was in acting capacity, the Respondent contends that it was not.
18. During trial, the Claimant averred that he was transferred to Kisii to act in a position that was two grades above the position he was serving in. Despite this, he contends that he was not paid acting allowance in accordance with the Respondent's regulations.
19. The Claimant averred that his role of Senior Accountant at the time fell under job group MG08. And the position of Chief Finance Officer which he was asked to serve in at Kisii fell under job group MG06.
20. The Claimant contends that the acting allowance he was to receive was to have been calculated at the rate of 25% of his basic pay. He further avers that this amount was not paid for a period of seven (7) months.
21. On the other hand, the Respondent's witness stated that the Claimant was deployed to Nyanza in September 2015 in the position of Senior Accountant. He stated that the Claimant was to act in the finance function until the position was substantively filled. The witness confirmed that the position was subsequently filled substantively after the Claimant was appointed to it through a competitive recruitment process.
22. The witness further stated that when the Claimant was deployed to Kisii in September 2015 to serve in the position,

he was in job grade 08. However, he stated that after he (the Claimant) was substantively appointed to the position, he was moved to job grade 06.

23. The evidence on record leaves no doubt in the court's mind that the Claimant was deployed to the Respondent's South Nyanza office whilst he was serving as Senior Accounts Officer in job group 06. It is further apparent that the Respondent moved him to South Nyanza to be in charge of the finance function pending the Respondent appointing a substantive holder for the position. This fact was not only admitted by the defense witness during cross examination but is also self-evidence from the Respondent's letter dated 10th September 2015 which indicated that the Claimant was deployed and or transferred to Kisii to "be in charge of the Finance Function, South Nyanza Region until when the position is [was] substantively filled".
24. It cannot be that the Claimant was substantively holding the position of Chief Finance Officer, South Nyanza Region whilst the Respondent sought to fill it (the position). Such supposition will be self-contradictory. If the Claimant was posted to Kisii in a substantive capacity, why was it necessary for the Respondent to undertake recruitment for the same position whilst the Claimant was in office?
25. In their submissions, the Respondent's advocates seek to draw a distinction between the terms "in charge" and "acting". However, I am not persuaded by the attempts.
26. The fact of the matter is that the Respondent's letter of 10th September 2015 intimated to and required of the Claimant

to discharge the functions of the finance officer until the position was substantively filled. This can only mean that the Claimant was to serve in the position in acting capacity until it was substantively filled.

27. The Respondent's counsel further relies on the case of ***Republic v Public Service Commission & another Ex Parte Peter Odoyo Ogweno [2021] eKLR*** to contend that the Claimant cannot claim to have been acting as Chief Finance Officer because the Respondent did not appoint him in writing to act in the position. I do not agree with this contention. To my mind, the Respondent's letter to the Claimant dated 10th September 2015 constituted his appointment to act as the Respondent's Chief Finance Officer, South Nyanza region pending the position being filled substantively.

28. The Claimant tendered in evidence a schedule from the Respondent's Manual which states as follows:-

"Where an employee is required to fill a post on an acting basis for a period in excess of two months, he/she will be entitled to payment of 25% of his/her basic salary as acting allowance subject to the following conditions:-

- a) That the employee is fully qualified and is actually carrying out the full duties specified for the post in which he is acting.*
- b) That no acting allowance will be paid in respect of the first two months during which he is acting.*

- c) *Acting allowance will not be paid in excess of a period of six months. It is expected that before expiry of this period a suitable replacement is found or the acting individual is confirmed to the position.*
 - d) *In exceptional circumstances where an employee may be called upon to act for a period in excess of six months, special approval will be obtained from the Chief Manager, Human Resources and Administration.*
 - e) *All grants of acting allowance must be authorized by the Chief Manager, Human Resource and Administration.”*
29. From the foregoing, it is apparent that claims for acting allowance can only accrue if an employee has acted in a position for more than two months. Further it is apparent that acting allowance is not payable for the first two months when an employee serves in acting capacity and is not payable beyond six months without special authorization.
30. In the instant case, the Claimant avers that he acted for a total of seven months. As such, he was entitled to draw acting allowance for only five months since the first two months when he served in acting capacity are discounted.
31. The Manual shows that the Claimant’s acting allowance was to be computed at the rate of 25% of his basic salary at the time. The Claimant was deployed on 10th September 2015. At that time, his basic salary was Ksh. 181,132.00 (see the September pay slip at page 123 of the Respondent’s trial bundle). The Claimant’s basic salary remained Ksh.

181,132.00 until it was revised to Ksh. 209,320.00 as from 1st January 2016 (see the Respondent's letter dated 21st March 2016 at page 4 of the Respondent's trial bundle).

32. Since the Claimant's deployment took effect from 10th September 2015, the regulations disentitled him from claiming acting allowance for September and October 2015. As such, he could only have earned the allowance from November 2015 but limited to six months.
33. The evidence on record shows that the Claimant was appointed as the Respondent's substantive Chief Finance Officer from 16th March 2016. As such, he served in the position in acting capacity until 16th March 2016. In effect, he was entitled to earn acting allowance for the position between November 2015 and mid-March 2016.
34. Between November 2015 and December 2015, the Claimant's basic pay remained Ksh. 181,132.00. As such, his acting allowance for this period was $\text{Ksh. } 181,132 \times 25\% \times 2 = \text{Ksh. } 90,566.00$.
35. Between January 2016 and February 2016, the Claimant's basic pay was Ksh. 209,320.00. As such he was entitled to $209,320 \times 25\% \times 2 = \text{Ksh. } 104,660.00$.
36. In March 2016, the Claimant worked in acting capacity for half of the month before he was appointed as the substantive Chief Finance Officer. At the time, his salary remained Ksh. 209,320.00. As such, his acting allowance for half the month was Ksh. 26,165.00.

37. The cumulative acting allowance due to the Claimant was thus Ksh. 221,391.00. As such, judgment is entered for him for this amount.
38. Besides the claim for acting allowance, the Claimant also claims for salary arrears which allegedly accrued from underpayment of his salary after he was appointed as the Respondent's substantive Chief Finance Officer. According to the letter of appointment, the Claimant's starting basic salary in the position was Ksh. 242,079.00. The evidence on record shows that this amount was increased to Ksh. 264,059.00 with effect from 1st January 2017. On 1st January 2019, the salary was further reviewed upwards to Ksh. 282,361.00. There was a further review of the amount to Ksh. 293,826.00 with effect from 1st January 2020.
39. The Claimant asserts that this amount was less than what his colleagues who were serving in the same position were earning. As such, he alleges that the Respondent discriminated against him by paying him differentially.
40. The Respondent disputes the Claimant's assertion in this respect. It contends that the Claimant was hired at the entry level basic salary for the position of Chief Finance Manager. It avers that the salary structure was as recommended by the SRC.
41. The Respondent avers that the reason for the difference in the salaries of its Chief Finance Officers across various regions is explained by the fact that they were employed on different dates. It contends that the Chief Finance Officers who had higher salary were employed earlier than the

Claimant and had benefited from earlier periodic salary hikes in line with the applicable salary structure.

42. The Respondent tendered in evidence a letter dated 27th April 2017 from the SRC to support its position. According to the letter, officers in job group MG 06, where the position of Chief Finance Officer fell, were to be paid an entry salary of Ksh. 242,079.00 for the period before 2017. The basic salary for that position was capped at Ksh. 374,079.00. In essence, the Respondent was permitted to hire officers in that position at an entry salary of Ksh. 242,079.00 and was allowed to revise their salary during that period subject to a ceiling of Ksh. 374,079.00.
43. The Claimant's appointment letter shows that he was hired to the position of Chief Finance Officer with an entry basic salary of Ksh. 242,079.00. This was in tandem with the recommendation by the SRC, albeit postdated. It is therefore erroneous for the Claimant to assert as he does in his email of 11th October 2022 that his starting salary ought to have been Ksh. 279,752.00.
44. The evidence on record shows that the Claimant's basic salary was reviewed upwards to Ksh. 264,059.00 with effect from 1st January 2017. According to the letter by the SRC dated 25th April 2017, the recommended salary band for the Claimant's job group for financial year 2017-2018 was set at between Ksh. 261,445.00 and Ksh. 404,005.00. As such, the Claimant's salary review of Ksh. 264,059.00 during this period fell within the range that had been recommended by the SRC.

45. For the financial year 2019-2020, the SRC recommended a basic salary band of between Ksh. 282,361.00 and Ksh.436,326.00 for the Claimant's position (see the letter by the Commission dated 25th April 2017). The evidence on record shows that the Claimant was granted upward basic salary review of Ksh. 282,361.00 with effect from 1st January 2019. Subsequently on 27th December 2019, he was granted another upward review of salary to Ksh. 293,826.00 with effect from 1st January 2020.
46. The aforesaid two reviews for 2019 and 2020 fell within the range of basic salary that was recommended by the SRC for the Claimant's position for the financial year under review.
47. From the foregoing, it is apparent that the Claimant's salary for the duration he served as Chief Finance Officer for the Respondent fell within the band of basic salary which had been recommended by the SRC. As was intimated by the SRC in its letter to the Respondent dated 25th April 2017, it has a constitutional mandate to recommend remuneration and other benefits for officers working for State agencies (see article 230 of the *Constitution of Kenya 2010*). This recommendation is binding on State agencies (***County Government of Kirinyaga & another v Njagi [2025] KEELRC 2428 (KLR), Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others [2024] KECA 419 (KLR) & National Hospital Insurance Fund Management Board v Kenya Union of Commercial Food and Allied Workers & another; Attorney General (Interested***

Party) [2025] KESC 37 (KLR)). As such, the SRC was entitled to make the recommendations it did to the Respondent. Conversely, the Respondent was bound by the recommendation.

48. The Claimant asserts that the amount the Respondent paid him as salary was less than the remuneration which it was paying other Chief Finance Officers. Whilst the Respondent does not deny this fact, it contends that the difference in the amounts that were paid to the said officers was due to the fact that they were hired on different dates. As such, the officers who were hired earlier than the Claimant were earning higher salaries since they had benefited from several salary reviews.
49. The court has studied the data which the Claimant relies on to contend that the Respondent paid him differentially. The record shows that the officers who were earning higher salary than the Claimant were employed between February and May 2015. On the other hand, the Claimant was hired on 16th March 2016 approximately one year down the line. As such, it is evident that these officers had been in the service of the Respondent for some while before the Claimant was on boarded to the same position.
50. The court agrees with the Respondent that the other officers having been hired much earlier than the Claimant, begun benefitting from upward salary reviews much earlier than the Claimant. As such, their salaries could not reasonably have been expected to be the same.

51. The Respondent has offered a reasonable explanation for the variance in the salaries of the various officers. As long as the different salaries fell within the band of what had been recommended by the SRC for the job group under inquiry, they (the salaries) were legitimately paid to the officers.
52. Commenting on what constitutes prohibited discrimination in the case of **Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] KEHC 9395 (KLR)**, Mwita J observed as follows:-

“I agree with the Court’s observation in the case of Law Society of Kenya v Attorney General & National Assembly [2016] eKLR that discrimination which is disallowed by the Constitution is that which is unjustifiable and without any rational basis. It is always the duty of the party who alleges discrimination to demonstrate that indeed there is unreasonable differential treatment accorded to persons of the same class or category to amount to real discrimination. At the same time it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation, (Nelson Andayi Havi v Law Society of Kenya & 3 Others- (supra), and that equality must not be confused with uniformity lest uniformity becomes the enemy of equality.

(National Coalition for Gay and Lesbian Equality v Minister for Justice-supra).''

53. The above observation applies to the instant case. As such, the court does not agree with the Claimant's assertion that he was discriminated by being paid a lower amount of salary than his colleagues who had been hired much earlier than him. The differences in the dates when the various officers were engaged justified the variances in their salaries given that the officers who were hired earlier had benefited from previous salary reviews before the Claimant was hired at the starting basic salary for the position he held.
54. The foregoing being the case, the court is convinced that the Respondent paid the Claimant salary that fell in the band of the approved salary structure for the position of Chief Finance Office. As such, his claim for salary arrears on account of alleged underpayment of salary fails.

Determination

55. The upshot is that the court makes the following findings and attendant orders:-
- a) The Respondent deployed the Claimant to its South Nyanza regional office to serve in the finance function in acting capacity until 16th March 2016 but failed to pay him acting allowance.
 - b) As such, the Claimant is entitled to be paid acting allowance for the duration he served in the position in acting capacity.

- c) The court enters judgment for the Claimant for the sum of Ksh. 221,391.00 being acting allowance which was not paid to him.
- d) The court finds that after the Respondent engaged the Claimant as its Chief Finance Officer, South Nyanza region in a substantive capacity, it remunerated him in accordance with the recommended salary structure by the SRC.
- e) As such, the Respondent did not underpay the Claimant as he claims.
- f) Consequently, the Claimant's claim for salary arrears on account of alleged underpayment fails.
- g) The court awards the Claimant interest on the amount awarded at court rates from the date of institution of the suit.
- h) Each party to bear own costs of the suit.

Dated, signed and delivered on the 15th day of December, 2025

B. O. M. MANANI
JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court

proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

ORIGINAL