



Shamwata v Chairman Governing Council Kenya Water Institute (Employment and Labour Relations Cause 2637 of 2016) [2024] KEELRC 301 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2637 OF 2016
AN MWAURE, J
FEBRUARY 16, 2024**

BETWEEN

JOSEPH ONGAYA SHAMWATA CLAIMANT

AND

**THE CHAIRMAN GOVERNING COUNCIL KENYA WATER
INSTITUTE RESPONDENT**

JUDGMENT

1. The Claimant filed a Statement of Claim of Arrears of Salary as Per Job Group dated 25th November 2016.

Claimant's Case

2. The Claimant avers that the Respondent is a state cooperation which came into operation on the 1st July 2002. He was employed as a pipe fitter 111 by the then Ministry of Water Development vide a letter dated 12.10.1987 earning a salary of 510 pounds.
3. The Claimant avers that the Respondent then employed him vide a letter dated 20.12.2006 as an artisan (plumber) maintenance unit at a salary scale KW9 which he accepted and worked till his retirement in the year 2014.
4. The Claimant avers that vide a letter dated 30th April 2012, the Permanent Secretary, Ministry of Water and Irrigation notified him that all his benefits for his service that were under the Ministry up to and including 30th September 2010 which shall be released as his pension under the Act.
5. The Claimant avers that the Respondent refused and/or neglected to calculate his arrears as per the required salary scale and forward to the Director of pensions and he suffered loss which he claims against the Respondent.



6. The Claimant avers that while on secondment at the Respondent's Institute had salary increment which was not implemented as per the law and he claims for Kshs 1.347,109/- as follows:-
- a. Year 2007, the Plaintiff was in job group H (KW8) Salary scale – 7407 x 12 months = Kshs 88,884/-
House allowance of Kshs 48,000/- per year
 - b. Year 2008
Salary scale – 7407 x 6 months = Kshs 44,442/-
Increased in June – 10,076 x 6 = Kshs 104,898/-
House allowance of Kshs 48,000/- per year
 - c. Year 2009
Salary scale – 10546 x 12 months = Kshs 126,552/-
House allowance of Kshs 48,000/- per year
 - d. Year 2010
Salary scale – 11030x 12 months = Kshs 132,360/-
House allowance of Kshs 48,000/- per year
 - e. Year 2011
Salary scale – 11570 x 12 months = Kshs 138,840/-
House allowance of Kshs 48,000/- per year
 - f. Year 2012
Salary scale – 12142 x 12 months = Kshs 145,704/-
House allowance of Kshs 48,000/- per year
 - g. Year 2013
Salary scale – 12704 x 12 months = Kshs 152,448/-
House allowance of Kshs 48,000/- per year.
 - h. Year 2014
Salary scale – 13339 x 3 months = Kshs 40,017/-
House allowance of Kshs 12,000 until retirement.
 - i. Leave allowance 1/3 of basic salary Kshs 29,406/- plus arrears top up of Kshs 40,000/-
Kshs 69,406/-
7. The Claimant avers that the claim is for salary arrears, house allowance and leave allowance accrued for the Period the Plaintiff was in employment with the Defendant till retirement.

Respondent's Case

8. In opposition, the Respondent filed a reply to claim dated 13th February 2016



9. The Respondent denied the content of the Claimant's claim and put him to strict proof.
10. The Respondent denied that it refused to calculate the Claimant's upgrade/arrears as per the required scale but states that it is ready to calculate the salary as per the Claimant's job grade hence the Claimant has not exhausted other mechanisms before approaching this court.
11. The Respondent avers that the Claimant has just posted figures but has not explained how he arrived at the figures and its source.

Evidence in Court

Claimant

12. The Claimant testified that he filed this case against his former employers, where he was seconded to from the Ministry of Water.
13. CW1 adopted his witness statement dated 28th November 2016 and documents as his evidence in chief and exhibits.
14. During cross examination, CW1 testified that he got an appointment letter dated 20th December 2006, he was under job group KW9, and he agreed and signed as per the terms of the letter.
15. CW1 testified that he worked for the Respondent until 2014 and he raised a complaint about the raise to job group KW8 dated 19.01.2007. The Respondent never responded to his complaint and he never received any letter from the management on the same.
16. CW1 testified that he was on secondment from the Ministry where he was employed under KEWI which was a parastatal.
17. CW1 testified that he has cleared with KEWI and was paid pension less KEWI.
18. During re-examination, CW1 testified that he was to hold job group H which is similar to KW8, his salary would have been of job group KW8.
19. CW1 testified that his secondment was a promotion and he should have been on promotion.
20. CW1 testified that the Ministry was the mother ministry of KEWI.

Respondent

21. The Respondent's witness (RW1) Caroline Kibui, said she works with KEWI as an HR an Administrative Officer. She adopted her witness statement dated 15.06.2023 as her evidence in chief and produced her exhibits in court.
22. RW1 testified that the Claimant is claiming for promotion by the Ministry, however, he was already absorbed by the Respondent when he got it.
23. RW1 testified that the Respondent has structures without guidance from the Ministry and the Claimant already had an appointment letter by the Respondent.
24. During cross examination, RW1 testified that the Claimant was in grade H as per the civil service structure which corresponds with KW8 according to the letter written.
25. RW1 testified that page 72 of the Claimant's exhibits (an extract of the document named Approved Salary Structure and Other Allowances for KEWI Members of Staff) showing the conversion of job groups shows that the job group H was equivalent to KW8.



26. During re-examination, RW1 testified that the document was a proposed salary and it was a proposal and it was never approved by the Board or then sent to SRC, therefore, it was never implemented.
27. RW1 testified that page 47 of the Claimant's exhibits contains 47 people who were seconded and their job groups from the Ministry. However, they were already seconded and their salaries were to be paid by the Respondent not the Ministry.
28. RW1 testified that the Respondent does not owe the Claimant any money.

Claimant's Submissions

29. The Claimant submitted that he adduced evidence that he was employed by the Ministry of Water Development on 4th September 1986 as a pipe fitter III earning 510 pounds. He was seconded to the Respondent on 18th December 2002.
30. The Claimant submitted that on 20th December 2006, the Respondent gave him a letter of employment as an artisan and plumber on job group KW9. However, vide a letter dated 14th March 2008, the Ministry of Water and Irrigation forwarded a list of all members seconded to the Respondent, it contained their designated job and date of secondment, the Claimant was listed under job group H starting 1st October 2007.
31. The Claimant submitted that the letter gave instructions for deductions of 31% as pension confirming that he was in job group H.
32. The Claimant submitted that the payslip for 20th September 2007 shows that the ministry had job group of the Claimant at 'H' which is equivalent to job group KW8 as per the Respondent's scale which was confirmed by RW1.
33. The Claimant submitted that RW1 testified that the Claimant was on the list of staff seconded from the Ministry but he was not to be paid by the Respondent. The notice of retirement dated 11th June 2013 from the Respondent, the retirement benefits were to be paid as per their pension scheme.
34. The Claimant submitted that pension percentage of 31% shows he was in job group 'H'. The Ministry made its payment in full and there is no complaint on that part. The Claimant's arrears are still unpaid by the Respondent.
35. The Claimant submitted that the Respondent had a long list of seconded workers from the Ministry of Water and Irrigation but the Claimant was not paid his retirement benefits according to his job group while others were paid all benefits.
36. The Claimant submitted that the Respondent promoted some of the seconded workers to higher jobs but retained the Claimant In the same job group and underpaid him.
37. The Claimant submitted that he has established a prima facie case of his arrears which have not been paid and that he served in that job group without being elevated to a higher group. Example, RW1 was employed in the same job group as the Claimant but rose to job group 'N' so this amounts to discrimination.

Respondent's Submissions

38. The Respondent submitted that the Claimant admitted that vide a letter dated 20th December 2006, he was employed by the Respondent as an Artisan (Plumber) maintenance unit at a salary scale KW9 which employment the plaintiff accepted and worked till his retirement in the year 2014. Before



absorbing the Claimant, KEWI undertook a suitability assessment interview to enable it place each of the seconded employees including the claimant to appropriate posts/grade. Indeed, the preamble to the offer of appointment letter states as follows:

“Following the results of the suitability assessment interview conducted in November, 2006 by KWEI Management on behalf of the Governing Council, you were adjudged successfully and the Governing Council is prepared to engage you in the position of Artisan (Plumber) in Maintenance Unit at Kenya Water Institute from 1st January, 2007, as permanent and pensionable officer on the following terms and conditions”.

The Claimant then duly accepted the offer of appointment under the preceding paragraph through his letter of acceptance dated 19th January, 2007.

39. The Respondent submitted that the Claimant’s assertion that he was upgraded from KW9 (job group G) to KW8 (job group H) from 2007 till his retirement in 2014 hence the claim for the difference lacks merit as he was absorbed at KEWI with effect from 1st January, 2007 when he accepted the offer of appointment vide his letter of 19th January, 2007.
40. The Respondent further submitted that the parent Ministry did not have the mandate to interfere in the Respondent’s human resource functions including setting terms and conditions of employees.
41. The Respondent submitted that the parent Ministry lost the mandate to up-grade or promote the claimant with effect from 1st July, 2007 when he accepted the offer of appointment with KEWI through his acceptance letter of 19th January, 2007. Hence, any purported up-grade/promotion from the Ministry was of no legal consequence as KEWI was and is an autonomous body with its own governance structures. It relied on the case of *Okiya Okioti Omtatah v The Board, Export Processing Zones Authority & 3 Others; Otieno (Interested Party)* (Petition E133 of 2021) [2022] KLR.
42. The Respondent submitted that the Ministry simply refused to acknowledge that the regime in respect to the employment status of the claimant changed once the Claimant joined KEWI- state corporation from the mainstream public service.
43. The Respondent submitted that whilst the Ministry’s records might show that the Claimant was job group ‘H’, KEWI had already absorbed the claimant after suitability assessment interview had placed the claimant at job group KEWI - 9.
44. The Respondent submitted that the Claimant’s claim is anchored on the conversion not approved by the State Corporations Advisory Committee (see Okiya Omtata supra) and thus the conversion lacks the legal standing. Table 1 of the proposed conversion deals with salary scale conversion where job group ‘H’ is proposed for conversion to KEWI 8.
45. The Respondent submitted that RW1 testified that the proposal was never approved until 2018 when KEWI adopted an approved scheme that is currently in use. Without an approved scheme of service, the Claimant cannot benefit from a proposal which for all intents and purposes lacks the force of law.
46. The Respondent submitted that the claim for leave allowance at a third of the basic salary as claimed lacks particulars since the year when the same was not paid has not been indicated, it has not been pleaded that the Respondent breached clause 9 of the offer of appointment letter dated 20th December 2006 which was accepted on 19th January, 2007. Further, the Claimant has not pleaded that he raised the issue with the Respondent and the Respondent failed to address the same and most importantly it has been pleaded whether the claim is founded on the proposed conversion which is not binding.



47. The Respondent submitted that the claim is founded on the proposed conversions which is not binding in law and secondly the parent Ministry ceased to be the Claimant's employer when the claimant accepted the offer of employment from KEWI. Therefore, the Ministry's purported up-grade and /or promotion of the Claimant was inconsequential as the Respondent remunerated its staff in accordance with its approved budget.

Analysis and Determination

48. The main issue for determination is whether the Claimant was solely an employee of the Respondent and the parent Ministry has no mandate to upgrade the Claimant's job group.
49. The Claimant submitted that he was seconded to the Respondent from the Ministry of Water and Development on 18th December 2002. And subsequently, the Respondent gave him a letter of employment as an artisan and plumber on job group KW9 on 20th December 2006 which he testified during cross examination that he agreed to and signed as per the terms of the letter.
50. On the other hand, the Respondent submitted that the parent Ministry lost the mandate to up-grade or promote the claimant with effect from 1st July, 2007 as the Claimant accepted the offer of appointment with KEWI through his acceptance letter of 19th January, 2007.
51. Secondment was defined in *Vincent Omao Mariita v County Government of Nyamira & 4 others; Godfrey Kiriago Nyangau & another (Interested Parties)* [2021] eKLR as follows: -

“The Public Service Commission Act, 2017, defines Secondment as:

“ means an arrangement in which a pensionable employee is temporarily released from an organisation within the public service to another organisation which does not have reciprocal pension arrangements, to provide critical skills or acquire new skills while preserving the pension rights of the employee.”

.....

Arising from these provisions, it is clear that the purpose for which secondment is intended, is to preserve the pension rights of an employee. This happens where an employee has been appointed to a position in another organization within the public service that does not have reciprocal pensions arrangements.”

52. The Court in *Vincent Omao Mariita v County Government of Nyamira & 4 others; Godfrey Kiriago Nyangau & another (Interested Parties)* [Supra] further proceeded to discuss situations that trigger secondment as follows: -

The next question is whether the way in which the Interested Parties were appointed was procedural. To my mind, there are three reasons or occasions that would trigger secondment. The first being where an employee is appointed to a position in an organization without reciprocal pension arrangement. Usually upon this appointment, the employee applies for secondment for the sole purpose of preserving their pension rights. These rights for public entities, would usually be lost where an employee decides to resign.

Secondly, secondment would be applied where a public entity intends to build capacity in a certain area within its cadres. The entity would request another public entity to second to it an Officer (s) with specific qualifications and skills for a specified period for purposes of capacity building. This happens mostly between the National Government and the County pursuant to section 32 of the Fourth Schedule to the Constitution, where the National



Government is mandated to provide capacity building and technical assistance to County Governments.

21. A third scenario is where government establishes a new entity such as a State Corporation or a Semi-Autonomous Government Agency (SAGA). Officers would be seconded for a specified period to start off the entity and once the entity recruits its own staff, the seconded officers would be sent back to the seconding ministry/department or choose to be absorbed as employees of that entity and transfer their services.”
53. In consideration of the above, it is not disputed that the Claimant accepted the Respondent’s letter of offer of employment dated 20th December 2006 whereupon he was employed as an Artisan (Plumber) Maintenance Unit – Salary Scale KW9.
54. This court observes that the Respondent effectively absorbed the Claimant vide a letter of appointment dated 3rd October 2011 which reads:-

“Following the expiry of the secondment term of service with KEWI on 30th September 2010 which started on 1st October 2007 vide letter no. MWI/TC/8/2 VOL.V/(80) dated 14th March 2008; from the Permanent Secretary, Ministry of Water and Irrigation and subsequent KEWI having been declared as a public service institution for pension purposes vide a letter no. MSPS 13/13A/ (10) dated 24th June 2011 from the Permanent Secretary, Ministry of State for Public Service, the Governing Council hereby appoints you as an Artisan at Kenya Water Institute with effect from 1st October 2010...”
55. Having established the Claimant’s services were transferred to KEWI vide letter dated 20th April 2012 and was backdated to 1st October 2010. So he was advised his salary from 30th April 2012 and allowances would be paid by KEWI and only his pension would be preserved including 30th September 2010.
56. Further, the Claimant submitted that the other seconded employees job groups were duly upgraded as set in the Ministry’s directive including RW1 who testified on this case. The Respondent have not satisfactorily explained to this court why the same did not apply to the Claimant.
57. Prior to 2012 April the claimant was seconded to KEWI but reading from the aforesaid letter his salaries and allowances were paid by the Government before then as he was still a civil servant before then.
58. The same Kenya water Institute retired him on 11th June 2013 and his last date of service was 4th April 2014. The terminal dues that was accorded to him were a per KEWI structures going by the notice given including the pension dues save for the pension dues before he seconded to KEWI. Going by the record and pleadings and documents in court the claimant was offered new employment terms as an employee of Kenya Water Institute from 30th April 2012.
59. Prior to that date the claimant had received his letter of appointment as early as 1st July 2006 and the salary and allowances had been clearly spelt out but was being paid by the parent Ministry until his transfer.
60. The claimant waived his right to demand promotion from the parent Ministry or grading since he accepted the terms with Kenya Water Institute from April 2012 till his retirement in April 2014.
61. The court however would concede there was some underpayment from the date of secondment till his services were officially transferred to KEWI in 2012. The court is ordering the respective parties to calculate the underpayment due to the claimant up to 2012 and present it to court on 10/4/2024



for courts final award. Also if there is unpaid pension the same should be processed without delay. Case to be mentioned on 10/4/2024 to give the necessary accounts on the aforesaid underpayment and pension funds. Respondent will pay the costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

