



**Kayere v Cabinet Secretary Ministry of Environment and Natural Resources & 2 others (Cause 268 of 2017) [2022] KEELRC 1184 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1184 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE 268 OF 2017**  
**DN NDERITU, J**  
**JULY 13, 2022**

**BETWEEN**

**GILBERT ONDENYI KAYERE ..... CLAIMANT**

**AND**

**THE CABINET SECRETARY MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES ..... 1<sup>ST</sup> RESPONDENT**

**OFFICE OF THE ATTORNEY GENERAL & ANOTHER ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. The Claimant commenced this cause by way of a memorandum of claim dated 23<sup>rd</sup> June, 2017 claiming for a sum of Kshs.1,243,388.75 being the balance of salary and miscellaneous allowance arrears due and owing to him from the Respondents, and costs of the cause. Accompanying the claim, as expected, is a verifying affidavit, list of documents and copies of the listed documents, and a witness statement, all dated 23<sup>rd</sup> June 2017. The Claimant filed a further list dated 27<sup>th</sup> July, 2021 and copies of the listed documents.
2. The Respondents filed a joint reply to the claim dated 9<sup>th</sup> July, 2018 in which they prayed that the entire claim be dismissed with costs for want of merits. The Respondents filed a list of documents, and copies of the documents listed, dated 26<sup>th</sup> November, 2020. A further list of documents and a copy of the one document attached was filed dated 28<sup>th</sup> June, 2021.
3. The Claimant filed a reply to the response to claim dated 29<sup>th</sup> October, 2018 and reiterated his claim.
4. This cause was heard on 4<sup>th</sup> October, 2021 and 6<sup>th</sup> December, 2021 and 18<sup>th</sup> January, 2022 when the Claimant (CW1) testified in chief, was cross-examined and re-examined, and he closed his case.



5. Stephen Mwariga (RW1) testified for the Respondents on 18<sup>th</sup> January, 2022 and he was cross-examined and re-examined and the Respondents closed their case.
6. It was agreed that Counsel address court by way of written submissions with Claimant's Counsel filing his submissions on 21<sup>st</sup> February, 2022 and Respondents' on 15<sup>th</sup> March, 2022.

## II. Claimant's Case

7. As can be discerned from the pleadings filed, the oral and documentary evidence, and the written submissions by his Counsel, the Claimant's case is that he was engaged by the 1<sup>st</sup> Respondent on 1<sup>st</sup> January, 1995 in job Group (JG) "K". He alleges that he erroneously earned a monthly salary of Kshs.6,155/= which was meant for employees in JG "H". He alleges that his rightful salary was supposed to be Kshs.8,320/= and as such he was losing Kshs.2,165/= per month in salary arrears which he alleges he lost for eight months making a total of Kshs.17,320/=.
8. The Claimant alleges that this one JG salary below his actual JG salary continued through the years as stipulated in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the statement of claim making an aggregate total of Kshs.1,134,067/=.
9. It is the testimony of the Claimant that during the period between 1<sup>st</sup> October, 1998 to 30<sup>th</sup> June, 2014 he was not paid miscellaneous allowance amounting to Kshs.66,925/= as per the table in paragraph 16 of the statement of claim.
10. The total claim based on the two foregoing paragraphs is Kshs.1,801,992/= out of which the Claimant admits that he was paid a sum of Kshs.558,603.30 in October, 2015 leaving a balance of Kshs.1,243,338.75, and that amount is now the subject matter of this cause.
11. The Claimant alleges that because of the Respondents' failure or refusal to settle his claim he has been denied his right to Fair Labour Practices Under Article 41(1) (2) of *the Constitution*. He testified that he has made all due efforts in pressing for his claim but that the Respondents have not yielded. He produced various correspondences between himself or his Counsel and the 1<sup>st</sup> Respondent as exhibits.
12. Further the Claimant testified that he was one of the many employees of the 1<sup>st</sup> Respondent who were represented by the plaintiffs in Nairobi HCCC No.709 of 2003 wherein the 1<sup>st</sup> Respondent was ordered to implement salary increment for certain cadres (diploma holders) of its employees.
13. The Claimant alleges that by 11<sup>th</sup> November, 2009 he was in JG "M". He alleges that the court order alluded to above backdated the benefits spelt out therein to 1<sup>st</sup> January, 1995. He alleges that through this order given on 28<sup>th</sup> April, 2004 and issued on 10<sup>th</sup> May, 2004 he was automatically upgraded without the need of formal letter from the 1<sup>st</sup> Respondent. The said order was produced as an exhibit and relied on by both sides.
14. The Claimant testified that the 1<sup>st</sup> Respondent failed or refused to implement the said court order as directed in the upgrading done in 1997 and that this together with the initial mistake of paying him a salary less than that of his rightful JG since 1995 affected his pension. He therefore urged this court to order the 1<sup>st</sup> Respondent to reinstate the 1997 upgrading which would allegedly place him in JG "N" as at the time of his retirement on 10<sup>th</sup> July, 2014.
15. It is on the basis of the foregoing that the Claimant insisted that judgment be entered in his favour as prayed in the claim.



### III. Respondents' Case

16. Based on the pleadings filed, the oral testimony by RW1, and the documentary evidence tendered as read together with the written submissions by their Counsel, the Respondent's case is as hereunder.
17. RW1 testified that contrary to the allegation by the Claimant that he was engaged by the 1<sup>st</sup> Respondent in 1995, that the Claimant was actually employed on 15<sup>th</sup> January, 1978 as a metrological Assistant JG "D". RW1 took the court through the various stages of Claimant's promotions and upgrading from 1978 to the time of Claimant's retirement on 10<sup>th</sup> July, 2014.
18. RW1 made reference to a letter dated 3<sup>rd</sup> September, 2015 which according to the Respondents harmonized and aligned Claimant's salary and allowances as per the court order alluded to above. RW1 testified that the Claimant was promoted to the position of metrological superintendent JG "M" in November, 2009 and that the Claimant retired in that position and JG on 10<sup>th</sup> July, 2014.
19. RW1 testified that through various correspondences the Claimant and other affected officers were duly informed of the alignment and harmonization of their grades, cadres, and pay. He in particular made reference to a Circular by the DPM dated 19<sup>th</sup> March, 2001. He emphasized that the court order alluded to only restated the position taken by the DPM as above and that the Respondent complied with the same.
20. RW1 testified that by 2015 all the affected employees, including the Claimant herein, were taken care of and that all Claimant's dues were fully paid as per the payment voucher for Kshs.558,603.30 issued by the 1<sup>st</sup> Respondent on 21<sup>st</sup> September, 2015. He insisted that the Circular of 9<sup>th</sup> January, 1995 is the basis for promotion and upgrading of the officers including the Claimant and as such the 1<sup>st</sup> Respondent fully complied with the same and the court order alluded to above in settling dues owed to the Claimant.
21. RW1 insisted that the Claimant retired in JG "M" and was never promoted to JG "N" as such promotion depended on availability of vacancy, qualifications, and availability of candidates. He stated that the Claimant retired before he was reached for such promotion. He stated that the Claimant attained JG "M" courtesy of waiver in line with the DPM Circular and the court order alluded to above. RW1 made reference to a letter dated 31<sup>st</sup> January, 2017 addressed to the Claimant and another dated 26<sup>th</sup> November, 2009.
22. RW1 testified that he is not aware of any diploma holder who was promoted to JG "N" and hence discounted the allegation by the claimant that he was discriminated against for not attaining JG "N" before retirement. RW1 insisted that the Claimant was paid all his dues as per the voucher produced by the Respondents and that he is owed nothing and accordingly prayed that the Claimant's cause be dismissed with costs.

### IV. Issues For Determination

23. Upon considering the pleadings filed, the oral and documentary evidence adduced, and the submissions by Counsel for both parties, the following issues commend themselves to this court for determination:-
  - (i) Is the Claimant's cause time barred? If not,
  - (ii) Is the Claimant entitled to the reliefs sought for?
  - (iii) Costs.



## V. Limitation

24. Section 90 of the *Employment Act* (the Act) provides as follows:-

“Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the Act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

25. Section 4(1) of the *Limitation of Actions Act* provides as follows:-

- “4(1) The following actions may not be brought after the end of six years from the date on which the cause accrued –
- a. actions founded on contract
  - b. –
  - c. –
  - d. Actions to recover a sum recoverable by virtue of written law, other than a penalty or forfeiture of sum by way of penalty or forfeiture.”

This means that for employment claims falling due and payable before 2<sup>nd</sup> June, 2008 the Claimant had to file the claim before expiry of six (6) years from that date. Six (6) years expired on or about June, 2014, long before this cause was filed in 2017.

26. The repealed *Employment Act* (Cap 226) had no provisions on limitation of actions based thereon. The law on limitation prior to 2<sup>nd</sup> June 2008 (date of commencement of Act No.11 of 2007) was the *Limitation of Actions Act* quoted above.
27. As can be discerned from Section 4(1) of the *Limitation of Actions Act* the Claimant still had six(6) years within which to file any claim based on his employment contract with the 1<sup>st</sup> Respondent. Likewise, after 2<sup>nd</sup> June, 2008 the Claimant had three (3) years within which to file in court any claim arising from the employment contract.
28. In the material paragraphs on how the sum claimed is made up, being paragraphs 3 to 17 of the memorandum of claim, the Claimant clearly states that this claim on alleged salary arrears dates back to 1995 while the claim on alleged allowance arrears dates back to 1997. The Claimant has segmented the various portions of the claim based on the period when a particular amount accrued and hence became due and payable.
29. The necessary legal implication is that upon promotion or upgrading the alleged arrears that had accrued as at the time of such promotion or upgrading became due and payable and time on such claim started running.
30. By reason of the foregoing, it is the opinion of this court and I so hold that any claim that was more than three (3) years as at the time of filing of this claim on 27<sup>th</sup> June, 2017 is time barred and hence null and void in as far as adjudication of the same by this court is concerned.



31. Counting backwards from 27<sup>th</sup> June, 2017, three (3) years go back to as far as 26<sup>th</sup> June, 2014. This means and this court so holds that the claims in paragraphs 5 to 14 of the claim are time barred. This effectively knocks out all claims by the Claimant on salary arrears.
32. The last item on salary arrears according to paragraph 14 of the claim is for the period from 1<sup>st</sup> July, 2012 to 30<sup>th</sup> June, 2014. Three years (3) expired on or about 29<sup>th</sup> June, 2017. This cause was filed on 27<sup>th</sup> June, 2017 by which time the three (3) years granted by the Act had not expired.  
  
In this item the Claimant is claiming for a sum of Kshs.198,720/= in salary arrears and this is the only claim in salary arrears that passes the test of limitation to proceed to the next test in the next part of this judgment.
33. The same reasoning above applies to the claims for miscellaneous allowance in paragraph 16 of the memorandum of claim. It is only the last item of Kshs.76,104/= that passes the test on limitation. That is allowance arrears for the period from 1<sup>st</sup> July, 2012 to 30<sup>th</sup> June, 2014.
34. It is important to note that strictly speaking where salary and allowances are payable on month to month basis the same fall in arrears if not paid at the end of the month or within such period as may be agreed between the employer and the employee. However, this court has taken a slightly different view in the foregoing paragraphs for the reason that the Claimant has in his claim segmented each amount claimed based on a particular period and the court finds no reason for splitting the hairs.
35. Therefore, in regard to issue (a) on whether the claim by the Claimant is statutorily time barred this court holds that only the two portions mentioned above are not time barred and shall proceed to the next test. All the other claims by the Claimant are time barred and this court so holds and are henceforth dismissed. It is a bit disappointing to this court that Counsel for both the parties did not dedicate enough time and effort on this important aspect of time limitation in their respective written submissions.

## **VI. Reliefs**

36. The second issue that this court has to deal with is whether the Claimant is entitled to the reliefs sought in the claim. This court has already found above that except for Kshs.108,720/= in salary arrears and Kshs.76,104/= in miscellaneous allowance arrears the other part of the claim is statutorily time barred and the same has already been dismissed.
37. It is not in dispute that the Claimant retired in JG “M” on 10<sup>th</sup> July, 2014. The last payslip confirms that the Claimant was in JG “M” and that position is further fortified by a letter dated 26<sup>th</sup> November, 2009 addressed to the Claimant by the permanent secretary of the 1<sup>st</sup> Respondent to the same effect. The Claimant has not produced any other letter to suggest that he was ever promoted or upgraded to JG “N” at any time before retirement.
38. RW1 was categorical in his testimony about the career progression of the Claimant from the time of his engagement in 1978 to his retirement in July, 2014. That evidence stands unchallenged and uncontroverted and this court takes the same to be the truthful. Promotion in public or civil service is done through proper records and documentation and the Claimant has failed to prove that he was ever promoted to JG “N”.
39. To state what is rather obvious, the Claimant cannot be promoted in retirement. That is exactly what the Claimant is calling upon this court to do through this cause in declaring that the Claimant was “supposed” to retire in JG “N” and not “M”.



40. An employer has the right to promote, upgrade, and even demote its employees as part of the human resource management function. It is not the province of this court to interfere with that function as that is not one of the areas of jurisdiction of this court under *the Constitution* and the constitutive legislations, including Section 12 of the *Employment and Labour Relations Court Act*.
41. There is no evidence that the Claimant was discriminated, abused, or violated as a result of which he failed to attain JG “N”. It was the burden on the Claimant to prove that indeed he either retired in JG “N” or that he was unfairly and unlawfully denied the promotion or upgrading to JG “N”. The Claimant failed to execute that burden. In any event, RW1 in his testimony explained that the Claimant retired before promotion to JG “N” due to lack of vacancy notwithstanding that he may have qualified. RW1 further explained that no diploma holder, and the Claimant was one, was promoted or upgraded to JG”N” and hence the Claimant was not discriminated at all.
42. The two sums of money claimed above, Kshs.108,720/= in salary arrears, and Kshs.76,104 in allowances have been claimed on the presumption that the Claimant was “supposed” to be in JG “N” as from September, 2007 till the time of retirement in July, 2014. That is a wrong and misguided presumption as the Claimant was never promoted or upgraded to JG”N”. This court has no reason to fault the 1<sup>st</sup> Respondent for not promoting the claimant from JG “M” to JG “N” before retirement.
43. This court has so far said enough to demonstrate that the Claimant’s cause must fail in all counts and the same is hereby dismissed.
44. In a letter dated 29<sup>th</sup> August 1997 by the Permanent Secretary to the 1<sup>st</sup> Respondent it was clarified what allowances were payable to the employees of the 1<sup>st</sup> Respondent including the Claimant. The payment voucher of 21<sup>st</sup> September, 2015 through which the Claimant was paid his final dues indicates that the allowances payable to the Claimant were taken care of and all arrears in salary and allowances were settled.
45. Unfortunately, this cause is based on a misguided notion by the Claimant that he is owed further or other dues by the 1<sup>st</sup> Respondent which he has been unable to prove in this cause.
46. It is also the view of this court that the entire claim comprises of claims based on continuous injury or damage under Section 90 of *the Act* which should have been filed within the (1) year (12 months) of Claimant’s retirement which was not done and as such the entire claim is time barred – See *David Ngala Ochieng v Hatari Security Guards Ltd* (2022) eKLR.

## VI. Costs

47. Costs ordinarily follow the event but in the interest of fairness and justice this court orders that each party shall bear own costs.

## VII. Disposal

48. This cause is dismissed with each party ordered to bear own costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 13<sup>TH</sup> DAY OF JULY, 2022.**

.....

**DAVID NDERITU**

**JUDGE**

