



REPUBLIC OF KENYA



KENYA LAW
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Wanguche v Masinde Muliro University of Science & Technology (Cause E003 of 2024) [2025] KEELRC 730 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 730 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE E003 OF 2024
DN NDERITU, J
MARCH 6, 2025

BETWEEN

PATRICK ODANGA WANGUCHE CLAIMANT

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE &
TECHNOLOGY RESPONDENT**

JUDGMENT

I. Introduction

1. Through K. N. Wesutsa & Co. Advocates the claimant commenced this cause by way of a statement of claim dated 26th February, 2024 seeking for the following reliefs –
 - a. Emergency Call allowances arrears of Kshs50,000 each month, beginning the 1st day of January 2017 to the 30th day of June 2023.
 - b. Medical risk allowances arrears of kshs15,000 each month beginning the 1st day of January 2017 to the 30th day of June 2023.
 - c. Costs of the suit and interest of the foregoing from the 1st day of January 2017 until payment in full.
2. As it is the procedure, the statement of claim was accompanied with a verifying affidavit sworn by the claimant, a list of witnesses, a witness statement by the claimant, and copies of documents filed.
3. The respondent entered appearance through the Attorney General (AG) and filed a statement of defence dated 12th March, 2024 seeking for the dismissal of the claim with costs for lack of merits. The statement of defence was amended through the response to the statement of claim dated 25th April, 2024.



4. On 29th May, 2024 the respondent filed a written statement by Benard Ooko (RW1) who later testified in support of its case during the hearing, a list of documents and a copy of the listed document.
5. The claimant's case came up in court for hearing on 28th October, 2024 when the claimant (CW1) testified and closed his case.
6. The defence was heard on 18th November, 2024 when RW1 testified and the respondent's case was closed.
7. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Ms. Ikhumba, filed her submissions on 5th April, 2024 while counsel for the respondent, Mr. Tarus, filed his submissions on 10th December, 2024.

II. The Claimant's Case

8. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the claimant, and the written submissions by his counsel.
9. In his claim, the claimant stated that he was offered employment as a medical officer vide a letter dated 18th March, 2010 (C-Exh-1) which he accepted on 5th April, 2010 on probationary basis. His probation ended after six months and he was confirmed to the position of medical officer vide a letter dated 23rd June, 2011(C-Exh-2). He pleaded that as a medical doctor, he was a member of the Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and the Kenya Universities Staff Union (KUSU).
10. The claimant pleaded that the Salaries and Remuneration Commission (SRC) vide a circular of 14th June, 2015 enhanced the allowances for medical officers which were incorporated in a Collective Bargaining Agreement (CBA) of 30th June, 2017 between the government and KMPDU which became effective on 1st January, 2017. It was pleaded that by virtual of the said CBA the claimant was entitled to an enhanced emergency call allowance from Kshs30,000/= to Kshs80,000/= and a medical risk allowance enhancement from Kshs5,000/= to Kshs20,000/= monthly.
11. It was pleaded that the judgment in Nairobi ELRC Cause No. E516 of 2020 (C-Exh-6) delivered on 30th November, 2022 settled the issue that the health workers such as the claimant were entitled to arrears of the enhanced allowances and that his claim is not time-barred.
12. It was pleaded that as at the time of his retirement the claimant was a senior medical officer and the deliberate failure to pay him the enhanced allowance amounted to unfair labour practice by the respondent.
13. In his virtual testimony in court the claimant adopted his filed witness statements on record as his evidence-in-chief and stated that he was an employee of the respondent from 2010 and retired on 30th June, 2023. He stated that he did not work with any other institution since he was employed on a full-time basis by the respondent.
14. He stated that he wrote to the respondent various letters of demand in regard to his unpaid medical allowances after he retired. He stated that he became aware of the above mentioned judgment by Mbaru J. delivered in 2022 in 2023, but the management kept on promising to settle the dues until he retired. This prompted him to file this cause.
15. It is on the foregoing circumstances and facts that the court is urged to allow the claim and grant the reliefs as sought to the claimant.



III. The Respondent's Case

16. The respondent's case is contained in the amended response to the statement of claim, the oral and documentary evidence adduced through RW1, an assistant registrar, and the written submissions by its counsel.
17. In the response to the claim it was pleaded that the claimant was not entitled to the enhanced emergency and medical risk allowances as they were only applicable to health workers working in facilities managed by the county government. It was pleaded that the claimant was not a public health worker but an employee of the respondent and the allowances payable to him were as per his contract of service.
18. It was pleaded that some of the claims by the claimant were statute barred and thus he was not entitled to the reliefs sought.
19. RW1 in his testimony in court stated that the claimant did not complain about or claim for any underpayment during his employment.
20. In cross-examination, RW1 conceded that the claimant was a member of the KMPDU as per his pay-slip. He conceded that he was aware of a SRC circular enhancing the allowances of medical workers although the said circular was not produced by either party, but the same was referred to in the judgment annexed as exhibit 6 by the claimant.
21. He conceded that the respondent had not paid medical workers the impugned allowances before and or after the judgment alluded to by the claimant as above.
22. In re-examination RW1 stated that the respondent did not pay the said allowances to any person because the judgment was never served upon it and it was not party to the said cause. He stated that the CBA referred to in Exhibit 6 was not served upon the respondent and it was not aware of it.

IV. Submissions

23. The claimant's counsel submitted globally to the effect that the respondent failed to pay the claimant the enhanced allowance as per the return-to-work-formula of 14th March, 2017 and the CBA of 30th June, 2017. It is submitted that despite demand and advice from the respondent of 19th December, 2023 for the claimant to hold taking legal action the respondent did not pay to him the enhanced allowances.
24. It is further submitted that despite the respondent's stance that the claimant is not an officer working in the county public service or public hospitals, all members of the KMPDU working in public universities were deemed to be beneficiaries of the terms of the return-to-work-formula, and the CBA through the Judgment in Nairobi ELRC E516 of 2020.
25. It is submitted that the aforementioned judgment applied to all members of KMPDU employed by public universities notwithstanding that the respondent was not a party to the said cause.
26. It is submitted that the judgment alluded to above is persuasive to this court and good law and thus the claimant is entitled to Kshs3,850,000 / =as emergency call allowance and Kshs1,155,000/ as medical risk allowance.
27. On the other hand, counsel for the respondent identified the following issue for determination – Whether the claim for enhanced allowances is statute-barrred; and, Whether the claimant is entitled to enhanced allowances.



28. On the first issue, it is submitted that the claim by the claimant is statute-barred under the provisions of Section 90 (now Section 89) of the *Employment Act* (the Act) as the same ought to have been filed within three years from 2017. It is submitted that the court can only entertain the claims from 2021 to 2023.
29. On the second issue, it is submitted that the claimant has not proved that he is a member of KUSU which negotiated the CBA as to be entitled to the enhanced allowances.
30. It is submitted that the circular of 14th June, 2015 by SRC related to members of KMPDU working in health sectors in county governments. It is submitted that the SRC letter of 10th March, 2021 on medical allowances for doctors in public universities operated health centres indicates that the said doctors are not entitled to medical allowances payable to doctors in public hospitals.
31. It is submitted that the medical facility run by the respondent is not open to the public and hence the decision in Nairobi ELRC cause E516 of 2020 is distinguishable from this cause since the doctors therein were employed by Kenyatta University which runs a public health center open to the public after it was classified as a Level 3A Hospital by the National Government, unlike the facility run by the respondent.
32. The court is urged to dismiss the claim.

V. Issues for Determination

33. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination –
 - a. Whether the cause by the claimant is statute-barred?
 - b. Whether by the claimant is entitled to the reliefs sought; and,
 - c. Who should bear the costs of the cause?

VI. Limitation of Action

34. The respondent stated that the claimant's cause of action arose in 2017 and thus some of his claims are statute-barred under section 89 of the Act for having not been filed within three years. The submitted stated that only claims from 2021 to 2023 may be entertained by this court. On his part, the claimant asserts that the judgment in ELRC E516 of 2020 was delivered on 30th November, 2022 and thus the claim is not time-barred.
35. The claim for arrears in emergency calls and medical risk allowances are said to have been due to the claimant from 1st January, 2017 until when he retired on 30th June, 2023. If the claimant was entitled to such allowances, which the court shall consider and determine below, the said allowances were payable at the end of each month. Legally, if the same were not thus paid they constitute a continuing injury under Section 89 of the Act.
36. The Court of Appeal in *The German School Society & Another v Ohany & Another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) in addressing what constitutes a continuing



injury cited the Supreme Court of India in *M. Siddiq v Suresh Das* (2020) 1 SCC 1 where the court observed –

“... What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation.”

37. Section 89 of the Act provides that –

“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”. [Emphasis added]

38. A claim based on continuing injury ought to have been filed in court within 12 months of termination of employment or cessation of the injury. The court notes that the respondent retired on 30th June, 2023 and the cause was filed in court on 27th February, 2024, a period of seven months and 28 days after the retirement and hence within the time limit of 12 months.

39. Therefore, the claim was filed within the statutory limitation in Section 89 of the Act.

VII. Reliefs

40. It is not in dispute that the claimant was an employee of the respondent. What is in issue is whether the claimant was not entitled to the enhanced allowances on emergency call and medical risk working in the respondent’s facility that is not a public health facility.

41. It is confirmed by the evidence on record that the claimant was a member of KMPDU. The claimant stated that under the SRC circular No. SRC/TS/CGOVT/3/61 VOV.IIIIV(36) of 14th June, 2015 referred to in the judgment of Mbaru J. in ELRC No. E516 of 2020, health workers in the public service and health facilities were entitled to those enhanced allowances. The circular referred to by the claimant was not produced as an exhibit in court but the RW1 confirmed that the respondent is aware of the said circular. At page 12 of the impugned judgment, the court observed that health workers in the public service and health facilities were entitled to various allowances based on the negotiations between the Ministry of Health and KMPDU.

42. The court observed that SRC in a letter dated 28th April, 2017 SRC confirmed the category of persons entitled to the said allowances. In the impugned judgment, the claimants therein worked for Kenya University Health Centre which had been declared as a public health facility under Legal Notice No. 97 of 2nd July, 2017. The honourable judge found and held that the claimants worked for a gazetted public health facility (Page 13) and thus the allowances declared by SRC were specifically payable to those workers.

43. The impugned judgment relied on by the claimant was delivered on 30th November, 2022. The respondent exhibited SRC Circular No. RC/TS/HW1/3/23 Vol. V(136) dated 10th March 2021, titled “Medical Allowances Payable to Doctors Working at Public Universities Health Centers” which was addressed to the Principal Secretary, Ministry of Education, State Department of University Education and Research, stating that doctors in specific universities were only eligible to allowances as per internal CBAs for respective universities; and where a public university health facility is not a



public hospital facility the medical doctors are not entitled to the said allowances referred to by the Ministry of Education.

44. No evidence was adduced by the claimant that the respondent's health facility is a public hospital facility gazetted as such. Distinguishable from the impugned judgment cited by the claimant, the Kenya University Health Centre had been gazetted as a public hospital facility where the general public could visit. That is not the case with the respondent's health facility where the claimant served that is only open to university students and staff.
45. The court finds that the facts and circumstances that culminated in the judgment in ELRC E516 of 2020 are distinguishable from those obtaining in this cause as the claimants therein worked in a facility open to the general public. That is not the case with the facility where the claimant served.
46. Circular No. RC/TS/HW1/3/23 Vol. V (136) dated 10th March, 2021 by the SRC settles the issue of which facilities in public universities entitle their medical doctors to the enhanced allowances and, that is those facilities that are open to the general public and gazetted as public hospitals. SRC is responsible for setting remuneration and terms of service in the public service and its circulars bind all public institutions. The respondent is bound by the said circular of 10th March, 2021 and thus the claimant was not entitled to the payment of the enhanced allowances as pleaded.
47. The court finds and holds that the cause by the claimant lacks merit and the same is dismissed.

VIII. Orders

- i. This cause is dismissed.
- ii. Each party to bear own costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 6TH DAY OF MARCH, 2025.

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DAVID NDERITU

JUDGE

