



Havelock (As the legal administrator and personal representative of Hon Justice Jonathan Bowen Havelock (Rtd) - Deceased) v Judicial Service Commission of Kenya & another (Cause 1273 of 2017) [2024] KEELRC 153 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 153 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1273 OF 2017

L NDOLO, J

FEBRUARY 8, 2024

BETWEEN

MARY ELIZABETH HAVELOCK (AS THE LEGAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF HON JUTICE JONATHAN BOWEN HAVELOCK (RTD) - DECEASED) CLAIMANT

AND

JUDICIAL SERVICE COMMISSION OF KENYA 1ST RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY 2ND RESPONDENT

JUDGMENT

1. “Fairly early on in my tenure as Chief Justice, I came to realise that I had a problem brewing regarding the older Judges. *The Constitution* of Kenya, 2010 quite clearly detailed that Judges should retire upon attaining the age of 70 years. However, several of the older Judges had service contracts valid up until attaining the age of 74 years. Rather than allowing such older Judges to leave the Bench at the age of 70 years and sitting out of the remaining 4 years of their contracts, I was of the view that their experience and knowledge could be put to good use by stationing them at the Judicial Training Institute and getting them involved in educating and guiding members of the Judiciary who were attending the Judicial Training Institute for training purposes.”
2. These words, contained in the witness statement of Dr. Willy Mutunga, DJUR, SC, EGH who served as the first Chief Justice under *the Constitution* of Kenya, 2010 neatly scans the theatre of this dispute.
3. The primary Claimant, Hon. Mr. Justice Jonathan Bowen Havelock (Rtd) (Deceased) was appointed as Judge of the High Court on 23rd August 2011 and was posted to the Commercial and Admiralty Division, effective 1st October 2011.



4. The Judge worked until 16th August 2014, when he retired upon attaining the constitutional retirement age of 70 years. There is evidence that prior to his retirement, there were discussions on the possibility of retaining the Judge within the Judiciary, to undertake specific tasks under the auspices of the Judiciary Training Institute (now the Kenya Judiciary Academy). These discussions appear not to have been concluded and this forms part of the claim. Further, the Judge raises several grievances regarding the tabulation of his terminal dues.
5. The Judge filed his claim on 6th July 2017 but quite unfortunately, he passed away before he could take the witness stand. By a Limited Grant of Letters of Administration Ad Litem issued on 23rd January 2023 in Nairobi High Court Succession Cause No. E069 of 2023 and a consent dated 27th February 2023, the Judge's widow, Mary Elizabeth Havelock became the substitute Claimant.
6. The 1st Respondent, the Judicial Service Commission of Kenya filed a Statement of Defence dated 22nd September 2017. The Claimant filed a Reply to the 1st Respondent's Statement of Defence on 10th November 2017.
7. The 2nd Respondent filed a Reply to Memorandum of Claim dated 7th November 2017.
8. The witnesses for the Claimant were; Mary Elizabeth Havelock, Chief Justice (Rtd) Dr. Willy Mutunga, Lady Justice (Rtd) Mary Kasango and Lady Justice Teresia Matheka. Hesbon Limusi and Susan Muthoni testified for the 1st and 2nd Respondents respectively.
9. The parties also filed written submissions.

The Claimant's Case

10. By a letter of appointment dated 8th September 2011, Justice Havelock was appointed as a Judge of the High Court. He served at the Commercial and Admiralty Division at Milimani Law Courts until his retirement on 16th August 2014.
11. The Judge's appointment letter detailed his remuneration package including a basic salary, house allowance, entertainment allowance, extraneous allowance, non-practicing allowance, domestic allowance, airtime allowance and leave allowance.
12. The Judge was also entitled to a medical cover for himself and his spouse as well as a personal accident cover. In addition, he was entitled to a refund of utility bills and monthly fuel expenses as determined from time to time.
13. On 28th April 2014, the Judge was notified by the 1st Respondent of his imminent retirement on 16th August 2014, upon attainment of the constitutional retirement age of 70 years. It is pleaded that the Judge availed to the 1st Respondent all the documents required by the Respondents to enable tabulation of his retirement benefits.
14. It is further pleaded that as per the employment contract the Judge was entitled to service gratuity in the sum of Kshs. 3,599,445. According to the claim, a sum of Kshs. 1,298,243.10 was paid, leaving an outstanding balance of Kshs. 2,301,201.90.
15. It is also pleaded that the Judge's employment contract provided for either a government motor vehicle and driver or a monthly sum of Kshs. 122,000.00 as transport allowance if the Judge used his personal motor vehicle.



16. The Judge opted to use his motor vehicle and he therefore received the monthly transport allowance until April 2013 when the Salaries and Remuneration Commission reviewed the terms and conditions of service for Judges by which their remuneration was consolidated into a single gross salary.
17. When the consolidated salaries backdated to 1st March 2013 were paid in June 2014, the Judge's transport allowance, which he had already received was deducted, a move that is said to be wrongful. It is pleaded that the unpaid transport allowance covering the months of March 2013 to October 2014 stands at Kshs. 2,450,000.00.
18. Regarding medical cover, it is pleaded that at the time he joined the Bench, the Judge had his own medical cover, which he opted to keep mainly because he had a short service period before retirement and it would be difficult for him to reinstate the cover post retirement.
19. According to the Claimant, it was agreed that the Judge would be reimbursed the equivalent of the annual premium that would have been paid on his account under the Judiciary medical scheme. Under this limb, a claim of Kshs. 199,927.00 has been made.
20. At the time of retirement, the Judge had accumulated 94 leave days which days were confirmed by the Respondents. It is pleaded that based on the Judge's salary, he was owed a total of Kshs. 2,681,029 in leave pay. After allowing for tax deductions amounting to Kshs. 804,308.70, a salary advance of Kshs. 437,625 and Kshs. 192,791.45 paid to the Judge in March 2015, an amount of Kshs. 1,246,3030.85 is said to be due under this head.
21. A further claim has been made regarding an alleged arrangement between the Judge and the then Chief Justice, Dr. Willy Mutunga in his capacity as the Chairperson of the Judicial Service Commission, that the Judge would work with the Judiciary Training Institute after his retirement in August 2014. It is alleged that the Judge was deployed at the Judiciary Training Institute by a circular issued on 8th August 2014. It is further alleged that the Judge was issued with an appointment letter dated 5th September 2014.
22. It is pleaded that the Judge worked at the Judiciary Training Institute in the months of September 2014 and October 2014 upon which he was notified by the Chief Registrar of the Judiciary who also served as the Secretary to the Judicial Service Commission that there were budgetary constraints.
23. The Judge was advised to await resolution of this issue before resuming work at the Judiciary Training Institute. In the meantime, the payment made to him in September 2014 was recovered from the Judge's gratuity, a move deemed to be wrongful by the Judge. The Judge was not paid for the month of October 2014 and a claim for Kshs. 1,246,3030.85 has been made under this head.
24. The Judge's claim is tabulated as follows:
 - a. Service gratuity.....Kshs. 2,301,201.90
 - b. Transport allowance (1.3.2013-31.10.2014).....2,450,000.00
 - c. Medical insurance reimbursement.....199,927.00
 - d. Outstanding leave pay.....1,246,303.85
 - e. Salary for September & October 2014.....1,439,778.00
 - f. Leave pay for September/October 2014.....165,673.10
 - g. General damages for loss of salary, benefits and allowances to 16th August 2018, loss of career and damage to reputation



- h. Costs plus interest

The 1st Respondent's Case

25. In its Statement of Defence dated 22nd September 2017, the 1st Respondent states that on 27th March 2017, it issued a memo confirming that the retirement age for all Judges is 70 years. The 1st Respondent maintains that Justice Havelock's contract was not capable of extension beyond the retirement age of 70 years.
26. The 1st Respondent adds that prior to the retirement of Justice Havelock, the then Chief Justice, Dr. Willy Mutunga approved commutation of the Judge's pending leave days into cash, which was paid by the 2nd Respondent in the sum of Kshs. 900,594 based on the Judge's basic salary. Out of the sum of Kshs. 900,594 the 2nd Respondent deducted Kshs. 437,625 being an outstanding salary advance.
27. The 1st Respondent denies that the Judge was entitled to gratuity computed at 5 months' pay at Kshs. 719,889 and avers that maturity of pension is not a vested right and only becomes an entitlement upon the fulfilment of statutory conditions.
28. The 1st Respondent avers that the Judge worked for less than 5 years entitling him only to contract gratuity amounting to Kshs. 1,971,899 which was processed and paid to him in April 2016. The 1st Respondent asserts that it was guided by Sections 5 and 6 of the Pensions Act in this regard.
29. According to the 1st Respondent, the Judge was fully paid his dues in line with his contract and guidelines issued by the Salaries and Remuneration Commission. The 1st Respondent denies making any wrongful deductions from the Judge's dues.
30. The 1st Respondent states that on the advice of the Salaries and Remuneration Commission vide letter dated 12th August 2015, the Judge was not eligible for compensation for the period from 1st March 2013 to April 2014 as he had been paid transport allowance during the period. The 1st Respondent adds that the Judge was only entitled to be paid for the months of May, June and July 2014.
31. The 1st Respondent further cites the Salaries and Remuneration Commission letter Reference No. SRC/TS/JSC/3/35/8 Vol 1 dated 23rd May 2016, reiterating and upholding its earlier decision on the strength that remuneration and benefits of state officers included official transport in the form of chauffeur driven cars for Judges and there was no provision for transport allowance for any state officer opting to use their own transport.
32. The 1st Respondent explains the reduction in the Judge's salary arrears compared to that paid to his colleagues in the same grade on the basis of Kshs. 122,000 in transport allowance previously paid to the Judge and discounted in tabulation of the salary arrears.
33. The 1st Respondent denies entering into any agreement with the Judge for reimbursement of medical insurance premium. The 1st Respondent adds that any such agreement was not sanctioned by it or the Salaries and Remuneration Commission.

The 2nd Respondent's Case

34. The 2nd Respondent filed a Reply dated 7th November 2017, admitting having received pension documents from the 1st Respondent in respect of the Judge. The 2nd Respondent states that payment was made to the Judge as evidenced by notification from the Pensions Department dated 29th March 2016.
35. The 2nd Respondent's case is that there is no legitimate claim against him.



Findings and Determination

36. The following issues fall for determination in this case:
- a. Whether the Judge's service gratuity was properly tabulated;
 - b. Whether the Judge was entitled to transport allowance;
 - c. Whether the Judge was entitled to medical insurance reimbursement;
 - d. Whether the Judge's leave pay was properly tabulated;
 - e. The Judge's status post retirement.

Service Gratuity

37. The Judge's complaint is that the formula applied in tabulating his gratuity was erroneous. It was submitted on behalf of the Claimant that the *Pensions Act*, which deals with the public service, did not apply to the Judge, who was a state officer. In pursuit of this argument, reference was made to Article 260 of *the Constitution* of Kenya, 2010 which defines public service as:

“the collectivity of all individuals, other than State officers performing a function within a State organ.”

38. The Respondents themselves were hazy as to how the figure paid to the Judge as gratuity was arrived at. In fact, the 2nd Respondent's witness, Susan Muthoni Ngugi, who described herself as Deputy Director, Human Resource Management and Development Department at the National Treasury, told the Court that she was not competent to comment on that issue.
39. But the Claimant was also unclear as to how the figure claimed as gratuity shortfall was arrived at and since the burden of proof rests with the Claimant, the only finding to make is that this part of the claim was not proved.

Transport Allowance

40. The Judge's letter of appointment dated 8th September 2011 provided for a transport allowance of Kshs. 122,000. It is not in dispute that upon joining the Bench, the Judge opted to use his own motor vehicle and driver in lieu of a government vehicle and driver and he was paid a monthly transport allowance of Kshs. 122,000.
41. This was confirmed by a letter dated 30th January 2012 from the Judiciary Director, Human Resource & Administration stating as follows:

“Dear Hon. Judge

RE: Implementation Of The Resolution Of The Judicial Service Commission-transport Allowance

The above subject matter refers:-

A review of the basic salaries was carried out for all Judges and the enhanced Transport Allowance was withdrawn for Judges who opted to retain official vehicles.

However, since you do not have an official vehicle by option, you will retain the enhanced Transport Allowance of Kshs. 122,000.



The suggestion you put forth for raising your enhanced Transport Allowance beyond the Kshs. 122,000 may not be implemented because it requires policy decision with input from Judicial Service Commission, Treasury and Salaries and Remuneration Commission.

Yours sincerely,

(signed)

D.O. Obondo

Director Human Resource & Administration

CC: Chief Registrar, Judiciary

Supreme Court of Kenya”

42. Significantly, this letter was not only issued on the letterhead of the Chief Registrar of the Judiciary but was also copied to the holder of that office.
43. A subsequent letter dated 7th January 2013 indicated that the Judge had been provided with an official vehicle and his transport allowance would therefore be adjusted downwards from Kshs. 122,000 to Kshs. 6,200. The Judge wrote back 23rd January 2013, indicating that he had in fact not been allocated an official vehicle.
44. It is on record that the Judge continued to use his personal vehicle throughout his service on the Bench. This was confirmed by a letter dated 15th June 2015 from the Chief Registrar of the Judiciary addressed to the Chairperson of the Salaries and Remuneration Commission stating thus:

“Dear Madam

RE: Guidance On Payment Due To Hon. Justice (rtd) Jonathan B. Havelock For Forfeiting Official Transport

Reference is made to the above subject matter.

Hon. Justice (Rtd) J.B. Havelock was appointed as a High Court Judge in the year 2011 and he retired from the Judicial Service last year in the month of August after attaining the constitutional retirement age.

Despite being entitled to an official car, Hon. Justice Havelock used his private vehicle during the entire period of his tenure as a High Court Judge. Prior to the SRC Circular Ref. No. SRC/TS/HRCOH/3/25 dated 10th June 2013, setting the remuneration and benefits payable to State Officers in the Judiciary, the Judge was paid a transport allowance of Kshs. 122,000 per month as compensation for use of private vehicle. Other Judges, who were assigned a chauffeur driven official car were paid transport allowance of Kshs. 6,200/= per month. The Circular consolidated most allowances and capped the same at 40% of the gross remuneration. The circular however did not take into account the situation obtaining to Judge Havelock. As a result, the Judge lost the payment which hitherto was paid to him, notwithstanding that he continued to use his private vehicle.

He has since requested to be compensated for the continued use of his private vehicle from 1st March 2013, being the effective date of the SRC circular.

The Judicial Service Commission (JSC) at its meeting held on 30th April 2015 deliberated on the request and resolved that pursuant to Article 172(1)(b)(i) of *the Constitution*, SRC be requested to give guidelines on how the Hon. Judge will be compensated. In reaching



this decision the JSC noted that the referenced SRC circular did not provide for transport allowance or how to treat cases where a Hon. Judge is not assigned an official vehicle and uses his private vehicle.

Kindly submitted for your advice.

(signed)

Mrs. Anne A. Amadi

Secretary,

Judicial Service Commission

Copy to: The Chairman,

Judicial Service Commission

Hon. Justice (Rtd.) J.B Havelock,

Nairobi”

45. A major shift introduced by the SRC circular of 10th June 2013, whose implementation was backdated to 1st March 2013, was consolidation of Judges’ salaries, with all allowances being collapsed under one segment of 40% with the remaining 60% being termed as basic salary.
46. While there was no drop in the take home salary for other Judges, Justice Havelock was immediately affected as his travel allowance of Kshs. 122,000 was taken away, ostensibly to place him at par with his colleagues. Of note however, the Judge continued to use his personal motor vehicle and driver up to the time of his retirement. His widow told the Court that the Judge was allocated an old government motor vehicle which broke down soon after and the Judge did not use it after that.
47. It follows therefore that the Judge continued to use his personal motor vehicle and driver for which he was not compensated. The Court was referred to several other correspondences between the Judicial Service Commission and the Salaries and Remuneration Commission on this issue.
48. The net effect of the advice from the Salaries and Remuneration Commission, which was adopted and implemented by the Judicial Service Commission, was to place the Judge at a disadvantage by taking away his enhanced transport allowance, while he continued to use his personal motor vehicle. This clearly flew in the face of Article 160(4) of *the Constitution*, which outlaws disadvantageous variation of the remuneration and benefits payable to a Judge, whether serving or retired.
49. Further, by unilaterally taking away the Judge’s transport allowance, the 1st Respondent violated Section 10(5) of the *Employment Act*, which provides that variation of existing terms of service must be with the concurrence of the affected employee.
50. In the final submissions filed on behalf of the Claimant, reference was made to the decision in *Patrick Kariuki v Mustek East Africa Limited* [2021] eKLR where the requirement for consultation prior to altering prevailing terms of service was underscored.
51. What is more, the advice by the Salaries and Remuneration Commission came too late in the day, after the Judge had left the Bench. The Judge was allowed to serve his full term while using his personal motor vehicle for which he was initially compensated by a monthly transport allowance fixed at Kshs. 122,000. There was not a single letter written to the Judge putting him on notice that he was using his personal vehicle at his own peril or that the transport allowance already paid to him would be recovered.



52. In fact, in her letter dated 3rd November 2015, addressed to the Secretary of the Salaries and Remuneration Commission, the Chief Registrar of the Judiciary was categorical that the Judge had been disadvantaged by implementation of the circular from the Salaries and Remuneration Commission. She states inter alia:

“...we note that during payment of the arrears (w.e.f 1st March 2013), the honourable Judge was greatly disadvantaged because of the fact that the SRC communication on the implementation of the new salary did not expressly give direction on how to handle instances of Judges who forfeit official transport.

It is also noteworthy that Judge Havelock continued to use his private transport until his retirement from service on 17/08/2014 yet, he earned the same as his colleagues.”

53. I am persuaded that a clear case of a legitimate expectation created at the highest level within the administrative machinery of the Judiciary has been established. Case law is to the effect that a claim of legitimate expectation is established when there is a clear representation, upon which a reasonable person can rely (see *Pevans East Africa Limited & another vs Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR and *Kenya Revenue Authority & 2 others vs Darasa Investments Limited* [2018] eKLR). This is what happened in the present case and I have no difficulty in agreeing with the Claimant in this regard.

Medical Insurance

54. The Claimant’s claim under this head arises from a choice made by the Judge to keep his private medical insurance cover. The explanation given for this choice, being that the Judge did not want to lose his private medical cover, which he would need post retirement, is a plausible one.

55. It seems to me however that the Judge’s request for payment of the equivalent of the insurance premium that the Judiciary would have paid on his behalf would not only be a material departure from the established terms of service but would also present accounting difficulties. I say so because in a group medical insurance scheme such as the one run by the Judiciary, premium is paid to the underwriter on the basis of economies of scale.

56. The Court did not see any policy decision authorising payment of premium to the Judge and no law was cited to support this proposition. In this regard, the letter dated 4th November 2013 from the Director, Human Resource & Administration indicating that the Judge would be reimbursed the sum of Kshs. 199,927 as insurance medical premium has no legal or policy basis. The claim on this score is therefore declined.

Leave Pay

57. Upon the Judge’s request, the Chief Justice authorised commutation of 94 leave days that were outstanding at the time of the Judges’ retirement. The Judge’s complaint under this head has to do with the factor employed in commuting his leave into cash. According to the Judge, tabulation of his leave pay ought to have been on the basis of his gross pay.

58. On their part, the Respondents simply stated that leave pay in the public service is tabulated on the basis of basic pay. None of the Respondents presented any document to support their position.

59. Kenya has ratified the ILO Holidays with Pay (Revised) Convention, 1970 (No 132) which by virtue of Article 2(6) of *the Constitution* is part of our law.



60. Article 3(1) of the Convention states as follows:

1. Every person to whom this Convention applies shall be entitled to an annual paid holiday of specified minimum length.

61. Paid holiday in our jurisdiction is what is commonly known as annual leave and when an employee goes on leave, they receive their full pay, inclusive of allowances. This then begs the question why an employer would decide to pay only a portion of that pay if the leave is commuted into cash. There is no justification for this, which in my view, is in violation of ILO Convention No. 132.

The Judge's Status Post Retirement

62. The Judge's claims for salary and leave pay for September/ October 2014 general damages for loss of salary, benefits and allowances revolve around discussions on the possibility of his engagement at the Judiciary Training Institute, after his exit from the Bench.

63. Former Chief Justice, Dr. Willy Mutunga, was categorical that the Judge could not be retained in the office of Judge after attaining the retirement age of 70 years. Dr. Mutunga disowned a letter dated 5th September 2014, which purported to re-appoint the Judge post retirement.

64. There are however several correspondences evidencing discussions on the Judge's engagement on consultancy basis, with financial support from bilateral partners. These discussions were however inconclusive and in the end, the Judge was not given a written offer.

65. Justice (Rtd.) Mary Kasango and Justice Teresia Matheka told the Court that they had witnessed Justice Havelock performing functions on behalf of the Chief Justice post retirement. Some documents were also produced to support this testimony. It is evident that the Judge did some work for the Judiciary after his retirement. Nevertheless, not every work relationship creates an employment relationship.

66. Any engagement of the Judge after his retirement from the Bench ought to have been properly documented, with clear terms of engagement. In the absence of any such documentation, I am unable to infer any employment relationship capable of enforcement by this Court whose jurisdiction is specialised.

67. For the foregoing reasons, the claims on salary and leave pay for September/ October 2014 and general damages for loss of salary, benefits and allowances are disallowed.

Final Orders

68. Finally, I enter judgment in favour of the Claimant as follows:

- a. Transport allowance (1.3.2013-16.8.2014).....2,017,066
- b. Outstanding leave pay.....1,246,304
- Total.....3,263,370

69. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.

70. The Claimant will have the costs of the case.

71. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024



LINNET NDOLO

JUDGE

Appearance:

Mr. McCourt, SC for the Claimant

Mr. Ochieng for the 1st Respondent

Mr. Odukenya for the 2nd Respondent

