



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Okhonjo & another v Kenya Ports Authority (Cause 118 of 2015)  
[2023] KEELRC 65 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 65 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 118 OF 2015  
AK NZEI, J  
JANUARY 19, 2023**

**BETWEEN**

**BILTON ETOBO BARASA OKHONJO ..... 1<sup>ST</sup> CLAIMANT**

**SAMSON NYELILEY & 32 OTHERS ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The suit herein is brought by the 1<sup>st</sup> and the 2<sup>nd</sup> claimants on behalf of themselves and thirty-two others whose names, identity card numbers and signatures are contained in a written authority dated March 10, 2015 and filed together with the suit herein on March 11, 2015.
2. On February 29, 2016, the claimants filed an amended memorandum of claim dated February 26, 2016. It is pleaded in the Amended memorandum of claim:-
  - a. that on October 4, 2005, the respondent (internally) advertised for the post of trainee gantry crane operator and invited suitable applicants to apply, and that the claimants, who were then at job Grade HG2 and below, were on 25<sup>th</sup>, 26<sup>th</sup> and September 27, 2007 appointed to the post of trainee assistant operations officer (Gantries), Div 1A Grade HG1/HM4 and subsequently transferred to the Container Operations Department.
  - b. That having been appointed to job grade HG1, the claimants ought to have been automatically translated(raised) to the new job group (HG1) from the date of such appointment (September 27, 2007).
  - c. That the claimants were appointed to the aforesaid post by virtue of their qualifications pursuant to the respondent's operational manual & code of conduct for lifting equipment operations.



- d. That according to their letters of appointment, the claimants were to undergo an 18 months training program and that upon successful completion of the training, they were to be confirmed to the post of assistant operations officer (Gantries) Grade HM4.
- e. That the 18 months training program was in 3 phases; 6 months for Forklift Driver training, 6 months for Top Loader training and 6 months for Gantry Crane Operator training, and that after each stage or phase of training, they were issued with letters and Certificates allowing them to progress to the next training.
- f. That the claimants were not confirmed as assistant operations officers (gantries) grade HM4 until December 1, 2010, and that their salaries remained unchanged for the entire period between September 2007 and December 2010 despite the fact that the claimants had formally been appointed to job group HG1 while on training.
- g. that the claimants were denied salaries for job Grade HG1 for the entire period between September 2007 and December 2010.
- h. that the claimants were discriminated upon by the respondent as other groups who underwent the same training prior to and subsequent to the claimants were equally appointed to the post of trainee assistant operations officer (gantries), division 1A Grade HG1/HM4 but unlike the claimants, they were automatically paid the salary of HG1 upon being appointed as Trainee Assistant Operations Officer (Gantries) Division 1A Grade HG1/HM4.
- i. that while on training between September 27, 2007 and December 2010, the claimants were not paid job training allowance, which is at the rate equal to the difference between the claimant's substantive salary at Grade HG1(Division 1A) and the salary that the claimants were to receive when promoted to grade HM4.
- j. That while still on training, the claimants raised a complaint with the respondent's Managing Director (vide a letter dated May 19, 2010) seeking to have their salaries adjusted to the correct scale.
- k. That upon successful completion of the job training, the claimants were confirmed to the post of Assistant Operations Officer (Gantries) with effect from December 1, 2010, *vide* letters dated February 2, 2011.
- l. That after confirmation, the claimants channeled their complaints through the Head of Container Operations, Terminal Manager, to the Managing Director in between the years 2010 and 2012, to have their salaries effected from September 27, 2007, that being the date they were promoted to the training grade Division 1A HG1/HM4.
- m. That the head of container operations attempted to intercede on behalf of the claimants through a letter dated May 15, 2012, pointing out that appointing the claimants to the training grade DIV.1A (HG1.HM4) without allowing them to draw the appropriate salary amounted to selective application of the Rules governing appointment of employees to training grades.
- n. That there were several appeals by the claimants and their Head of Department between July 19, 2010 and December 6, 2012, and that on December 6, 2012, the respondent communicated to the claimants of the refusal to honour the obligation and to effect and award the claimants job training allowance and salaries of job grade HG1.



3. The claimants further pleaded that their rights as enshrined in article 41 of the [Constitution of Kenya](#) had been violated, and that the respondent had violated the general principles of labour Laws under sections 5,17 and 18 of the [Employment Act](#).
4. The claimants sought the following reliefs:-
  - a. a declaration that the claimants herein were discriminated upon and treated unfairly by the respondent herein.
  - b. a declaration that the respondent's failure to pay the claimants the salary for job grade HG1 from September 27, 2007 to the date of confirmation to job group HM4 is unfair.
  - c. a declaration that the respondent's failure to pay the claimants job training allowance while on training was unfair.
  - d. an order of specific performance compelling the respondent to confirm the claimants to the post of assistant operations officer (gantries) with effect from September 27, 2007.
  - e. an order of specific performance compelling the respondent to pay the claimants salary for job Grade HG1 for the period from September 27, 2007 to January 20, 2010 amounting to Kes 64,780,770.
  - f. general damages/compensation for discrimination at the work place.
  - g. costs of the claim
  - h. interest at court rates from September 27, 2007 until payment in full.
5. The respondent filed an amended memorandum of reply on January 16, 2016, dated January 12, 2016, denied the claimants' claim and pleaded:-
  - a. that parties who qualified for the trainee gantry crane operator's training were appointed to take the training, and were clearly informed vide letters dated December 14, 2007 that terms and conditions of service would remain constant, and that the management had discretion to review terms and conditions from time to time.
  - b. that the respondent did not represent to the claimants about the alleged automatic elevation to HG1 and automatic review of salaries and that the mere fact that the claimants were issued with certificates did not *ipso facto* mean that they were to get salary increment.
  - c. that matters of promotion and salary increment are in the sole discretion of the employer, and that the respondent saw it fit to promote the claimants on 2<sup>nd</sup> February 2011.
  - d. that any claim arising from the alleged period of September 27, 2007 and December 1, 2010 is statutorily barred pursuant to the provisions of section 90 of the [Employment Act](#), and that the claimant's claim was not only bad in law but an abuse of the court's process.
  - e. that the comments of the head of container operations were not material to the case herein, the same being statute barred.
  - f. that the letter dated December 6, 2012 only communicated what the claimants (already) knew, the same position having been communicated *vide* letters dated December 14, 2007.
  - g. that the claimants were not discriminated, either as alleged or at all.



6. On March 25, 2015, the respondent filed a notice of preliminary objection on a point of law dated March 24, 2015, stating that the Claimant's suit herein was time barred pursuant to section 90 of the Employment Act 2007 as it referred to events that occurred between 2007 and 2010. The preliminary objection was canvassed, and was dismissed by this court (Rika, J) *vide* a ruling delivered on September 25, 2015.
7. The issue of the suit herein being statute barred will therefore not be considered in this judgment as the same stands determined.
8. Trial commenced on March 17, 2021 before Ndolo, J. The claimant's first witness (CW-1) adopted his written and filed witness statement dated October 26, 2020 as his testimony. He also produced in evidence the claimant's bundle of documents dated March 10, 2015 and a supplementary bundle of documents dated March 30, 2017. The witness testified that the claimants were appointed at Grade HG2 and were to move to HG1 before going to HM4 after training for 18 months. That letters dated December 14, 2007 issued after interviews gave them Grade HG1, but were not paid the applicable salaries as their salaries were not adjusted. That the 18 months training was to qualify the claimants for HM4, and were to be confirmed to the position of assistant operations officer (Gantries). That the claimants had been discriminated.
9. CW1 further testified that the training was undertaken at Bandari College, but the claimants used to work as Crane/Winch Operators whenever there was an issue, and used to work during weekends and public holidays.
10. The claimants' second witness, Bilton Otego Baraza Okonjo, (CW-2) adopted his filed witness statement dated November 9, 2020 as his testimony. CW-2 further testified that after the trainee advert dated October 4, 2005 and subsequent interviews, the claimants were given letters dated December 14, 2007 requiring them to go for training, and that on successful training, they (the claimants) were confirmed at job group HM4, and were paid new salary from the date of confirmation. That the training was for 18, months but the claimants took 3 years because they used to be called from Bandari college where they were being trained to work at the respondent. That they would withdraw from class to go and work, and that the respondent did not follow normal practice in the claimants' case.
11. The respondent's witness, Charles Kimeli Koech (RW-1), testified before me on May 9, 2022. He adopted his filed witness statement dated January 12, 2016 as his testimony, and produced in evidence the seven documents listed on the respondent's list of documents dated January 11, 2016. The witness further testified:-
  - a. That in October 2005, there was a shortage of gantry crane operators at container terminal operations within KPA (the respondent) and KPA advertised the vacancies internally. That the positions were for trainee gantry crane operators, and the people joining were to undergo training before being confirmed to the positions.
  - b. That KPA employees (the claimants) applied, shortlisting was done, and interviews were conducted; upon which the successful candidates (the claimants) were given letters of appointment (dated December 14, 2007).
  - c. That the claimants, who had been forklift drivers at Grade HG2, were to undertake 18<sup>th</sup> months training and retained their salaries during training, and that their letters of appointment (dated December 14, 2007) stated as much. That the claimants accepted this position and never filed any case during training.



12. The witness further testified that the group that came in 2011 or 2012 and got salary increment on appointment (as they went through training) came during an extra ordinary situation that required an extraordinary action in order to motivate the group to work to avoid grounding the port of Mombasa as the gantry crane operators then in office had gone on strike. That this was around 2011 or 2012.
13. Cross-examined, RW1 testified that *vide* a letter dated May 15, 2012, the respondent's head of container operations acknowledged the issue of discrimination (raised by the claimants). That *vide* a letter dated December 6, 2012, the respondent's head of human resource declined and said that they could not pay the claimants.
14. RW-1 admitted (under cross-examination) that the respondent had not adduced any evidence to show that the 2011/2012 group had been appointed during an extra-ordinary situation (during a strike).
15. Upon considering the pleadings filed and evidence adduced by both parties, issues that present for determination, in my view, are:-
  - a. whether the claimants were discriminated against by the respondent upon appointment to the post of trainee assistant operations officer (Gantries) Div.1A, Grade HG1/HM4 and subjected to selective application of the respondent's staff rules and scheme of service.
  - b. whether the claimants are entitled to the reliefs sought.
16. On the first issue, the claimants produced in evidence their letters of appointment dated December 14, 2007 appointing them to the position of trainee assistant operations officer (Gantries) Div.1A, Grade HG1/HM4 with effect from September 27, 2007 and transferring them to container operations department, which read in part:-

“...subsequent upon your success in the interview for the post of assistant operations officer (gantries) Grade HM4 held on 25<sup>th</sup>, 26<sup>th</sup> and September 27, 2007 at Bandari College, I have the pleasure to inform you that you have been appointed to the post of trainee assistant operations officer (Gantries) Div.1A, Grade HG1/HM4 with effect from September 27, 2007 and subsequently transferred to the container operations department.

Your salary and incremental date will remain the same during your initial training period.

On successful completion of your training and subject to a satisfactory progress report on your performance, from your head of department, you will be confirmed to the post of assistant operations officer (Gantries) Grade HM4.

Terms and conditions of service remain as at present and as subsequently amended from time to time...”

17. Further, the claimants produced in evidence a similar letter of appointment issued by the respondent on May 31, 2011 to a member of a similar trainee Group (one Mr. Vitu Salim), whose validity the respondent did not dispute. The said letter read in part:-

“...consequent upon your success in the interview for the post of assistant operations officer (Gantries) held from 5<sup>th</sup> to April 11, 2011, I have the pleasure to inform you that you have been appointed to the post of Trainee Assistant Operations Officer (Gantries) Div 1A, Grade HG1/HM4 with effect from 5<sup>th</sup> April 2011...

Your salary will be Kes 43,610 per month in the scale of ..... You will retain your incremental date of 1<sup>st</sup> January and you will therefore be eligible for your next increment in January 2012.



On successful completion of your training period as stated and subject to a satisfactory progress report on your performance from your head of department, you will be confirmed to the post of assistant operations officer (Gantries) grade HM4...

Terms and conditions of service remain as at present and as subsequently amended from time to time...”

18. The respondent did not explain, to the satisfaction of the court, why the two groups/sets of trainee assistant operations officers (Gantries) Div. 1A, Grade HG1/HM4, were treated differently, under the same staff rules and regulations, on payment of salaries payable to staff serving on the trainee job grade, trainee assistant operations officer (Gantries) Div. 1A, Grade HG1/HM4. The Court was not told that there was a change of the relevant Staff Rules and regulations at any given time between September 27, 2007 and April 5, 2011.
19. All that the respondents told the court was that the 2011 group was appointed during an extra-ordinary situation as there was a strike at the time, and that the trainee officers then had to be motivated to work. Interestingly, RW-1 did not dispute the claimants’ evidence that they took three years to train, instead of eighteen months, because they were called to work at the respondent whenever there was an issue, thus withdrawing from class, and even worked on week ends and public holidays. Indeed, the respondent’s witness (RW1) confirmed and corroborated this position.
20. It is clear from the evidence on record that for three years, the claimants served on job Grade Div.1A, Grade HG1/HM4 without drawing the salary attached to that job grade. This position is captured in the claimant’s head of department’s letter to the respondent’s general manager, human resource and administration, dated May 15, 2012. The said letter states:-

“it has been brought to our attention that a group of 34 Crane/Winch Operators Grade HG2 who were appointed to trainee Assistant Operations Officer (Gantries) Div. 1A, Grade HG1/HM4 on 14<sup>th</sup> December 2007 did not draw the HG1 salary while on training, while another group of Terminal Tractors Drivers Grade HG2 who were appointed to the same training grade on May 10, 2011 drew HG1 salary.

The foregoing has brought up sentiments of selective application of rules and demoralization of this lot. The 2007 group is humbly requesting for the review of their case and be considered to have been promoted to grade HG1 with effect to the dates that they passed their interviews which were held on 25<sup>th</sup>, 26<sup>th</sup> and September 27, 2007.

We have attached copies of their scenerios for your ease of reference.

Hoping this meets your fovourable and positive consideration.”

21. The respondent did not act on the foregoing letter from its own Head of Department, and did not correct the apparent case of discrimination. Instead, the respondent wrote to the claimants on December 6, 2012, informing them that the request had been declined by the respondent as the claimants “did not hold the requisite qualifications one is to attain before being appointed as trainee gantry crane operator Div. 1A, Grade HG1/HM4.” This sounds rather strange as the claimants were successfully interviewed for this particular Job Grade on 25<sup>th</sup>, 26<sup>th</sup> and September 27, 2007, and were duly appointed to the position (job grade) *vide* letters of appointment dated 27<sup>th</sup> September 2007.
22. Section 5(1) (a) of the [Employment Act](#) provides as follows:-
  - (1) it shall be the duty of the Minster, Labour Officers and the Industrial Court:-



- a. to promote equality of opportunity in employment in order to eliminate discrimination in employment...”
23. Section 5(2) of the *Employment Act* provides:-
- “(2) an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.”
24. Further, section 5(3) (b) of the *Employment Act* provides that an employer shall not discriminate against an employee or prospective employee in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
25. For record purposes, the name “industrial court” as used in section 5(1) of the *Employment Act* refers to the fore-runner of this court, and in the context of the Act refers to this court.
26. An employer cannot plead discretion in order to perpetuate discrimination in employment, and neither can an employer hide behind its human resource manual or operational manual; or even Scheme of Service, with a view to defeating the statute outlawing discrimination in employment. Selective application of an employer’s Scheme of service or staff rules and regulations amount to discrimination. Selective adjustment of employees’ salaries amounts to discrimination. Selective promotion of employees amounts to discrimination. The list is endless as it encompasses “other matters arising out of the employment.” (Section 5(3) (b) of the *Employment Act*).
27. I am satisfied that the claimants have, on a balance of probability established that they were discriminated against by the respondent upon their appointment to the post of trainee assistant operations officer (gantries), Div. 1A, Grade HG1/HM4, and were subjected to selective application of the respondents’ staff rules and scheme of service, and I so hold.
28. On the second issue, it is my finding that each of the claimants is entitled to payment of the full salary and or salary arrears that ought to have been paid to them during the period that they served as Trainee Assistant Operations Officer (Gantries) Div. 1A, Grade HG1/HM4; this being the period between September 27, 2007 and the date of their confirmation to the post of assistant operations officer (gantries) grade HM4, this being December 10, 2010.
29. The claimants claimed a total of Kes 64,780,770, whose tabulation is contained in a schedule of the claimants’ individual claims dated March 10, 2015 and filed with, and as part of the claimants’ initial memorandum of claim filed in Court on March 11, 2015. The respondent did not dispute the accuracy of any part or element of the said tabulation, and did not present an alternative tabulation.
30. In the said filed schedule of the claimant’s tabulation of individual claims, the claimants, who also exhibited bundles of their payslips, calculated in great detail each and every cent that ought to have been paid to each of the claimant during the period referred to in paragraph 28 of this Judgment. Indeed, it is acknowledged in the written submissions filed herein on behalf of the respondent that the claim for Kes 64,780,770 “has been calculated to the last cent.” It is this detailed particularized calculation/schedule that was filed together with the claimants’ memorandum of claim, and which is referred to at paragraph 31 of the amended memorandum of claim. This accords with the Court of Appeal’s decision in *National Social Security Fund Board of Trustees v Sifa International Limited* case where the court stated:-

“we would restate the position, special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint



as was done in this case that particulars of special damages were to be supplied at the time of trial. If at the time of filing suit the particulars of special damages were not known, then, those particulars can only be supplied at the time of trial by amending the plaint to include the particulars previously missing. It is only when the particulars of special damages are pleaded in the plaint that a claimant will be allowed to strict proof of those particulars...”

31. I do not agree with the respondent that particulars of the claimed sum of Kes 64,780,770 were not pleaded. They were pleaded at paragraph 31 of the initial and the amended memorandum of claim by pleading and annexing the tabulation/schedule of calculation of the claim to the memorandum of claim. As I have already stated, the respondent has not faulted this tabulation, and did not deny the same.
32. I am satisfied that the claimants’ have proved their claim for the said sum of Kes 64,780,770 on a balance of probability.
33. The claimants’ claim for general damages/compensation for discrimination at work place is declined; the claimants having raised a specific claim for special damages. The claimants are not entitled to damages arising from their employment relationship with the respondent, having raised a specific claim for special damages. Awarding the claimants general damages under the circumstances of this case would amount to duplication (*Dharamshi v Karsan* [1974] EA 41)
34. Finally, and having considered written submissions filed on behalf of both parties, judgment is hereby entered for the claimants against the respondent for Kes 64,780,770.
35. The claimants are awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Mr. Wafula for Claimant

Mr. Ndambuki respondent

