



**Mtange & 2 others v Food and Agriculture Organization (FAO) & another  
(Cause 36 of 2020) [2023] KEELRC 1731 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1731 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 36 OF 2020**

**M MBARÚ, J  
JULY 6, 2023**

**BETWEEN**

**JENIPHER MNAMO MTANGE ..... 1<sup>ST</sup> CLAIMANT  
RITAH NANGILA WAFULA ..... 2<sup>ND</sup> CLAIMANT  
ZIPPORAH MORAA RIOBA ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**FOOD AND AGRICULTURE ORGANIZATION (FAO) ..... 1<sup>ST</sup> RESPONDENT  
WORLD FOOD PROGRAMME (WFP) ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimants are adults. The 1<sup>st</sup> respondent is defined as the principal organ of United Nations and the employer of the claimants. The 2<sup>nd</sup> respondent is a subsidiary of the 1<sup>st</sup> respondent. The 3<sup>rd</sup> respondent is the organ of government under which the 1<sup>st</sup> and 2<sup>nd</sup> respondents are working under.
2. The 2<sup>nd</sup> and 3<sup>rd</sup> claimants have filed the claim with the authority of the 1<sup>st</sup> claimant and a copy of such authority is attached to the Memorandum of Claim.
3. The claim is that the 1<sup>st</sup> claimant was employed by the respondents on 1<sup>st</sup> September 2000 as a port/warehouse clerk.
4. The 2<sup>nd</sup> claimant was employed in the year 2000 as the port/warehouse clerk. The last salary paid was Kshs. 100,775.41 per month and employment was terminated on 30 April 2019 while serving as the logistics assistant.



5. The 3<sup>rd</sup> claimant was employed on 28 December 2001 as the port/warehouse clerk. The last salary was Kshs. 100,775.41 per month and employment was terminated on 30 April 2019 while serving as the logistic assistant.
6. Upon employment, the claimants worked for the respondents until 31 December 2006 when they were promoted to the positions of logistic clerk of grade service contract equivalent to FT G2/2. The 3<sup>rd</sup> claimant who was employed in the year 2001 had the appointment extended on 28 December 2001. In the year 2002 the 3 claimant was issued with a revised performance appraisal report.
7. In late 2006 the claimants' contracts were improved and they became pensionable employees.
8. Upon the approval of the human resource directive of the respondents, there was a general service job profile review and the claimants became logistic assistant and in the year 2015 there was a review of salaries with effect from 1<sup>st</sup> November 2015 but such was not effected for the years 2015 to 2018.
9. The claimants filed a complaint with the Administrative Tribunal of the respondents as a means of seeking justice but this did not yield fruits.
10. Through letters dated 9 October 2018 the respondents notified the claimants that their contract would end by 31 March 2019. On 7 March 2019 the claimant sought clarification on whether the affected employees would be compensated for years worked at the salary of a logistic assistant but there was no response.
11. On 25 April 2019 the claimants received letters and notices terminating their employment. The complaints lodged had not been heard and the terminal dues paid did not factor the length of time worked. The respondents gave the reasons to be job titles were non-existent but there was an advertisement issued by the respondent for the same posts.
12. On 13 August 2019 the claimants received notice from the investigator who was also an officer of the respondents asking them to agree to the report sent to the Mombasa office. Later the claimants received judgment of the administrative tribunal of 21 May 2020.
13. There was unfair termination of employment since the complaint filed at the Tribunal and judgment thereof was unfair. The complaint had been that the claimants were logistics assistants but were underpaid under the G4 group and by advertising their positions upon termination of employment was indicative of the fact that such position still existed hence unfair labour practice. The complaint to the Tribunal was justified.
14. The claimants had worked for the respondents for over 18 years and claim as follows;
  - 1<sup>st</sup> claimant
    - a. Salary arrears from 1 July 2016 to 30 October 2016 Kshs. 299,573.60
    - b. Arrears from 1 November 2016 to October 2017 Kshs. 930,518.40
    - c. Arrears from 1 November 2017 to 30 October 2018 Kshs. 976,116
    - d. Arrears from 1 November 2018 to April 2019 Kshs. 497,325.50
    - e. Arrears on leave payable Kshs. 58,164.10
    - f. Arrears on indemnity pay Kshs. 894,499.90
    - g. Severance pay at 15 days for 18 years Kshs. 1,652,967



- h. Compensation Kshs. 2,203,956
- i. Certificate of service.

2<sup>nd</sup> claimant

- a. Arrears on the wage disparity from 1 July 2016 to 30 October 2016 Kshs. 299,573.60
- b. Arrears on the wage disparity from 1 November 2016 to 30 October 2017 Kshs. 930,518.40
- c. Arrears from 1 November 2017 to 30 October 2018 Kshs. 976,116
- d. Arrears from 1 November 2018 to April 2019 Kshs. 497,325.50
- e. Arrears on leave Kshs. 227,586
- f. Arrears on indemnity pay Kshs. 894,499.90
- g. Severance pay at 15 days for 18 years Kshs. 1,652,967
- h. Compensation Kshs. 2,203,956
- i. Certificate of service.

3<sup>rd</sup> claimant

- a. Arrears on the wage disparity from 1 July 2016 to 30 October 2016 Kshs. 299,573.60
- b. Arrears on the wage disparity from 1 November 2016 to 30 October 2017 Kshs. 930,518.40
- c. Arrears from 1 November 2017 to 30 October 2018 Kshs. 976,116
- d. Arrears from 1 November 2018 to April 2019 Kshs. 497,325.50
- e. Arrears on leave Kshs. 100,517.20
- f. Arrears on indemnity pay Kshs. 894,499.90
- g. Severance pay at 15 days for 18 years Kshs. 1,561,135.59
- h. Compensation Kshs. 2,203,956
- i. Certificate of service.

- 15. The 1<sup>st</sup> claimant testified in support of the claim and produced List of documents and further list of documents.
- 16. The claimant was cross-examined by the 3<sup>rd</sup> respondent, Cabinet Secretary, Ministry of Foreign Affairs and confirmed that there is no claim made against this party. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not working with the 3 respondent.
- 17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not enter appearance or file any responses. Despite being served with a Hearing Notice, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not oblige.

There being no claim against the 3 respondent, no witness was called.



18. At the close of the hearing, the claimants and 3<sup>rd</sup> respondent filed written submissions.
19. The claimants submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have no immunity against legal action in Kenya and are bound under Kenyan laws. Under 2002 bilateral agreement (Basic Agreement) between the 2<sup>nd</sup> respondent and the government, Section 26(b) of the Agreement was signed on 15 January 2002 with requirement for the respondents to observe Kenyan laws and regulations. The court is given jurisdiction over all employment and labour relations disputes pursuant to Article 162(2) of the Constitution and such jurisdiction cannot be negated under the Agreement, which in any event allow for application of Kenyan laws.
20. The respondents unfairly terminated the claimants' employment through letters dated 9 October 2018 which informed them that their contracts would be abolished with effect from 31 March 2019.
21. Prior to this notice, the respondents had carried out a global survey of their employees and the Kenya country office staff were informed of job grade reviews and the human resource office was to prepare an implementation action plan to be discussed with the country director and then communicate to the employees, including the claimants. The claimants converted from clerks to logistics assistants in the job titles – G4, G5 and reflected in the contracts of employment.
22. On 22 December 2014 the deputy director, division of the administrative services wrote to the head office of the United Nations fund office in Kenya and forwarded the revised Nairobi – interim local salary scales for 2014 effective November 2014 to October 2015 but this was not implemented. Despite various communications over the matter in this regard, the position and salary increases did not issue.
23. The claimants submitted that they were unfairly terminated in their employments through notices dated 17 October 2018 with effect from 31 March 2019 before resolving grievances lodged at the time. from the year 2006 to 16 July 2015 the claimants were logistics assistants job group G4- G5 which positions were advertised by the respondents as the notices which issued can confirm. This resulted in unfair labour practices.
24. On the grievances lodged, the respondents appointed Barney Ketty as an investigator and an employee and hence not independent. The respondents, as international organisations working under ILO Conventions were aware that the claimant were at the lowest cadre job profiles and who went ahead and advertised their positions while their grievances were pending. There was no valid reason given as required under ILO Convention No.158 and Recommendation No. 166.
25. Under Section 43 of the Employment Act, the respondents had no valid reasons leading to termination of employment. The claimants are entitled to salary arrears from 1 July 2016 to 30 April 2019. The demand for the arrears was consistently made from notice dated 17 June 2005 without success and has culminated to this suit.
26. The leave pay arrears are due based on the increased salary that was not paid. leave entitlements are legal under Section 28 of the Act.
27. The indemnity arrears are due based on facts that the respondents had an indemnity cover for each claimant at end of employment at Kshs. 1,982,029.90 and the claimants were paid less a balance of Kshs. 894,499.90.
28. Severance pay is due on the basis the reasons given for termination of employment were alignment of structure and positions abolished and in terms of Section 41 of the Act for years worked, the claimants are entitled to a severance pay as claimed together with compensation for the unfairness in termination of employment.



29. The 3<sup>rd</sup> respondent submitted that the claimants were initially employed as port/warehouse clerks from 1 September 2000 and their employment was terminated on 30 April 2019 on the grounds that their positions were non-existing. The claimants filed a complaint at the Administrative Tribunal of the respondents which did not yield any fruits.
30. On 7 March 2019 the claimants asked for clarification if they would be compensated for serving as storekeepers which was equivalent to logistics assistants but paid under G2 but there was no response.
31. On the given facts, the 3 respondent is not a proper party herein as employment was with the 1 and 2 respondents, both UN agencies and under Order q rule 10(2) of the *Civil Procedure Rules*, without the proper joinder of the 3<sup>rd</sup> respondent, they ought to be removed from these proceedings. No orders or liability can result from the joinder.
32. The 1 and 2 respondents signed the Basic Agreement with the government on 15 January 2002 which granted it privileges and immunities to facilitate its operations in Kenya and under Article V section 7, the respondents enjoy immunity from every form of legal process, except in so far as in any particular case, immunity shall have been expressly waived.
33. In this instance, the 1 and 2 respondents have no immunity from the claims made by the claimants. Under the Basic Agreement, there was capacity to enter into contracts and under Kenyan law, entered into employment contracts and hence regulated under Kenyan labour laws particularly for locally sourced employees. under Section 26(b) of the Basic Agreement, it was agreed that the respondent would be subject and cooperate under Kenyan law.

### **Determination**

34. The claimant's case is premised on facts that they initially were employed by the 1 and 2 respondents as port/warehouse clerks and following a global staff survey feedback, their positions converted to G4, G5 and change of job profiles for Logistics assistants. There was exchange of new salary scales with a review increments but these were never reviewed for the claimants with effect from November 2014 until termination of employment following notice taking effect on 31 March 2019.  
The claimants have filed extensive documents to support their case.
35. The change of time from clerk to logistic assistant is communicated through an email extract and attachment dated 26 September 2006. This comprised an ongoing conversation back and forth among the respondents' officers.
36. Noteworthy, at this time, the claimants were under their letters of appointed with the extensions.
64. On 22 December 2014 the revised Nairobi –interim local salary scales for 2014 was placed with the head of offices on United Nations, Kenya with the attendant salary scales.
37. This was followed soon thereafter by email dated 9 February 2016 to the effect that as a result of the salary survey conducted in November 2015, the revised salary scales in the G5 and NO categories have been approved as attached. Revised net salaries reflect an across the board increase of 4.6% for the General Service category and 10.1% for National Officer category. The new scales are effective November 2015 and will be implemented in the February payroll.
38. The claimants have produced their service contracts for the period of 1 July 2001 to 31 December 2001 as port/warehouse clerks.
39. Extension of contracts as logistics clerks for the period 28 December 2001 for 6 months.



Extension as logistic clerk 1 January 2002 to 31 December 2002.

40. Of importance is the notice terminating employment dated 9 October 2018 to each claim as Tally Assistant. And letters and notices dated 25 April 2019 for each claimant as Tally Assistant, WFP Kenya.
41. The reference of the claimants as logistics clerk is under the 3 months' contracts last issued and ending on 31 December 2006.
42. In the Amended Memorandum of Claim, the detailed written submissions, save for the case for graduated salary scales over the years through various emails and records, the positions held by the claimants remained as outlined under the written contracts. The change of terms and conditions as required under Section 10 and 13 of the *Employment Act*, 2007 (the Act). upon a written contract of employment that is term bound, fixed and renewable every end of term, other unwritten terms cannot be inferred;
  - (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.
43. This is the case for the claimant who on various date lodged their grievances with the respondents and received the same results. No salary increase.
44. In the letter dated 17 October 2018 part of the grievances raised by the claimants included the non-payment of increased salaries from this background. Under this reference, the claimants define themselves as tally assistants.
45. Under paragraphs 29 of the written submissions, the claimants admits that from the year 2006 to 16 July 2015 they were working as logistics clerks and were elevated to positions of logistics, which was an unfair labour practice. without proof of change of terms, the court must respect the written contracts under which the claimants served. Each had its start and end date.
46. Under page 45 to the Amended Memorandum of Claim, in a communication by Jenniffer Chege, with regard to Generic Job Titles and Grades in the PACE Form it states that;

The issue with the affected Mombasa staff is that they actually have a Job Title – logistics clerks

However, according to the SC survey conducted in 1999, Logistics Clerks are under G4 – G5 Functions which is also in conformity with the APCE Form.

Our 'Logistics clerks' are G2s which is clearly a non-conformance that requires to be corrected. Are other logistic clerks elsewhere so affected?
47. These rhetorical questions do not seem to have received any answers. The court cannot confer a position or position of logistic assistants upon the claimant without any record of the respondents that such position existed and that it had been approved in writing. To claim under such positions for a salary increment would negate the sanctity of the written contracts under which the claimants worked under lastly titled tallying assistants.
48. At page 128 and 136 of the Amended Memorandum of Claim, the 1 claimant's job title is that of a Tallying Assistant - G2 under a fixed term contract.



49. It is settled law that every term contract starts and ends on its terms pursuant to Section 10(3) of the *Act*. Despite the 1<sup>st</sup> and 2<sup>nd</sup> respondents failing to respond to the claims herein, this much can be discerned from the filed records.
50. The claims for salary arrears under the basic wage disparity effective 1 July 2016 to 30 April 2019 has no merit. The positions allegedly held are at variance with the alleged benefits.
51. With regard to the claim for unfair termination of employment, on the one hand, the claimant asserts that employment terminated without good cause and after they had lodged grievances with the Administrative Tribunal, their contracts were terminated. Soon thereafter the same position was advertised which resulted in unfair termination of employment.
52. On the other hand, the claimants assert that they are entitled to severance pay because their contracts were terminated on the grounds that their positions were non-existing. But the same positions were advertised and hence, severance pay is due for the total number of years worked for each claimant.

The letters dated 9 October 2018 are to the effect that;

53. ... following the approval of the Kenya Country Strategic Plan (CSP) covering the period of July 2018 to June 2023, the Country Office initiated an Organisation Alignment process aimed at aligning the organisational structure with the Country Office strategic priorities and funding forecasts. In consultation with the Senior Leadership, Strategic Outcome manager and Functional heads of Units, the Organisation Alignment Committee proposed a new organisational structure for implementation of the CSP objectives. The Country Director has now approved this new structures. Consequently, a significant number of the current positions were affected in terms of either abolishment of posts, reduction in number of posts, upgrade or downgrade of position, change of position profile or position type.

As discussed with you, the position which you currently occupy has been identified for abolishment with effect from 31 March 2019. At the time, several positions in various offices, including newly created positions, will be advertised and you are encouraged to apply to those, which match your skills and competences. A career coaching initiative is underway to help support all staff affected by the realignment during this time of change, including specific career management skills such as interviewing and writing of CVs, and you are encouraged to take advantage of this resource.

Furthermore, according to Staff Rule 302.9.8 unutilised annual leave will be compensated based on your net salary ...

Several matters arise from this communication.

54. Following various consultations and including the claimants, an organisational realignment was found necessary and for strategic priorities and funding forecasts, a significant number of the current positions were affected in terms of either abolishment of posts, reduction in number of posts, upgrade or downgrade of position, change of position profile or position type.
- Also, the positions held by the claimants had been abolished.
55. Again, At the time, several positions in various offices, including newly created positions, will be advertised and you are encouraged to apply to those, which match your skills and competences. The offered was to have a coach to assist with skills in interviewing, CVs and career coaching initiatives.
56. New positions would be advertised and the claimants were encouraged to apply.



57. In terms of Section 40 of the *Act*, the respondents had given the claimants notice of 6 months, the reasons for, and the extent of, the intended redundancy.

Pursuant to Section 45(2) of the *Act*;

- (2) A termination of employment by an employer is unfair if the employer fails to prove—
  - (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - (i) related to the employee’s conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.

58. In *Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 others* Civil Appeal No.46 of 2013, the court of Appeal held that loss of employment by redundancy has to be at no fault of the employee and arises where services of an employee are superfluous through the practice commonly known as abolition of job or occupation and loss of employment.

59. For the new advertised positions, the claimants were encouraged to apply. the 1 claimant testified that immediately upon termination of employment, the respondent posted advertisements for the same positions they were holding. They did not apply. no reasons are given for this lapse.

60. An employer, justified in reorganising its operations in accordance with the law cannot be faulted. Where the claimant felt there was unfair termination of employment, that they had the required skills for the positions advertised at the end of notice issued and terminating their employments, nothing stopped them from applying. Having worked for the respondents for long periods, they stood the best chance. They never applied. They cannot justify such inaction and claim there was unfairness.

61. The final clause of the notice terminating employment was confirmation that the claimants would be paid all outstanding leave days in accordance with the applicable policy.

The claim for unfair termination of employment is not justified.

62. The claim for arrears on leave payable premised on positions not held is not due.

63. However, upon a restructuring, re-organisation of business or realignment of offices and leading to termination of employment for no fault of the employer or employee, under Section 40 of the *Act*, severance pay is due, at the rate of not less than fifteen days’ pay for each completed year of service.

64. The lapse in the 1<sup>st</sup> and 2<sup>nd</sup> respondents attending in these proceedings has denied the court crucial records with regard to the entirety of the duration of service in this regard. The court shall reply on the pleading and records of the claimants that 1 and 3 claimants worked for a total of 18 years and 2 claimants for 17 years. Save, in the Amended Memorandum of Claim, under paragraph (7) the claim is that employment became continuous and pensionable from 31 December 2006. This becomes a crucial date in tabulating the due severance pay from such date to the end of notice on 31 March 2019 a total of 12 full years of service.

65. The last salary earned for each claimant was ksh. 100,775.41 and the minimum 15 days allowed under the Act, each claimant is entitled to Ksh. 604,656 in severance pay.



66. On the claim for indemnity pay, under such a scheme, there are rules and regulations which every employee must address at the end of employment and based on the last payable salary. In this case, the last salaries to the claimants were Kshs. 100,775.41 and they shall pursue the administrators of the scheme, if any claim is pending in this regard.
67. A certificate of service is due to every employee at the end of employment whatever reasons results in termination of the same. Section 51 of the Act give the employee the right to a Certificate of Service.
68. As correctly submitted, there is no claim that arose against the 3 respondent and this ought to have been addressed instantly to avoid attendance costs up to the end of these proceedings. The court appreciates the attendance and submissions of the State Counsel Ms Janet Langat for the 3 respondent.
69. Accordingly, as analysed above, the claims made assessed, judgment is hereby entered for the claimants against the 1 and 2 respondents for severance pay at Kshs. 604,656 each. The Claimants are awarded costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JULY, 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

