



**Mwangi v Mpala Research Centre (Cause E004 of 2023)
[2024] KEELRC 845 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 845 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E004 OF 2023
ON MAKAU, J
APRIL 19, 2024**

BETWEEN

PAULINE WAIRIMU MWANGI CLAIMANT

AND

MPALA RESEARCH CENTRE RESPONDENT

JUDGMENT

1. By a Statement of Claim dated 28th February 2023, the Claimant sued the respondent seeking the following orders that:
 - a. Declaration that the Claimant, through the respondent's actions was unfairly discriminated against contrary to the provisions of the *Employment Act* and is liable to compensate her accordingly.
 - b. An order that the respondent is liable to pay the claimant Kshs 7,595,885 being the cumulative difference in pay between what the claimant was earning and that of her predecessor for the period of 55 months.
 - c. An order that the respondent is liable to pay the claimant Kshs 8,758,090 being her unpaid salary for working as the Ranch Accountant at the rate of Kshs 159,238 for 55 months.
 - d. An order that the respondent is liable to pay the claimant Kshs 583,873 being the difference between the rightful severance pay for the 11 years served and what was paid to him.
 - e. Costs of the claim and interest on (a) and (b) and (c).



2. The Claimant's claim was accompanied by her written witness statement dated 28th February 2023 and a list and bundle of documents dated the same date plus a further Bundle of documents dated 6th June 2023.
3. The Respondent filed Statement of Defence denying liability to pay the Claimant the dues sought and prayed for the suit to be dismissed with costs. It further filed Witness Statement dated 14th April 2023 and bundles of documents in the list dated 20th April 2023 to support their defence.

Factual background

4. In a nutshell, the Claimant's claim is that she was employed by the Respondents as an Accountant on 16th May 2011. In 2018, she was directed by the respondent to take over accounting role at the Mpala Ranch Limited which is a distinct entity from the respondent. According to the claimant, the new role meant that she had two jobs at the same time but her salary was not increased to compensate her adequately for the added work but remained Kshs 159,238.
5. It is further claimant's case that when she took over the accounting work at the Ranch, she discovered that her predecessor who had retired was earning Kshs 297,345 which was Kshs 138,107 more than the salary she was given. She questioned the said salary disparity but the same was not resolved for the 55 months she served both the respondent and the Ranch.
6. In the year 2020, she was given a fresh contract for 1st January 2020 to 31st December 2020 detailing her job as Grade D-S5. The contract was renewed for another one year from 1st January 2021 to 31st December 2022. However, she continued with her duties until 29th September 2022 when she was unexpectedly served with a termination letter on account of redundancy. At the time of the termination, her monthly salary was Kshs 159,238.
7. It is further Claimant's case that the redundancy was not justified because the respondent is still operating and the accounting duties were just assigned to another person. She contended that her employment contract with the respondent was not terminated and therefore the operational problems at the Mpala Ranch had nothing to do with her since she was never employed by the Ranch. She maintained that the redundancy was not in accordance with section 40 of the Employment Act and therefore she was unlawfully kicked out of employment since.
8. She further contended that she was discriminated with respect to payment of severance pay because she was paid 20 days pay per year of service contrary to the respondent's policy of paying 30 days' pay per year of service. She contended that the discrimination was unjustified. She reported the matter to the labour office but the respondent never addressed the matter hence this suit.
9. She confirmed in her testimony that she was initially employed by the respondent but from 2018 she was asked to take over as the accountant for Mpala Ranch Limited after the one who was working there left. Henceforth her salary was being paid by Mpala Ranch limited. However, she continued working for the respondent and the Ranch at the same time.
10. On cross examination, she admitted that her appointment letter stated that she could be allocated other duties or even transferred. She further admitted that the employer has the right to appoint another person to do the same duties she was doing. She admitted that the respondent and Mpala Ranch Limited were owned by Princeton University but they were distinct entities. She further admitted that after a report of the proposed merger of the said entities, she was assigned work at Mpala Ranch Limited. She admitted that a report done on 18th November 2022 by the Labour Officer indicated that the said entities shared resources but the staff were paid according to their contracts of employment.



11. She admitted that she was served with a letter dated 1st September 2022 notifying her of intended redundancy and thereafter another letter dated 29th September 2022 terminating her employment on account of redundancy. The letter offered to pay her severance at the rate of 22 days for each year of service but she contended that the tradition in the respondent was payment of 30 days' pay for each year served. However, she admitted that no one was declared redundant during the period she was in the respondent but they all retired and were paid gratuity not severance.
12. She reiterated that her predecessor at the Ranch was earning Kshs 297,345 but hers was Kshs 148,905 after deductions including pension. She admitted that she was not a Certified Public Accountant CPA(K). She further admitted that her salary had been increased over the years to the said amount.
13. On the other hand, the Respondents' case is that the Claimant was its employee having signed a valid contract of employment which lasted until it was terminated on account of redundancy. It is further respondent's case that it paid the claimant all her terminal dues after the redundancy as provided by the law.
14. It is further defence case that, the Respondent works in mutually beneficial manner with Mpala Ranch Limited and their operations are run by a joint board. They share resources including land, buildings, human resource, motor vehicles and security. In 2021, Princeton University legally acquired the two entities and henceforth ran its operations as Mpala under one Board. Mpala reared livestock not only for research, but also for sale, and the proceeds donated to the Respondent to finance its operations and enhancement of its core mission of interdisciplinary research and training programs.
15. It the respondent's case that in January 2022, the Ranch lost its livestock from 1200 to 500 which by extension affected the respondent due to diminished revenue. As a result of the said loss the Board of Mpala reviewed its strategic objective and resolved that it would only focus on research and abandon commercial ranching operations. Accordingly, the Ranch was going to retain a small number of the livestock for research purposes only.
16. In addition, the Board of Mpala approved the implementation of a new structure proposed by the Agricultural Employer's Association, in line with Mpala's reviewed operations, mission and vision. The purpose of the restructuring was to create a lenient and cost-effective management team.
17. As a result, the Claimant's position of Accountant was abolished and the roles distributed among other employees based on their qualifications. Consequently, the Claimant was then issued with a redundancy notice dated 1st September 2022 simultaneously with the labour office. The affected employees were also given the liberty to present their grievances before lapse of notice. Grievances were reported to the labour Office but after hearing the parties the officer made a finding that the redundancy was compliant with the [Employment Act](#) and the CBA. Further the computation of the terminal dues was also found to be correct.
18. In her testimony during the hearing, Ms Beatrice Wanjohi, the respondent's Head of Human Resources and Administration contended that the respondent is a Research Center that operates within the land measuring 48000 acres owned by Mpala Ranch Limited. She testified that the Ranch finances the respondent but the two entities are managed by one Board under Princeton University but they are distinct from each other. The two entities operate on a policy of shared resources.
19. On cross examination, she reiterated that the respondent and the Ranch are distinct entities but operation wise, they share everything. She contended that the contract of employment dated 5th March 2020 was between the claimant and the respondent. However, she admitted that the claimant handled accounts for the Ranch as well. Finally, she admitted that though the redundancy notice stated that



the Ranch was closing down, the Ranch is still operating for research and not as a commercial Ranch for profit.

Submissions

20. The claimant submitted that she has tendered evidence to prove that she was employed by the respondent which is a distinct legal entity from Mpala Ranch limited. The respondent was a non-governmental organization (NGO) while Mpala Ranch Limited is a Company. However, she was assigned duties at the company from 2018 when the company Accountant retired. She maintained that she was discriminated by not being paid the same salary as the retired accountant contrary to section 5 of the *Employment Act*.
21. Consequently, she submitted that she is entitled to Kshs 7,595,885 being the difference between her salary and what the retired accountant was earning. She also submitted that she is also entitled to Kshs 8,758,090 being the unpaid salary of Kshs 159,238 times 55 months she served the accountant for Mpala Ranch. She also submitted that she is entitled to Kshs 583,873 being the underpaid severance pay. She contended that the employer computed her severance pay at the rate of 20 days pay instead of 30 days' pay, hence the above claim computed using the 10 days pay withheld by the respondent.
22. The respondent submitted that she was employed by the respondent and she was never discriminated in any manner. It submitted that the research centre and the ranch were merged after acquisition by Princeton University and operated under one board since 2019. Thereafter the claimant was appointed to serve under the new structure and therefore she was not entitled to two salaries.
23. As regards the claim for discrimination, the respondent submitted that the claimant has not named the ranch accountant who allegedly retired before her appointment. She has admitted that she is not a CPA(K) nor is she a member of the Institute of Certified Public Accounts of Kenya. It therefore submitted that the claimant has the burden of proving the alleged disparity by evidence which she has failed to discharge. For emphasis it cited the case of *Ol Pajeta Ranching Limited v David Wanjau Muboro* [2017] eKLR.
24. Finally, the respondent submitted that the reliefs sought by the claimant are not warranted since no basis has been laid for the same to be awarded. It maintained that the claimant never had two jobs and the computation of her severance pay was properly done even to the satisfaction of the Labour Officer. Therefore, she prayed for the suit to be dismissed with costs.

Issues for analysis and determination

25. Having considered the pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent as an accountant. There is further no dispute that her contract of service was terminated on account of redundancy effective 2nd October 2022. Finally, it is a fact that she was paid her terminal dues after the termination. The issues falling for determination as follows:
 - a. Whether the Claimant was discriminated by the Respondent contrary to the provisions of the *Employment Act*.
 - b. Whether the Claimant is entitled to the reliefs sought.

Discrimination

26. The claimant contended that she was discriminated by being paid salary that was less than what her predecessor was being paid before retirement. The respondent denied the alleged discrimination and contended that the claimant has not named the retired accountant. It also contended that the claimant



has admitted that she is not a CPA(K) and she is also not a member of the Institute of Certified Public Accountants which accredits accountants. It further contended that the claimant has not adduced any evidence to prove the grounds upon which she was discriminated.

27. Section 5 of the *Employment Act* prohibits employers from discriminating against their employees in the following terms:

- “(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
- (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
 - (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
 - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
- (4) ...
- (5) an employer shall pay his employees equal remuneration for work of equal value.”

28. Article 1 of the *Discrimination (Employment and Occupation) Convention, 1958* (No 111) defines discrimination as follows:

- 1. “For the purpose of this Convention the term discrimination includes—
 - a. any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
 - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organizations, where such exist, and with other appropriate bodies.”

29. *Black’s Law Dictionary* 10th Edition defines discrimination inter alia as follows:

“Differential treatment; esp., a failure to treat all people equally when no reasonable distinction can be found between those favoured and those not favoured.”



30. The Supreme Court also defined discrimination in the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) as follows:

“... where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex, disability etc. or due to unfair practice and without any objective and reasonable justification.”

31. As indicated above, Section 5 of the *Employment Act* prohibits discrimination at the workplace whether directly or indirectly on grounds of race, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status; or respect of recruitment, training, promotion, terms and conditions of employment, termination and other matters arising out of employment. Subsection (5) provides that an employer shall pay his employees equal remuneration for work of equal value.

32. The alleged discrimination herein was on the basis of equal pay for equal work or work of equal value. The claimant contended that she took over work which was being done by another accountant who retired. She further alleged that the retired accountant was earning Kshs 297,345 but she was paid Kshs 159,238 for the same work. However, she neither named the retired accountant nor did she produced any evidence to prove that they held the same academic qualification and work experience.

33. Guided by the definition of discrimination by the Supreme court and the Black's Law dictionary above, I am of the view that discrimination occurs where there is differential treatment without any justification. It is further my view that the burden of proof lies with the party alleging discrimination to prove that he/she was subjected to different treatment without any justification. He/she must show that:

- a. The work involved is the same in all aspects or is of the same value,
- b. He/she holds the same or comparable academic qualifications with the favoured counterparts.
- c. He/she has the same or comparable professional qualifications.
- d. He/she has the same or comparable work experience with the favoured counterpart.
- e. The comparator is not hypothetical but real.

34. In this case, I have already noted that the claimant has not given the identity of the comparator. The alleged retired accountant remains mysterious. His academic and professional qualification were withheld from the court. The length of his service was also not stated. The claimant had the reason to get the above information if at all what she is alleging was true. Minus that information, there is nothing to compare the claimant with, and as such the alleged discrimination unsubstantiated.

35. The claimant also alleged that she was discriminated by being paid less severance pay than what was the practice in the respondent. She contended that respondent used to pay its retiring employees' gratuity at the rate of 30 days' pay for each year of service but when it came to her turn, she was paid 20 days' pay for each year of service.

36. Having considered the evidence on record, it is obvious that the claimant is wrong in her argument. I say so because, she admitted that those who were paid gratuity of 30 day pay exited through retirement while in her case she exited on redundancy which entitles an employee to severance pay at the rate of 15 days' pay for each year of service. She was therefore not discriminated because, there is evidence that she was paid severance pay at the rate of 20 days' pay for each year served plus pension. Her predecessors, were never declared redundant and they were not paid pension. It follows that there was no sufficient



comparator in the circumstances and therefore the alleged discrimination in payment of gratuity has not been proved on a balance of probabilities.

Reliefs sought

- 37. In view of the foregoing holding I find that the claimant is not entitled to the declaration that she was unfairly discriminated by the respondent through its actions. For the same reason, I also find that the claimant is not entitled to the monetary claims sought and therefore I dismiss the suit.
- 38. However, I will not condemn the claimant to pay costs because, going by the material presented to this court, the relationship between the respondents and other related organization is the reason why this suit was brought.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF APRIL, 2024.

.....

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

