



**Steve v Kenya Ports Authority (Cause E008 of 2020)
[2022] KEELRC 1471 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1471 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E008 OF 2020**

AK NZEI, J

MAY 26, 2022

BETWEEN

ISAIAH OMUYOMA STEVE CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The suit herein was filed by the Claimant on 26th October 2020 vide a memorandum of claim dated 22nd October 2020. The Claimant pleaded:-
 - a) that at all material time, the Claimant was employed by the Respondent as a Permanent Way Inspector Grade PA5, which was later restructured to Grade HM-4 and later HM-3, a position he held upto 2013.
 - b) that sometimes in 2013, after the position of the Senior Permanent Way Officer fell vacant, the Respondent requested the Claimant to perform the duties of Senior Permanent Way Officer Grade HM-2 Post No. 810-2201, on acting capacity, which the Claimant did for a period of six months, and thereafter continued with the said duties upto his retirement on 26th May 2020.
 - c) that as at the time of the Claimant's retirement, the position of HM-2, in which the Claimant acted for seven years, was designated as HM-3 personal to the Claimant, with the Respondent still paying the Claimant a basic salary of ksh.132,300 instead of ksh.137,010 as per the HM-2 salary grade.
 - d) that the Claimant diligently performed his duties as the Permanent Way Officer Grade HM-2 for seven years, and his performance was not put to question, and that he is entitled to salary increment as well as allowances for the position of Permanent Way Officer Grade HM-2 for a period of seven years.



- e) that the Claimant was entitled to the salary accruing to the post of HM-2 after the expiration of six months' probation period during his employment with the Respondent for seven years amounting to ksh.3,293,599.98.
 - f) that the Claimant was entitled to the allowances ordinarily accruing to the post of Senior Permanent Way Officer Grade HM-2 and not any other lower cadre and as such claimed a sum of ksh.839,433.00 being the allowance variance accruing to the Claimant during the period he acted as such.
 - g) that the Claimant is entitled to the acting allowance as required under Section 10 of the [Employment Act](#).
 - h) that the Claimant was underpaid for seven years, as the basic salary of ksh.132,300 paid to him during this period was below the minimum basic wage for the position of Senior Permanent Way Officer Grade HM-2, which was Ksh.137,010 per month.
 - i) that non payment to the Claimant of salary variance and allowance variance for work done for seven years was in violation of mandatory provisions of the [Employment Act](#) 2007, the Labour Institutions Act 2007, the Regulation of Wages and Conditions of Employment 1998 and the Kenya Ports Authority Staff Manual.
2. The Claimant tabulated the pleaded salary and allowance variance at paragraph 12 of his Memorandum of Claim and sought the following reliefs:-
- a) a declaration that the Claimant was entitled to salary for the position of Senior Permanent Way Officer Grade HM-2 of Ksh.137,010 per month.
 - b) a declaration that the Claimant was entitled to allowance accruing to the position of Senior Permanent Way Officer Grade HM2.
 - c) a declaration that the Claimant was underpaid by the Respondent for seven years of his employment.
 - d) an order directing the Respondent to pay the Claimant:
 - i) a sum of ksh.3,295,599.98 being underpayment for seven years.
 - ii) a sum of ksh.839,433 being the variance of allowances for seven years.
 - e) a declaration that the Claimant is entitled to Retirement Benefits accruing to the Post of Senior Permanent Way Officer Grade HM-2.
 - f) costs of the cause.
3. The Respondent filed Response to the Memorandum of Claim on 18th November 2020, dated 17th November 2020, vide which it denied the Claimant's claim and pleaded:-
- a) that the request put up by the Claimant's Head of Department for the Claimant to undertake duties of Senior Permanent Way Officer Grade HM2 was declined by management on the basis that the Claimant did not meet Scheme of Service requirements.
 - b) that the Claimant was being paid at his Grade HM-3 and was put to strict proof as to whether he was confirmed to Grade HM-2.
 - c) that the Claimant held the position of Permanent Way Officer Grade HM-3 and was entitled to salary accruing to that post.



- d) that the Claimant held the position of Permanent Way Officer HM-3 and allowances due to him were settled.
4. The Respondent further pleaded:-
- a) that the Claimant was employed in the services of the Respondent on 2nd August 1994 as a Permanent Way Inspector Grade PA5 and was later promoted to Permanent Way Inspector Grade PA4 with effect from 17th November 2001, which subsequently translated to the post of Permanent Way Inspector Grade HM-3 with effect from 1st September 2002.
- b) that vide a letter dated 26th July 2013, the Head of Civil Engineering requested for an opportunity to have the Claimant act against the position of Senior Permanent Way Officer Grade HM-2, which request was declined as the Claimant did not meet the requirements stipulated in the Scheme of Service.
- c) that this decision was communicated to the Claimant's Head of Department on 18th September 2013.
- d) that the Claimant cannot claim accrued benefits of acting appointment as appointment on acting capacities are valid only upon approval by management and the Respondent's Board of Directors.
- e) that it is the employer's prerogative to develop a Scheme of Service and determine working conditions of employees as is enshrined in the Employment Act and the Constitution of Kenya.
- f) that prayers sought are unremitted.
5. When trial opened on 15th November 2021, the Claimant adopted his witness statement dated 22nd October 2020 as his evidence in chief, and produced in evidence the thirteen documents listed on his list of documents dated the same date. The Claimant's said witness statement substantially replicated the averments made in his Memorandum of Claim.
6. The Claimant further testified, both in chief and under cross examination, that his first document (exhibit) was the letter vide which he was posted to the higher post, that his benefits were calculated based on the lower post, but not on the senior post on which he acted. The Claimant further testified:-
- a) that he did not receive any letter of appointment regarding the senior post.
- b) that he, the Claimant, was qualified for the higher post as he had professional qualifications, long service and experience.
- c) that upto his retirement, he earned the salary for the lower post, that is the Permanent Way Officer (HM-3).
7. The Respondent's case was heard on 1st February 2022, and the Respondent called one witness, one Joseph Cheruiyot Langat (RW-1), a Senior Human Resource Officer charged with the duties of recruitment and appointment of staff, promotions and transfer of staff at the Respondent Authority.
8. RW-1 adopted his witness statement dated 17th March 2021 as his sworn testimony and produced as exhibits the nineteen documents listed on the Respondent's list of documents dated the same date. The Respondent (RW-1) further testified:-
- a) that the Claimant retired on 26th May 2020 at Grade HM-3, this being his third promotion as from 1st September 2002.



- b) that the Claimant was never appointed to the post of Senior Permanent Way Inspector (Officer).
 - c) that on 26th July 2013, the Claimant's Head of Department wrote a letter recommending the Claimant for the position of Senior Permanent Way Inspector Grade HM-2 in acting capacity, but the request was declined by the Respondent's Managing Director whose decision in such matters is usually informed by the Scheme of Service, as the Claimant lacked a degree in Civil Engineering and Higher National Diploma in Civil Engineering which were necessary qualifications for the post proposed.
 - d) that this decision was conveyed to the Claimant's Head of Department vide a letter dated 18th September 2013 and the Claimant's Head of Department appealed this decision vide a letter dated 23rd May 2014.
 - e) that the Head of Department's appeal was rejected by the Managing Director, and the decision was conveyed to the Claimant's Head of Department vide a letter dated 10th July 2014.
 - f) that the Claimant's benefits were calculated based on his designation and job grade at the point of exit.
9. Having considered the pleadings filed and evidence presented by both parties, issues that emerge for determination, in my view, are as follows:-
- a) whether the Claimant was appointed by the Respondent to act as Senior Permanent Way Officer, and if so, for how long did he act.
 - b) whether the Claimant was ever confirmed to the position of Senior Permanent Way Officer?
 - c) whether the Claimant was a victim of unfair labour practice.
 - d) whether the Claimant is entitled to the reliefs sought.
10. On the first and second issues, the Claimant was shown to have been employed by the Respondent vide a letter of appointment dated 15th November 1995 (Respondent's exhibit no. 1) and was on 12th April 2012 translated to the post of Permanent Way Inspector Grade HM4 with effect from 20th January 2012. With this translation, the Claimant was allocated a new post Number, being 810-2202. His salary was to remain the same.
11. Vide a letter dated 6th February 2013 (Respondent's exhibit no. 3), the Claimant was notified by the Respondent that his salary had been reviewed with effect from 1st October 2012, and that his monthly salary would be ksh. 132,300 and a house allowance of ksh.43,000.
12. Vide a letter dated 26th July 2013 (the Respondent's exhibit no. 4), the Respondent's Head of Civil Engineering (Department) notified the Respondent's Head of Human Resource of internal posting of staff that would take place with immediate effect, whereby the Claimant would take over the position of Senior Permanent Way Officer Grade HM2 Post No. 810-2201, while the holder of that post, a Mr. David Arika, would be deployed to the position of Senior Civil Engineer (Marine Structures) Grade HM2 on Post No. 810-3002. The author of this letter reminded the Head of Human Resource that the changes were part of the reviewed organizational structure, and requested that records be amended as appropriate.



13. On 4th September 2013, the Respondent's Head of Human Resource wrote an Internal Memo to the Respondent's Managing Director, (through the General Manager Human Resource and Management) which reads in part:-

“the Head of Civil Engineering through the General Manager Infrastructure Development has vide his letter REF MEN/5/5/1 dated 26th September 2013 effected the following staff changes:-

1. Mr. David Arika
2. Mr. Steve Omuyoma, Permanent Way Inspector Grade HM3, C/No. 90523 is being deployed to take over the duties of Senior Permanent Way Officer Grade HM2, Post No. 810- 2201 in acting capacity.

Observation/recommendation

From the above observation, it is observed that Mr. Omuyoma does not meet the requirements for his recommended position. It is therefore recommended that he be paid duty allowance at the rate of ten percent (10%) of his substantive basic salary with effect from a current date....

The above recommendation is made in line with Section B.13(b) of the Human Resource Manual 2011 which provide for payment of duty allowance to an employee who is called upon to perform duties of a higher post but is not qualified.

It is important to note that acting appointments at Grade HM2, and above require recommendations to the Board by the Managing Director as per Clause B.12(c) of the Human Resource Manual 2011...”

14. The Internal Memo dated 4th September 2013 was produced in Court by the Respondent as its exhibit no. 5.
15. The Respondent's Management declined the recommendation for the Claimant to be appointed to act on the post of Senior Permanent Way Officer Grade HM2, and this decision was conveyed to the Claimant's Head of Department vide a letter dated 18th September 2013 (Respondent's exhibit no. 6). Despite two appeals by the Claimant's Head of Department (Respondent's exhibit nos. 7 and 10 respectively), the Respondent's management still declined the Claimant's appointment on account of lack of requisite qualifications, but said nothing over the Claimant's posting to the senior post (in acting capacity), which had already been effected.
16. It is my finding that the Claimant was, with effect from 26th July 2013, appointed to the post of Senior Permanent Way Officer Grade HM2 in acting capacity, but his appointment was not confirmed by the Respondent's management on account of lack of requisite qualifications, a fact which was appreciated by the Claimant's Head of Department in his letter dated 23rd May 2014 (Respondent's exhibit no. 9). This back and forth of correspondence between the Claimant's Head of Department and the Respondent's management is shown to have continued until 23rd September 2018 (Claimant's exhibit no. 5).
17. By his letter to the Managing Director dated 23rd September 2018 (Claimant's exhibit no. 5), the Respondent's General Manager Infrastructure Development confirmed that the Claimant had been performing the duties of Senior Permanent Way Officer diligently even though he had not been confirmed and had not been reaping any benefits that come with the post. Indeed, none of the parties herein exhibited any evidence to show that the Claimant was ever recalled from the post of Senior Permanent Way Officer, to which he was posted on 26th July 2013 on acting capacity, after the Respondent's management declined to confirm him to that post. The Claimant testified that he



remained on this post until his retirement on 26th May 2020. This evidence was not controverted by the Respondent.

18. It is my finding that the Claimant remained on the post of Permanent Way Officer Grade HM2 in acting capacity from 26th July 2013 until his retirement on 26th May 2020, though the Respondent's management never formally confirmed his posting to this position. He acted on this post for a period of six years and ten months.
19. On the third issue, the Respondent did not tell this Court why it would refuse to confirm the Claimant's posting to a higher job grade and at the same time hold him to that position in acting capacity without paying him salary and allowances that come with such higher office for a period of six years and ten months. If this is not unfair labour practice, then what is? It is my finding that the Claimant was subjected to unfair labour practice by the Respondent, and was therefore a victim of such practice. He is entitled to be paid for the work he did on the higher job grade in acting capacity.
20. On the fourth issue, other than the prayers for declaratory orders, the reliefs sought by the Claimant are alleged accrued salary underpayment for seven years and allowance variance for seven years. These are of the nature of special damages and must be strictly proved. None of the parties, however, presented to this Court the relevant Scheme of Service or such other relevant document showing the salary and allowances of a Senior Permanent Way Officer Grade HM2 during the period between 26th July 2013 when the Claimant was posted to that post in acting capacity and 26th May 2020 when he retired from service. The Claimant did not even bother to cross examine the Respondent's witness (RW1) on this issue. So, how is the Court expected to compute and award the alleged salary underpayment and allowance variance even after finding that the Claimant is entitled to payment for the work he did on the higher job grade in acting capacity?
21. As already stated at paragraph 17 of this judgment, the Respondent's Head of Human Resource wrote to the Managing director on 4th September 2013 (Respondent's exhibit no. 5) and requested that the Claimant be paid ten percent (10%) of his substantive basic salary as duty allowance with effect from a current date in accordance with Section B.13 (b) of the Respondent's Human Resource Manual; in view of his lack of qualification. On 2nd April 2015, the Head of Human Resource wrote to the Managing Director again (Respondent's exhibit no. 11) requesting that the Claimant be paid 15% of his substantive basic salary with effect from a current date. He stated:-

“...kindly consider and approve Mr. Omuyama's acting appointment as Senior Permanent Way Officer Grade HM2 with subsequent payment of acting allowance at the rate of 15% of his substantive basic salary with effect from a current date based on the justification by the Head of Civil Engineering.”
22. It is only fair and just that the Claimant's claim for payment for work done on a higher job grade upon posting to that post, but without formal confirmation to the post, be computed based on the Respondent's Head of Human Resource's proposals. On 13th September 2013, he proposed payment at the rate of 10% of the Claimant's basic salary and on 2nd April 2015, he proposed payment at the rate of 15% of the Claimant's basic salary. I will adopt the latest proposal.
23. No proposal was made by the Respondent's Head of Human Resource on allowances payable to the Claimant while acting on the higher post. The Claimant did not present any evidence on allowances attached to the post of Senior Permanent Way Officer on which the Claimant acted from 26th July 2013 to 26th May 2020 when he retired, for six years and ten months (not seven years as contended by the Claimant).



24. Consequently, the claim for a declaration that the Claimant was entitled to salary for the position of Senior Permanent Way Officer Grade HM2 of ksh.137,010 per month and for underpayment for seven years is declined. I make a finding that the Claimant was entitled to 15% of his substantive basic salary of ksh.132,300 per month, payable from August 2013 to May 2020 (six years and ten months).
25. The prayer for a declaration that the Claimant is entitled to allowance accruing to the position of Permanent Way Officer Grade HM2 and claim for payment of the same are declined. As already stated in paragraph 20 of this Judgment, that claim was not proved.
26. Non-payment to the Claimant for work done in acting capacity on a higher job grade for a period of six years and ten months amounted to a continuing injury under Section 90 of the *Employment Act* 2007, which ceased upon the Claimant's retirement on 26th May 2020. The suit herein was filed on 26th October 2020.
27. Ultimately, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered in favour of the Claimant against the Respondent for a sum of ksh. 1,627,290 being 15% of the Claimant's substantive monthly salary of ksh.132,300 which ought to have been paid to him for a period of six years and ten months.
28. The Claimant is also awarded costs of the claim and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Wafula for Claimant

No Appearance for Respondent

