**Nganga v Christ the King Parish & another (Civil Appeal 22 of 2019) [2023] KECA 1100 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1100 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPEAL 22 OF 2019**

**FA OCHIENG, LA ACHODE & WK KORIR, JJA**

**SEPTEMBER 22, 2023**

**BETWEEN**

**ESTHER WAIRIMU NGANGA ............................................................ APPELLANT**

**AND**

**CHRIST THE KING PARISH ...................................................... 1ST RESPONDENT**

**CATHOLIC DIOCESE OF NAKURU ......................................... 2ND RESPONDENT**

***(An Appeal from the Judgment of the Employment and Labour Relations Court at Nakuru (Mbaru, J.) dated and delivered on 29th November 2018 in E&LRC Cause No. 385 of 2015)***

## JUDGMENT

1. Through an Amended Memorandum of Claim dated 11th January 2016, the appellant, Esther Wairimu Nganga, moved the Employment and Labour Relations Court (E&LRC) for judgment against Christ the King Parish Nakuru and Catholic Diocese of Nakuru, the 1st and 2nd respondents respectively, claiming compensation for gross underpayment, 3 months' unpaid salary as well as the costs attendant to the suit. In a judgment dated 29th November 2018, Mbaru, J. dismissed the appellant's case save for an award of Kshs.19, 431.00 being unpaid wages for three months.

2. The appellant being dissatisfied with the said judgment is before this Court raising 9 grounds of appeal. The grounds can be condensed as follows: that the trial court erred in failing to find that the appellant was protected by the *Regulation of Wages (General) Order*; that the learned Judge erred in failing to find that the appellant having been employed as a nursery school teacher had the requisite knowledge and skill hence ought to have been ranked as a junior clerk and not a general worker; that the trial court erred in failing to find that the appellant was underpaid; that the trial court erred in failing to find that the appellant was owed Kshs.45,000.00 in salary arrears for 3 months; and, that the trial court erred in failing to award the costs of the claim to the appellant.

3. The appellant's case was premised on her pleadings and own evidence. It was her case that she worked for the 1st respondent as a nursery school teacher for the period between May 2000 and 31st July 2015 when she quit employment. During this period, her salary rose from Kshs.2,000.00 to Kshs.9,216.00. The appellant contended that she was underpaid during her service contrary to the provisions of the *Employment Act*. She stated that being a qualified nursery school teacher, she fell in the same rank as a junior clerk within the provisions of the *Regulation of Wages (General) Order*. The appellant averred that she made numerous verbal requests to the respondents for salary increment but her pleas were not acted upon. She also faulted the respondents for failing to establish clear terms of employment as required by Section 9 of the *Employment Act* and that the respondents deliberately frustrated her leading to her resignation on 31st July 2015.

4. The respondents denied the claim through a response dated 14th April 2016 and called one witness. The respondents acknowledged having employed the appellant for the stated period. They, however, denied all the other allegations made against them save for owing the appellant salary arrears for the months of May, June and July 2015 which they averred they had promptly paid less statutory deductions. The respondents averred that they adequately remunerated the appellant and that she was not a qualified nursery school teacher thus falling in the rank of a general labourer. However, in this appeal the respondents have abandoned the position that the appellant was a general labourer and instead assert that the appellant's position was not governed by the *Regulation of Wages (General) Order* altogether.

5. This appeal was canvassed by way of written submissions. Mr.Maragia appeared for the appellant while Mr. Orege represented the respondents. Mr. Maragia submitting for the appellant stated that the relationship between the claimant and the respondents was that in the nature of an employee-employer as defined in Section 2 of the *Employment Act*. Counsel also stated that the respondents were not exempted under Section 3(2) of the *Employment Act* and therefore the appellant was an employee and not a volunteer with the respondents. Counsel further argued that Section 26 of the *Employment Act* provides for the minimum requirements relating to employment contracts and the respondents did not adhere to the dictates of that provision when it engaged the appellant. He therefore urged us to find that the terms stipulated under Section 26 of the *Employment Act* were applicable to the appellant.

6. Counsel also submitted that since the appellant was not regulated by the Teachers Service Commission, the applicable terms and conditions of the contract of service between the appellant and the respondents are as provided in the *Regulation of Wages (General) Order*. Counsel urged that the appellant's claim for underpayment was justified since what she was paid was below the minimum wage as per the various wages orders that were in force during the entire period of her employment. To buttress this view, counsel cited Rule 3 of the *Regulation of Wages (General) Order* which requires that an employee's remuneration be aligned to the basic minimum wage provided in the Order. According to counsel, the appellant possessed the requisite qualifications and experience of a junior clerk and therefore her salary ought to have been equivalent to that of a junior clerk and not a general labourer. In support of this submission, counsel pointed out that the appellant specialized in training of children and had over 15 years' experience doing the same job. To this end, counsel urged us to adopt the tabulation in page 3 of the amended memorandum of claim in assessing the amount payable to the appellant.

7. Counsel also submitted that under Section 31 of the *Employment Act* and Rule 2 of the *Regulation of Wages (General) Order*, the appellant was entitled to house allowance and this was never paid by the respondents. In conclusion, counsel urged that the appellant was under a contract of service with the respondents and was therefore protected under Sections 7 and 8 of the *Employment Act*. Counsel consequently urged us to allow the appeal.

8. On his part, Mr. Orege for the respondents submitted that the appellant was not entitled to any order for payment of three months' salary arrears as payment had been done during the pendency of the suit and that the payment was less statutory deductions hence there was no unpaid salary owing to the appellant. Regarding the claim for underpayment of salary, counsel submitted that there was no evidence that the appellant had sought to address this complaint with her employer during the course of their engagement. Counsel also pointed out that the appellant had not tendered any evidence of her academic qualification as a teacher.

9. Mr. Orege further contended that the wages earned by the appellant were subject to a mutual agreement between the parties to the employment contract and were not subject to the *Regulation of Wages (General) Order*. Counsel submitted that the appellant had not tendered any authority in support of her argument in favour of aligning her wages to the *Regulation of Wages (General) Order*. Counsel relied on the cases of *Jane Awino Malowa v St Anne's ACK Church* [2019] eKLR and *George Kimiti Kiguru v Board of Management Bavuni Secondary School & another* [2022] eKLR to buttress the argument that the appellant ought to have established the link between the nature of her engagement and the application of *Regulation of Wages (General) Order*.

10. Regarding the issue of costs, Mr. Orege submitted that considering the fact of the payment of the appellant's salary arrears during the pendency of the claim, the trial court judiciously exercised its discretionary power when it ordered the parties to meet their own costs of the proceedings. Counsel consequently urged this Court to dismiss the appeal with costs.

11. We have given due consideration to the record of appeal and submissions by the advocates for the parties. This being a first appeal, we are clothed with the jurisdiction of re-appraising the evidence and drawing inferences of fact. In doing so, we are obliged to consider if the law was properly and correctly applied to those facts. That is the import of Rule 31(1)(a) of the *Court of Appeal Rules*, 2022. As expected of an appellate court, we must give leeway to the fact that it is only the trial court that saw and heard the witnesses testify and was therefore in a better position to assess their demeanour. In living to that mandate, it is our view that this appeal turns on the interrogation of the question as to whether the appellant was qualified to be subjected to the *Regulation of Wages (General) Order* and if so, whether the appellant was underpaid by the respondents.

12. There is no dispute of the fact that the appellant was engaged by the respondents as a nursery school teacher for the period between May 2000 and July 2015. This confirms the fact that the appellant was an employee of the respondents. That being the case, the point of departure between the parties herein is whether the appellant ought to be paid in line with the *Regulation of Wages (General) Order* as amended from time to time. According to the appellant, she was a qualified and trained nursery school teacher who had acquired experience spanning 15 years. She argued that, as a result, she was comparable to a junior clerk under the *Regulation of Wages (General) Order* which position is above a general worker. The respondents on their part submitted that the appellant's terms of service were as a result of mutual agreement between the parties and was not subject to the *Regulation of Wages (General) Order*. They also refute the claims that the appellant was a trained and qualified teacher.

13. The issue herein cannot be determined without ascertaining whether the appellant was a qualified nursery school teacher. The only documentary evidence on record in support of the appellant's claim of qualification is the letter dated 17th July 2015 written by one Jane W. Kariuki, the Head Teacher the respondents' Hekima Nursery School. It is apparent from the record that respondents challenge not the authenticity of this letter but the capacity of the author of the same. According to the respondents, it was DW1 Jimina Kimani Mwangi, the respondents' Human Resource Manager, who was authorized

to issue such letters. We discern that the basis of the letter in question is Section 51 of the *Employment Act* which provides as follows:

> "(1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.
>
> (2) A certificate of service issued under subsection (1) shall contain—
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> a. the name of the employer and his postal address;
>
> b. the name of the employee;
>
> c. the date when employment of the employee commenced;
>
> d. the nature and usual place of employment of the employee;
>
> e. the date when the employment of the employee ceased; and
>
> f. such other particulars as may be prescribed.

3. Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee.

    4. An employer who willfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both."

14. Our reading of the letter appearing at page 29 of the record of appeal leaves us with no doubt that the letter falls within what is anticipated under Section 51(3) of the *Employment Act*. The contents of that letter fall within that which the employer is bound to offer an employee when exiting service. If that be the case, does the respondents' move to refute the letter invalidate it? In our view, the answer is outrightly in the negative. The respondents have not demonstrated that the author of the letter was not their employee at the time holding the position of a head teacher at their nursery school. They have also not challenged the veracity of the contents of the said letter. Further, during the hearing before the trial court, DW1 stated that the respondents trained the appellant at Montessori for the work she was doing. It is therefore our finding that the appellant was a duly trained nursery school teacher with the necessary certification to undertake her work.

15. This leads us to the question as to whether the appellant was underpaid. During trial, the respondents equated the appellant to a general worker. In their submissions before this Court, it was their argument that the *Regulation of Wages (General) Order* (hereinafter also referred to as "the wages order") was not applicable to the appellant altogether. The appellant on her part maintains that the *wages order* was applicable to her case as no employer should pay an employee a wage below the minimum wage set by the *wages order*.

16. The respondents in support of their case relied on the decisions of the E&LRC in *Jane Awino Malowa v St Anne's ACK Church* [2019] eKLR and *George Kimiti Kiguru v Board of Management Bavuni Secondary School* [2022] eKLR where it was held that the wages order is not applicable to teachers. It is indeed the general position of the judges of the E&LRC that unless employed in a government institution, teachers in general and specifically nursery school teachers are entitled to whatever wages they negotiate and consent to so long as they meet the minimum standards provided in the prevailing

*wages order*. A case in point is *Ignas Karingo Mghona & 4 others v Star of Hope International Foundation* [2016] eKLR where James Rika, J. held as follows:

> "31. ...Wage increment cannot be based on an individual's market research. There are instruments and mechanisms for wage review in different sectors. The Teachers in public service have their structures of wage adjustment. Teachers have the option of seeking employment in the private or public sectors. Once in the private sector, they are not guided by the structures in the public sector. They do not have a Trade Union which negotiates collectively. They are not covered under a specific wage order. They negotiate their own terms and conditions of employment with their Employers, and provided what they have agreed does not breach the minimum wage law set by the Government across the industries, they cannot be heard to lament that what they are earning is too little. The two Claimants do not say they were paid below the general minimum wage; they allege they should have been earning a certain amount as Nursery School Teachers. They did not focus the attention of the Court on any specific wage instrument, affording them the higher rate they demand. It was submitted for the two Claimants that the Court should at the very least consider the two Teachers 'General Labourers' and find they were underpaid considering the rate availed to General Labourers under the *Wage Order*. The Court understood this to mean that the two Claimants were paid below the general wage floor, as General Labourers occupy the bottom of the pile. The *Regulation of Wages [General] [Amendment] Order* 2012, set the basic, minimum monthly wage for General Labourers on monthly contracts, in Mombasa, at Kshs. 8,579. Teachers are not 'General Labourers,' but to answer their submission, they accepted and earned Kshs. 9,000 monthly, above the basic pay for General Labourers. Their claims for underpayment of wages; their adoption of Kshs. 11,684 as their rightful monthly salary rate; and their argument that they should have been earning Kshs. 15,000 per month, have no foundation in law or fact and are rejected."

17. We agree with the finding by the learned Judge that the minimum wages provided in the wages order are indeed applicable to all employer-employee contracts in Kenya save for those excluded by Section 3(2) of the *Employment Act*. In saying so, we start by observing that Section 2 of the *Employment Act* defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. It also defines remuneration as the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee. Section 3(1) then proceeds to provide that the *Act* applies to all employees employed by any employer under a contract of service. Section 3(6) specifically states:

> "(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this *Act* shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void."

18. In our view, the *Employment Act* is applicable to all employee- employer relationships save for those specifically excluded by the same *Act*. The respondents did not tender any evidence to persuade us that their employment relationship with the appellant was not governed by the provisions of the *Employment Act*. The rights and obligations arising thereunder bind all employees and employers

whether unionisable or not. In as far as the wages order is concerned, the same is always published by the Cabinet Secretary responsible for labour matters pursuant to Section 46 of the *Labour Institutions Act*. Section 48(1) of the same Act provides thus:

> " Notwithstanding anything contained in this *Act* or any other written law—
>
> a. the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the *wages order* applies and may not be varied by agreement;
>
> b. if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the *wages order* shall be inserted in the contract in substitution for those terms."

19. The above provisions can be related to Section 26 of the *Employment Act* which states that:

> " (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
>
> (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."

20. Our interpretation of these provisions is that ordinarily, there are minimum statutorily set standards of wages and terms of employment contracts. Even in a negotiation, the employee should be subjected to the minimum terms and it is only from those basic standards set by law that they can negotiate for better terms. The minimum wage is what the Government sets from time to time through amendments to the *wages order*. A contract of employment with wages and terms descending below the minimum standards is therefore unlawful. This Court in Kenya *Tea Growers Association v Kenya Plantation & Agricultural Workers Union* [2018] eKLR albeit dealing with a collective bargaining agreement adopted a similar reasoning and interpretation of Section 26(2) of the *Employment Act* as follows:

> " We find that the above provision not only allows parties to a CBA to agree on terms that are more favourable than the minimum terms and conditions of employment set out by the EA and *Wages Order* but also empowers the ELRC to issue such favourable terms."

21. The Court went ahead and quoted with approval the decision of Rika, J. in *Kenya Chemical and Allied Workers Union v Leather Life EPZ Limited* [2014] eKLR where the learned Judge held that:

> " The Wage Orders fix the wage floors. Collective Bargaining between Employers and the Workers' Representatives on wage increment aims at fixing the cost of labour above the market benchmark, this benchmark being the minimum wage fixed under the *Wage Orders*."

22. We agree with the cited authorities and find that even though the appellant's role may not have been expressly defined under the wages order, there was no excuse to underpay her. The prevailing wages order makes provision for the minimum wage for all employees. An appropriate interpretation and application of the *wages order* would then demand that employees whose duties are not specifically provided in the *wages order* should at least be paid the minimum wages. We are therefore not convinced and neither do we find merit in the respondents' submission that the wages order was not applicable to the appellant because her work is not mentioned therein. Indeed, a restricted application of the wages order is not only unlawful but is also discriminative and violative of the right to fair working conditions of the employees within the Kenyan labour market.

23. Having stated the foregoing, the next frontier is to assess whether the appellant was underpaid by the respondents. In doing so, it is imperative to first determine when the cause of action arose and the wages orders applicable during that period. We start by observing that Section 90 of the *Employment Act* limits actions arising out of employment disputes to 3 years in the following terms:

> " Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this *Act* or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

24. The general import of cited provision is that the claims under the *Employment Act* are to be made within 3 years from the date of the cause of action. In this case, the appellant lodged the present claim on 11th January 2016 which was within the three years limit since the cause of action arose on 31st July 2015 when she resigned from her employment. The appellant had been in employment since the year 2000. The issue which then requires determination is whether the claim was one of a continuing injury or whether the claim was to be cut off at three years prior to 11th January 2016.

25. In the case of The *German School Society & another v Ohany & another* [2023] KECA 894 (KLR), this Court defined a "continuing injury" under Section 90 of the *Employment Act* as follows:

> " "A continuing wrong" refers to a single wrongful act which causes a continuing injury. "Recurring/successive wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action."

26. The Court went ahead to cite with approval the interpretation of the concept of "continuing injury" by the Indian Supreme Court in *Balakrishna S.P Waghmare v Shree Dhyaneshwar Maharaj Sansthan* AIR 1959 SC 798 thus:

> " It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury."

27. We agree with the interpretation adopted in the decisions referenced above. Perhaps to add our understanding, a continuing wrong simply put, is a wrong arising out of a continuous breach of an obligation which transcends a single completed act or omission. The obligation so breached must be

one borne of law or agreement between parties and which gives rise to an actionable claim. And, as this Court stated in The *German School Society & another* (*supra*), the existence of a continuing wrong is an exception to the rules of limitation of actions hence a claimant is within their right to seek reliefs emanating from the date when the continuing wrong commenced. We therefore reject the respondents' defence that the appellant did not raise these grievances with the respondents during her term of service. We find that the appellant's claim is one of a continuing injury and the claims ought to be considered dating back to the year 2000 when she was first employed by the respondents. On this we find comfort in the holding in The *German School Society & another* (*supra*) that:

> "Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90."

28. The next question is whether the various wages orders were applicable to the appellant. The parties advanced contradicting arguments on this issue. However, we have already discredited the respondents' submission that the appellant was not covered by the wages order as amended from time to time as the wages order is what provides for the basic minimum wage for all employees. Having found that the wages orders published during the relevant years were applicable to the appellant, the question then is whether the appellant's argument that the position of a school nursery teacher is equivalent to that of a junior clerk has merit. Counsel argued that the appellant possessed the requisite skills, knowledge, certification and experience to attain a position that can be equated to a junior clerk.

29. The parties agree that the appellant was employed as a nursery school teacher but are not in tandem as to whether she had the requisite qualifications for that position. However, from the letter by the head teacher at Hekima Nursery School, she served as a teacher having been trained at Montessori. Although it is not apparent what qualifications she obtained at Montessori, it is clear from the letter of the head teacher that the appellant performed the role of a nursery school teacher. We are not persuaded by the position held by the respondents at the trial that the work of a nursery school teacher is equivalent to that of a general labourer. Our view is that the role of a nursery school teacher is of higher standing. It is interesting to note that although James Rika J. equated a nursery school teacher to a general labourer in I*gnas Karingo Mghona & 4 others* (*supra*), he nevertheless elevated a book-keeper to a general clerk despite finding that the term book-keeper was not found in the wages order. This is what the learned Judge said:

> "The 3rd Claimant Chenye was described as a Book- Keeper in her letter of appointment. She reported to an Accounts Clerk, and in the absence of the Accounts Clerk, to the Chairman of the Management Committee. Chenye confirmed in her evidence she was a Book-Keeper, earning as of the last day of employment, a monthly salary of Kshs. 7,140. The term Book-Keeper is not captured in the *Wage Order* of 2012. In the view of Court, Chenye was in the position equivalent to that of a General Clerk, answerable to the Accounts Clerk and the Chairman."

30. It is evident that although the learned Judge found that the position of a book-keeper was not recognized in the *Regulation of Wages [General] [Amendment] Order* 2012, he nevertheless went ahead and equated the position to that of a general clerk.

As for the teachers he equated them to general labourers. He, however, gave no reason for treating the roles of a book-keeper and that of a teacher differently. On our part, we are of the view that although an employee and an employer are at liberty to negotiate terms above the minimum provided by the prevailing wages order, those terms should be proportionate to the skills brought to the table by the employee. We do not think that the work of a nursery school teacher can be equated to that of a general labourer for the reason that we elucidate in the subsequent paragraphs.

31. In our constitutional dispensation, the values and principles of governance include equity, social justice and equality, all enshrined under Article 10 of the *Constitution*. Article 41(1) and (2) of the *Constitution* further provides for the right to fair labour practices which includes fair remuneration. Section 5(5) of the *Employment Act* enshrines the doctrine of "equal remuneration for work of equal value." It suffices therefore to say that at the heart of our labour laws is the intention to achieve fairness. In *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, this Court in acknowledging the place of fairness in labour practices noted that:

> " Further, fairness requires that people doing similar work should receive equal pay. The principle has however extended to an analogous situation requiring that work of equal value should also receive equal pay as is claimed in the present appeal. The principle of equal pay for equal work, or work of equal value was succinctly explained in by the South African Labour Court in *Louw v Golden Arrow Bus Services (Pty) Ltd* [1999] ZALC 166 as follows;
>
> > '.............it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g. race or ethnic origin.'"

32. The Kenyan labour law regime does not provide a succinct definition or considerations for assessing what amounts to work of equal value. In our view, skills required to perform a certain job as well as the various attributes of job in question ought to play an important role in assessing the value of work done by an employee hence determining the remuneration. In *Mangena & Ors vs Fila SA (Pty) Ltd & Others* (2010) 31 ILJ 662 (LC) the South African Labour Court identified some of the factors to be considered when assessing the value of work as follows:

> " This suggests that a claimant in an equal pay claim must identify a comparator, and establish that the work done by the chosen comparator is the same or similar work (this calls for a comparison that is not over-fastidious in the sense that differences that are infrequent or unimportant are ignored) or where the claim is for one of equal pay for work for equal value, the claimant must establish that the jobs of the comparator and claimant, while different, are of equal value having regard to the required degree of skill, physical and mental effort, responsibility and other relevant factors."
>
> (Emphasis ours)

33. In the same breadth, Adolph A. Landman in his article *"The Anatomy of Disputes about Equal Pay for Equal Work", (2002) 14(2) South African Mercantile Law Journal 341* identifies the parameters for assessing the value of work as:

> " Neither the EEA nor the PEPUDA defines or gives guidance as to the meaning of the term 'equal work' (or 'like work'). A useful example of a legislative definition of 'like work' is contained in section 7 of the Employment Equality Act of Ireland. This definition has been summarized as providing that the term connotes work that is identical or interchangeable; similar in nature, where the differences are infrequent or of small importance in relation to the work as a whole; and equal in value in terms of the demands made in relation to matters such as skill, physical or mental requirements, responsibility, and working conditions...
>
> But work of equal value is more complex. A claim on this basis also involves an analysis of 'the jobs of the claimant and the comparator in terms of skill, physical and mental effort, responsibility, working conditions and any other relevant heading and will [require] a decision on whether or not the work is equal in value on the overall basis of the various comparisons and evaluations of the demands of the work being done'"
>
> (Emphasis ours)

34. In our view, in as much as the wages order does not provide for the position of a nursery school teacher, equating trained personnel to general labourers is against the constitutional values of equity, equality and fair labour practices. Taking into consideration the appellant's skills and qualifications, physical and mental effort as well as the level of responsibility required in discharging her duties, we are inclined to agree with the appellant that the value of her work can be equated to that of a junior clerk.

35. On the question of house allowance, which was incorporated by the appellant in her calculations of the underpayments, it is clear from regulation 4 of the wages order that where a house is not provided to the employee by the employer, house allowance shall be calculated at 15% of the minimum wage and added to the salary. The appellant was therefore entitled to a house allowance.

36. The award for underpayments will therefore be as follows:

a. For the period between May 2000 to December 2000 (Legal Notice No. 61 of 2000)

Basic minimum wage = Kshs. 3,702.00

Add House allowance (0.15x3,702) = (+) Kshs. 555.30

Total minimum payable = Kshs. 4,257.30

Less payment by respondent = (-) Kshs. 2,000.00

Monthly Underpayment = Kshs. 2,257.30

Total Underpayment for the period = Kshs. 2,257.30x8 months = Kshs. 18,058.40

b. For the period between January 2001 to April 2001 (Legal Notice No. 61 of 2000)

Basic minimum wage = Kshs. 3,702.00

Add House allowance (0.15x3,702) = (+) Kshs. 555.30 Total

minimum payable = Kshs. 4,257.30

Less payment by respondent = (-) Kshs. 2,200.00

Monthly Underpayment = Kshs. 2,057.30

Total Underpayment for the period-Kshs.2,057.30x4 months = Kshs. 8,229.20

c. For the period between May 2001 to April 2002 (Legal Notice No. 87 of 2001)

Basic minimum wage = Kshs. 3,980.00

Add House allowance (0.15x3,980) = (+) Kshs. 597.00

Total minimum payable = Kshs. 4,577.00

Less payment by respondent = (-) Kshs. 2,200.00

Monthly Underpayment= Kshs. 2,377.00

Total Underpayment for the period- Kshs. 2,377.00x12 months = Kshs. 28,524.00

d. For the period between May 2002 to April 2003 (Legal Notice No. 86 of 2002)

Basic minimum wage = Kshs. 4,259.00

Add House allowance (0.15x4,259) = (+) Kshs. 638.85

Total minimum payable = Kshs. 4,897.85

Less payment by respondent = (-) Kshs. 2,200.00

Monthly Underpayment= Kshs. 2,697.85

Total Underpayment for the period-Kshs. 2,697.85x12 months = Kshs. 32,374.20

e. For the period between May 2003 to April 2004 (Legal Notice No. 48 of 2003)

Basic minimum wage = Kshs. 4,727.00

Add House allowance (0.15x4,727) = (+) Kshs. 709.05

Total minimum payable = Kshs. 5,436.05

Less payment by respondent = (-) Kshs. 3,000.00

Monthly Underpayment = Kshs. 2,436.05

Total Underpayment for the period-Kshs.2,436.05x12 months = Kshs. 29,232.60

f. For the period between May 2004 to April 2005 (Legal Notice No. 36 of 2004)

Basic minimum wage = Kshs. 5,247.00

Add House allowance (0.15x5,247) = (+) Kshs. 787.05

Total minimum payable = Kshs. 6,034.05

Less payment by respondent = (-) Kshs. 5,500.00

Monthly Underpayment = Kshs. 534.05

Total Underpayment for the period-Kshs. 534.05x12 months = Kshs. 6,408.60

g. For the period between May 2005 to April 2006 (Legal Notice No. 42 of 2005)

Basic minimum wage = Kshs. 5,614.00

Add House allowance (0.15x9,024.15) = (+) Kshs. 842.10

Total minimum payable = Kshs. 6,456.10

Less payment by respondent = (-) Kshs. 5,500.00

Monthly Underpayment = Kshs. 956.10

Total Underpayment for the period- Kshs. 956.10x12 months = Kshs. 11,437.20

h. For the period between May 2006 to April 2009 (Legal Notice No. 38 of 2006)

Basic minimum wage = Kshs. 6,288.00

Add House allowance (0.15x6,288) = (+) Kshs. 943.20

Total minimum payable = Kshs. 7,231.20

Less payment by respondent = (-) Kshs. 5,500.00

Monthly Underpayment = Kshs. 1,731.20

Total Underpayment for the period- Kshs. 1,731.20x36 months = Kshs. 62,323.20

i. For the period between May 2009 to September 2009 (Legal Notice No. 38 of 2006)

Basic minimum wage = Kshs. 7,420.00

Add House allowance (0.15x7,420) = (+) Kshs. 1,113.00

Total minimum payable = Kshs. 8,533.00

Less payment by respondent = (-) Kshs. 5,500.00

Monthly Underpayment= Kshs. 3,033.00

Total Underpayment for the period- Kshs. 3,033.00x5 months = Kshs. 15,165.00

j. For the period between October 2009 to April 2010 (Legal Notice No. 38 of 2006)

Basic minimum wage= Kshs. 7,420.00

Add House allowance (0.15x7,420) = (+) Kshs. 1,113.00

Total minimum payable = Kshs. 8,533.00

Less payment by respondent = (-) Kshs. 6,000.00

Monthly Underpayment = Kshs. 2,533.00

Total Underpayment for the period- Kshs. 2,533.00x7 months = Kshs. 17,731.00

k. For the period between May 2010 to September 2010 (Legal Notice No. 98 of 2010)

Basic minimum wage = Kshs. 8,162.00

Add House allowance (0.15x8,162)=(+) Kshs. 1,224.30

Total minimum payable = Kshs. 9,386.30

Less payment by respondent = (-) Kshs. 6,000.00

Monthly Underpayment = Kshs. 3,386.30

Total Underpayment for the period- Kshs. 3,386.00x5 months = Kshs. 16,931.50

l. For the period between October 2010 to April 2011 (Legal Notice No. 98 of 2010)

Basic minimum wage = Kshs. 8,162.00

Add House allowance (0.15x8,162) = (+) Kshs. 1,224.30

Total minimum payable = Kshs. 9,386.30

Less payment by respondent = (-) Kshs. 6,200.00

Monthly Underpayment = Kshs. 3,186.30

Total Underpayment for the period- Kshs. 3,186.00x7 months = Kshs. 22,304.10

m. For the period between May 2011 to April 2012 (Legal Notice No. 64 of 2011)

Basic minimum wage = Kshs. 9,182.00

Add House allowance (0.15x9,182) =(+) Kshs. 1,377.30

Total minimum payable = Kshs. 10,559.30

Less payment by respondent = (-) Kshs. 6,200.00

Monthly Underpayment = Kshs. 4,359.30

Total Underpayment for the period- Kshs. 4,359.30x12 months = Kshs. 52,311.60

n. For the period between May 2012 to September 2012 (Legal Notice No. 71 of 2012)

Basic minimum wage = Kshs. 10,384.80

Add House allowance (0.15x10,384.8) = (+) Kshs. 1,557.72

Total minimum payable = Kshs. 11,942.52

Less payment by respondent = (-) Kshs. 6,200.00

Monthly Underpayment = Kshs. 5,742.52

Total Underpayment for the period- Kshs. 5,742.52x5 months = Kshs. 28,712.60

o. For the period between October 2012 to April 2013 (Legal Notice No. 71 of 2012)

Basic minimum wage = Kshs. 10,384.80

Add House allowance (0.15x10,384.8) = (+) Kshs. 1,557.72

Total minimum payable = Kshs. 11,942.52

Less payment by respondent = (-) Kshs. 6,500.00

Monthly Underpayment = Kshs. 5,542.52

Total Underpayment for the period- Kshs. 5,542.52x7 months = Kshs. 38,797.64

p. For the period between May 2013 to September 2013 (Legal Notice No. 197 of 2013)

Basic minimum wage = Kshs. 11,838.65

Add House allowance (0.15x11,838.65)= (+)Kshs. 1,775.65

Total minimum payable = Kshs. 13,614.45

Less payment by respondent =(-)Kshs. 6,500.00

Monthly Underpayment = Kshs. 7,114.45

Total Underpayment for the period- Kshs. 7,114.45x5 months = Kshs. 35,572.25

q. For the period between October 2013 to April 2015 (Legal Notice No. 197 of 2013)

Basic minimum wage = Kshs. 11,838.65

Add House allowance (0.15x11,838.65) = (+)Kshs. 1,775.65

Total minimum payable = Kshs. 13,614.45

Less payment by respondent = (-) Kshs. 9,216.00

Monthly Underpayment = Kshs. 4,398.45

Total Underpayment for the period- Kshs. 4,398.45x19 months = Kshs. 83,570.55

r. For the period between May 2015 to July 2015 (Legal Notice No. 117 of 2015)

Basic minimum wage = Kshs. 13,259.30

Add House allowance (0.15x13,259.3) = (+) Kshs. 1,988.90

Total minimum payable = Kshs. 15,248.20

Less payment by respondent = (-) Kshs. 9,216.00

Monthly Underpayment = Kshs. 6,032.20

Total Underpayment for the period- Kshs. 6,032.20x3 months = Kshs. 18,096.60

Cumulative Underpyament = 18,058.40 + 8,229.20 + 28,524 + 32,374.20+ 29,232.60 + 6,408.60 + 11,437.20 + 62,323.20 + 15,165+ 17,731 + 16,931.50 + 22,304.10 + 52,311.60 + 28,712.60 + 38,797.64 + 35,572.25 + 83,570.55 + 18,096.60 = KSHS. 525,780.24

37. The final issue for our determination is in relation to the question of costs. The appellant has challenged the order on costs by the trial court. She contended that she ought to have been awarded the costs since her claim partially succeeded before the trial court. The trial court ordered that each party was to bear their own costs. It is always a general rule that costs follow the event. Even so, the issue of costs remains for the discretionary power of a court seized with the matter. It is a general rule that an appellate court will not interfere with the exercise of judicial discretion unless it is shown that the discretion was exercised injudiciously. An appellate court is also not to interfere with the exercise of discretion simply for reasons that it would have reached a different conclusion in the matter. In *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR, this Court identified some of the factors to be considered when faced with an appeal on costs as follows:

> " In the light of the above principles, the factors we are enjoined to consider when deciding whether to interfere or otherwise with the award of costs made by the trial court resulting in this appeal are not limited to the conduct of the parties in the actual litigation, but also to matters which triggered the litigation, and the contribution of the party in whose favour the order of costs was withheld, to the causation of those factors."

38. In this case, the cause of action was triggered by the appellant's resignation and claims of underpayment. The respondents moved to mitigate their responsibility by making the conceded payments during the pendency of the suit. It is only on the basis of those concessions that the appellant was deemed to have succeeded by the trial court. Surely, the respondents' conduct during trial ought to have counted for something during the award of costs and we agree with the trial court that it did hence the order on costs. In the circumstances, the appeal against costs is without merit.

39. As for the costs of this appeal, we are cognizant of the fact that we have the mandate to make orders as to the costs before this Court. The appeal has succeeded substantially to the extent that we have sanctioned the claim for underpayment. The appellant worked diligently for the appellant for years on an undercut salary. She has had to litigate all the way to this Court against her former employer to secure justice for the wrongs experienced. In the circumstances, we find no reason advanced before us

to depart from the general rule that costs follow the event. We therefore condemn the respondents to pay the appellant's costs of this appeal.

40. In summary, the appellant is hereby awarded claim for salary underpayment to the tune of Kshs.525, 780.24 as tabulated and Totaled in paragraph 36 of this judgment. She will also have the costs of the appeal. The award shall earn interest at court rates until the decree is satisfied in full.

41. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2023**

**F. OCHIENG**

**.......................................**

**JUDGE OF APPEAL**

**L. ACHODE**

**.......................................**

**JUDGE OF APPEAL**

**W. KORIR**

**.......................................**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**