



**Mchama v County Government of Mombasa & another; Kenya County
Government Workers Union (Interested Party) (Cause E008 of 2024)
[2024] KEELRC 2763 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2763 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E008 OF 2024
M MBARŪ, J
NOVEMBER 11, 2024**

BETWEEN

ERIC OMURWA MCHAMA CLAIMANT

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

MOMBASA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION . INTERESTED PARTY

JUDGMENT

1. The claimant removed the interested party from these proceedings.
2. The claim is based on the fact that the claimant was employed by the defunct Municipal Council of Mombasa in the fire department in 1997. He was designated to the position of fire recruit and then promoted to foreman 1. He was issued with a contract and appointment letter.
3. Upon the establishment of the respondents in 2013, the claimant became an employee and a member of the interested party. The 1st respondent signed a collective agreement (CBA) with the interested party dated 9 April 2010.
4. The claimant went for professional training as an employee of the respondents. He trained in Fire Protection and Safety Technology and graduated on 6 September 2010. He also attended other training courses during his employment. The CBA provided that when an employee went for training and graduated successfully, he was to be promoted to a higher scale. However, owing to a lack of vacancies, the employee was to receive two additional increments with effect from the date of passing the examination and placed on the waiting list for vacancies.



5. Despite the claimant passing his examination and attaining certification, which qualified him for promotion to higher ranks, the respondents should have placed him accordingly. There was no salary increment as agreed under the CBA.
6. In 2008, the claimant wrote to the respondents about his promotion. In a letter dated 25 November 2023, the chief officer, Harrison Kengo, wrote to the municipal engineer explaining his plight and that the claimant should be considered for promotion under the provisions of clause 7(b) of the CBA.
7. The position of Fireman 1 became vacant, and through Fire Brigade Order No.4/5/2009 dated 7 May 2009, he was appointed to the position of substation officer to assist the acting station officer, Elias Chirunga, in manning the Changamwe Substation. Under clause 8 of the CBA, he was entitled to an acting allowance equal to the difference between his basic wage and the minimum wage of the higher position, but this was not paid.
8. On 11 October 2020, the acting director of human resources, Sheba Hassan, issued a memo to all heads of department on the ongoing rationalization exercise, stating that all employees of the defunct Municipality were required to submit original personal documents. On 27 May 2023, the claimant was recommended for a promotion to the position of Assistant Divisional Officer, but this was not effected.
9. The claimant had a legitimate expectation that he would be promoted or earn a higher wage based on the CBA. He worked for the respondents from 18 May 2009 to 11 April 2022 in an acting capacity without being given a substantive position. Through the intervention of the interested party, the respondents agreed to promote the claimant on 11 August 2021 as the Fire Station Officer, effective 5 April 2022. However, the respondents realized that the claimant was due to retire and decided to promote him to avoid a claim for his benefits.
10. On 6 November 2020, the interested party reported a dispute to the Minister, which was sent for arbitration. On 17 August 2021, it was amicably and by consent agreed that the respondent would make the necessary adjustments to remedy the matter.
11. The claim is that the actions by the respondent amounted to subjecting the claimant to unfair labour practices. The failure to be promoted to a substantive position and payment of the due allowances denied him fair remuneration, and he is claiming the following;
 1. A declaration that the respondent engaged in unfair labour practices;
 2. A declaration that the actions of appointing the claimant to an acting position for over 10 years was unlawful, illegal and unconstitutional;
 3. A declaration that placing the claimant in an acting position was unlawful, illegal and unconstitutional;
 4. A declaration that refusing to pay the claimant acting allowances or special duty allowances was illegal, unfair and unconstitutional;
 5. A declaration that the respondent's actions were in violation, breach, non-compliance and in contravention of the CBA;
 6. General damages for subjecting the claimant to unfair labour practices;
 7. An order compelling the respondents to pay the claimant all the unpaid, withheld and pending special duty allowances;
 8. Costs.



12. The claimant testified in support of his case that he has since retired, and his case relates to unfair labour practices and non-payment of allowances while in service. Upon employment in 1997, he was promoted to the position of fireman and then promoted to substation officer in an acting capacity in 2008. He was not paid the due acting allowance, and no documents were issued to confirm him in the position.
13. Respondents admitted that the claimant was employed as a fireman II on 27 June 1997 at a wage of scale No.17 and was later promoted to Fireman I. At the time of retirement, he had been promoted to Job group H, earning Ksh.47, 597 per month on 28 April 2022. The claimant did not provide any appointment letters regarding the alleged acting capacity of the second respondent.
14. The response is that there is a difference between performing duties that have been delegated and an appointment by the second respondent. There is also a difference between a CBA and a scheme of service, and the respondents are governed by a scheme of service to promote employees upon satisfactory performance. The referenced CBA has not been filed to address the claims made.
15. The 1st respondent took over from the defunct Municipal Council of Mombasa, and the claimant was on job group F and before retirement, he was promoted to job group H and was supposed to be;
2014, 2015, and 2016, he should be in job group F;
2018, 2019, and 2020, he should be in job group G;
He should be in job group H in 2021, 2022, and 2023.
16. Under Section 63 of the County Government Act, only the 2nd respondent can promote officers in the public service subject to availability of vacancies, merit and upon approval of the public service commission. The claimant was subject to the policy regulations in employment, and promotion was regulated based on job vacancies. No constitutional rights were violated as alleged, and the claims made should be dismissed with costs.
17. As evidence, the respondents called Peter Munguti, the Administrative officer of human resources.
18. His documents were expunged.
19. At the close of the hearing, both parties filed written submissions.
20. The claimant submitted that he had produced several payslips showing that he was designated under job group E and was promoted to job group H before retirement. The claimant had met the promotion threshold and informed the Respondents of the same, but he still needed to be promoted earlier. Additionally, from 7 May 2009 to 3 September 2013, the claimant was appointed as a sub-station officer. On 3 September 2013, the claimant was appointed to act as a station officer and served in this position until a labour officer intervened. The claimant was never paid any acting allowance and special duty allowance contrary to the provisions of the collective bargaining agreement.
21. The claimant also argues that he was subject to unfair labour practices. The claimant relied on the Supreme Court case of *Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023)* [2023] KESC 112 (KLR) (Civ) (28 December 2023) (Judgment) where it was held that:-
22. From the above definition, unfair labour practice encompasses all conduct before, in the course of employment, during and after termination of employment. The provisions of Article 41, therefore, encompass the full spectrum of labour practices. The provisions of Article 41 are borne from the realization that employment and the right to work are human rights. The right is also linked to other



rights in the Bill of Rights, more so the protection of life and a person's dignity. The right is, therefore, a principle with legal obligations.

23. The respondents submitted that during cross-examination, the claimant stated that he had been promoted through five job groups, from Job Group B upon commencement of employment to Job Group H at the time of his retirement. The claimant did not specify the work category for promotion or the required qualifications the respondent declined to give him. They relied on the case of Geoffrey Mworira v Water Resources Management Authority [2015] eKLR as quoted in John Moogi Omare v Kenya National Commission for Unesco [2020], where the Court stated thus,
24. The court will sparingly interfere in the employer's entitlement to perform human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of *the Constitution* or legislation, in breach of the agreement between the parties, or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted, or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process.
25. Regulation E.27 of the Public Service Code of Regulations 2006 guides the selection of candidates for promotion. It provides that regard should be given to merit and ability as reflected in work performance and results, as well as seniority, experience, and official qualifications. The claimant needed to prove that he met the threshold for promotion to two more job groups as required under Regulation E.27 of the Public Service Code of Regulations. Additionally, Section C.14 (1) of the Human Resource Policies and Procedures Manual for the Public Service provides that an appointment in an acting capacity can only last for 6 months.
26. The claimant only exhausted some remedies available before approaching court under section 77 of the County Government Act. As a County Public Service employee, the claimant had a right of appeal to the Public Service Commission. Where there exists another sufficient avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process as was held in the cases of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, Republic v National Environment Management Authority Ex parte Sound Equipment Ltd, [2011] eKLR. And the case of Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR.

Determination

27. The issues for determination are;
 - i. Whether the respondents unlawfully failed to promote the claimant.
 - ii. Whether the respondents unlawfully failed to pay the claimant's acting allowance.
 - iii. Whether the claimant is entitled to the prayers sought in the claim.
28. The claimant relies on the CBA between the interested party, municipal council, and respondents, dated 9 April 2010. The CBA is not produced. The respondent's case is that the terms and conditions of service are regulated under the schemes of service and not the CBA. However, where parties have recognized a trade union, such as the interested party (removed from these proceedings) and a CBA is registered in court, such becomes a binding document. The terms and conditions of service negotiated by the parties become enforceable under the provisions of Section 69 of the *Labour Relations Act*.
29. A CBA is a lawful and binding agreement.



30. However, the claimant should produce the subject CBA. He removed the interested party from these proceedings whose attendance would have assisted the court to a great extent.
31. On whether the respondents unlawfully failed to promote the claimant, the mandate of the 2nd respondent is addressed under the County Government Act. This is the body mandated under Sections 59, 60, 63, 74 and 86 of the County Government Act to recruit and promote employees in the service of county governments such as the 1st respondent as held in *Kenya Union of Clinical Officers & 76 others v County Government of Vihiga* [2023] KEELRC 1343 (KLR).
32. Section 63 of the County Government Act provides;
- (1) Except as provided for in *the Constitution* or legislation, the County Public Service Board has the power to make appointments, including promotions, in respect of offices in the county public service.
 - (2) The power of the County Public Service Board under subsection (1) shall be exercised—
 - (a) at the request of the relevant county chief officer of the department to which the appointment is to be made;
 - (b) ... ;
 - (c) on the County Public Service Board’s motion on account of the best interest of the county public service and parity of treatment of public officers taking into account the circumstances of each case.
33. From the evidence on record, the claimant has not shown that the respondent unlawfully failed to promote him. He failed to demonstrate that the promotions he received over the years were not based on merit and available vacancies. The respondent’s evidence that he was placed in job groups F to H from 2014 to 2022 is not challenged.
34. Without a written letter of promotion to serve in an acting position, the claimant cannot justify a claim that the respondent failed to pay his acting allowances. It is the prerogative of the employer to place its employees accordingly. Where the claimant was delegated duties at his station, there needed to be written communication that he was serving in an acting capacity. There was no legitimate expectation that he was entitled to acting allowances. No communication was issued to that effect.
35. The Fire Brigade Order No. 4/5/2009, dated 7 May 2009, placed the claimant at the substation. This is not a promotion letter or conferring him the acting position. It is not similar to the letter dated 28 April 2022, where the second respondent promoted the claimant to job group H.
36. He was appointed to the position of acting Substation Officer. According to the Fire Brigade Order No. 11 dated 3 September 2013, the claimant was appointed station officer, without an acting allowance. The claimant produced the said orders as evidence, signed by the chief fire officer on behalf of the respondent.
37. However, under the defunct Municipality, the authorized officer to issue letters of promotion or acting positions was the Town Clerk and not any other officer. For the respondents, that role is given to the 2nd respondent under the County Government Act.
38. On the orders sought, declaratory orders can only be issued with proof of the core issue: that the respondents unlawfully and unconstitutionally breached the claimant’s promotion and remuneration. Payment of general damages only accrues where a rights violation is proved, which is not the case here.



39. Before conclusion, the claimant pleaded that the interested party reported a dispute to the Minister, where parties attended, and the matter was amicably resolved by consent. Where indeed, the claimant was a member of the interested party, and the matter was amicably resolved, filing the claim was unnecessary.
40. Equally, a case of promotion and unpaid allowances by employees of a county government should be initiated with the 2nd respondent and an appeal to the Public Service Commission under the provisions of Section 85 of the *Public Service Commission Act* and Section 77 (2) of the *County Governments Act* as held in the case of *Tome & another v Bungoma County Assembly Service Board (CASB) & 9 others; Ethics and Anti-Corruption Commission (Interested Party) [2022] KEELRC 12864 (KLR)*. The position is aptly captured by the Court of Appeal in the case of *Secretary County Public Service Board and Another -vs- Hulbhai Gedi Abdille*, where the court held that;
41. There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides the forum through which the respondent could agitate her grievance at first instance and the jurisdiction thereof, which is specialized and tailored explicitly by legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.
42. The court is not a first-instance forum for agitating the claimant's case in matters relating to county government employees' promotions and allowance payments.
43. Having gone through arbitration before the Minister with an amicable outcome, these proceedings abuse the court process.
44. Accordingly, the claim is hereby dismissed. Each party bears its costs.

DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 11TH DAY OF NOVEMBER 2024.

M. MBARŪ

JUDGE

