

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. E213 OF 2022**

**JAMES MWASHEMBE MALUSHA ..... CLAIMANT**

**-VERSUS-**

**KAJIADO COUNTY PUBLIC**

**SERVICE BOARD ..... RESPONDENT**

**(BEFORE HON JUSTICE DAVID NDERITU)**

**JUDGMENT**

**I. INTRODUCTION**

1. The Claimant commenced this cause through Gatore Jay & Co.

Advocates by way of a memorandum of claim dated 18th February 2022. The Claimant is seeking for the following reliefs –

- a) Payment of salary differential between lower position and higher position claimant was promoted to, being a total of Kshs1,348,352/-.***
- b) Payment of earnings lost in job Group R which claimant was not appointed to, being Kshs312,000/-.***
- c) Payment for loss of lump sum pension Kshs1,000,000/-.***
- d) Payment for loss of Kshs50,000/- monthly pension, total 12,000,000/-.***

- e) *Damages for embarrassment and mental torture*  
*Kshs2,000,000/-.*
- f) *Any other further or better relief that this Honourable court may deem fit.*

2. The memorandum of claim was accompanied with a verifying affidavit, a list of documents and copies of the listed documents and, a witness statement by the Claimant.
3. Though duly served as per the affidavit of service on record, the Respondent neither entered appearance nor filed a response to the claim.

## **II. THE CLAIMANT'S CASE**

4. The Claimant's case is expressed in the memorandum of claim, the oral and documentary evidence he adduced and, the written submissions by his counsel.
5. In the memorandum of claim, it is pleaded that the Claimant retired from the employment of the Respondent on 30th June 2021.
6. It is further pleaded that the claimant was employed by the National Government in the Ministry of Health in 1986 and in 2013 he was absorbed into the Respondent's workforce following the devolution of health services. He was promoted to Assistant Chief Public Health Officer on 13th August 2014 with a starting monthly gross salary of Kshs95,840/=. It is the Claimant's case that the commensurate salary increment was neither implemented nor effected.

7. It is further pleaded that on 26th February 2020 the Claimant was again erroneously promoted to the same position above instead of the Respondent promoting him to the next Grade P and, yet again, the applicable salary and allowances were not applied.
8. It is further pleaded that on February 2021 the Claimant was interviewed for the position of Director of Health and, although he allegedly emerged the best candidate, he was not appointed to the position and the reason allegedly given by the Chair of the Respondent is that the Claimant was approaching retirement.
9. It is the Claimant's case that despite his numerous requests and later demands that his salary and allowances be implemented, the Respondent ignored the same.
10. It is the Claimant's case that as a result of the wrongful and unlawful acts of the Respondent, he has suffered the losses and damages as per the reliefs sought in the prayers set out above.
11. In his testimony in court, the Claimant stated that he holds a Doctorate degree in public health. He stated that as at the time of his retirement in 2021 he had served in the National Government from 1986 to 2013 and thereafter with the Respondent until his retirement in June 2021.
12. The Claimant adopted his filed statement and reiterated the averments in the memorandum of claim as summarized above. He produced his filed documents as exhibits 1 to 9.
13. In the written submissions, Mr. Kanga for the Claimant submitted that the claim arises from the failure on the part of the Respondent

to implement the financial benefits and entitlements of the Claimant as demonstrated in the documentary evidence filed with the claim and supported by the oral testimony of the Claimant in court.

14. It is further submitted that despite numerous inquiries and subsequent demands made the Respondent failed, refused, and or neglected the Claimant's plea resulting in the losses pleaded culminating in the filing of this claim in court.

15. Counsel identified the following issues for determination by the court –

*I. Whether the claimant lawfully earned the first promotion in question.*

*II. Whether the respondent unlawfully failed to implement the promotion benefits due to the claimant.*

*III. Whether the respondent wrongfully and erroneously failed to promote the claimant to a higher job grade.*

*IV. Whether the respondent unfairly denied the claimant further promotion on account of age.*

*V. Whether the claimant is entitled to the reliefs sought.*

16. On the first issue, it is submitted that the Claimant applied for promotion in 2012 while still working with the National Government but the same was approved in 2014 after he had been seconded to the County Government of Kajiado and the promotion was duly communicated to the Respondent. It is submitted that the

Claimant had been duly seconded in pursuance to ***Section 138 of the County Governments Act.***

17. On the second issue, it is submitted that the Respondent was legally bound to implement the promotion of the Claimant and pay to him the commensurate salary and allowances for the position he held. It is submitted the failure to so act by the Respondent amounted to unfair labour practice by the Respondent under ***Article 41 of the Constitution.***
18. On the third issue, it is submitted that the purported promotion by the Respondent vide a letter dated 26th February 2020 to the position that he already held was erroneous, wrongful, and unlawful as the Claimant could only have been promoted to the next grade and not to the one that he already held. It is again submitted that this amounted to unfair labour practice.
19. On the fourth issue, it is submitted that the Claimant was denied promotion to the position of Director of Public Health based on his age. It is submitted that this conduct on the part of the Respondent was against ***Article 27 of the Constitution*** and ***Section 5 of the Employment Act*** for being discriminatory.
20. On the fifth issue, it is submitted that the oral and documentary evidence by the Claimant establishes a case for the court to award him as pleaded. It is submitted that the Respondent opted not to defend the cause and as such the evidence by the Claimant stands unopposed and uncontroverted.

### **III. THE RESPONDENTS' CASE**

21. As stated in an earlier part of this judgment, the Respondent did not defend the claim notwithstanding that it was duly served.

### **IV. ISSUES FOR DETERMINATION**

22. The court has carefully and dutifully gone through the memorandum of claim, the attached documentary evidence, the oral evidence by the Claimant and, the submissions by his counsel. Notwithstanding that the claim is undefended, it was upon the Claimant to prove his cause on a balance of probabilities.

23. The following issues commend themselves to the court for determination -

- a) Did the Claimant prove an employment relationship between him and the Respondent?*
- b) If (a) above is in the affirmative, what were the terms and conditions thereof?*
- c) Is the Claimant entitled to the reliefs sought as against the named Respondent?*
- d) Who should bear the costs of the cause?*

### **V. EMPLOYMENT**

24. This cause raises a fundamental issue of employment in the devolved units otherwise known as county governments. Who is the employer of the persons who work for the county governments? What is the role of a county public service board in

employment of those workers? The answer to these questions, as a preliminary issue, should primarily and fundamentally determine the direction that the Claimant's case shall take.

25. As can be seen from the header, the Claimant instituted this cause against the County Public Service Board of Kajiado and left out the County Government of Kajiado. In the very nature of the reliefs sought, the Claimant is seeking salary differential, lost earnings, pension, and other remedies related or incidental to his employment. Those are reliefs that should naturally be demanded from an employer. The question that follows then is – who was the Claimant's employer? In other words – with whom did the Claimant have an employer-employee relationship?
26. ***Section 56 (1) of the County Governments Act*** provides for the creation of a County Public Service in the following terms – ***Each county shall, in accordance with Article 235 of the Constitution, have its own public service to be known as county public service.***
27. ***Section 57 of the County Governments Act*** provides for the establishment of the County Public Service Board with functions spelt out in ***Section 59*** as illustrated and discussed hereunder.
28. As far as the above provisions go, a County Public Service Board is more or less an agent of the county government in matters of human resource recruitment and promotions. Once recruited – a process that involves advertising of vacancies, shortlisting, and interviewing - it is the county government that employs the

appointed the recommended persons. A county public service is a replica of the public service in the National Government and the county public service board should be a replica of the Public Service Commission.

29. Clearly and evidently, the Claimant was not and cannot have been an employee of the Respondent. Rather, the Claimant was an employee of the County Government of Kajiado. This finding and holding is based on the following reasons.
30. Except for its own staff, a county public service board merely acts as an agent of a county government in the manner and style described above. For avoidance of doubt, Article 176(1) of the Constitution provides as follows – ***There shall be a county government for each county, consisting of a county assembly and a county executive.***
31. Further, ***Article 235 of the Constitution*** provides as follows –
- (1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for—***
- (a) establishing and abolishing offices in its public service;***
  - (b) appointing persons to hold or act in those offices, and confirming appointments; and***
  - (c) exercising disciplinary control over and removing persons holding or acting in those offices.***
- (2) Clause (1) shall not apply to any office or position subject to the Teachers Service Commission.***

32. The above constitutional provisions confirm that a county public service board is neither a member nor equivalent of a county government. **Article 235 of the Constitution** in particular confirms that the employer of all county governments workers is the respective county government. Furthermore, a county public service board is a separate and independent legal entity and a creature of the law under **Section 57 of the County Governments Act**. This law provides as follows – ***There is established a County Public Service Board in each County, which shall be—***  
***(a) a body corporate with perpetual succession and a seal; and***  
***(b) capable of suing and being sued in its corporate name.***
33. The functions and powers of a county public service board are spelt out in **Section 59 of the County Governments Act** and more specifically **Section 59(1)** provides as follows – ***In the performance of its functions under this Act, the county public service board shall—***  
***(a) be independent and shall not be subject to the direction or control of any other person or authority;***
34. The court has this far said enough in demonstrating that a county public service board, such as the Respondent herein, is not the same legal entity as a county government. A county public service board is merely an agent of a county government and acts on behalf thereof on the matters cited above. A county public service board does not become the employer as it is the respective

county government that employs and deploys those recommended by the county public service board for appointment.

35. In support of his case, the Claimant availed in court a pay-slip for the month of April 2021. This payslip confirms that he was an employee of the executive branch of the County Government of Kajiado. It therefore follows that any claims on salary arrears and allowances may only be met by the rightful legal employer, the County Government of Kajiado, and not the agent on whose behest he was employed and or absorbed into the county government's workforce.
36. The reliefs by the Claimant were set out at the introductory part of this judgment. Whereas the named Respondent may have been culpable of not implementing the promotions and the attendant salary and allowances applicable, the Board was not the employer and cannot be ordered to make good the claimed payments.
37. While joinder and non-joinder of a party is not fatal to a cause, the court arrives at the inevitable conclusion that by not joining the employer, the County Government of Kajiado, the Claimant shot himself in the foot and his ammunition is now directed and aimed at the wrong party as far as the reliefs sought are concerned.
38. Had the Claimant joined the County Government of Kajiado in the cause, the court should have had reasons and grounds for evaluating the remedies and reliefs sought on merits. As it stands for now, the court finds and holds that the named Respondent is

responsible and answerable for the claims made by the Claimant as it was not the employer of the Claimant. The Respondent neither supervised the Claimant in his day to day duties nor did it pay his salary. To this extent the Claimant did not prove an employer-employee between him and the named Respondent.

39. The court has no powers to amend pleadings for parties and, in any event, the County Government of Kajiado shall have been denied the fundamental right of a hearing if the court issued any orders against it.
40. For all the foregoing reasons, the court finds and holds that the claim herein is without merit as against the named Respondent and the same is hereby dismissed.

## **VI. RELIEFS**

35. Clearly and evidently, the Claimant failed to prove his case as against the named Respondent and hence the reliefs and remedies sought are hereby denied.

## **VII. ORDERS**

25. The court issues orders that -

- a) The claim against the named Respondent is without merit and the same is denied in its totality.*
- b) There is no order as to costs.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2026.**

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**DAVID NDERITU**

**JUDGE**