



**Mwangi v Nairobi City Water & Sewerage Company Limited (Cause 1414 of 2018) [2023] KEELRC 989 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 989 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1414 OF 2018  
SC RUTTO, J  
APRIL 28, 2023**

**BETWEEN**

**JAMES NJARAMBA MWANGI ..... CLAIMANT**

**AND**

**NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .. RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent sometimes in 1999 as a Marketing Assistant. He states that in 2006, he was appointed to serve in an acting capacity as a reconnection/disconnection supervisor, a duty he still performs to date albeit in an acting capacity. It is the claimant's case that following a road accident he was involved in sometimes in August, 2009, the respondent has made no steps whatsoever to accommodate his special needs save for the payment of a monthly personal guide allowance of kshs 15,000.00. On account of the foregoing, the claimant seeks against the respondent acting allowance being Kshs 3,963,885.75, mileage allowance being Kshs 474,600.00, reimbursement for fuel spent being Kshs 157,500, general damages on account of discrimination, interests and costs of the suit.
2. In response to the Memorandum of Claim, the respondent filed a Response which was subsequently amended on September 9, 2019. The respondent denies the claimant's averments that his employment commenced in 1999 as it was incorporated in 2003 upon enactment of the *Water Act* in the year 2002. Putting the claimant to strict proof, the respondent has denied that the claimant has been serving as supervisor in an acting capacity for 13 years. On this issue, it maintained that the claimant's acting period was limited to six months. Consequently, the respondent has asked the court to dismiss the claimant's suit with costs.
3. The matter proceeded for hearing on November 10, 2022, with each side calling oral evidence.



### **Claimant's case**

4. The claimant testified in support of his case and to start with, he sought to rely on his witness statement to constitute his evidence in chief. He further produced the List and Bundle of Documents filed together with his Claim as well as his Further List and Bundle of Documents as exhibits before Court.
5. It was the claimant's evidence that he has served as a reconnection/ disconnection supervisor in an acting capacity since January 2006 and in recognition of his performance, he was designated to be in charge of "fat" accounts in 2007, with his monthly target being Kshs 15 Million. In the same year, he was recognized as the employee of the year by the respondent's Managing Director and Human Resource Director who appreciated him with a token of two branded tee shirts, one branded umbrella, a branded cap and Kshs 20,000.00.
6. In August, 2008, he wrote to the Human Resource Manager requesting for a confirmation as he had been serving in an acting capacity for two years and had obtained the necessary qualification. He followed up with another letter on the same issue in May, 2009.
7. He further stated that in 2009, a Memo was written by the Regional Manager on the subject of confirmation of supervisors and he was listed as one of the supervisors who had the necessary qualifications for confirmation but were still in an acting capacity. Among the supervisors with qualifications as shown in the Memo of September 14, 2009, he is still the only one serving in an acting capacity. He has written severally to the respondent on the issue but has not received any response.
8. In August, 2009, he was involved in a road accident that left him unable to walk and severely limited his functions. He became apprehensive that he was being discriminated against on the basis of his disability hence he raised the issue again on May 30, 2018 and a reminder on July 10, 2018. He further testified that he has never been paid acting allowance from January 2006.
9. He further stated in evidence that he has tried his best, often using his own resources to make up for the challenges presented by his disability. He has continued to meet his targets and his disability has not in any way impacted negatively on his performance. That from January, 2010, when he resumed work following his accident, he has been using his own private car for company business and he spends about Kshs 1,500.00 per day.

### **Respondent's case**

10. The respondent called oral evidence through Mr George Oketch who identified himself as its Industrial Relations Coordinator. Similarly, he sought to adopt his witness statement and the Bundle of Documents filed on behalf of the respondent, to constitute his evidence in chief.
11. RW1 stated in his testimony that the claimant was to serve in an acting capacity as the reconnection/ disconnection Supervisor for a maximum of six months and thereafter, it behooved on him to revert to his substantive position of Revenue Collection Assistant, which he did.
12. Since the claimant was mostly on sick offs and sick leave since 2009, the respondent was not officially made aware as to the nature of his illness. The respondent had accorded the claimant a fair and conducive working environment. Despite the Human Resource Manual providing for full salary for the first 3 months of his sick leave, the claimant was paid his full salary in spite of exceeding the three months. Further, the claimant was a beneficiary of the respondent's Group Life Insurance Scheme.
13. It was his further testimony that the respondent was officially made aware of the claimant's disability in March, 2017 upon presentation of proof of registration with persons living with disability. As a



prudent employer and in demonstration of good faith, the respondent has provided the claimant with a Personal Guide Allowance of Kshs 15,000.00 upon submission of proof of registration. The claimant was further provided with adequate time to rest and recuperate as and when he requested.

14. RW1 further stated that the claimant is not entitled to claim monetary compensation for personal expenses incurred as a result of allegedly using his own car for company business as he is drawing commuter allowance.
15. RW1 further told Court that the relief sought for confirmation is not tenable as there is another person holding that position. That besides, the same is subject to an interview.
16. Concluding his testimony in chief, RW1 told Court that the claimant has no case against the respondent.

### **Submissions**

17. Placing reliance on Article 27 of the Constitution, Section 5 of the Employment Act and the case of Pravin Bowry vs Ethics & Anti-Corruption Commission (2013) eKLR, it was submitted on behalf of the claimant that the respondent has not shown anything to prove that discrimination did not occur or was indeed necessary, except indicating that the confirmation was subject to its absolute unqualified discretion.
18. It was further submitted that no allowance was paid to the claimant and that the respondent has kept him in an acting capacity, not just beyond 6 months, but to date.
19. On the part of the respondent, it was submitted that the claimant has not provided any evidence to the effect that he was appointed to serve as the acting disconnection/reconnection supervisor in January, 2006 as he alleges. The respondent further argued that contrary to the claimant's submissions, he was duly paid acting allowance for the period he served as acting disconnection/reconnection supervisor.
20. The respondent further argued that the claimant never provided any documentation to support his allegation that he was a person with disability. As such, the respondent was under no obligation to accord him the benefits that are attendant to persons with disability. It was further submitted that the nexus that the claimant alludes to between the alleged appointment of the other three supervisors and him being left out on account of his disability is not only far-fetched but also non-existent.
21. It was further submitted that contrary to the claimant's submissions that he has been discriminated against and treated unfairly, due to his disability, it has been nothing but understanding of his position and has always endeavoured to protect his best interests.

### **Analysis and Determination**

22. Flowing from the pleadings and evidence on record, this Court singles out the following issues for determination: -
  - a. Whether the claimant's acting capacity lapsed after six months and whether he was paid acting allowance;
  - b. Whether there is a case of discrimination;
  - c. Whether the claimant is entitled to the reliefs sought.



## Acting capacity and Allowance

23. The crux of the claimant's case is that he has been serving in an acting capacity as disconnection/reconnection supervisor since January, 2006. This position has been vehemently opposed by the respondent who contends that the acting period was limited to six months and thereafter the claimant reverted to his previous position of Revenue Collections Assistant.
24. At the outset, it is worth noting that at paragraph 4 of its Amended Response, the respondent admits the claimant's assertion that he was appointed as a disconnection/reconnection supervisor in an acting capacity from January, 2006. I take it that to that extent, there is no dispute of the claimant's acting capacity. What is in dispute is whether the claimant's acting capacity went beyond six months and whether he was paid the attendant acting allowance.
25. In support of his case, the claimant exhibited a Memo authored by the Regional Manager (SR) dated September 14, 2009 referenced "Confirmation of Supervisors". The said Memo reads in part: -
- "Reference is made to the HR & Admin directorate meeting held on 14 August 2009 at Pangani on the above mentioned subject. Under listed are list of the supervisors who have been and are acting as supervisors from Southern Region:
- Supervisors with qualifications.
1. Peter Njunge Wangui.....
  2. James Njaramba....acting position: disc/reconnection supervisor...
  3. Paul Muriuki.....
  4. Geoffrey Githinji..."
26. What manifests from the foregoing Memo is that contrary to the respondent's assertions, the claimant was still serving in an acting capacity as at September 14, 2009, when the Memo was authored.
27. Coupled with the foregoing, there is no communication from the respondent informing the claimant that he had ceased to serve in an acting capacity.
28. What's more, the record bears that the claimant addressed the respondent's Human Resource Manager a couple of times being August 5, 2008, September 20, 2010 and on August 5, 2011, seeking to be confirmed and or appointed to the position of supervisor. However, the said communication from the claimant elicited no response and or clarification from the respondent's end. It is also notable that in all his letters, the claimant stated that he had been serving in an acting capacity. Why didn't the respondent correct this impression and advise the claimant that his acting capacity had long ceased upon lapse of six months and that he had reverted to his original designation.
29. Indeed, the respondent's deafening silence on the issue only compounded matters. The respondent did not stand to loose anything by communicating to the claimant and stating its position on the issue. Even a No is an answer and would have sufficed.
30. In the circumstances, I cannot help but find that the claimant's acting capacity lasted well beyond six months. There is no better confirmation on this issue than the Memo of September 4, 2009 from the Regional Manager (SR) which discounts the respondent's position that the claimant stopped acting after six months.



31. With regards to the payment of acting allowance, the respondent has stated that the claimant was duly paid for serving in the acting capacity. Be that as it may, the respondent did not lead any evidence to support this position. Its only argument was that the claimant earned salary increments over time. However, there was no accompanying evidence and moreso, prove that the increments were attributable to the acting allowance. As a matter of fact, increments are just that, increments, and have nothing to do with allowances which by their very nature, are specific.
32. In light of the forgoing, it is the Court's finding that there being no evidence that the claimant was paid acting allowance, he is entitled to the same.

### **Discrimination?**

33. It is the claimant's case that he was discriminated on account of his disability. In this regard, he contends that following the Memo of September 14, 2009, his three colleagues named therein as being qualified, were confirmed except him. He has attributed this fact to his disability. The respondent has disputed this argument and stated that at the time, it had not even been served with any documentation to the effect that the claimant was disabled.
34. The *Black's Law Dictionary*, (10<sup>th</sup> Edition), has defined the term "discrimination" to mean: "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
35. I find it worth pointing out that the respondent merely made a bare denial of this issue at paragraph 11 of its Amended Response. In this regard, it did not sufficiently discount the claimant's position that his three colleagues were confirmed while he was left out. In fact, the respondent did not provide better particulars save for the express denial. In addition, it is noteworthy that RW1 did not mention the issue at all in his testimony. If I may add, the respondent was quite economical with information on this subject and skirted around the same without any direct address to dispel the claimant's assertions. In the circumstances, I am led to conclude that the respondent's avoidance of the issue is quite telling and lends credence to the claimant's assertions that his three colleagues were confirmed while he was left out.
36. In its submission, the respondent has argued that the confirmation was within the discretion of the Human Resource Manager as opposed to the Regional Manager recommending the confirmations. The respondent having asserted as much, was expected to prove the criteria and or consideration it applied in deciding to confirm the claimant's colleagues to his exclusion.
36. Section 5(3) of the *Employment Act*, 2007 prohibits discrimination or indiscriminate of an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status. Such discrimination is in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
38. In this case, and as stated herein, the respondent did not provide any justification as to why the claimant's three counterparts were considered more favorably than he was. At the very least, the respondent should have provided the grounds and or consideration it took into account when exercising its discretion against the claimant and thus failed to confirm him.



39. Notably, Section 5(7) of the *Employment Act*, 2007 places the burden of proof on the employer where an allegation of discrimination has been made. The said provision is couched as follows: -

“(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.”

40. This provision was amplified by the Supreme Court in the case of *Gichuru vs Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) as follows: -

“The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds.”

41. Of further significance is the holding by the Apex Court, where it was determined that: -

“According to section 5(7) of the *Act*, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part.”

42. In the instant case, the respondent did not prove that there was no discrimination as alleged. It could have discharged its burden under Section 5(7) of the *Employment Act*, by justifying why the claimant’s colleagues were treated more favourably and confirmed as supervisors, while he was left out.

43. In the circumstances, I return that the claimant was treated differently from his counterparts and no justification for the same was provided, hence this amounted to discrimination.

## **Reliefs**

### **Acting allowance**

44. As stated herein, the respondent did not lead evidence to discount the claimant’s assertions that he was not paid acting allowance, having served in an acting capacity. Indeed, there is no evidence of payment on record hence the claimant is entitled to the same from January, 2006 upto the date of filing this suit. For avoidance of doubt, the same shall be at the rate of 25% in line with the respondent’s Human Resource Policy Manual and shall be subject to the claimant’s salary progression from January, 2006.

### **Compensation for discrimination**

45. As the Court has established that the claimant was discriminated, he is awarded compensatory damages in the sum of Kshs 800,000.00. I must add that the claimant’s prayer to be awarded Kshs 7,000,000.00 has not been sufficiently justified. Further the precedents relied upon by the claimant in support of his claim for Kshs 7,000,000.00, are distinguishable from the case herein since in those cases, there was total loss of employment by the employees who had suffered discrimination, while in this case, the claimant is still in employment.



### **Mileage allowance and Fuel reimbursement**

46. On this issue, the claimant stated that he was using his personal motor vehicle for his daily activities and for purposes of the respondent's business. Notably, the claimant did not state under what circumstances he had to use his personal motor vehicle for the respondent's business. This is further noting that as per his job description, he was not required to do field work as the nature of his duties required that he works from the office. Further, he did not dispute the respondent's assertion that he was earning commuter allowance.
47. In any event, clause 6.8.2 of the Human Resource Policy Manual exhibited by the respondent, requires that for an employee to qualify for mileage allowance, the respondent's Managing Director ought to give his approval for use of personal cars. There is no evidence this was done in this case.
48. It is on account of the foregoing that I find that there is no basis for this claim hence the same is declined.

### **Confirmation to the position of Supervisor**

49. On this issue, the respondent was categorical that there is a substantive holder in the said position. Testifying under cross examination, the claimant admitted as much. In the circumstances, it would not be logical to issue an order confirming the claimant to the position of supervisor whereas there is another person holding that office.

### **Orders**

50. In the final analysis I allow the claim and enter Judgment in favour of the claimant against the respondent as follows: -
  - a. A declaration that the claimant was discriminated and as a consequence, he is awarded damages in the sum of Kshs 800,000.00.
  - b. The claimant is entitled to acting allowance from January 2006 to the date of filing the suit. To this end, the respondent shall do a computation of the acting allowance due to the claimant at his prevailing salary over the period in question. The computation shall then be served upon the claimant within 14 days for concurrence and for recording of the figure in court on a date convenient to both parties. In default of the respondent undertaking the computation as ordered, the claimant shall be at liberty to undertake his computation and share with the respondent for concurrence whereupon the computation shall be presented to Court on a date convenient to both parties for recording and entry of the final Judgment.
  - c. The respondent to bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2023.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Githinji

For the Respondent Mr. Ochola

Court Assistant Abdimalik Hussein



## **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

