



Olwande v Kenya Medical Research Institute & 2 others (Cause E056 of 2021) [2023] KEELRC 745 (KLR) (28 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 745 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E056 OF 2021
CN BAARI, J
MARCH 28, 2023**

BETWEEN

WINSTONE OLWANDE CLAIMANT

AND

**DIRECTOR GENERAL, KENYA MEDICAL RESEARCH INSTITUTE 1ST
RESPONDENT**

**THE BOARD OF MANAGEMENT, KENYA MEDICAL RESEARCH
INSTITUTE 2ND RESPONDENT**

KENYA MEDICAL RESEARCH INSTITUTE 3RD RESPONDENT

JUDGMENT

Introduction

1. The Claimant's Memorandum of Claim is dated July 29, 2021, and filed on July 30, 2021. The Claimant seeks a declaration that withholding of his dues is illegal and unlawful, an order for payment of his statutory entitlement, together with interest and the costs of this suit.
2. The Respondents filed notice of appointment of Advocate on January 10, 2022, appointing Ms Margaret Rigoro to act for them in the matter. This was replaced by a notice of change of Advocates by the Firm of Siganga & Co Advocates on February 22, 2022, and who subsequently filed a response to the Claimant's claim on April 20, 2022.
3. The claim was first heard on the November 22, 2022, when the Claimant testified in support of his case. He adopted his witness statement and produced a bundle of documents filed in support of his case. The hearing of the Claimant's case continued on November 29, 2022, culminating in the closing of the Claimant's case.



4. The Respondents' case was heard on November 29, 2022, when the Respondents presented a Mr Gachuhi Mungai, their Principal Human Resources Officer to testify on their behalf. Mr Mungai adopted his statement and produced a bundle of documents in support of the Respondents' case.
5. Both parties filed submissions in the matter.

The Claimant's Case

6. The Claimant's case is that he was an employee of the 3rd defendant having been employed on the January 16, 1991; initially as an Engineering Technologist II (Electronics) rising up to the position of Chief Engineering Technologist, and retired from the service of the 3rd Respondent on July 31, 2018.
7. It is the Claimant's case that he was seconded to a project christened KEMRI-CDC project on or about February 19, 1998, and which secondment was to take effect on March 1, 1998. It is his case that the terms of secondment were captured in a contractual document giving the Claimant certain allowances which were much higher than those in his previous position.
8. The Claimant states that on or about May 1, 2007, he was promoted to the position of Deputy Manager/Deputy Chief ICT KEMRI-CDC, and awarded Supplement II allowance being 75% of his basic salary from the 3rd Respondent.
9. The Claimant states that from April 2015 to July 31, 2018, he was not paid the three supplements amounting to Kshs 3,241,560.00. The Claimant further states that his Supplement II allowance, based on 75% of his basic salary from the 3rd Respondent, was never adjusted by the 3rd Respondent from May 1, 2007 to July 31, 2018, all amounting to Kshs 7,288,919.75.
10. The Claimant avers that he was entitled to a medical cover allowance according to the contractual relationship between himself and the 3rd Respondent, while on secondment working for KEMRI-CDC project. It is the Claimant's case that from 2015 to July 31, 2018, he was never paid the medical allowance amounting to a total of Kshs 6,750,000.00.
11. The Claimant further states that he was entitled to airtime according to the terms and conditions of service between himself and the 3rd Respondent while on secondment working for KEMRI-CDC project. It is the Claimant's case that from March, 2016 to July 31, 2018, he was never paid the airtime amounting to Kshs 145,000.00
12. The Claimant states that he was entitled to Defined Benefits (DB) pension according to the terms and conditions of service between him and the 3rd Respondent. It is the Claimant's case that from March 31, 1991 to December 31, 2007, he was never paid his pension on retirement, which he is entitled to, amounting to Kshs 3,627,849.42 as per the audited accounts of June, 2018.
13. The Claimant avers that he acted as Chief ICT KEMRI-CDC, from May 1, 2007 to July 31, 2018, a period of 135 months, without payment. He is therefore entitled to an additional Kshs 25,000.00 per month.
14. The Claimant's position is that his terminal benefits be computed based on an inflation rate of 10% from 2015 to date.
15. The Claimant prays that the Court be pleased to find that the withholding of his dues is illegal and unlawful, and he be awarded the reliefs in his statement of claim.



The Respondent's Case

16. The Respondents' case is that the Claimant was an employee of the 2nd and 3rd Respondents who as at the date of employment was designated as an Engineering Technologist II under personnel number 211xx. The Respondents further states that the Claimant served in the service of the 2nd and 3rd Respondents on permanent and pensionable terms of employment.
17. The Respondents state that the Claimant was deployed to one of the 3rd Respondent's Research Centres-the Vector Biology & Control Research Centre (VBCRC) at Kisian, Kisumu, now known as Center of Global Health Research (CGHR).
18. The Respondents state that at the time of his retirement in July, 2018, the Claimant had risen to the position Chief Engineering Technologist Job Group MR 12.
19. The Respondent states that the Claimant was seconded to the KEMRI-CDC Program (a collaborative research program between the Kenya Medical Research Institute and Center for Disease Control, Atlanta). It is the Respondents' case that the secondment of the Claimant was communicated vide a letter dated February 19, 1998, and that the secondment was to be valid for a period of three (3) years with effect from March 1, 1998.
20. The Respondents state that the terms of secondment had earlier on been agreed upon between the office of the 1st Respondent on behalf of the 2nd and 3rd Respondents, and KEMRI-CDC program as per the letter dated February 10, 1998. It is the Respondents' further case that during his secondment, the Claimant was responsible for maintenance and repair of computer equipment within VBCRC.
21. The Respondents state that according to the letter of secondment and the letter of agreement between KEMRI and CDC, CDC was to reimburse KEMRI for the costs of the Claimant's salary and pension. It is their case that the Claimant's salary, allowances and pension were therefore paid by the 3rd Respondent and a reimbursement made to the 3rd Respondent by the KEMRI-CDC program as agreed.
22. The Respondents state that after the lapse of the term of secondment, the Claimant was deemed to be on normal deployment at VBCRC now renamed CGHR until his retirement as a Chief Engineering Technologist on July 31, 2018.
23. The Respondents state that the Claimant was on secondment in line with the terms approved in the letters of secondment. The Respondents further state that the Claimant's allegation that he was promoted to the position of Deputy Manager/Deputy Chief ICT KEMRIC/CDC and awarded supplement II Allowance based at 75% of his basic salary are strange to the Respondents and that ordinarily a promotion would be communicated in writing by the 1st Respondent.
24. It is the position of the Respondents that KEMRI-CDC Program, was a program under the 3rd Respondent and had no legal capacity to promote an employee of the 2nd and 3rd Respondents.
25. The Respondents state that the Claimant's allegation that he was not paid a total of Kshs 7, 288,919.75 being Supplement II allowance for the period May 1, 2007 – July 31, 2018, Supplement I amounting to Kshs 17,580.00 per month, Supplement II amounting to Kshs 27,054 per month and Supplement S amount to Kshs 40,000.00 per month from April 2015 to July, 2018, does not arise since there was no agreement for the payment of such allowances by the Respondents.
26. The Respondents state that Claimant's allegations that he was not paid Medical Cover allowance of Kshs 6,750,000.00, are untrue since no such medical cover allowance was payable to any staff by



insurance underwriters. It is their case that all staff including the Claimant, were on medical cover by various insurance underwriters.

27. The Respondents' further case is that the Claimant's allegations that he was not paid airtime amounting to Kshs 145,000.00 during the period March, 2016 to July 31, 2018, are not true. It is the Respondents' position that the Claimant's secondment with the KEMRI/CDC Program had ceased as at the time and further there was no such agreement between the Respondents and KEMRI-CDC Program/Projects for the payment of airtime to the Claimant.
28. It is the Respondents' position that pension matters are handled by an independent and distinct entity from Respondents, and that this is well known to the Claimant having worked with the 3rd Respondent for over 20 years. It is the Respondents' further position that pension matters are adjudicated by the Retirement Benefits Disputes Tribunal and not by the Employment and Labour Relations Court.
29. The Respondents further state that pays slips produced in evidence from KEMRI-CDC projects in favour of the Claimant under employee number 50245, may have been issued to the Claimant by KEMRI-CDC program based on personal arrangements between the Claimant and KEMRI-CDC projects and without the involvement of the 3rd Respondent.
30. It is the Respondents' position that the Claimant was paid all his salary and allowances as Chief Engineering Technologist, which position he held as at his retirement, and as per remuneration provided to employees of the 2nd and 3rd Respondents.

The Claimant's Submissions

31. The Claimant submits that under Section 10 and 74 of the *Employment Act*, it is the responsibility of the employer to keep records of employment for all employees, and to produce such records when required. It is the Claimant's submission that he produced all documentations showing that he worked for Respondents, and cannot be expected to provide records that are ordinarily in the Respondents' custody when the Respondents are parties to the suit.
32. It is the Claimant's Submission that he is entitled to salary supplements, a medical cover allowance, airtime allowance and pension contributions not remitted to the pension scheme.

The Respondents' Submissions

33. The Respondents submit that they have demonstrated in their evidence and upon cross examination of their witness that the Claimant's was not entitled to Medical Cover Allowance of Kshs 6,750,000.00, since no such medical cover allowance was payable to any staff of the Respondents. It is their submission that their witness adduced evidence to show that their employees were on medical cover by various insurance underwriters.
34. The Respondents submit that they have demonstrated that there was no agreement between the Respondents and KEMRI-CDC Program/projects for the payment of airtime to the Claimant and that allowances and any other benefits could only have been made to the Claimant by KEMRI-CDC projects based on personal arrangements between the Claimant and KEMRI-CDC projects, without the involvement of either of the Respondents.
35. The Respondents submit that the Claimant has brought before court various claims that are continuing injury, and further submit that the claims are time-barred and ought to be dismissed. The Respondents had reliance in *Silas Otieno Okumu v Kenya Medical Research Institute [2022] eKLR* to support this decision.



36. The Respondents submit that they have shown the relevant terms that applied between themselves and the Claimant, and he cannot purport any other terms subject to external projects.

Analysis and Determination

37. I have considered the pleadings, the witnesses' testimonies and the Parties' written submissions. The issues that fall for determination are:
- i. Whether the Claimant is entitled to the reliefs sought.
 - ii. Who bears the costs of the suit.

Whether the Claimant is entitled to the reliefs sought

38. The Claimant's claim is for payment of a total of Kshs 7, 288,919.75 being Supplement 1, II and supplement S allowances for the period May 1, 2007 – July 31, 2018, Kshs 6,750,000.00 as airtime allowance, Medical Cover allowance, an acting allowance of Kshs 145,000.00.
39. The Claimant's assertion is that from April 2015 to July 31, 2018, he was not paid three supplement allowances amounting to Kshs 3,241,560.00. It is his contention that he was entitled to a Supplement II allowance based on 75% of his basic salary from the 3rd Respondent, but which was not adjusted from May 1, 2007 to July 31, 2018, and he thus claims an aggregate Kshs 7,288,919.75 in this respect
40. The Claimant was seconded to serve under a CDC program under the 3rd Respondent for a period of three years, but instead, served for about 17 years. The evidence of the 3rd Respondent is that the Claimant continued in the program, not on secondment, but on deployment and that immediately his secondment terminated, his salary and allowances reverted to that which he earned prior to his secondment.
41. The Claimant's position is that he was paid the allowance he seeks herein between the years 2007 and 2015.
42. The 3rd Respondent's letter dated January 14, 1998, indicates that the Claimant had made the arrangement and/or secured the opportunity to work for Centre for Disease Control (CDC) independently without the knowledge of the 3rd Respondent raising the need under paragraph one of that letter for him to clear out the matter with the Director of the 3rd Respondent before he could be seconded.
43. Although the Claimant contends that he was promoted to the position of Deputy Manager/Deputy Chief ICT KEMRIC/CDC and awarded supplement II Allowance which he claims herein, no evidence was adduced to show that he was promoted nor prove that he was given a supplement allowance.
44. Further, the letter dated February 10, 1998, required that the Claimant explains the rationale for his secondment to Acting Director Vector Biology & Control Research Centre (VBCRC), and the CDC project undertaking to reimburse the 3rd Respondent for the costs of the Claimant's salary and pension for the time of his secondment. CDC also undertook to pay the 3rd Respondent 15% of the Claimant's salary to cover administrative costs.
45. The 3rd Respondent's letter of February 19, 1998, seconded the Claimant to the CDC program with effect from March 1, 1998, and the secondment renewed for a further three years vide the 3rd Respondent's letter dated October 30, 2001.



46. The court notes that the reimbursement that was to be made in respect of the secondment included medical allowance. There is no indication however that the Claimant's secondment was extended (at least officially) after the lapse of three years from October 30, 2001. The reimbursement from the court record, only covered the period the Claimant was on secondment.
47. Email exchanges produced in evidence confirm that the Claimant remained in the KEMRI-CDC program even after the lapse of the secondment. It is not clear whether reimbursements continued to be made to the 3rd Respondent after the lapse of secondment period.
48. This in my view, confirms the Respondents' position that they did not have an agreement with KEMRI-CDC Program to pay airtime to the Claimant and that allowances and any other benefits could only have been made to the Claimant by KEMRI-CDC projects based on personal arrangements between the Claimant and KEMRI-CDC projects without the involvement of any of the Respondents.
49. Further, no evidence has been led to show that the Claimant was to benefit from the allowances claimed even under the CDC program.
50. In my view, it looks like the Claimant made his own arrangements to remain in the program until retirement, or was as submitted by the Respondent, deployed to the program to retirement.
51. A perusal of the documents presented before this court, show that the Claimant did not make effort to ensure he stayed in the KEMRI-CDC Program procedurally. Documents before court indicate that at times it was not clear who was to pay the Claimant's salary between the 3rd Respondent and the CDC program. He had two distinct pay roll numbers and an email on record, sought to know whether he was paid, or if he was remunerated twice. In short, the Claimant's stay in the program beyond the secondment period could not be explained.
52. As submitted by the Respondents, the Claimant was not entitled to the allowances claimed herein, at least not from the Respondents. Further, the Claimant did not join the CDC program to this suit to help the court determine whether the program owed him on these accounts.
53. Further, the claims herein, accrued in 2015 and continued all the way to his retirement in 2018. The claims being monthly payments, are what Section 90 of the *Employment Act*, refer as continuing injury, whose statutory time limitation is one year. In *Silas Otieno Okumu v Kenya Medical Research Institute* [2022] eKLR, the court held that: -

' The claimant has also prayed for the sum of Kshs 462,000/= being unpaid per diem. It is worth noting that this claim is time barred as it is in the nature of a continuing injury. Pursuant to the provisions of section 90 of the *Employment Act*, such a claim ought to have been brought before Court within 12 months following the cessation of the continuing injury. In this case, the cessation occurred when the employment relationship terminated on April 30, 2014, hence that is the effective date when the cause action arose and time started running. The suit herein was brought on 3rd November, 2016, which was well past two years since the cause of action arose. To this end, this court lacks jurisdiction to entertain the same as the issue of limitation of time is jurisdictional.'

54. Section 90 of the *Employment Act* provides as follows on limitation:

' Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall



lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.'

55. The cause of action herein, arose on July 31, 2018, when the Claimant retired. This suit should thus have been instituted by July 31, 2019. It was instead, filed on July 30, 2021, one day short of three years.
56. I conclude by holding, that other than the confirmation that the Claimant acquiesced to the non-payments, the claims for airtime allowance, supplemental allowance, acting allowance and medical allowance are all continuing injury and are this statute barred.
57. On the claim for pension, the Claimant's case is that he was in a defined benefit pension scheme but when he retired, he was paid pension only in respect of the period 2008 to 2018, and that his claim herein, is for the period 1991 to 2007, amounting to Kshs 3,707,829.00.
58. The Claimant contends that he followed up for the payment with the pension scheme but has since not been paid.
59. From the statement dated June 30, 2018, the Claimant's dues on account of pension stood at Kshs 3,627,849.42/-. The Respondents did not dispute this claim, and their only issue in this respect, is that the pension scheme is a different entity and that the Claimant should pursue his payment with the pension scheme.
60. I will start by finding that unlike other claims, pension is not affected by the statute of limitation. Further, the Respondents confirmed that the Claimant is a member of their staff pension scheme and is thus entitled to receive his pension. The Court of Appeal however held in [*Kenya Ports Authority-v-Industrial Court of Kenya & 2 others, Civil Appeal No 236 of 2012*](#) that pension disputes are not trade disputes and the Labour Court has no jurisdiction to hear pension disputes which is a jurisdiction reserved for the Retirement Benefit Authority.
61. Further, the Supreme Court in [*Albert Chaurembo Mumba & 7 Others V Maurice Munyao & 148 OTHERS*](#), held thus on disputes in respect of pension claims: -

' A reading and interpretation of the provisions of the section 46(1) poses no difficulty and leaves no doubt that the section requires that any member, beneficiary or dependents of the Scheme who is aggrieved or dissatisfied by any decisions made by a manager, administrator or trustees of the Scheme while exercising their powers under the provisions of the relevant scheme rules or the Act under which the scheme is established, may if he or she wishes make a written request to the CEO to review such decisions with a view to ensuring that such decisions are in accordance with the provisions of the relevant Scheme Rules or the Act under which the Scheme is established and above all lawful.'
62. It then follows that a claim for pension such as the one before this court, falls within the jurisdiction of the Chief Executive Officer of the Retirement Benefits Authority.
63. In whole the Court makes orders as follows: -
 - i. The Claimant's pension claim is remitted for adjudication by the Chief Executive Officer of the Retirement Benefits Authority.
 - ii. That the rest of the Claimant's Memorandum of Claims is statute barred, and is struck out.
 - iii. That Parties shall bear their own costs of the suit.



64. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH
DAY OF MARCH, 2023.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Omondit T present for the Claimant

Mr. Dave Siganga present for the Respondent

Christine Omolo- C/A

