



Adoyo v Kenya Post Office Savings Bank (Employment and Labour Relations Cause 672 of 2011) [2023] KEELRC 3289 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3289 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 672 OF 2011
BOM MANANI, J
DECEMBER 14, 2023**

BETWEEN

MARK ADOYO CLAIMANT

AND

KENYA POST OFFICE SAVINGS BANK RESPONDENT

JUDGMENT

Background

1. The parties to this action had an employment relation that commenced on 22nd July 1990 when the Respondent hired the services of the Claimant as a management trainee. From the evidence on record, the Claimant rose through the ranks to management position at the point of his exit. The record also shows that the Claimant resigned from employment through his letter of 30th April 2005 to pursue greener pastures.
2. The dispute between the parties is anchored on two things:-
 - a. First, the Claimant contends that from about 1993, the Respondent placed him in a wrong job grade. As a result, his salary was understated beginning that year. The Claimant contends that efforts to have the Respondent correct this anomaly did not bear fruit. And hence the action.
 - b. Second, the Claimant contends that at the point of his exit from employment, the Respondent unlawfully deducted from him the sum of ksh 160,300.00 allegedly to cover pay in lieu of notice to terminate the contract of service.
3. The Claimant has therefore prayed for judgment against the Respondent for ksh 717,085.00 to cover the underpayments that he allegedly suffered from 1993 till the day that he exited employment in May 2005. In addition, he has claimed the sum of ksh 160,300.00 being the amount that was deducted from his terminal dues to cover the alleged notice period. He has also prayed for interest and costs of the case.



4. The facts of the case are not difficult to follow. According to the Claimant, after his recruitment in 1990, he worked in the position of management trainee at job group 7 until 1993 when the job group was split into two, that is to say job group 7.1 and job group 7.2.
5. After this split, the Claimant contends that freshly hired employees were to henceforth be absorbed at job group 7.2. For other employees at the lowest job group but who had been in service for some while, they were to be placed at job group 7.1. In line with this new structure, the Claimant contends that he was to be placed under job group 7.1.
6. By a twist of fate, the Claimant avers that he was placed in job group 7.2. As a result of this wrong placement, the Claimant contends that his salary was understated from 1993. Whilst he had expected to receive monthly salary of ksh 10,575.00 upon the transition, he ended up with much lower pay.
7. The Claimant contends that this wrong placement affected his career progression throughout his employment. He contends that the wrong placement meant that he was always a grade below what he deserved at any given time during the tenure of his service to the Respondent. As a result, he earned salary that was much less than what he was entitled to for the entire of his contractual period.
8. The Claimant contends that he wrote several letters to the Respondent asking that the matter be addressed but to no avail. This remained the position until he resigned from employment in May 2005.
9. At the point of his exit, the Claimant contends that an internal audit was conducted over his grievance. He asserts that the audit recommended that he be paid ksh 800,000.00 to cover the underpayments.
10. The Claimant's attempts to produce the audit report in evidence were resisted by the Respondent. As a result, the document was not placed on the court record. However, the Claimant called a witness who testified to the fact that an internal audit on his (the Claimant's) issue was undertaken and it was recommended that he (the Claimant) be paid ksh 520,000.00 or thereabouts to cover the underpayments for the duration of his service.
11. The Claimant also stated that on his exit, he issued the Respondent with one month's notice to terminate his employment in line with the termination clause in his letter of appointment. However, when the Respondent processed his terminal dues, it (the Respondent) paid him less an amount that was equivalent to his salary for two months allegedly to cover the balance of the notice period.
12. The Claimant contends that he was not aware of any alteration to the notice clause in his letter of employment. As a result, it was wrong for the Respondent to have deducted from his dues an amount that was equivalent to his salary for two months to cover the alleged shortfall in the notice period.
13. On its part, the Respondent has denied that the Claimant was placed in the wrong job group. According to the Respondent, the Claimant was first placed under job group 7.2 because he had not served for three years to qualify to move to job group 7.1. However, immediately he qualified for upgrade, he was moved to job group 7.1.
14. The Respondent denies that the Claimant suffered the alleged underpayments. According to the Respondent, the only underpayments that the Claimant suffered were in respect of money that was wrongfully deducted from him towards training levy. However, this amount was reimbursed after the matter was addressed.
15. In respect of the notice pay, the Respondent's position is that it circulated an internal memo which altered the period of notice to terminate contracts of service for employees. For employees who had been in service for more than ten (10) years, the notice period was adjusted from one to three months.



16. The Respondent contends that this memo was widely circulated to all employees including the Claimant. Further, it (the Respondent) states that the internal memo was directly shared with the Claimant in his capacity as a member of its (the Respondent's) management in order for him to sensitize employees who were working directly under him on its effect.
17. Finally, the Respondent contends that the instant claim is statute barred. As a result, it (the Respondent) prays that the action be dismissed.

Issues for Determination

18. From the pleadings and evidence on record, the following emerge as the issues for determination in the cause:-
 - a. Whether the Claimant's suit is time barred.
 - b. Whether the Claimant is entitled to the reliefs that he seeks through the Memorandum of Claim.

Analysis

19. The first issue for consideration relates to whether the claim is statute barred. The Respondent contends that under section 90 of the *Employment Act*, any suit to enforce a right under a contract of service must be filed within three years of the cause of action arising.
20. The Respondent contends that the Claimant having resigned from office in April 2005, he ought to have filed this case within three years of that date. However, the case was filed in May 2011, more than three years down the line. As such, the matter is time barred.
21. The *Employment Act* which the Respondent has invoked to advance this argument came into force on 2nd June 2008. This was long after the Claimant's contract had been closed through resignation. Therefore, section 90 of the Act cannot apply retrospectively to the instant dispute.
22. The law on limitation of actions that was in force when the Claimant resigned from employment is the *Limitation of Actions Act*. Section 4 of the Act bars the filing of suits based on contracts after the lapse of six years from the date of accrual of the cause of action.
23. The Claimant contends that breach of his employment contract happened in 1993 when the Respondent erroneously placed him under job grade 7.2 instead of job grade 7.1. As a result, he began receiving salary underpayments on account of this wrong placement in 1993.
24. On its part, the Respondent admits that the Claimant was initially placed under job group 7.2 in 1993 before he was subsequently moved to job group 7.1. The Respondent denies that the Claimant suffered underpayment as a result.
25. From this evidence, it is evident that the Claimant's contention that he suffered underpayments as a result of wrong job grade placement commenced in 1993. Therefore, the cause of action in this respect accrued in 1993 when the wrong placement was allegedly done and not April 2005 when the Claimant tendered his letter of resignation.
26. The Claimant filed this action in May 2011, approximately eighteen (18) years from the date that he was allegedly placed in the wrong job group which triggered the underpayments which he now seeks to recover. Clearly, this suit was filed well outside the six (6) year period that is prescribed under section 4 of the *Limitation of Actions Act*. Thus, I find that the claim for underpayment of salary as a result



- of wrong job placement was time barred at the time that the Claimant instituted the instant case. It is so declared.
27. On the other hand, the decision to effect deductions from the Claimant's terminal dues allegedly to cover the two months' notice to terminate his contract was sanctioned through the Respondent's letter of 13th May 2005. Thus, the cause of action in this respect accrued on 13th May 2005.
 28. The record shows that the instant claim was filed on 4th May 2011, a few days before the six (6) year period lapsed from 13th May 2005. Consequently, this part of the claim is not time barred. It is so declared.
 29. The next question for determination is whether the Claimant is entitled to the reliefs that he seeks. For the reason that the claim for underpayment of salary was statute barred, it collapses. Therefore, the Claimant is not entitled to any relief in respect of it.
 30. In respect of the two months' notice pay, the Claimant's case is that his letter of appointment required him to issue the Respondent with notice of one month in the event that he wished to terminate his contract of service. Alternately, the letter required him to pay the Respondent an amount that is equivalent to his salary for three months in lieu of the one month's notice.
 31. The Respondent does not deny that this was the initial position in respect of the period of notice to terminate the contract of service between the parties. However, it (the Respondent) contends that the position was subsequently changed through its internal memo dated 10th March 2004 which altered the clause on notice to terminate a contract of service. According to the Respondent, this memo was issued to all of its employees.
 32. According to the Respondent, although its policy initially provided for a notice to terminate period of one month or payment of a sum of money that is equivalent to salary for three months in lieu of such notice, the bank decided to revise the clause so as to enlarge it to three months' notice. In effect, either party who wished to terminate a contract of service that had been in force for ten (10) years and above had to either give notice of three (3) months of such intention or pay the other an amount that was equivalent to salary for three (3) months.
 33. According to the Respondent, the internal memo was widely circulated and effectively varied the Claimant's contract in this respect. Therefore, he was bound by this new arrangement.
 34. The Respondent contended that on the Claimant's exit, he only gave notice for one (1) month. Therefore, it (the Respondent) was entitled to recover from him an amount that was equivalent to his salary for two (2) months to cover the shortfall in the notice. Hence the decision to recover the sum of ksh 160,300.00 from the Claimant.
 35. On his part, the Claimant contends that he was unaware of the changes to the notice clause. The Claimant contends that he was not issued with the internal memo dated 10th March 2004. As such, the Respondent could not have relied on the memo to alter his contract.
 36. The law on contract is that once parties agree on the terms and conditions of a contract, neither of them can unilaterally vary such terms to the detriment of the other. The terms can only be varied with the concurrence of both parties (*County Government of Migori v Hope Self Help Group* [2020] eKLR).
 37. The Respondent contends that it varied the termination clause in contracts of service for its employees through a unilateral internal memo that was allegedly widely circulated to all employees including the Claimant. However, there is no evidence that individual employees were engaged over the decision to vary the clause. As such, it is evident that by this memo, the Respondent attempted to unilaterally vary



a term of contract for its employees including the Claimant without their concurrence. Such attempt was unlawful and of no legal consequence. It is so declared.

38. Therefore, the decision by the Respondent to deduct ksh 160,300.00 from the Claimant's terminal dues to cater for the shortfall in the unilaterally revised notice period was illegal. As such, the Claimant is entitled to recover this sum from the Respondent together with interest thereon at court rates from the date of the illegal debit of his account, that is to say 13th May 2015. It is so declared.

Determination

39. After evaluating the evidence on record together with the applicable law, the court makes the following findings:-
- a. The Claimant's claim for ksh 717,085.00 to cover salary underpayments is time barred. Accordingly, it is declined.
 - b. The Respondent's decision to recover from the Claimant ksh 160,300.00 on account of deductions towards pay in lieu of notice to terminate the Claimant's contract of service was unlawful. Accordingly, the Respondent is ordered to reimburse the Claimant this amount (ksh 160,300.00).
 - c. The above amount shall attract interest at court rates from the date of the unlawful deduction (13th May 2005).
 - d. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 14TH DAY OF DECEMBER, 2023

B. O. M. MANANI

JUDGE

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

