

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT KISUMU**  
**CAUSE NO. E030 OF 2025**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**DIPHINAH M. NYAMBANE & 28 OTHERS.....**  
**CLAIMANT**

**VERSUS**

**KENYA**

**AIRPORTS**

**AUTHORITY..**

**.....RESPONDENT**

**JUDGMENT**

The claimants filed the instant suit on 30<sup>th</sup> April 2025 and subsequently amended the claim on 23<sup>rd</sup> May 2025.

The claimants' case is that they had been job Group S3 since employment in 2007, 2011, 2012 and 2016 respectively, and were promoted to Job Group 4 on 27<sup>th</sup> May 2024 with revised basic salaries and house allowance but contend that Firefighters and Security Wardens whose salary increments upon promotion were backdated to their dates of confirmation, Bird scouts were not and house allowance was Kshs.28,000.00 from 2019 until promotion.

That the disparity had resulted in financial loss and feeling of discrimination against Bird Scouts.

According to the claimants promotions were biased and discriminatory because their salaries were not backdated on promotion which amounted to unfair labour practice.

The claimants prayed for:

- (i) *Compensation for unfair labour practice and discrimination.*
- (ii) *Declaration that the respondent's failure to backdate their salaries upon promotion to Job Group 4 was an unfair labour practice and discriminatory.*
- (iii) *An Order directing the respondent to backdate the salary of Bird Scouts from their respective dates of confirmation similar to Firefighters and Security Wardens from date of appointment in 2007, 2011, 2012 and 2016 total Kshs.66,444,577.*
- (iv) *Backdated house allowance, shift allowance, meal allowance and hardship allowance for those who worked in gazetted hardship areas.*

- (v) *An Order for the respondent to pay arrears from back dated salary increments and hardship allowance.*
- (vi) *Costs of the suit.*
- (vii) *Any other relief the court deemed just and equitable.*

### **Respondent's case**

The respondent admitted that the claimants were appointed Bird Scouts in the Bird and Wildlife Control Section on diverse dates and at the time the position of Bird Scouts was classified as Job Group S3 as per the evaluation and structure applicable then and all the claimants were appointed in the Job Group.

The respondent stated that on 29<sup>th</sup> April 2024, its board of Directors approved the upgrading of Bird Scouts from Job Group S3 to Job Group S4 and concomitantly established Job Group 5 and 6 within the Bird and Wildlife Control Section to enhance career progression effective 1<sup>st</sup> May 2024 and their salaries and other terms were reviewed.

The respondent averred that the claimants salaries could not be backdated because their position was classified as Job Group S3 under the structure in force and the new structure came in on 1<sup>st</sup> May 2024 and Fire Fighters and Security Wardens had a different structure as they required certification courses in addition to minimum competence requirements prior to confirmation and had a defined course structure for one (1) year before confirmation of appointment as per the Human Resource Structure and backdating of salaries of Firefighters and Security Wardens was not proved and salaries notches were enhanced upon signing of the CBA 2024/2027 cycle. It denied having discriminated the claimants and prayed for dismissal of the suit with costs.

### **Claimant's evidence**

In his written witness statement, Mr. Dominic Oгода Okiyo stated that on 13<sup>th</sup> February 2024 Security Wardens confirmation of appointment was reviewed to Job Group S4 and were paid backdated salaries to their respective dates of confirmation in appointment and the same applied to Firefighters on 22<sup>nd</sup> May 2024 but salaries of Bird Scouts was not backed on 27<sup>th</sup> May 2024 which led to a feeling of discrimination.

On cross-examination, CWI confirmed that he was employed on 2<sup>nd</sup> May 2011 at a salary of Kshs.17,146 and a house allowance of Kshs.17,000 total Kshs.34,146, 3 months probation and from 1<sup>st</sup> March 2013 salary had risen to Kshs.40,745 and by July 2025 it was Kshs.137,766. He confirmed that his salary had progressively increased from the date of appointment.

He testified that his duties include control of birds and other wildlife within the airport and its vicinity and neither dealt with fire nor screening of passengers.

That he had a Diploma in Airport Operations and Dispatch but did not avail a copy.

The witness admitted that the minimum qualifications for the position of Bird Scout, Fire Fighter and Security Wardens were different and in the case of Bird Scouts no experience was required, while the others required one (1) year experience. The witness admitted that he was not being qualified for appointment as a Firefighter or Security Warden.

The witness further admitted that the three positions had distinct qualifications. He admitted having provided

certificates awarded after training for 14 days and 8 days in 2014 and 2018 respectively. He additionally admitted that the two courses were not basic in the discharge of his duties.

According to the witness, under the International Civil Aviation Organization, the respondent was obligated to ensure that Bird Scouts and Wildlife staff were trained prior to engagement but he was qualified to perform his duties prior to obtaining the two certificates he availed and added that the certificates were mandatory.

Although that the witness stated that there was a requirement for one (1) year training, he further stated that the requirement of training was for capacity building not to enable him discharge his duties.

**CWI** admitted that the Board Resolution dated 8<sup>th</sup> May 2024 on enhancing Birds Scouts from Job Group S3 to S4 and establishment of Job Group S4, S5 and S6 was specific to Bird Scouts effective 1<sup>st</sup> May 2024 and did not apply to other employees.

On re-examination, CWI testified that Job Group S4, S5 and S6 did not exist previously. That he had been in one

position for 13 years. That ICAO standards were inaugurated in 2012.

That the trainings in 2014 and 2018 were for capacity building and was not upgraded after the training.

According to the witness salary review was after adoption of a CBA in January 2024 but did not avail a copy of the CBA.

### **Respondent's evidence**

**RWI**, Rose Wasike, the Acting General Manager Human Resources Development confirmed that the claimants were appointed as Bird Scouts then classified as Job Group **S3** and were upgraded effective 1<sup>st</sup> May 2024 and salaries could not be backdated because the new structure was dated **1<sup>st</sup> May 2024**.

According to **RWI** Fire Fighters and Security Wardens required certification courses over and above the minimum qualifications.

That no evidence of backdating salaries of Firefighters and Security Wardens had been provided and the CBA

enhanced salaries of all unionisable employees effective July 2025.

It was RWI's testimony that although jobs were distinct the respondent treated all employees equally.

That paragraph 4.9 of ICAO did not make training a requirement but capacity building and the respondent operated under ICAO, had domesticated its procedures and Firefighters and Security Wardens were promoted after one year of training after being engaged at Job Group S3 analogous to Bird Scouts. That when the salaries of bird Scouts were reviewed, they were not backdated because there was no manual for their training prior to promotion and ICAO had a provision on training prior to engagement and were not discriminated but were not promoted after training in 2014 and 2018 and Human Resource documents were available to all employees.

The witness testified that the General Managers Memo to the Managing Director was an expression of his opinion on the complaint against stagnation and ICAO standards required domestication and by 2008 the 2009 Guidelines were operational and the respondent had attempted to resolve the issue in 2015, 2020 and in 2022 when the

structure was approved, it was quashed by the court at the instance of employee.

The witness admitted that Bird Scouts were employed as Job Group S3 and confirmed as such until revised in April 2024, but were currently being hired at Job Group S4.

That whereas Firefighters and Security Wardens required the certificates which were not required for Bird Scouts and no mandatory training for them and the respondent had aligned itself with the ICAO guidelines by capacity building.

**RWI** testified that the payslips on record revealed that the claimant's salaries had increased through salary reviews and no unfairness had been visited upon Bird Scouts and could not discern any feeling of discrimination.

### **Claimants submission**

As to whether Bird Scouts and Security Wardens/Firefighters were in comparable circumstances for purposes of remuneration and review, reliance was placed on ICAO and the Kenya Civil Aviation

(Aerodromes) Regulations 20B to underscore the role of Bird Scouts and urge that they had stagnated in their careers. Counsel urged that Bird Scouts performed critical and safety sensitive functions in safeguarding life and property.

Counsel submitted that under the respondent's Human Resource Policy an employee appointed at grade S4 and below were confirmed after 3-6 months probation and did not provide for confirmation of Firefighters and Security Wardens on Grade S4 after specialized regulatory training of one (1) year, to urge that there was discrimination because the respondent confirmed Firefighters and Security Wardens in Grad S4 leaving the Bird Scouts in Grade S3 even after confirmation.

That there was no provision on training of Firefighters and Security Wardens in the respondent's Human Resource Manual.

Counsel urged that while Bird Scouts may not have undergone training immediately, they undertook regulatory trainings for 3 weeks each as evidenced by copies of certificates on record.

That Firefighters and Security Wardens were not appointed with qualifications of Firefighting and Screeners certificate training course because their appointment was subjected to 3 months training at the Kenya Wildlife Training Institute at Manyani and one (1) year on the job training.

Counsel argued that the Firefighters and Security Wardens were appointed without regulatory training and only attended a 3 months training and the rest was on the job training.

That unlike Bird Scouts who produced training certificates, those of Security Wardens and Firefighters were not produced as evidence and reliance on training for confirmation of Security Wardens and Firefighters in Grade S4 was misleading, selective, discriminatory and promotion to Grade S4 for Firefighters and Security Wardens was automatic but not the case for Bird Scouts.

Reliance was placed on **Ole Pejeta Ranching Co. Ltd V David Wanjau Muhoro** [2017] eKLR, for the proposition that differential treatment without justification constituted discrimination.

That Firefighters and Security Wardens were confirmed in Grade S4 and salaries backdated and payslips were attached and Bird Scouts were neglected and discriminated and no organizational structure was produced and an adverse inference ought to ensue as held in **Kenya Plantation Workers V Harvest Ltd.**

According to counsel, the respondent discriminated the Bird Scouts in the review of Human Resource instruments in 2009 which disadvantaged Bird Scouts as the cadre was excluded.

Reliance was placed on **Beatrice Achieng Osir V Board of Trustees, Teleposta Pensions Scheme** [2021] eKLR for the proposition that policy cannot override constitutional rights of equality, to urge the court to find that Bird Scouts were discriminated in job grading, inclusion in the organisational structure and backdating of salaries, citing the decision in **Nakuru Water & Sanitation Services Co. Ltd V Gichuki** [2018] eKLR on different treatment of comparable employees as were the decisions in **GMV V Bank of Africa Ltd** [2013] eKLR and **International Planned Parenthood Federation (IPPF) V Pamela Ebot Arley Effiom** [2019] eKLR on job description or training to urge that Bird Scouts received

trainings thus closing the gap as they were in comparable circumstances.

Counsel urged the court to allow the claim as prayed.

### **Respondent's submissions**

As to whether the claimants were discriminated, reliance was placed on the provisions of Article 27 of the Constitution of Kenya and section 5 of the Employment Act on the outlawing of discrimination in Kenya on specified grounds such as race, colour, religion, language, politics or other opinion, ethnicity, nationality, social origin, disability, pregnancy, marital status, HIV status, colour, age, sex, culture, dress, birth etc.

Counsel urged that under section 5(4) of the Employment Act, it was not discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Reliance was also placed on the decision in **Law Society of Kenya V Attorney General & another** [2019] KESC (16) KLR as well as **Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others** [2018] eKLR on

the definition of discrimination, to submit that the claimants' contention that the salaries of Firefighters and Security Wardens were reviewed and backdated was based on an erroneous factual basis because the resolution of the Board on 29<sup>th</sup> April 2024 related to Bird Scouts only and there was no basis for a salary review or salary backdate and no evidence had been adduced as proof.

That the roles of Bird Scouts, Security Wardens and Firefighters were distinct as were their qualifications and were incomparable as evidenced by documents on record.

That Firefighters and Security Wardens were employed as trainees at Job Grade S3 and are confirmed at Grad S4 after one (1) year of training.

Reliance was placed on the sentiments of the Court in **Mboga V Sameer Africa PLC** [2025] KEELRC 3039 (KLR) which cited the sentiments of Tanaka J in **South West Africa Cases (Ethiopia, South Africa; Liberia V South Africa)** second phase ICJ (18<sup>th</sup> July 1966) and the Court of Appeal decision in **Tunoi & another V Judicial Service Commission** [2016] KECA 530 (KLR) to

submit that Bird Scouts, Security Wardens and Firefighters were not similarly situated in terms of the core mandate, certification, training, licencing requirements, risk exposure and operational readiness as the latter occupied critical safety and emergency response roles of a specialized nature and Bird Scouts were operationally different, subject to different risk profiles and the three positions could not be placed on similar terms of employment.

Counsel submitted that neither the contention that they were similarly situated nor that the differentiation or treatment had no justification had been demonstrated and discrimination had not been proved.

Concerning the reliefs sought, the respondent submitted that since the claimants failed to prove discrimination, none of the reliefs sought was merited. In addition, as at the date of confirmation Grade S4 did not exist and the claimants were at the time not eligible promotion in 2007 and employment terms were different at the time.

The respondent urged the court to dismiss the suit with costs.

## **Analysis and determination**

It is common ground that the claimants are and have been employees of the respondent having been employed on diverse dates from 2007 and 2016 and all authorized Mr. Domnic Ogonda Okiyo and Diphinah Moraa Nyambane to execute documents and testify on their behalf. Only Mr. Domnic Ogonda Okiyo testified.

Strangely, the witnesses' written witness statement dated 23<sup>rd</sup> May 2025 was exceedingly brief and general in light of the allegations made against the respondent. The statement, as will become clearer later in the judgment lacked essential particulars of persons dates and figures crucial is such a case.

On employment, letters of appointment reveal that the claimants were employed in March or June 2007, April or June 2011, November 2011, February 2013 and September 2016.

Those appointed in March 2007 and June 2007 had a probationary period of one (1) month and were confirmed in August 2007 and December 2007 as Bird Scout initially for two years but changed to permanent in June 2011.

Those appointed in April 2011 were subjected to three (3) months probationary period and confirmed in November 2011 while those appointed in June 2011 were confirmed in October 2011.

**CW1** was appointed in April 2011 and confirmed effective December 2011.

Puzzlingly, Mr. Paul Nduah Nduhiu who was appointed on 7<sup>th</sup> April 2011 like many others but was confirmed effective 1<sup>st</sup> February, 2012. Viola Jelimo Birech was appointed on 18<sup>th</sup> February 2013 and confirmed effective 1<sup>st</sup> June 2013 and Ali Mohammed was appointed on 15<sup>th</sup> September 2016.

While in a majority of the cases the letters of appointment made reference to an interview, others were direct appointments.

For unexplained reasons, the copies of payslips on record were either dated May 2024 or July 2025.

The only common denominator was that they included arrears.

Records show that to qualify for appointment as a Bird Scout an individual required no experience. A basic O-level certificate Grade C or equivalent and computer knowledge and application were sufficient. Although analytical skills and computer knowledge were required no certification was required.

According to **CWI** they were appointed Bird Scouts and stagnated there and were not promoted even after attending two or one week courses and obtained certificates.

Finally, Bird Scouts were appointed at Job Group S3 and confirmed as such after probation.

According to the claimants, they ought to have been confirmed in Job Group S4 analogous to Firefighters and Security Wardens and were claiming the same from the date of confirmation.

The first issue for determination is whether the claimants were entitled to be confirmed in Job Group S4 after the one (1) or three (3) months probationary period.

Since the claimants are using Firefighters and Security Wardens as their equals at the work place, it is essential to compare the three cadres of employees.

To qualify for appointment as a Firefighter an individual required;

- (i) O-Level Grade C or equivalent.*
- (ii) 3 months basic field training course.*
- (iii) Basic Fire and Rescue Training Certificate.*
- (iv) One (1) year of experience in fire and rescue services.*

Similarly, to qualify for appointment as a Security Warden an individual required:

- (i) O-Level Certificate Grade C or equivalent*
- (ii) Attended 3 months basic field training course.*
- (iii) Basic AVSEC training certificate.*
- (iv) Minimum of one (1) year of working experience in security.*

Clearly, these two positions required specialised training for 3 months and one (1) year experience.

In contradistinction to qualify for appointment as a Bird Scout an individual required O level, Grade C and

computer knowledge which in the court's view is a fairly low requirement as no other certificate was required.

Evidently, Firefighters and Security Wardens were comparatively rated higher than Bird Scouts.

The claimants provided copies of appointment and confirmation letters for Security Wardens, Firefighters and Apron Controllers who were confirmed at Job Grad S4.

Similarly, copies of letters availed by the respondent revealed that the Firefighters were engaged as Trainees for one (1) year at Job Group S3 and confirmed at Job Group S4 after on-the-job training for one (1) year.

**RWI** testified while Security Wardens and Firefighters had mandatory trainings Bird Scouts did not.

Bird scouts on the other hand relied on paragraph 4.9.1 of ICAO, Airport Services Manual Part 3 Wildlife Control and Reduction, which provides;

*“Airport Wildlife Control personnel should received Training prior to that initial engagement as Wildlife Controllers. Staff need to be trained, competent and equipped for detection and dispersal tasks. Each state,*

indeed each airport operator within a state may have varying wildlife management requirements due to varying ecosystems, topography, geographical location, habitat, hazard, risk and resources. Detailed and specific instructions therefore cannot be given due to these variables and the following therefore provides only general guidelines. States should prepare and distribute, with co-operation of their national wildlife control Committee, guidelines for the training of airport personnel involved in airport wildlife control. Airports should include procedures for the training of staff involved in wildlife control in their wildlife management programmes”.

While the claimants testified and counsel submitted that the foregoing paragraph made the training of Birdscouts in Kenya mandatory, the respondent maintained that these were guidelines and the respondent had domesticated them to the local circumstances and operated under them.

Without delving into usage of the terms “shall” and “should” in documents, paragraph 4.9.1 quoted above states clearly that those were mere guidelines and airport operators were at liberty to develop their detailed

requirements based on their national, regional and varying needs.

Guidelines are beacons within which the person or organization ought to operate.

The opening sentence of paragraph 4.9.1 is categorical that those who are engaged as airport Wildlife control personnel should be trained prior to their engagement. It thus behoves the individual who desires to join the organization as a Bird Scout to scout for relevant courses.

If the drafters of paragraph 4.9.1 intended to make the provision mandatory for all countries and states, nothing would have prevented it from doing so but the outcome would have been less acceptability of the paragraph and attract less compliance.

Equally, the ICAO Airport Service manual is not part of public international law properly so called.

Finally, RWI confirmed that the respondent's primary document in addressing staff issues was its Human Resource instruments.

For the foregoing reasons, it is the finding of the court that paragraph 4.9.1 of the ICAO Airport Services Manual

did not impose a mandatory obligation on the part of airport operators to train persons employed as Bird Scouts other than ordinary capacity building trainings typical in the public and private service.

Significantly, the claimants were not engaged as Airport Wildlife Control Officers but as Bird Scouts perhaps because wildlife in Kenya is governed by the Wildlife Conservation and Management Act.

It is however, puzzlingly that the respondent has been employing persons with no basic training on bird scouting to be its bird scouts, yet the bird menace at the Jomo Kenyatta International Airport (JKIA) is in the public domain and bird strikes were not uncommon.

The court is left wondering how effective Bird Scouts could be if there are dumpsites or other places frequented by birds not far from the airport, whether Bird Scouts are trained or not.

A panoramic view of the wildlife control section of the respondent under which the claimants were employed would appear to show that it was neither properly conceptualized nor intended to serve a strategic purpose

within the respondent. The first Bird Scouts were those employed in March 2007 and none attached a copy of a basic Diploma or degree certificate which perhaps explains the clamour that they be trained by the employer like their counter parts whose initial engagement was conditional upon completion of the one (1) year training.

Notably, the respondent's Board of Directors approved the upgrading of Bird Scouts from Job Grade S3 to Job Grade S4 effective 1<sup>st</sup> May 2024 and their salaries were reviewed and career progression defined by establishment of other positions Job Grades S4, S5 and S6.

The next related issue is whether the claimants were discriminated by the respondent in any manner or treated unfairly.

**CWI** stated that on 13<sup>th</sup> February 2024, Security Wardens confirmed appointment was reviewed to Grad S4 and their salaries backdated to the date of confirmation of appointment of appointment and the same happened to Firefighters on 22<sup>nd</sup> May 2024 as per paragraphs 5 and 6 of the written witness statement.

It is unclear to the court as to what the review entailed and how the backdating of salary took place.

A copy of the review letter to any of their colleagues or a payslip with concealed identities or an affidavit or witness statement by one of the recipients would have effortlessly demonstrated the factual circumstances.

It is trite law that he who alleges any factual circumstance is obliged to demonstrate its existence.

Section 107 of the Evidence Act provides:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.**

Under Section 108 **The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**See Miller V Minister of Pensions [1947] 2 ALLER 372, Ignatius Makau Mutisya V Reuben Musyoki Muli [2015] KECA 612 (KLR) Muriungi Kanoru Jeremiah V Stephen Ungu M' Mwarabua [2015] eKLR and Janvan Gathara Ngunda V Ready Consultancy Ltd [2022] KECA 572 (KLR).**

In the instant case, the claimants did not avail any material to show on a balance of probabilities that Security Wardens and Firefighters salaries were reviewed on 13<sup>th</sup> February 2024 and 22<sup>nd</sup> May 2024 respectively, and backdated to the date of confirmation of appointment and when that was and perhaps why it happened that way, their having written a complaint notwithstanding. In the court's view the issue of backdating of salary remained an allegation.

It also important to determine whether the claimants were discriminated.

The provisions of Article 27(4) and (5) of the Constitution of Kenya and Section 5(3) of the Employment Act outlaw direct or indirect discrimination on any ground including race, sex, pregnancy, marital status, health status, ethnic

or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

In **Nyarangi & others V Attorney General** [2008] KLR 688 the court stated:

*“Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances”.*

Similarly, in **Peter K. Waweru V Republic** [2006] KLR the court stated:

*“... Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which were not accorded to persons of another such description...*

*Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age or sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”.*

In **Samson Gwer & 5 others V Kenya Medical Research Institute & 3 others** [2020] eKLR, the Supreme Court of Kenya applied Section 108 of the Evidence Act by requiring the claimant to prove his case was in a matter involving discrimination.

In **Raila Odinga & others V I. E. B. C & others** [2013] eKLR the court held,

*“... A Petitioner should be under an obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden...”*

In **Simon Gitau Gichuru V Package Insurance Brokers Ltd** KESC 12 (KLR) the court held;

*“From the above definition it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex, disability etc or due to unfair practice and without any objective and reasonable justification.*

The court further stated:

*“The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to*

*disprove the allegation of discrimination is enormous. The employer must prove that the discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds...*

*This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer”.*

Relatedly, in **Mohammed Abduba Dida V Debate Media Ltd & another [2018] eKLR**, the Court of Appeal cited the decision of the Supreme Court of India in **Kedar Nath V State of WB [1953] SCR 835 [843]** thus:

*“Mere diffentia or inequality of treatment does not perse amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view”.*

On shifting of the burden of proof under Section 5(7) of the Employment Act, in **Nyachae V Kenya Orient Insurance Ltd [2023] KECA 136 (KLR)**, the Court of Appeal stated:

*“As noted above, Section 5(7) of the Employment Act places the burden of disproving discrimination on the*

*employer. The crux of that provision is that once an employee has made out a prima facie case of discrimination, the burden then shifts to the employer to disprove the allegation.*

*A prima facie case is one in which a court properly directing itself would conclude on the evidence presented that there exists a right which has been infringed. Only then can the burden shift to the respondent to disprove the allegation..."*

In this case, the claimants bore the burden of proving a *prima facie* case of discrimination but aside from alleging that the salaries of Firefighters and Security Wardens had been backed after confirmation, the claimant did not provide any component or particulars of the alleged discrimination or unfair treatment.

It was incumbent upon the claimants to establish a *prima facie* case of discrimination or unfair treatment. Compared to Security Wardens and Firefighters for the burden of proof to shift to the respondent to prove that it did not do so, but having failed to demonstrate such *prima facie* case, the burden of proof did not shift to the respondent.

Having failed to show that Bird Scouts were unjustifiably treated differently in contradistinction with Firefighters and Security Wardens, the claim of unfair treatment or feeling of discrimination in paragraphs 8 and 9 of the claimants witness statement, which lacked relevant particulars and the claimants' allegations of being subjected unfair labour practices and discrimination were unsubstantiated.

Notably, the claimants did not plead that they had been discriminated, they pleaded that they felt discriminated. This would possibly explain why they did not set out the particulars or components of the discrimination which are actual as opposed to a feeling.

However, as regards the respondent's organizational structure, the only evidence adduced in court was that in 2007, the respondent's organizational structure had no Grade S4.

Neither party availed a copy of the alleged structure for perusal by the court and appreciate the respondents structure at the time.

It is trite that the fact that an organizational structure of a given state corporation has only one job Grade does not of itself amount to discrimination. There ought to have been evidence to show how the structure discriminated one cadre of employees while favouring others.

As held in **OI Pejeta Ranching Co. Ltd V Muhoro** (supra) justifiable differential treatment demonstrates that there was no discrimination.

Worthy of note prior to 2010, very few state corporations had streamlined their organizational structures, Career Guidelines and Human Resource Policy and Procedural Manuals.

Hitherto, human resource practices and ethos were rudimentary chaotic and generally whimsical.

Article 234(2)(f) of the Constitution of Kenya 2010 which conferred on the Public Service Commission the mandate to “develop human resources in the public service” gave the process the necessary shot in the arm.

The Public Service Commission subsequently delegated powers to the State Corporations Advisory Committee (SCAC), a creation of the State Corporations Act, to assist

state corporations prepare their human resource instruments and SCAC had authority to approve or reject the instruments.

Having found that no evidence was adduced to show that the absence of Grade S4 was of itself discriminatory, nothing turns on the issue.

It is important to emphasize that had the respondent developed and ensured that its Human Resource instruments were in place in 2015 when the Board of Directors allegedly declined to approve them, this case may have been averted. It is unclear to the court why it took so long for such a critical government body to remain without post - 2010 Constitution of Kenya Human Resource instruments which *inter alia* provide for internal grievance resolution mechanisms.

This is a matter the respondent ought to have resolved internally to enhance harmony at the work place.

As expected while the claimants were undertaking short courses to enhance their capacity, it was not alleged that other employees including Firefighters and Security Wardens were not doing the same for a similar purpose

While the respondent is required to ensure that services are rendered optimally by building the capacity of all its employees to discharge their duties effectively, individual employees have a role too in enhancing their skills and better themselves for growth and taking advantage of opportunities as and when they arise.

The foregoing is informed by the disclosure that as late as 2022, the respondent did not have enough persons with a basic degree to act as Bird and Wildlife Control Officers Job Grade S6 and unqualified members of staff had to be appointed to act in some positions.

Finally, the court is in agreement with the respondent's submissions that Bird Scouts, Security Wardens and Firefighters were not similarly circumstanced on account that the positions have different minimum qualifications, mandate, certification, licensing and training.

Firefighters and Security Wardens are subject to higher risk exposure and are at the frontline in emergency cases and their roles are of a more specialized in nature.

Flowing from the foregoing findings, it is discernible that the claimant's case is unsustainable, it is for dismissal and it is accordingly dismissed.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
KISUMU ON THIS 20<sup>TH</sup> DAY OF JANUARY 2026.**

**DR. JACOB GAKERI**  
**JUDGE**  
**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under

Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**  
**JUDGE**

ORIGINAL