



REPUBLIC OF KENYA



**Esevwe & 57 others v University Of Nairobi (Cause 511 of 2016)
[2022] KEELRC 4117 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4117 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 511 OF 2016
M MBARÚ, J
MAY 19, 2022**

BETWEEN

FRANK ESEVWE	1 ST CLAIMANT
MIZPAH M. NDAMBUKI	2 ND CLAIMANT
CHARLES MUSYOKA	3 RD CLAIMANT
MAURICE O. OMAR	4 TH CLAIMANT
GILBERT A. ESIARANDA	5 TH CLAIMANT
SAMUEL W. GAKUNGA	6 TH CLAIMANT
DANIEL MAINA	7 TH CLAIMANT
HENRY MWANGI	8 TH CLAIMANT
LAZARO N. OTONCHI	9 TH CLAIMANT
CHARLES K. MBERIA	10 TH CLAIMANT
ALFRED LIHANDA	11 TH CLAIMANT
APOLLO A. ALOO	12 TH CLAIMANT
KENNEDY ONDITI	13 TH CLAIMANT
TITUS MUKAME	14 TH CLAIMANT
EPHANTUS MUGO	15 TH CLAIMANT
DAVID M. NDUNGU	16 TH CLAIMANT
HERMAN M. MWAZAME	17 TH CLAIMANT
DOMINIC M. MBOGO	18 TH CLAIMANT
KIPROP PHILIP	19 TH CLAIMANT



MATHEW RUTO	20 TH CLAIMANT
JOHN MURIITHI	21 ST CLAIMANT
CHARLES ONJWANG	22 ND CLAIMANT
ALFRED MULEI	23 RD CLAIMANT
ROBERT MASAKA	24 TH CLAIMANT
BEDAN MUMIRA WAITHAKA	25 TH CLAIMANT
PAUL NJOROGE	26 TH CLAIMANT
PETER MUTIRIA GATUNGURU	27 TH CLAIMANT
EDWIN KABUI MUIHU	28 TH CLAIMANT
ISAIA M. MOGOI	29 TH CLAIMANT
CARVIN M. NYARENCHI	30 TH CLAIMANT
IBRAHIM ORINA BIBAO	31 ST CLAIMANT
HENERY EDEWA	32 ND CLAIMANT
JAMES RUHARA	33 RD CLAIMANT
HILLARY NGARE	34 TH CLAIMANT
NICHOLAS MWANGI	35 TH CLAIMANT
KARIUKI KINUTHIA	36 TH CLAIMANT
SAMUE NGUGI	37 TH CLAIMANT
WACHIRA	38 TH CLAIMANT
PETER NJESH	39 TH CLAIMANT
PROTUS O. EGESSA	40 TH CLAIMANT
PETER ANUNDA OCHARO	41 ST CLAIMANT
FLAVIAN MAINA	42 ND CLAIMANT
STANLEY NGUGI	43 RD CLAIMANT
OYUGI FREDRICK	44 TH CLAIMANT
EDWARD MWANZA	45 TH CLAIMANT
ISAAC MOGOI	46 TH CLAIMANT
BENARD ONGANGA	47 TH CLAIMANT
NICHOLAS OSUSU	48 TH CLAIMANT
CHARLES MDATI	49 TH CLAIMANT
ELIVANSON K. KAREGA	50 TH CLAIMANT
DOUGLAS MWAURA	51 ST CLAIMANT



JAMES WANYAMA	52 ND CLAIMANT
ERICK MONDI	53 RD CLAIMANT
FRANCIS J. NDIRANGU	54 TH CLAIMANT
FRANCIS NYABENDE	55 TH CLAIMANT
NYABUTO MONDA OGOTI	56 TH CLAIMANT
KENNEDY ORAYO	57 TH CLAIMANT
NEWTON MORIASI	58 TH CLAIMANT

AND

UNIVERSITY OF NAIROBI	RESPONDENT
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JUDGMENT

1. The claimants are employees of the respondent. The respondent is registered by the University of Nairobi Charter.
2. The claimants are employed by the respondent as drivers. There was a trade union that represented employees in the public universities over the Collective Bargaining Agreement (CBA) covering the period of 2010/2013 and the dispute was resolved and reduced into an agreement signed on March 19, 2014 and signed by the Vice Chancellor for the respondent.
3. The claimants were employed by the respondent with a minimum education of 'O' level and the respondent being a public institution was bound to follow grading and pay similar to that of public service employees. The claimants were however lumped up in one pay point without any job progression or clear salary structure and whereas some remained in the service of the respondent for many years, the entry point for any recruited drivers remained the same.
4. The claimants have only benefited from the minimum wage guidelines gazetted by the Ministry as opposed to those recruited with a minimum 'O' level grade and terms applied in other sectors.
5. The claim is that the respondent has been discriminating against the claimants and has not appreciated their services. The respondent failed to implement the minimum wage guidelines in notices of 2012 and 2015 forcing the claimants to file Cause No 817 of 2015 where the court ordered that the payment of backdated house allowance addressed in agreement dated March 19, 2014.
6. The respondent has since issued notices to the claimants that it will reduce house allowances from Ksh 17,013 to Ksh 10,317 with effect from March 1, 2016. The claimants have been earning a house allowance of Ksh 17,013 and the reasons for reduction is not given or justified.
7. Under the agreement between the respondent and the trade union, parties had agreed that house allowance be paid at Ksh 20,416 but the respondent paid Ksh 17,013 and before they could claim the underpayments, the new notice to further reduce the allowance was issued. Under section 18 of the *Employment Act*, the wages of an employee cannot be reduced without negotiations or consent of the employee. The reduction of house allowance only targets the claimants which is a discriminatory act and claim the following;



- a) An order of declaration that the purported reduction of the house allowance is discriminatory, unlawful and the same be declared null and void and has no consequence in law.
 - b) An order of declaration that in accordance with the Agreement entered between the Trade Union represented the unionisable employees of the respondent at the time of signing the agreement on March 19, 2014 had placed the house allowance of the claimants herein at Ksh 20,416 and not Ksh 17,013.
 - c) An order of declaration that the respondent shall establish salary structure that factors in the experience, skills and qualification of the claimants otherwise the current structure is discriminatory and encourages poor remuneration and had labour practice.
 - d) An order of declaration that the said establishment shall provide for upward mobility and creates an environment of fair reward, promotes training and education and provide opening for claimants in the hierarchy of the management in the respondent's institution,
 - e) An order of injunction to issue against the respondent to compel her to pay all the underpaid house allowance arrears to all the claimants in terms of Ksh 20,416 for all the months that is covered by the agreement signed on March 19, 2014 and not paid in the payroll of November, 2015.
 - f) A permanent order of injunction to issue against the respondent restrain it, its agents and/or servants from interfering with the house allowance of the claimants herein except to implement the house allowance of Ksh 20,416 as contained in the agreement signed on March 19, 2014.
 - g) Any other relief the court may deem fit to grant.
 - h) Costs of the suit.
8. The 1st claimant, Frank Esevire testified in support of the claim that he is a driver employed by the respondent and all the claimants are drivers each issued with a letter of appointment and his evidence relates to the claims made by all the claimants.
 9. In the year 2016 the basic wage was Ksh 25,413 with a house allowance of Ksh 17,013 and the wages for the claimants have remained the same since.
 10. The house allowance was reduced from Ksh 17,013 to Ksh 10,000 despite the CBA giving the same at Ksh 23,000 and instead of paying the CBA allowance; the respondent reduced contrary to what other employees similarly situated and in the same category are being paid. There was no notice or reasons given on the change and reduction of the house allowances paid. There was no consultation or agreement with regard to the reduction of house allowance.
 11. The claimants are members of the Union and a meeting had been held over the CBA and the respondent directed to pay basic pay arrears. The CBA was found to have affected all employees who benefited save for the drivers. The basic wage had been increased through a court order and therefore not covered under the CBA. There was also the return to work formula of March 19, 2014 where all house allowances were increased but instead of the respondent complying, it reduced the house allowance which is barred through the court order which addressed the payment of the basic wage.
 12. This was discriminatory against the claimants and the allegations that the payment was by error in accounting is not correct since all other employees were paid. The respondent should be made to implement the return to work formula of March 19, 2019 and pay the difference in house allowances



due to the drivers and the claimants herein. This should be at the rate of Ksh 23,000 per month on account of experience.

13. The return to work formula had a financial implication factored in the increased house allowance. Allowances are approved by the Salaries and Remuneration Commission and the respondent is a public entity and each CBA should apply the prevailing policy.

Response

14. In response, the respondent's case is that the claimants are all its employees and each has a letter of appointment. The respondent did sign a return to work formula on March 19, 2014 with binding terms and there is full compliance.
15. The claimants are of different grades and earning different salaries and Legal Notice No 197 on Regulation of Wages (General) (Amendment) Order, 2013 was gazetted providing a new schedule of minimum wages and pursuant to court orders issued on November 2, 2015 the respondent proceeded and paid the claimants in accordance with the said Schedule.
16. The respondent has a system to promote long serving employees and remunerate them accordingly as per a schedule of basic pay for May, 2016 demonstrate and there is no discrimination. The claimants have had their wages increased beyond their actual qualifications and expertise. The respondent has been paying a wage in adherence to legal Notice No 197, court orders, CBA and return to work formula of March 19, 2014.
17. The respondent issued notice to reduce the house allowance of the claimants. The issued appointment letters was for employees on fixed term contracts which had expired. The contracts were prepared in accordance with Legal Notice No 197, the return to work formula and the pay grade structure.
18. There was an accounting error that occurred that erroneously enhanced the house allowance of some of the claimants beyond their grade and immediately the respondent discovered this error, rectifications were made in accordance with section 19(1)(e) of the Employment Act. The payment of a house allowance is done in accordance with the letters of appointment and CBA.
19. From the month of October, 2015 there occurred an accounting error and the claimants were aware that they had not been promoted save for the error but continued to silently enjoy the consequences of the error without notifying the respondent. The error was noted and corrected by restoring the house allowance to what was lawful and agreed between the parties, the union and in the letters of appointment.
20. The respondent has since complied with the orders herein issued on March 31, 2016 as demonstrated in the payslips issued to the claimants. The suit herein is a misrepresentation of facts and should be dismissed with costs.
21. In evidence, the respondent called Harrison Simoni Akala the Senior Assistant Registrar Administration with the role of general administration and human resource and testified that the respondent implemented the 2013/2017 CBA and the minimum wage but in tabulation made an accounting error and applied a wrong house allowance. There is a scheme of service and grades which are used and in salary implementation, an error occurred and the wrong house allowance was applied.
22. The claimants were covered under the 3 negotiated CBA with KUDHEIHA, the claimants filed suit and their basic wage was paid in arrears through a court order and when adjusting the house allowance, an accounting error occurred.



23. The CBA represents the claimants' interests in grade I to IV in all public universities on basic salary and house allowance and through the Ministry of Labour, the Regulation of Wages (General) (Amendment) Order 213 and Legal Notice No 70 of 2012 and 197 of 2013 there was provisions for minimum wage which includes the house allowance payable.
24. The house allowance from grades I to IV was set at Ksh.10,317 per month and the disputed house allowance at Ksh 17,013 is not provided for under the Regulation of Wages (General) (Amendment) Orders and was not approved by the SRC for implementation by the respondent. Such payment cannot be justified. The payment of Ksh 17,013 in house allowances was an accounting error and resulted in an illegal payment and affected the salary structure of the respondent and unsustainable.
25. The house allowance payable is based on the employee individual grade and not a blanket application. Before 2014 the respondent was paying the claimants below the minimum wage and the court in ELRC Cause No 817 of 2015 issued orders for payment of the underpayments and the respondent has since complied and paid.
26. The respondent paid the correct basic pay but on house allowance, there was an accounting error with some claimants earning more house allowance than the basic wage and resulting in wage overlaps. The respondent has continued to pay Ksh 17,000 in house allowances following court orders herein as an interim measure pending hearing and judgement.
27. Mr Akala also testified that when the accounting error was noted, each employee was informed in writing. The union was not informed as it was not a party to the employment agreement. The payment of a higher house allowance at Ksh 17,000 was against SRC guidelines and therefore unlawful and no employee of the respondent should earn a higher house allowance than the basic pay.

Determination

28. At the close of the hearing both parties filed written submissions which have been put into account and the issues which emerge for determination are whether there was discrimination against the claimants; whether the court should review the salary structures within the respondent; whether the orders sought should issue; and who should pay costs.
29. The claimants assert that there was discrimination against them on the basis that following the negotiated CBA with the union and the return to work formula, all other employees got an increase in the house allowance and they were left out and in any event the allowance was reduced.
30. There is also a case that the claimants careers have stagnated due to no salary structure to accommodate skills and experience.
31. Discrimination at the workplace is prohibited whether direct or indirect pursuant to the provisions of section 5 of the Employment Act, 2007 (the Act) read together with article 27 of the Constitution, 2010 and by extension, any discriminatory practice at work is contrary to the principles of fair labour practices in terms of article 41 of the Constitution, 2010.
32. In this regard, discrimination against an employee is defined under various case law and the Court of Appeal in the case of Barclays Bank of Kenya LTD & another v Gladys Muthoni & 20 others [2018] eKLR held as that;

... discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such



description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

33. Claims of unfair discrimination are not to be lightly brushed aside, but that does not mean that every claim must be entertained no matter how slender the factual basis of the grounds advanced. An employee who complains of unfair discrimination in terms of section 5 of the Act is only required to “allege” unfair discrimination and the employer against whom the allegation is made must prove that it is fair.
34. It is the claimant’s case that they were treated differently from other employees in the same category when their house allowances were increased and then reduced without notice. The other employees said to have been treated differently and separately from the claimants and their house allowances left intact are not outlined save to urge the court that under the CBA between the union, KUDHEIHA and the respondent, the house allowance was increased and which was later affirmed in the return to work formula signed on March 19, 2014.
35. Discrimination against an employee as defined above must relate to two similarly situated persons/groups and who end up being treated differently without a justification.
36. The alleged acts of discrimination against a person or ground must be particularised for the court to pick and analyse as against that other person or groups being treated differently to the disadvantage of a claimant.
37. The claimant’s claims of unfair discrimination are not well articulated in the statement of claim. However, in light of the fact that the burden of proof is on the employer to establish fairness; the court should not ignore the employees in cases of this nature. It may be a good consideration that as drivers, the claimants were left out in the CBA negotiations and have continued to indirectly benefit under agency. However, it does not necessarily mean that the respondent unfairly discriminated against them by placing a higher house allowance for unionised employees as against unionisable employees who have not joined the union.
38. This is aptly captured in the case of *Wycliffe Lisalitsa v Chief Executive Officer Kenyatta National Hospital & 5 others* [2014] eKLR the court held that;

For an employee to prove discrimination the employee has to demonstrate that two or more persons doing the same work were being paid differently with one earning and the other not earning the allowance and that there is no justification or explanation for the difference such as merit, seniority or length of service. Section 5 of the Employments Act prohibits discrimination in the following terms.
39. This is an issue that can properly be determined in due course when all the facts are placed before court and not in this instance without particulars.
40. The other issue addressed in the pay/salary structure and non-payment of the due allowances. The claimants concede that the respondent is a public entity enjoying funding from the tax payer and that the Salaries and Remuneration Commission (SRC) approved CBA terms and the increased house allowances. Where indeed the approved the CBA and the payment of house allowances at an enhanced rate, this suit ought not to have ended up in court.
41. The rationale is that the SRC is the repository of government in terms of advisory on the salaries and remuneration to be paid out of public funds with regard to reviews, harmonisation, and determination of cycle of salary reviews in different sectors. Under such mandate, the SRC is allowed to address



the issue of salary harmonisation in the public sector and before any reviews can be lawfully and constitutionally made, the advisory of SRC is imperative.

42. In the case of *Banking Insurance & Finance Union (Kenya) v Kenya Post Office Savings Bank Ltd* [2017] eKLR the court held that;

... In establishing SRC under the 2010 Constitution, Kenyans wanted to cure two related mischiefs; first, an unchecked wage bill and second, glaring wage disparities within the public sector. I further hold that ‘public sector’ was intended to cover all parastatals, including those in the commercial sector. I say so because the wishes of Kenyans which I have stated above cannot be achieved with the SRC only dealing with the salaries and benefits for state officers and some public officers.

I must also take judicial notice that even the parastatals operating in the commercial sector often turn to Government for financial bailout. The fact that they may fully cover their operational costs cannot therefore be a valid reason for placing them beyond the reach of SRC. ...

43. The increase of house allowances for the claimants was not within the single power of the respondent before the SRC advice was secured.
44. On February 16, 2017 the court delivered ruling herein and paragraph 11, 12, and 13 made a finding that the reduction of an employee’s wages is an act of unfair labour practice and contrary to section 10(5) of the *Employment Act*, 2007 which direct that an employer cannot change the terms of an employment contract without consultations with the employee.
45. The court then directed the respondent as the employer not to interfere with the house allowances paid to the claimants and retain it at Ksh 17,013 and not Ksh 10,271 pending the hearing of the main claim.
46. The claimants have relied on the provisions of Legal Notice No 71 of 2012 and 197 of 2013 on *Minimum Wages (General) (Amendment) Orders*, the CBA and return to work formula entered with the Union on March 19, 2014 save though unionisable, they are not unionised.
47. On the payment statements filed by the employer and attached to the response, the claimants had a deduction of agency fees due to KUDHEIHA. Even though the applicable terms and conditions of service under the CBA between the respondent and KUDHEIHA should not apply differently and separately to the claimants, their letters of appointment and the minimum wage due for drivers apply to them.
48. The respondent has admitted that sometime in October, 2015 there was an accounting error and the claimants were paid a house allowance higher than due and when this was identified, there was notice and rectification.
49. A payment to an employee done in error hence appreciated was recoverable. Payment in error in employment and labour relations is not a wage increment or a review of the terms and conditions of employment. An error cannot result into a variation of the employment contract where there is no such intention.
50. An employee cannot rely on the provisions of section 10(5) of the Act to justify a payment done in error. The reason being pursuant to section 19(1) (e) of the Act, the employer is allowed to deduct from the employee’s wages, any amount paid to the employee in error as wages or in excess of the amount of wages due to the employee.

- (1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—



...

- (e) Any amount paid to the employee in error as wages in excess of the amount of wages due to him;

51. It is therefore important that once the error is noted by either party, it is addressed to avoid the same accumulating and placing the employee at a disadvantage when recovering the same following an honest mistake or error of the employer. And on the other hand, the employer should bring the error to the notice of the employee at the earliest to avoid the employee falling into a comfort zone with the windfall.
52. It is trite and an acceptable labour practice that under the Regulation of Wages (General) (Amendment) Orders, the minimum wage is subject to payment of a house allowance at 15% of the basic wage. A house allowance is therefore not a wage. It is a benefit in employment pursuant to section 31 of the Act and which can be secured in kind or monetised and paid in form of an allowance. The applicable rate is 15% of the basic wage and to expect more, such must be negotiated under a CBA registered with the court.
53. In this regard, the claimants claim outside the letters of appointment as drivers, the applicable Regulation of Wage Orders for a house allowance that is above 15% of their basic wage is not lawful and in this regard is not justified.
54. Ultimately, there is no evidence that the SRC approved any salary increase or a review to the house allowance as alleged by the claimants. The same body has the mandate to review, harmonise and determine the cycle of salaries in public service and recommend a review.
55. Since the orders of February 16, 2017 have applied herein to allow for hearing of the suit on the merits, any payments done in this regard shall suffice and revert to a house allowance at 15% of the due basic wage unless revised under a CBA under which the claimants are beneficiary as members or under agency.
56. The case that there was discrimination against the claimants in this regard is without basis.
57. As noted above, the agreement between the trade union and the respondent dated March 19, 2014 does not directly apply to the claimants since they are not members of the trade union save they cannot be placed at a disadvantage thereof.
58. Where the respondent has a system of a salary structure that factors experience, skills and qualifications for unionised employees similarly placed as the claimants, such yardstick should apply without placing the claimants at a disadvantage. In the absence of any salary structure, the same is regularised through the Regulation of Wages (General) (Amendment) Orders issued by the Minister from time to time.
59. In the written submissions, the claimants assert that their trade union KUDEIHA and IPUCCF signed a return of work formula dated March 13, 2014 and which agreement was registered in court and their salaries were raised to Ksh 25,314 and house allowance from Ksh 10,000 to Ksh 17,013. That under the return to work formula the house allowance was erroneously put at Ksh 17,013 and ought to have been Ksh 23,819 per month.
60. A simple tabulation of a house allowance based on a wage of Ksh 25,314 at 15% amounts to Ksh 3,797.10.
61. On this basis, the payment of Ksh 10,000 on a wage of Ksh 25,314 is a generous provision weighed on the applicable Regulation of Wages (General) (Amendment) Orders for the year 2016.



- 62. The claimants are not unionised so as to claim under the CBA or return to work formula agreement entered into between the Union, KUDHEIHA and the respondent. The filing of the instant claim outside of any unionisation is evidence of such fact. The benefit(s) already enjoyed shall suffice.
- 63. On the orders sought, there is no underpayment of a house allowance as claimed. Parties can review the employment terms in future CBA negotiations and/or upon a review and approval by the Salaries and Remuneration Commission. Each party shall bear own costs.
- 64. Orders accordingly.

DELIVERED IN COURT AT NAIROBI THIS 19TH DAY OF MAY, 2022.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

