



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 178 OF 2018

RACHAEL NJAMBI THUO.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF NYANDARUA.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Memorandum of Claim on 7th June, 2018 contending nonpayment and reduction of her House allowance. The Claimant prays for the following remedies: -

- a) That the Respondent do pay the balance on house allowance for all the months worked.**
- b) That the Respondent do continue paying the house allowance at Kshs.40,000 per month as the letter of appointment**
- c) General damages**
- d) Interest on prayer (a) above at Court rate until payment in full.**
- e) Costs of this suit**
- f) Any other or further relief that this Honorable Court may deem fit and just to grant.**

2. The summary of the facts of this case is that the claimant was employed by the Respondent on 9th September, 2015 as the Assistant Director Pre-Primary and Childcare in the ministry of Education, Culture and Social Services. Among the emoluments the Claimant was entitled to was house allowance of Kshs. 40,000 which the claimant alleged informed her of the need to apply for the said Job and resigned from her previous employment.

3. Upon receiving her first salary she noted that her house allowance was reduced to Kshs.13, 600 without Notice or consultation.

4. The claimant together with her colleagues inquired on the reduction of allowance vide the letter of 25.11.2015 which did not receive any response. Several correspondences ensued therefrom however that the Respondent did not give any explanation of the reduced house allowance.

5. The claimant contends that the Respondent breached the contract forcing her to seek redress from this Court.

6. The Respondent entered appearance on the 31st July, 2018 and filed a response to the claim on the 19th October, 2018.

7. The Respondent avers that the determination of salary and allowances i.e house allowance for public service employees is determined by salaries and Remuneration Commission (SRC). It is stated that the reduction was informed by the direction given by SRC vide the letter dated 10.12.2014 and the letter of 11.08.2015 directing the Respondent among other Government institutions to implement the house allowance reduction.

8. The said reduction of house allowance was communicated to all employees including the claimant vide a notice pinned on the Respondent's Notice Board.

9. The Respondent therefore contends that the reduction was done by SRC and therefore the claim by the claimant is not warranted.

Hearing.

10. The claimant testified as CW-1 and adopted her witness statement dated 23.3.2018. She stated that she accepted the job offer on the strength of the house allowance which was offered by the respondent and signed the letter of acceptance in September, 2015. She avers that she noted her house allowance was reduced when she first received her pay slip, that was issued few months later and her efforts to notify the appointing authority of the anomaly fell on deaf ears.

11. Upon cross examination CW-1 testified that she accepted the appointment on the 26.8.2015 and admitted that she is a public officer bound by the public officers Ethics Act. She avers that she is not aware of the circular from SRC reducing house allowance for public officers. Finally, that she only joined the Respondent because of the House allowance which was more favorable than her previous employment.

12. The Respondent on the other hand called one witness, Beatrice Macharia, as RW-1, who is the acting County Attorney who adopted her witness statement dated 5.3.2020 and produced the list of documents.

13. The witness testified that the Respondent did not have any hand in reduction of house allowance but only acted on directive from the Salaries and Remuneration Commission and the said reduction was commuted to all affected employees through the Human Resource department also that the claimant was not the only affected employee but all employees.

14. Upon cross examination, RW-1 testified that the claimant was employed under the old house allowance and that the reduction was communicated to all affected persons however that there was no evidence of the said communication.

Claimants Submissions.

15. It was submitted for the claimant that the claimant entered into an employment contract with the Respondent on the basis of the stipulated terms and remuneration therein and the change of remuneration ought to have been communicated to the claimant and or the claimant ought to have been consulted before the said changes of remuneration were effected. It was argued that the Kshs.13,600 paid to the claimant by the Respondent as House allowance is not indicated in the SRC circular produced in Court as the house allowance for former municipalities is Kshs.21,000 and other areas is Kshs.16,800 therefore that even if SRC implemented the circular the Claimant was still underpaid her house allowance.

16. It was submitted that the reduction of house allowance was in breach of terms of employment contract which amounts to violation of Article 42 of the Constitution. In this the claimant cited the case of **Kenya County Government Workers Union V Wajir County Government and Another [2020] eKLR** and the **ELRC Petition No.29 of 2016 Maxwell Miyawa & 7 others V JSC [2017] eKLR**.

17. Accordingly, it was argued that the variation of terms of employment by the employer unilaterally is not only unlawful but also in violation of right to fair labour practices as it took away the claimant's vested rights and entitlement.

Respondent's Submissions.

18. The Respondent submitted from the onset that the Salaries and Remuneration Commission is empowered under Article 230(4) of the Constitution to set and review remuneration and benefits of all state officers.

19. Accordingly that the House allowance was reduced by the Salaries and Remuneration Commission and the Respondent had no option but to execute the SRC directive and to order otherwise would not meet the ends of justice as the Respondent cannot be forced to pay the initial house allowance which was reviewed. It was argued that the Respondent would not be in any position to effect the Court Orders. It was also argued that Court does not act in vain and in this they cited the case of **Kalya Soi Farmers Cooperative society V Paul Kiru & Another [2013] eKLR**.

20. The Respondent then submitted that it did not do any wrongful act therefore that the remedies sought are not warranted and prayed for the claim to be dismissed.

21. I have examined the evidence and submissions of the parties herein. The claimant was employed vide an appointment letter dated 24th August, 2015 which set out her salary and allowances. House allowance was indicated to be 40,000/=. The claimant received the letter and signed the acceptance letter on 26th August 2015. It is also apparent that though the appointment letter indicated that the house allowance payable to be 40,000/= the pay slips show that the claimant was paid a house allowance of 15,200/=. The claimant amongst others inquired to their appointing authority as to why their house allowance had been reduced but there was no response to the inquiry.

22. The respondents contend that the reduction in house allowance was informed by a circular from SRC dated 10th December, 2014 and another dated 11th August 2015. It is apparent that these circulars were in force at the time the claimant was appointed on 9th September, 2015 but which the respondents failed to consider at the time due to some error or omission.

23. The claimant indeed received her appointment letter and her emoluments were indicated which she accepted.

24. The respondent had a right to alter the claimant's emoluments if indeed there was an error in the appointment letter but the law is clear on how the alteration should be done. Section 10 (5) of the Employment Act 2007 states as follows;

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the

contract to reflect the change and notify the employee of the change in writing.

25. Indeed under the law an employment contract can only be altered after consultation with the employee. There is no indication that the respondent upon realization that there was an error on the appointment letter and in view of the circular from SRC informed the claimant of the changes.

26. Their silent was loud and they didn't inform the claimant as to why they were paying her less house allowance deviating from the appointment letter provision. This was done in breach of the law.

27. In the circumstances I find that the respondent are guilty of breach of contract between them and the claimant and I award the claimant damages equivalent to 1million for the breach.

28. In order to avoid a further miscarriage of justice, I direct the respondents to further seek concurrence with the SRC in order to correct the mistakes already done in altering the house allowance of the claimant.

29. Costs of the case to the claimant.

DATED AND DELIVERED IN OPEN COURT THIS 20TH DAY JANUARY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kabata for respondent – present

Kamau for claimant – present

Court assistant - Fred