



**Osoro v University of Nairobi (Cause E720 of 2021)  
[2023] KEELRC 1376 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1376 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E720 OF 2021**

**J RIKA, J**

**MAY 31, 2023**

**BETWEEN**

**RONALD WANDERA OSORO ..... CLAIMANT**

**AND**

**UNIVERSITY OF NAIROBI ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed his statement of claim on August 31, 2021.
2. The statement indicates the cause was filed at the Magistrate's Court at Nairobi.
3. The rest of the pleadings indicate the cause is at the Employment & Labour Relations Court at Nairobi.
4. The indication that the cause was filed at the Magistrate's Court seems to be an error, which in light of the other Pleadings is corrected, to show on the record, that the Statement of Claim was filed at the E&LRC, Nairobi. Parties should exercise caution in their Pleadings, so as not to plead the wrong jurisdiction. The Court Registry likewise must exercise utmost care, not to receive Pleadings which are intended for another jurisdiction.
5. The Claimant states that he is a registered Pharmacist. He was employed by the Respondent as a Tutorial Fellow, in the Department of Pharmaceutics and Pharmacy Practice on December 19, 2016. A Tutorial Fellow is the equivalent of an Assistant Lecturer.
6. He worked up to December 18, 2018.
7. He was entitled to a basic salary of Kshs 69,794 and allowances, including clinical allowance at Kshs 95,000 monthly.



8. The clinical allowance was enhanced to Kshs 168,000 monthly, following a return-to-work formula agreement, between Kenya Medical Practitioners, Pharmacist and Dentists Union [KMPDU], effective January 1, 2017.
9. The Respondent requested for funds from the Department of Higher Learning in the Ministry of Education, through a letter dated February 15, 2018, based on the above agreement.
10. The Respondent wrote to KPMDU on June 29, 2020, acknowledging receipt of the funds from the Ministry of Education. It indicated that it was processing payment to eligible Employees.
11. The Claimant was an eligible Employee. He expected to receive his allowance in arrears.
12. His arrears for the period January 1, 2017 to December 18, 2018, amounted to Kshs 1,721, 387.
13. He was not paid. Other Lecturers, colleagues of the Claimant were paid. He was told by the Respondent, upon demand letter issued by his Advocates, that eligible Employees were those deployed to health facilities, subject to Salaries & Remuneration Commission Circular Ref No SRC/ TS/ CGOVET/3/61 Vol 111 [136]. The Claimant states that the said circular applied to Employees of the County Public Service Boards. He was an Employee of the National Government, and eligible to be paid clinical allowance.
14. The Claimant therefore pleads that he was discriminated against by the Respondent. The Respondent acted contrary to the Constitution, the contract, and the Employment Act.
15. He prays for Judgment as follows: -
  - a. Declaration that the Respondent's actions amount to discrimination against the Claimant, contrary to Article 27 of the Constitution and Section 5 of the Employment Act.
  - b. General damages for discrimination.
  - c. Kshs 1,721, 387 in arrears of clinical allowance.
  - d. Interest from the date of filing the Claim, to the date of payment in full.
  - e. Costs.
  - f. Any other suitable relief.
16. The Respondent filed its Statement of Response, dated September 21, 2021. It is conceded that the Claimant was employed by the Respondent for 2 years, as a Tutorial Fellow, from December 12, 2016 to December 18, 2018.
17. He was not entitled to clinical allowance of Kshs 95,000. It was not in his contract of employment.
18. The Respondent does not have a Recognition Agreement with KMPDU, and was not party to the return-to-work agreement. It was not bound by the agreement if any. Health services are a devolved function, and the Respondent has no constitutional or statutory mandate to perform devolved functions.
19. It is conceded that the Respondent received funds from the Ministry of Education, for payment to eligible staff. Eligible staff included health personnel; staff with clinical duties in a hospital or health facility; excluded staff with administrative duties; and staff who were in direct contact with patients.



20. The Claimant was not in direct contact with patients. He was not deployed to a health facility. He was not eligible for clinical allowance. The Respondent paid clinical allowance only to staff who were eligible.
21. The Respondent was guided by Salaries and Remuneration Commission, under Article 230 [4] of the Constitution, through the circular referred to by the Claimant. The details of discrimination pleaded by the Claimant are a futile imagination of the Claimant, and contrary to the advisory of the SRC. The Respondent prays the Court to dismiss the Claim, with costs.
22. The Claimant filed a Reply to the Statement of Response, dated November 8, 2021. He states that the return-to-work agreement, was between the National Government and KMPDU. He is a member of KMPDU. The Respondent falls under the National Government and was bound to implement the agreement. It requested for, and was granted funds by the National Government, to implement the agreement. He prays the Court to allow the Claim.
23. He gave evidence and rested his Claim, on January 25, 2023, as did Harrison Akala, Respondent's Senior Assistant Registrar. The Claim was last mentioned before the Court on February 28, 2023, when Parties confirmed filing and exchange of their Closing Submissions.
24. The Claimant adopted his Witness Statement, Pleadings and Documents on record, in his evidence. He restated that he was employed by the Respondent, as a Tutorial Fellow. His position was equivalent of an Assistant Lecturer.
25. He was entitled to clinical allowance under his terms of service. He received clinical allowance as shown in his pay slips on record. Part of his work involved offering services to patients. He was based at Kenyatta Hospital.
26. The SRC circular preceded the return-to-work agreement. It refers to Employee of the County Public Service Boards. It did not apply to the Respondent, which is under the National Government's Ministry of Education.
27. The Claimant's colleagues, who included Dr Mutuiiri were paid medical allowance. The term medical allowance did not exist on the terms of service. Mutuiiri was paid clinical allowance, which was termed 'medical allowance.' This is evidence of discrimination.
28. Cross-examined, the Claimant told the Court that he was employed as a Tutorial Fellow, on a basic salary of Kshs 69,000 – Kshs 96,000 monthly. He was expected to obtain a post-graduate degree. He was advised that his position was a training grade.
29. The return-to-work agreement involved KMPDU and National, as well as County Governments. The Respondent and the Ministry of Education were not parties. The agreement states pending cases before the Courts, would be withdrawn. The Ministry of Education and the Respondent were not parties to the pending cases.
30. Paragraph 7 of the Statement of Response, identifies eligible staff. Allowances were to be paid to eligible staff. The Respondent stated in replying to the demand letter made by the Claimant, that he was excluded by the SRC circular, because he was not in touch with patients. The circular referred to County Health Workers. Redirected, the Claimant told the Court that the terms of service were incorporated in his contract. The terms of service included clinical allowance. Clause 15 of the terms of service did not exclude training grade. The Respondent confirmed receiving funds from the Government. The pay slips on record were generated by the Respondent. Mutuiiri availed his pay slip to the Claimant.



31. Akala told the Court that the Claimant was on training grade. This is confirmed by his letter of appointment. He was paid in accordance with his terms of service.
32. The SRC circular advised on remuneration for Public Officers. The allowances in question were not covered under the circular.
33. The return-to-work agreement did not involve the Respondent. The Respondent does not have a Recognition Agreement with KMPDU. The Respondent asked for funds to pay eligible staff. The Claimant was not eligible. The Respondent does not operate a hospital. Clinical allowance is not medical allowance. The pay slips relied on by the Claimant are not certified. The Claim has no merit.
34. Cross-examined, Akala told the Court that the Statement of Response, paragraph 4, states that the Claimant was not entitled to clinical allowance in the sum of Kshs 95,000 monthly. The Claimant was a member of staff. Allowances were payable to members of staff. Clause 15 [c] of the Terms of Service for Academic, Senior Library and Administrative Staff, May 2006, provides for clinical allowance. This was payable to Medical Teaching Staff and University Health Services Medical Staff with clinical duties.
35. Akala expected that the Claimant would attend to clinical work, in the course of teaching students. Akala did not have any certified pay slips from the Respondent. The pay slips exhibited by the Claimant include clinical allowance. It is indicated that the Claimant received clinical allowance. The terms of service are not incorrect.
36. The return-to-work agreement did not bind the Respondent. The Respondent received funds from the Government, under the return-to-work agreement. The schedule of allowances on record refers to Doctors' allowances. It states that the allowances would be extended to teaching staff. The schedule includes Assistant Lecturers and their rate of pay. The new rate is indicated as Kshs 168,000 monthly. Tutorial Fellow was classified as an Assistant Lecturer.
37. Eligibility was to be read from the terms of service, Clause 15 [c]. The term 'health personnel' is not in the terms of service. Doctors and Lecturers were paid their allowances. Mutuiro was paid Doctors' allowance. It can be assumed that this was clinical allowance.
38. The Claimant made written demand for payment 3 times. It was not paid. No reason was given for refusal to pay. It was not stated that he was on training grade, or that SRC circular forbid the Claimant from receiving clinical allowance. The SRC circular is dated September 14, 2015. It does not mention clinical allowance. It predates return-to-work agreement. It refers to health workers not teaching staff. It refers to Employees of County Public Service Boards. The Claimant did not work for County Public Service Board. The Respondent paid other enhanced allowances. Redirected, Akala told the Court that clinical allowance is paid to health workers and University staff on clinical work. The Claimant was not assigned clinical work.
39. The issue in dispute is whether the Claimant was eligible for payment of clinical allowance; whether he should be paid enhanced clinical allowance in arrears; whether the Respondent discriminated against the Claimant; and whether the Claimant should be paid damages for discrimination, costs and interest.

**The Court Finds: -**

40. Employment and Terms of Service. The Claimant was employed by the Respondent, as a Tutorial Fellow in the Department of Pharmaceuticals and Pharmacy Practice. The salary scale attached to his post was Kshs 69,794 –Kshs 99, 642 monthly. His entry salary was Kshs 69,794. He was placed on a renewable, fixed-term contract of 2 years. He was advised that he appointment was a training grade,



within the University Staff Development Programme. To be considered for a substantive post, he was expected to obtain a post-graduate degree.

41. His letter of appointment, dated November 30, 2016, stipulates these terms and conditions of employment. It also forwarded to the Claimant, the Terms of Service for Academic, Senior Library and Administrative Staff, 2006. He was advised that the Terms, the letter of appointment and any other subsequent amendments, would constitute the contract of employment, between him and the Respondent.
42. Clinical allowance. Although the benefit is not featured in the letter of appointment, it is prominently featured in the Terms of Service. Clause 16 [c], states that, clinical allowance is an allowance paid to medical teaching staff and the University health services medical staff, with clinical duties [ non-practice, extraneous and risk] The allowances were payable under table V, annexed to the Terms of Service.
43. Table V refers to clinical allowances, rather than clinical allowance. The clinical allowances included non-practice, extraneous and risk allowances. The table restates that clinical allowances were payable to staff with clinical duties in the school of medicine, school of dental sciences, school of pharmacy, school of nursing sciences, University of Nairobi Institute of Tropical and Infectious Diseases [UNITID] and the University Health Services.
44. Eligibility. This would be gauged against Clause 16[c] and Table V annexed to the Terms of Service. The table clearly indicates that clinical allowances were payable to Assistant Lecturer/ Tutorial Fellow. The Respondent's Witness, Harrison Akala told the Court on cross-examination, that he expected the Claimant would attend clinical work, in the course of teaching students. Having been included in the Terms of Service, it was not necessary that the benefit is restated expressly, in the letter of appointment. The Terms were incorporated in the contract of employment.
45. It is disconcerting, that the Respondent has advanced a spirited argument, on the ineligibility of the Claimant, in payment of clinical allowance. Yet, the Claimant has exhibited pay slips for June 2017 and November 2018, showing that the Respondent was paying him Kshs 95,000 in clinical allowance. Why pay and argue after the allowance has been enhanced, that the Claimant was not entitled to clinical allowance in the first place?
46. The argument by the Respondent that the exhibited pay slips are not certified, carries no weight. The Respondent did not provide the Court with alternative pay slips, certified or uncertified. Section 20 of the *Employment Act*, places an obligation on an Employer, to give to an Employee a written itemized pay statement, at or before the time at which any payment of wages or salary is made to the Employee. The Respondent did not show that there was any other version of pay slips it provided the Claimant with, for the months of June 2017 and November 2018. The pay slips establish the Claimant's eligibility to receive clinical allowance.
47. The proposition by the Respondent, that the Claimant was in training grade, and therefore not eligible, is not supported by the Terms of Service. The Terms of Service create grades, which are specified under Table 1. The Claimant fell in the category of teaching staff. He was a Tutorial Fellow, a grade specifically captured under Table 1 [a]. Nowhere in the Terms of Service, is training grade excluded from payment of clinical allowances.
48. Enhanced clinical allowances: Clinical allowances were enhanced against the backdrop of a strike, called by the Kenya Medical Practitioners, Pharmacists and Dentists Union [KMPDU]. The strike was resolved through a return-to- work agreement, dated March 14, 2017. It was executed by



representatives from the Union, County Governments and the National Government. It bound the Union, the County Governments and the National Government.

49. The Respondent is a University, running under the National Government. It is funded by the National Government. Its medical, health services and clinical staff, are in the cause of research and teaching, engaged with hospitals under the Ministry of Health. Strikes called by their Union often involve the Ministry of Health. The University of Nairobi does not have to own a hospital, for its medical, health services and medical staff, to be members of KMPDU, and to enjoy collective benefits, such as those that came with the return-to-work agreement. It need not have had a recognition agreement with the KMPDU, to be bound by the return-to-work agreement. The strike involved a critical mass of its staff, and was disruptive to normal learning.
50. The Respondent was aware about this, and would not have taken the next step it took, after the return-to-work agreement. Its Acting Deputy Vice-Chancellor, Administration and Finance, Prof Isaac M Mbeche, wrote to the Principal Secretary, Department of Higher Education, Ministry of Education, calling for funds to finance the return-to-work agreement. Why would this be so, if the Respondent was not bound by the return-to-work agreement? Prof Mbeche made it clear that he was writing pursuant to the return-to-work agreement. He termed clinical allowances as Doctors' allowances. The term 'Doctors' allowances,' does not appear in the Terms of Service. Mbeche explains that the Doctors' allowances are consolidated, and include emergency call, non-practice, risk and extraneous allowances. As shown at clause 16 [c] and table V in the Terms of Service, clinical allowances include non-practice, risk and extraneous allowances. The term 'Doctors' allowances applied by Mbeche in his letter calling for funds, is the same thing as clinical allowances, contained in the Terms of Service.
51. The money was made available by the National Government. There are tables on record, which show the designation of beneficiaries in various Universities, their old rates of clinical allowances, and the enhanced rates payable under the return-to-work agreement. There were 39 Assistant Lecturers at the University of Nairobi. Their old rate is indicated as Kshs 95,000. The new rate was Kshs 168,000 per month. The increment per month was Kshs 73,000.
52. The Claimant prays for this increment in arrears, from January 2017 to December 18, 2018. The Court is persuaded, that the Claimant was eligible for payment of clinical allowances; he was a Tutorial Fellow; he was entitled to clinical allowances under the Terms of Service; he was paid clinical allowance prior to its enhancement; he was a member of KMPDU; and other staff in his position, were paid the enhanced benefit.
53. The SRC circular does not appear relevant to this dispute. It is dated September 14, 2015, before the return-to-work agreement of the year 2017. It addresses emergency call allowance, extraneous allowance, health risk allowance, non-practicing allowance and uniform allowance, of Health Workers in the employment of County Public Service Boards. The Claimant was not an Employee of County Public Service Board. He was employed by the University of Nairobi, an Institution of the National Government, on November 30, 2016. The SRC would only be relevant to this dispute, in the context of the return-to-work agreement. The agreement states that the SRC rendered its advice to the Parties, before execution of the agreement. The National Government would not release funds, without having been satisfied, that the return-to-work agreement had the input of the SRC. The SRC circular of the year 2015, is otherwise irrelevant to the issues in dispute.
54. Discrimination. In a decision of the Court of Appeal, *Ol Pajeta Ranching Limited v. David Wanjau Muboro* [2017] e-KLR, it was held that people doing similar work, should receive equal pay. The Court held that this principle has extended to an analogous situation, requiring that work of equal value,



should receive equal pay. The Claimant must establish that unequal pay is caused by the Employer discriminating on unlawful grounds.

55. The Respondent was aware about the Terms of Service extended to the Claimant. It was aware about its obligation to the Claimant under the Terms of Service. It paid clinical allowance to the Claimant, but once enhanced, declined to pay him. He made several demands without compliance. Others like Dr Bururia John Mutui, a colleague of the Claimant in the Department of Pharmaceuticals and Pharmacy Practice, received their clinical allowances in arrears. Mutui received Kshs 2,455,200 as shown in his pay slip on record. Mutui is a good comparator of the Claimant, in proof of pay discrimination.
56. It is clear that the Respondent discriminated against the Claimant, contrary to Section 5 of the Employment Act, Articles 27 and 41 of the Constitution of Kenya. He merits damages for discrimination.
57. Remedies. The prayer for clinical allowances in arrears, for the period January 1, 2017 to December 18, 2018, has been established and is allowed, at Kshs 1,721,387.
58. There was discrimination in continuity, even after the Claimant made demand for payment. Discrimination did not cease. The arrears ought to have been paid as soon as the money was made available by the National Government. The Claimant made demands on June 8, 2020, July 24, 2020, November 19, 2020, and only received a reply from the Respondent on April 30, 2021, declining payment. No reasons, not even the ones advanced by the Respondent in this Claim, were expressed in the reply declining payment. The Claimant's colleagues, were paid clinical allowances in arrears.
59. The Claimant is granted general damages for discrimination, in the sum of Kshs 500,000.
60. Costs to the Claimant.
61. The Deputy Vice-Chancellor, Human Resource and Administration, wrote to KMPDU on June 29, 2020, acknowledging receipt of funds from the National Government, to implement the return-to-work agreement. Funds were available for disbursement, on June 29, 2020. The Claimant did not receive his dues. He amended his Claim to include a prayer for interest on the principal amount, from June 29, 2020. The Court is persuaded that the Claimant merits interest on the clinical allowances, at court rate, from June 29, 2020, till the amount is paid in full. Interest is granted on the arrears of clinical allowances of Kshs 1,721,387, at court rate, from June 29, 2020, till payment is made in full.
62. Interest on general damages at Kshs 500,000, is granted at the same rate, from the date of Judgment, till payment is made in full.

It is ordered: -

- a. The record is corrected to indicate that the Cause herein is before the E&LRC Nairobi, not before the Magistrate's Court at Nairobi.
- b. It is declared that the Respondent's actions against the Claimant, amounted to discrimination contrary to Section 5 of the Employment Act and Articles 27 and 41 of the Constitution of Kenya.
- c. The Respondent shall pay to the Claimant arrears of clinical allowances at Kshs 1,721,387 and general damages for pay discrimination at Kshs 500,000.
- d. Costs to the Claimant.



- e. Interest on the arrears of clinical allowances of Kshs 1,721, 387, is granted at court rate, from June 29, 2020, till payment is made in full.
- f. Interest on general damages at Kshs 500,000 is granted at the same rate, from the date of Judgment, till payment is made in full.

**DATED, SIGNED AND DELIVERED VIA E-MAIL AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, THIS 31<sup>ST</sup> DAY OF MAY, 2023**

**JAMES RIKA**

**JUDGE**

