



**Ungu v County Government of Meru (Cause E031 of 2021)
[2024] KEELRC 1184 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1184 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E031 OF 2021
ON MAKAU, J
MAY 22, 2024**

BETWEEN

CHRISTINE KAWIRA UNGU CLAIMANT

AND

COUNTY GOVERNMENT OF MERU RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 22nd September 2021, the Claimant averred that she was employed by the Respondent for a fixed term of six years from 25th July 2013. Her starting salary was Kshs. 172,442.00 plus annual increments. She further averred that her remuneration was subject to her letter of appointment, and the recommendations, advice, directions and approval of the SRC and the same was not to be reviewed to her detriment.
2. She averred the Salaries and Remuneration Commission reviewed her salary vide circular Ref No. SRC/TS/CGOVT/3/61 Vol. IV (49) dated 8th December 2017 but the Respondent failed to upgrade her salary accordingly. She further averred that the Governor appointed her to act in the position of Chairperson County Public Service Board on 31st August 2017 and did so until the end of her contract on 22nd July 2019.
3. The Claimant cited frustration, intimidation and discrimination by the Respondent's officers by failing to pay her full remuneration and allowances for July and August 2013. She further accused the respondent of salary underpayment, failure to refund her imprest claims incurred while on official duty, failure to pay her airtime allowance, failure to advance her a mortgage facility despite being qualified for the same. She also accused the respondent of acts of frustration and insubordination by the Respondent's officers, withdrawal of the official motor vehicle allocated to her, failure to pay her service gratuity, failure to pay her acting allowance, and failure to increase her salary in accordance with the relevant scale applicable. For that reason, the Claimant sought judgement to be entered against the Respondent in the following terms:



- a. A declaration that the respondent and its officers violated the claimant's constitutional rights to equality and freedom from discrimination guaranteed under article 27 of *the constitution* and the claimant's right to fair administrative action guaranteed under article 47 of *the constitution* by treating her unfairly and differently from the rest of her colleagues by failing to extend to her the benefits of the car loan and housing funds (mortgage) facility despite her being qualified and entitled to the said benefit.
 - b. Payment of the outstanding amount due and owing to the claimant in respect of her monetary claim summarized in paragraph 11, 14, 16, 19 and 22 of the claim.
 - c. General, aggravated and punitive damages for violation of the Claimant's constitutional rights protected under Articles 27 and 47 of *the Constitution* of Kenya.
 - d. An order directing the Respondent to give the Claimant a certificate of service within the specified period.
 - e. Costs of this claim and interest on b and c above at court rates.
4. Vide a Reply dated 8th December 2021 the Respondent admitted that the Claimant was appointed as a full-time board member on 25th July 2013 and accepted the offer on 17th February 2014 to serve on part time basis from 1st April 2014. It averred that the Claimant confirmed her status as part time member vide her letter dated 22nd October 2014. Consequently, it averred that the Claimant served as a fulltime member of the Board only between 25th July 2013 and 31st March 2014.
 5. It further averred that the Claimant was not a full-time member when the circular of 31st July 2014 was issued and as such her remuneration was not reviewed since the terms therein applied only to full time members. It was further averred that the circular Ref. No. SRC/TS/CGVT/3/61 VOL. IV (89) dated 8th December 2017 also did not apply to the claimant since it was applicable only to persons appointed or assuming office after its effective date. It also averred that the Claimant was not paid on a graduating scale since she was not full time member.
 6. It admitted that the Claimant was appointed as acting chairperson but maintained that her pay was on part time basis. It averred that the Claimant was paid all her allowance and as such none were owing to her. It denied the alleged hostility towards the claimant and averred that had there been any, then there would have been a report to Public Service Commission or the Governor. It averred that when the Payroll Manager received the claimant's appointment letter as acting chair of the board, he adjusted her sitting allowance accordingly to Kshs. 12,000. As regards the issue of loan, the respondent averred the same was not approved because the claimant's contract term was coming to an end and also because there were no funds at the time.
 7. It further averred the claimant was paid all the imprests claims and as such nothing was owing. It averred that as per circular Ref No. SRC/TS/CGOVT/3/61/ [52], part time members of the Board were not entitled to gratuity and therefore, the Claimant was only paid gratuity of Kshs. 267,286.74 through remittance to LAP Fund for the period she was on full time service. The claim for salary underpayment was denied on grounds that the only time her payment was deducted was for the period between April – September 2014 when it was recovering from monies she was erroneously paid as full time member.
 8. The Respondent also filed its counter claim against the Claimant on grounds that the Claimant failed to disclose that she was a resident of Meru and as such she received accommodation allowance of Kshs. 10,000/= for every sitting. Consequently, the Respondent seeks a refund of the said monies paid to the Claimant for a period of 64 months totaling to Kshs. 5,120,000/=. In that regard, it prayed for judgement to be entered for:



- a. Recovery of the erroneous overpayment being accommodation allowance amounting to Kshs. 5,120,000/=.
- b. Costs of the claim and interest on a above.

Evidence

9. During the hearing, the Claimant adopted her written statement dated 22nd September 2021 and further statement dated 17th June 2022 as her evidence in chief. She also produced 27 documents as exhibits to support her case. She then clarified that she currently lives in Kiambu County but she lived in Nakuru county until 2019. She further clarified that during her term in office she was living in Nakuru and would travel to Meru for board meetings. She maintained that she was appointed as per SRC terms and the dues she is claiming are lawful entitlements which have been withheld.
10. With respect to the alleged discrimination in terms of the loan application, she stated that her application was approved but the funds were never released despite there being a resolution that the Board members be given priority. She relied on the letter of the Director HR who was member of the Mortgage and Loan Committee dated 24/9/2018 which stated that her loan was approved. She stated that the funds for other 4 members of the Board were received.
11. She further stated that in March 2018 she was asked to substitute the property (security) and she complied by submitting a sale agreement for a property in Ruaka Kiambu County. The request to substitute the property was by the Credit Officer Mr. Antony Gitobu. She contended that funds were available at the time but she was denied because according to paragraph 18 of the defence, her contract term was about to end.
12. In cross examination, she reiterated that she started working on part time from April 2014. She added that in her letter of 17.2.2014 accepting the appointment, she indicated that that she would serve on part time basis from 1st April 2014. She stated that during her part time service she was in the IPPDR system and she was receiving pay slips. She admitted that she was entitled payment of Kshs. 10,000 as sitting allowance, Kshs. 10,000 for accommodation allowance plus Kshs 20,000 as commuter allowance per month. A maximum of the 8 sittings were allowed per month entitling her to Kshs 180,000 which paid as special allowance.
13. She reiterated that from August 2017, she was appointed acting Chairperson of the board and her sitting allowance became Kshs.12000. However, she continued being paid Kshs 10,000 until December 2017 which was an underpayment since she was the acting chairperson of the board. The error was rectified as per the pay slip for January 2018 which indicated payment of arrears of Kshs. 64,516.13. She also admitted that from April 2014 to September 2014 she was paid Kshs. 172,000 being the monthly pay for a full time Board member as indicated in her appointment letter. She contended that the alleged recovery of overpayment during that period was an error.
14. She stated that her October 2014 pay slip indicated a special salary of Kshs. 164,000. Her sitting allowance was being calculated at Kshs. 8,000 yet she was entitled to Kshs. 10,000 as vice chair since 2013. She maintained that she was not a resident of Meru though she had rented a house which she never stayed in continuously.
15. She reiterated that Antony Gitobu, a credit officer, informed her that the mortgage she applied for had been approved, but she admitted that there was no letter confirming the approval. She added that there was confirmation of the approval during the Board meetings. She admitted that her second application dated 11.3.2018, for Kshs. 5,000,000 was made 11 months before the expiry of her contract on 22.7.2019 but clarified that all the other board members were given the loan yet they were appointed



- and sworn into the office the same day. She made follow up vide her letter dated 22.3.2019, but her loan application was never granted.
16. Ms. Sabina Gatimu, testified as RW1. She is the Director HR of Meru Teaching and Referral Hospital and the respondent's former Payroll Manager. She adopted her written statement dated 9/12/2021 as her evidence in chief and produced 8 documents as exhibits.
 17. In cross examination, she stated that she relied on the information from other departments to prepare the payroll. She stated that when she joined the respondent in 2014, she found the claimant already in the payroll. She stated that for her to change the payroll, she had to receive instruction from someone. She testified that the respondent recovered salary from the claimant because she changed her terms from full to part time service. She stated that in implementing the changes, she was acting under the instruction of the board chair. She clarified that the chairman merely communicated the change of terms by the Claimant herself.
 18. She stated that she had no mandate to enter into contract or change terms of service of any employee. She added that she verbally informed the Claimant and the Director HR that she would be recovering the overpayment from the claimant. She acknowledged the claimant's assertion that the data capture sheet did not have a provision for residence. She also added that she did not receive any instruction for the recovery of salary for days not worked.
 19. In re exam she clarified that it was her duty to recover overpayment once it was established that someone was over paid. She stated that she notified the claimant before she commenced the recovery. She stated that the IPPD system was used to pay salaries and allowances but board members' allowances were accumulated and paid together as special salary. She stated that the claimant used to receive Kshs. 180,000 per month and denied that she was denied gratuity. She clarified that the claimant was paid gratuity for the duration she was on full time, and averred that she was not entitled to the same as a part time Board member according to SRC circular. She also stated that the claimant was also not entitled to leave allowance when she was on part time. Finally, she observed that the claimant never complained about any unpaid allowances before her exit from the Board.
 20. Mr. Samuel Murithi testified as RW2. He is the respondent's former Director HR and secretary to Mortgage Committee. He adopted his written statement dated 9/12/2021 as his evidence in chief. In brief he stated that the claimant put in an application for a mortgage of Kshsh. 5000,000 on 11th September 2018. The loan was to purchase a parcel of land Title number Kajiado/kisaju/13730 and application was approved but the claimant failed to pursue the same and instead on 11th march 2019, she made another application to the Housing Management Committee for a loan to purchase land Title Kiambaa/ruaka/6231. The said application was totally new and it was not approved due to lack of funds in the scheme.
 21. On cross examination he admitted that the claimant was entitled to mortgage like any other staff, but clarified that he did not know why she did not get mortgage during her term since he only joined the committee in 2018. He further admitted, there were no other members of the board who were denied mortgage. He stated that the committee was willing to give the claimant the loan but there was no money to give everyone. He added that her mortgage to buy land in Kajiado was approved, but she filed a fresh application in March 2019 to change the earlier loan in order to buy land in Kiambu. He confirmed no written communication was given to notify her that there was no money. He also confirmed that the claimant never wrote to state that she would not take the loan. However, he stated that she declined the approved loan and put in a new application in March 2019.
 22. He outlined the requirements for mortgage application as including Title of the land, sale agreement, pay slip, copy of ID, and the area map of the land concerned. On being shown the minutes of the Loans



Committee of 24th September, 2018, he confirmed that the claimant's loan application was for Kshs. 5,000,000, but only Kshs. 850,000/= was approved. He also confirmed that two other applicants got approval for Kshs. 2,000,000 each and another one even got Kshs. 25,000,000. He further stated that the County was supposed to give a Professional Undertaking.

23. In re exam, he stated that by the claimant bringing another loan application meant that she had declined the earlier loan and was therefore seeking a fresh application. He stated that the committee was in charge of making the decisions and thus the chairman was not the sole decision maker. He stated that the deputy governor was entitled to Kshs. 25,000,000, whereas the County Executive Committee Member was entitled to Kshs. 5,000,000. However, the Executive member was granted only Kshs. 2,000,000. Finally, he stated that no one was denied loan and clarified that the committee also considered the remaining term of the applicant's contract.

Claimant's submissions

24. The claimant raised the following issues for determination:
- a. Whether the claimant was serving as a member of the Meru County Public Service Board on full time and part time basis.
 - b. Whether the Claimant was underpaid her salary and allowances and if there are unpaid imprest claims owing to the Claimant.
 - c. Whether the Claimant was entitled to service gratuity at the end of her term of office.
 - d. Whether the Respondent and/or its officers treated the Claimant in discriminatory and unfair manner by declining to grant her mortgage facility under the Meru County Executive Staff Housing Fund contrary to Article 27 sub article 5 as read with sub article 4 of *the constitution* and in violation of the claimant's right to fair administrative action contrary to Article 47 (1) of *the constitution*.
 - e. Whether the Respondent's counterclaim is merited
 - f. Whether the claimant has proved her claim against the respondent and if so, what are the reliefs to be granted.
25. On the first issue, it was submitted that the claimant was employed on full time basis and there was no point when her contract was reviewed. It was reiterated that there was no mutual agreement between the claimant and the respondent to vary her remuneration or terms of service. It was submitted that the claimant assumed the acting capacity when the chairman of the board was charged in the anti-corruption court at Meru on 15th July 2016. It was contended that the claimant took over the official duties and responsibilities of the office including convening and chairing board meetings and overseeing its activities and operations and performing other duties under section 59 of *County Governments Act, 2012*.
26. It was further argued that the workload at the board necessitated her to work full time. The Court was urged to find that the Claimant was working on full time basis as there was no evidence tendered by the Respondent to show that she was on part time. To support that argument, she relied on the Salaries and Remuneration Commission's Circular Ref No. SRC/TS/CGOVT/3/61 dated 13th June 2013, at page 2.
27. It was argued that her salary could not be validly reviewed on the basis of the letter dated 17th February 2014 or the memos of 13th October 2014 and 22nd October 2014. It was argued that since the County



- Secretary never responded in writing to the Claimant's request to work part time, then the same was never considered or accepted by the appointing authority. It was therefore contended that DW1 acted ultra vires in reviewing the salary downwards as she was not authorized by anyone as admitted by her during cross examination. In support of her argument on variation of contracts, reliance was placed on the case of *Justina Mutitu Nyaga v Kenya Civil Aviation Authority* [2017] eKLR at paragraph 67.
28. On the second issue, it was submitted that the Claimant was not paid her full salary, and allowances as was evidenced in the pay slips. She submitted that she did not receive her pay slips for the months of July and August 2013 and the amount remitted to her account on 29th August 2013 for both months was Kshs. 204,958. She disputed the Respondent's assertion that the net pay of Kshs. 140,457/= indicated in the pay slip for August 2013 was not what was remitted to her account.
 29. It was also observed that the Claimant's salary was not adjusted progressively in line with the remuneration package contained in her letter of appointment but rather reviewed downward without her consent. It was therefore submitted that the said review was irregular and in violation of the law. For emphasis, reliance was placed on the case of *Gladys Agayo v Somak Travel Ltd* [2015] eKLR and the case of *Janine Buss v Gems Cambridge International School Limited* [2016] eKLR.
 30. On the issue of unpaid and underpaid imprests, it was argued that the respondent never proved that the same were ever paid to the claimant as there were no payment vouchers produced.
 31. On the third issue, it was submitted that since the claimant demonstrated that she was in full time employment, she was entitled to service gratuity at the rate of 31% of her annual basic salary in line with the respondent's policy, labour laws and the SRC directives. It was argued that the SRC circular Ref. No. SRC/TS/CGOVT/3/61/(52) and letters dated 16th October 2017 and 22nd October 2017 could not be a basis to disentitle the Claimant of gratuity as the same was payable to members on fixed term. It was argued that the said disentanglement was in violation of section 10 (5) of the [Employment Act](#).
 32. It was further submitted that there had been no communication of the remittance of Kshs. 267,286.74 to LAP Fund as service gratuity for the claimant for the period 25th July 2013 to 31st March 2014. It was further submitted that the said amount was never paid the claimant and the court was urged to grant Kshs. 4,825,684.24 as service gratuity to the Claimant.
 33. On the fourth issue, it was submitted that the claimant has laid sufficient basis for the court to find a case of discrimination. She has adduced evidence to prove the discrimination she suffered at work in particular; harassment, hostility, intimidation, outright disrespect and undermining. She also cited the refusal to furnish her with a Kshs. 5,000,000/= mortgage loan facility, although she met all the requirements. It was submitted that the discrimination was due to the claimant's refusal to support the respondent's political establishment, and also due to her rejection of the request to employ affiliates of members of the County Executive. For emphasis reliance was placed on the case of *Peter K. Waweru v Republic* [2006] eKLR and the Supreme Court decision in *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021).
 34. It was argued that the claimant having shown that she was discriminated upon, the burden shifted to the respondent to prove that the differential treatment was not discriminatory, and which burden was not extinguished. In support of her argument on damages for discrimination of Kshs. 10,000,000/=, reliance was placed on the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR and the case of *VMK v Catholic university of Eastern Africa*.
 35. On the fifth issue, it was submitted that the counterclaim is an afterthought actuated by malice, spite, ill will and personal vendetta against the claimant. It was submitted that there was no time that the respondent asked the claimant to provide details on her residence for purposes of payment



of allowances, more so, since the IPPD capture sheet had no field for residence information. It was contended that by renting a temporary place in Meru did not disentitle the claimant of her accommodation allowance. It was argued that the respondent failed to prove that the claimant resided in Meru so as to disentitle her of the allowance. It was argued that singling out the claimant on basis of her home county amounted to discrimination.

36. On the final issue, it was submitted that the claimant had served on full time basis and there being no evidence to show that her contract was reviewed, she was entitled to her full and progressively increasing salary. It was contended that the claimant had shown that she was underpaid and also denied some allowances. She also proved that her service gratuity together with imprest claims were not paid. It was further submitted that the claimant has sufficiently demonstrated discrimination and unfair treatment without any lawful justification. Consequently, the court was urged to grant the prayers sought and dismiss the counterclaim with cost.

Respondent's submission

37. The Respondent raised the following issues for determination:
- a. Whether the memorandum of claim was time barred.
 - b. Whether the claimant was serving as a member of the Meru County Public Service Board on full time basis or part time basis.
 - c. Whether the claimant was underpaid
 - d. Whether there was discrimination
 - e. Whether the respondent's counterclaim is merited
38. On the first issue, reliance was placed on section 90 of the *Employment Act* and the case of John Kiiru Njiri v University of Nairobi [2021] eKLR to urge that the suit is stale since all the claims are continuous injuries and the suit was commenced after 12 months from time of cessation. It cited the definition of a continuing injury as given by the Court of Appeal in G4S Security Services (K) Ltd v Joseph Kamau & 468 others [2018] eKLR, to support its submission.
39. On the second issue, it was submitted that the Claimant voluntarily accepted the appointment and indication that she would serve on part time which made the Payroll Manager to effect the payment as per the SRC Circular. It was argued that if at all the claimant was dissatisfied with the said change, she ought to have raised concern during her tenure and not to wait seven years. It was also argued that no evidence was tendered by the claimant to prove that she worked on full time basis.
40. On the third issue, it was submitted that the claimant was paid all her allowances as a part time Board member in full and nothing more is owing. It was further submitted that, with the admission she was on part time service from 1st April 2014, the respondent embarked on recovery of the overpayments done from April 2014 to October 2014. It was submitted that the claimant never raised any issue with the recovery or adjustments and continued serving.
41. As regards the claim for leave allowance and gratuity, it was submitted that part time Board member, like the claimant, are not entitled to the same. It was argued that SRC clarified that issue vide the letter dated 23rd October 2017 which was produced as exhibit D.6. Consequently, it was submitted that the claimant was only entitled to gratuity during the period she served on full time basis being Kshs 277,286.74 which was remitted to the LAP Fund.



42. As regards the alleged underpayment, it was submitted that the claimant being a part time member of the Board, she was entitled to Kshs. 196,000 per month and she was paid all of it. It was clarified that, from August to December 2017 the claimant was erroneously paid Kshs 180,000 for a Vice Chairperson while she was acting Chairman, but the error was rectified in January 2018 when she was paid the arrears of Kshs. 64,516.13 as per Exhibit D15 (IPPD Data Sheet).
43. As regards the claim for Airtime allowance, it was submitted that the claimant was paid all her entitlement and that is why she never raised any claim during her term of six years. In addition, it was argued that by dint of SRC circular No. SRC/TS/CGOVT/3/61 dated 10th July 2013 (exhibit D11) the claimant was not entitled to that benefit. Further that the claimant was not entitled to the remuneration for part-time members of the County Board published under SRC Circular Ref. No. SRC/TS/CGOVT/3/61(49) dated 8th December 2017.
44. On the fourth issue, it was submitted that there was no discrimination towards the claimant and reliance was placed on the case of *Gichuru v Package Insurance Brokers Ltd (petition 36 of 2019)* [2021] KESC (KLR) (22 October 2021) where the Supreme Court discussed the meaning of discrimination. It was argued that the claimant failed to establish a nexus between the Respondent's action and the grounds for discrimination.
45. It was submitted that the Claimant's mortgage application that was approved was for the purchase of Kajiado/Kisaju/13730 for Kshs. 850,000/= but the second application for Kshs. 5,000,000/= for purchase of Kiambaa/Ruaka/6231 was not approved due to unavailability of funds. It was also argued that approving the second application was also difficult as the claimant's term was to end in four months. It was contended that several factors had to be taken into consideration before approval of applications such as availability of funds, term of contract remaining, the applicant's salary among other considerations. It was also argued that there was no evidence placed before the court to prove political difference.
46. As regards the counterclaim, it was submitted that the claimant has admitted that she resided in Meru, albeit on temporary basis. It was further argued that since she did not prove that she had another permanent residence elsewhere, the amount paid to her as accommodation allowance was an overpayment and the respondent is entitled to recover the same.

Analysis

47. Having considered the pleadings, evidence and submissions summarized above, it is a fact that the claimant was appointed as member of the CPSB from July 2013 for a fixed term of six years. It is further a fact that she took office on fulltime basis and was even elected the vice Chairperson before signing acceptance. Finally, it is a fact that she served through her whole contract term. The issues that fall for determination by this Court are as follows:
 - a. Whether the claimant was a full time or part time member of the CPSB during her whole contract term.
 - b. Whether there was discrimination against the claimant.
 - c. Whether the claimant is entitled to the prayers sought.
 - d. Whether the counterclaim is merited.



Full time or part time member of the CPSB

48. The answer to this question is straight forward. The claimant stated that she was employed as a member of the respondent's CPSB vide a letter of appointment dated 25th July 2013 and assumed office upon taking the required oath even before signing her acceptance. She was also elected the Vice Chairman of the CPSB and received benefits of a fulltime member until she gave express acceptance to the appointment vide the letter dated 17th February 2014.

49. The respondent produced as an exhibit, the said letter which the claimant had addressed to the County Secretary stating as follows:

“I refer to my letter of appointment as a member of the County Public Service Board (REF: MC/ST/2/1/65) dated 25th July 2013 and regret the delay in replying.

I hereby signify my acceptance of the appointment.

I also wish to inform you that I will serve on part time basis with effect from 1st April 2014.”

50. Despite the said letter, the claimant continued to receive the benefits of a fulltime board member until 13th October 2014 when the Board Chairman wrote a letter to the claimant to clarify her working status. The letter stated as follows:

“RE: Working Status Clarification

Kindly furnish this office with information on your working status. This will enable it to answer audit queries. State whether part-time or full time, the date part time status commenced and whether it was approved.

Thank you

Mwambia Patrick

Chairman – CPSB

Cc :

County Secretary

Payroll Manager”

51. The claimant responded vide her letter dated 22nd October 2014 captioned “Working status clarification” and stating as follows:

“RE: Working Status Clarification

Your memo dated 13th October 2014 concerning the above subject refers. I serve on part time basis with effect from 1st April 2014. I am not aware of any requirements for approval under section 58 (4) (b) of the County Governments Act, No. 17 of 2012.

Attached, please find my letter communicating the same.

Thank you.

Christine K. Ungu

Member – CPSB

cc.



County Secretary
Payroll Manager”

52. Section 58 (4) (b) referred to in the above letter states thus:

“ 58. Composition of the County Public Service Board

(4) A member of the Board shall—

- (a) hold office for a non-renewable term of six years; and
- (b) may serve on a part-time basis.”

53. Having considered the two letters written by the claimant above, it is clear that the claimant communicated her intention to serve on part time basis in accordance with the law. Nothing in the above provision bars a member who started off as fulltime member of the Board to change status to part-time service. My interpretation of subsection (4) above is that the legislature intended members to serve fulltime but gave liberty to any member who wished to serve on part-time basis. The use of “may” in (4) (b) means that, a member would make a deliberate choice and cannot be coerced to be fulltime if he/she elects to be part-time.

54. The said provision and the claimant’s appointment letter do not indicate any particular procedure to be followed whenever she chose to serve as a part-time member. There is also no indication of the time within which to make the election or whether any consent from the appointing authority or any other authority is required before a member changes from fulltime to part-time. Consequently, I find and hold that the letter from the claimant dated 17th February 2014 was sufficient notice to the respondent that she had made a choice to serve on part-time basis. If at all there was any doubt, the same was cleared vide her letter dated 22nd October 2014.

55. Section 10(5) of the *Employment Act* was cited to support the view that the change of the terms of the contract requires consent of the appointing authority. However, the said law does not apply to a case where the change to the terms of the contract are instigated by the employee. It reads as follows:

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

56. The claimant further attempted to renounce her decision to change to part-time and purported that she served on fulltime basis. The reason for the said allegation is that as the acting chairman she had a lot of work which forced her to be at work all the time. I find that a bit contradictory considering that she denied being a residence of Meru but Nakuru during the time she was in office. This court is satisfied that the claimant exercised her free will to serve on part-time basis under section 58 of the County Government Act, and as the saying goes, she made the bed and she must lie on it.

Discrimination against the claimant.

57. *The Constitution* under Article 27 provides for discrimination as follows:

“ 27. Equality and freedom from discrimination.

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.



- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

58. Section 5 of the [Employment Act](#) provide for discrimination as follows:

“ 5. Discrimination in employment

- (1) It shall be the duty of the Minister, labour officers and the Industrial Court—
 - (a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and
 - (b) to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.
- (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) It is not discrimination to—
 - (a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;
 - (c) employ a citizen in accordance with the national employment policy; or
 - (d) restrict access to limited categories of employment where it is necessary in the interest of State security.



- (5) An employer shall pay his employees equal remuneration for work of equal value.
- (6) An employer who contravenes the provision of the section commits an offence.
- (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section”

59. 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.”

60. 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.”

61. 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.”

62. 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 objective and reasonable 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 such justification. He/she must show that the comparator is real, not hypothetical in all aspects.

63. The question that begs for answer is whether the claimant has placed substantial evidence before this court to prove discriminatory conduct by the respondent. In a nutshell, the claimant’s claim on discrimination is centered around the withdrawal of official motor vehicle, failure to pay her service gratuity, underpayment, failure to reimburse imprests, failure to pay her airtime allowances, failure to grant her a loan facility, failure to pay her acting allowance and failure to increase her salary progressively.

64. Guided by the authorities cited above I find that the claimant has not proved that the employer discriminated against her in the stated matters. She did not identify the comparator sufficiently with respect to withdrawal of official motor vehicle, failure to reimburse imprest, failure to pay airtime



allowances, failure to pay acting allowance and denial of loan facility. She has also not shown that she had similar claims with her fellow Board members and she was the only one singled out for exclusion, denial or differential treatment. The issue of loan has been hyped, but there is no evidence to show that the claimant put in an application at the same time with the other board members, and they were given the same but she was denied.

65. In my considered view, the claimant's evidence does not manifest a case of discrimination but a case of outstanding employment benefits which according to her, they were not paid by the respondent before the separation. The other areas of discrimination mentioned included withdrawal of official car, but I would say that the withdrawal of a privilege which is not provided in the contract of service cannot be said to be discrimination. I say so because there is no evidence to prove that the claimant was entitled to both commuter allowance and official car. Consequently, I hold that the alleged discrimination has not been substantiated and I should now proceed to consider whether the employment benefits claimed are due to the claimant.

Reliefs sought by the claimant

66. The claimant has computed her claims of unpaid employment benefits including salary underpayment, commuter allowance, airtime and annual leave from July 2013 to July 2019. For her to succeed in the claims, she must prove that the claims are grounded on the terms of her employment contract as advised by the SRC. I have considered the various SRC Circulars and letters concerning the terms of service for County Public Service Boards during the period of service by the claimant.
67. I begin dealing with airtime allowance. The SRC Circular ref. no. SRC/TS/CGOVT/3/61 dated 13th June 2013 outlined the benefits due to part time members which excluded airtime allowance. However, by a subsequent SRC letter to the Transition Authority, dated 10th July 2013 the omission was rectified and the allowance was provided for. The Vice Chairman like the claimant, airtime of Kshs.4000 per month while Chairman was entitled to Kshs. 5000. She has claimed for Kshs. 4000 per month from July 2013 to July 2019 (73 months) contending that she was not paid that benefit. However, the respondent has filed documentary evidence of payment of airtime allowance for all CPSB members and some officers. Consequently, I find and hold that the claim for unpaid airtime allowance has no merits.
68. As regards commuter allowance, the claimant alleged that she was not paid some months from October 2013 but the respondent contended that it paid her all her commuter allowance at the rate of Kshs. 20,000 per month until her contract term lapsed. It clarified the IPPD for the County Government was not enabled to pay part-time members and as such it paid an accumulated allowance as special consolidated salary and indicated nil commuter allowance.
69. I have carefully considered the said explanation and it confirmed that as a Vice Chairman her sitting allowance plus accommodation for eight meetings, totaled to Kshs. 160,000. After adding commuter allowance of Kshs. 20,000, the accumulated allowances were Kshs. 180,000 per month. When she became acting chairman, her sitting allowance went up to Kshs.12,000, hence the total monthly allowance became Kshs. 196,000. I am satisfied with the explanation by the respondent and proceed to hold that the claim for unpaid commuter allowance by claimant is without merits.
70. The claim for gratuity suffers the same fate. There is evidence that the claimant served as fulltime member from July 2013 to March 2014 after which she elected to be a part-time member. There is also evidence that she was paid gratuity for the said period when she served on full time basis being Kshs. 277,286.74. The respondent produced a letter written by the SRC to the Respondent clarifying that part-time members were not entitled to gratuity. The only evidence that part-time members are entitled to gratuity is SRC Circular No SRC/TS/CCGOVT/3/61 Vol.IV(49) dated 8th December



2017 which was not applicable to the claimant. The circular was categorical that it only applied to members appointed or assume office after it came into force or after a new Board is constituted in 2018. The claimant was in office when the Circular came into force and therefore, she was not entitled to payment gratuity.

71. Turning to the claim for underpayment, I have already made a finding of fact that the claimant was entitled to Kshs. 180,000 as total allowances per month plus airtime allowances of Kshs 4000 in her capacity as Vice Chairperson. The amount, however, increased to Kshs.196,000 plus airtime when she became the acting chairperson. The respondent has admitted that there was an underpayment from August 2017 and December 2017 when the claimant was paid as Vice Chairperson yet she was acting Chairperson. However, it has proved by evidence that the erroneous underpayment was rectified vide the Pay slip of January 2018 whereby the arrears of Kshs. 64,516.13 was paid. Consequently, I find and hold that the claim for the alleged underpayment has not been substantiated.
72. As regards the claim for annual leave allowance for the year 2013/2014, the respondent has proved by documentary evidence that the said allowance was paid to the claimant in February 2016. Consequently, that claim must also fail.
73. Finally, the claimant prayed for reimbursement of out of pocket expenses incurred when she attended official duties outside her workstation. However, the respondent has proved by documentary evidence that the said reimbursement was done. There are two payment vouchers approved on 27th June 2017 and 27th November 2018 reimbursing travel expenses amounting to Kshs. 121,363.20 and Kshs.113,168.20 respectively. Consequently, I find and hold that the claim for reimbursement is devoid of merits.

The counterclaim

74. The respondent's counter-claim is premised on the allegation that the claimant was a resident of Meru during her term of office and therefore she was not entitled to accommodation allowance of Kshs.10,000 per day equaling to Kshs. 80,000 per month. The claimant, denied that allegation and maintained that she was a resident of Nakuru and she used to travel to Meru for meetings and return to Nakuru. However, she admitted that she rented a room in Meru although she was not living there.
75. I have carefully considered the evidence adduced but did not find merits in the respondent's allegation that the claimant was a resident of Meru. There is indeed no sufficient evidence to prove that the claimant had relocated from Nakuru to Meru and lived there without going back, until the end of her contract. In my view, a convenient arrangement for the claimant to have a rented room or hotel at a cost whenever she attended meetings at Meru was lawful. It was also okay, in my view, if she got free accommodation from a relative or friend in town whenever she was in Meru for meeting before returning to her home in Nakuru.
76. In view of the foregoing observations, I find and hold that the counterclaim by the respondent is also bereft of merits.

Conclusion

77. I have found that both the claimant and the respondent have failed to prove their respective claims on a balance of probabilities, save for certificate of service which is hereby granted. Consequently, I dismiss both the suit and the counter-claim with no order as to costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 22ND DAY OF MAY, 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

