



Githanga & 3 others v County Government of Nyandarua (Cause 358 of 2016) [2022] KEELRC 1348 (KLR) (12 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1348 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 358 OF 2016
HS WASILWA, J
JULY 12, 2022**

BETWEEN

**GEDION GITOGO GITHANGA 1ST CLAIMANT
STEPHEN MUNGAI KABURU 2ND CLAIMANT
JOHN ITATHI MWANGI 3RD CLAIMANT
SARAH WAMAITHA IRUNGU 4TH CLAIMANT**

AND

COUNTY GOVERNMENT OF NYANDARUA RESPONDENT

JUDGMENT

1. The claimants filed this suit seeking to compel the respondent to release their withheld remuneration and for enforcement of part IV of the *Employment Act*.
2. The background of the claimants' case is that the claimants were employed by the respondent as ward administrators vide letters of appointment dated August 19, 2015, which employment was on permanent and pensionable terms.
3. The salary of each of the claimants as per the appointment letter was basic salary of Kshs 48,190/=, House allowance of Kshs.24,000/= and commuter allowance of Kshs.8,000/= together with other allowances.
4. The respondent has however paid the claimant Kshs.12,467/= toward House allowance leaving a balance of Kshs.11,533 which money has never been paid to them from the time of employment in the year 2015 despite several demands.
5. The claimants prayed for the following reliefs; -



- a) An order compelling the respondent to pay the claimants the monthly amount withheld and/or deducted since August, 2015 to the tune of Kshs.11,533/= per month plus interest at Court rates.
 - b) An order compelling the respondents to pay the claimants their employment benefits as per the letter of appointment.
 - c) Costs of this suit with interest at court's rate.
6. The respondent entered appearance on the October 4, 2016 and filed a defence to claim on the November 15, 2016 admitting to employing the claimants but denying agreeing to paying the House allowance as pleaded.
 7. It is averred that initially on the July 29, 2013, Salaries and remuneration commission set out regulations that ward administrators House allowance was set out at Kshs.24,000/=.
 8. The job for the ward administrators herein was advertised between October and November, 2014 and shortlisting concluded sometimes between January, 2015 and June, 2015.
 9. In the employment letter dated August 19, 2015 issued to the claimants, the House allowance indicated in the said letter was Kshs.24,000/=. However, that the salaries and remuneration Commission vide regulation dated December 10, 2014 had issued regulations revising the House allowance payable depending on Towns the administrator was situated.
 10. In the regulation issued on the December 10, 2014, the House allowance for Nyandarua County, being under other areas, was capped at Kshs.15,400/=. These regulations were to take effect from 2015/2016 financial year, however, due to inadvertence or mistake the said regulations were not brought to the attention of Nyandarua County Public Service Board for consideration and implementation. Another regulation was made on the August 11, 2015 reinforcing the earlier regulation and directing that the said regulations would be implemented in phases.
 11. It is averred that the appointment letters were dispatched on August 19, 2015 before the respondent received the letter of August 11, 2015 and on seeking clarification on the implementation date of the said letter the respondent was informed by Salaries and Remuneration Commission (SRC) that implementation of the revised regulation took effect on August 11, 2015 days after the Claimant were served with the appointment letter.
 12. It is the respondent's case that the implementation of the payments of the House allowance was staggered for a period of three year starting in the financial year 2015/2016 and the starting House allowance payable was Kshs.12,467/=. Further that the determination of House allowance payable to the employees in various Job Groups was determined by Integrated Personnel Payroll Data (I.P.P.D) which is a system operated by the National Government as such they did not have any control in the same.
 13. They contends that the payment of House allowance to the claimant is per the law and regulations of Salaries and remuneration commission as such the claim herein is without merit and ought to be struck out.

Claimant's case.

14. The hearing in this case proceeded on the 23rd May, 2022, where the 1st claimant testified as CW-1 and adopted his witness statement dated 14.9.2016 which reiterated the contents of the claim. In addition, he stated that when he was employed, his House allowance together with his colleagues



was Kshs.24,000/=. In October 2015 the House allowance was reduced to Kshs.12,467/= without any communication and or consultation and later increased to Kshs.13,934/= in July, 2016 and Kshs.15,400/= in June, 2017 which allowance is paid to them to date.

15. Upon cross examination by Kanyi Advocate, the claimant testified that he is not aware of any of the circulars issued by SRC only that he was informed that his House allowance was Kshs.24,000/= and accepted the offer based on that expectation. He stated that as per the zoning of areas, County headquarters are to receive house allowance of Kshs.17,000/=:, other county offices Kshs.13,000/= while other areas were to receive Kshs.15,400. He confirmed that as per the said circular the ward administrators in Nyandarua County are to be paid Kshs.15,400/= which was to be paid in three phases. He avers that when they filed this suit their House allowance was at Kshs.11,467/= which increased overtime. He contends that he did not sue SRC and the National Government for the reason that the letter of employment indicated the House allowance which letter was issued by the Respondent.
16. Stephen Mungai testified as CW-2 and adopted his witness statement dated 14th September, 2015 which also reiterated the contents of the claim.
17. Upon cross examination by Kanyi Advocates, CW-2 testified that he is aware that SRC regulates remuneration for all public officers. He however states that he was not aware that SRC was the one that changed their House allowance as the same was never brought to their attention by the respondent.
18. Sarah Irungu, testified as CW-3 and adopted her witness statement 14.9.2016 and in addition stated that her house allowance was changed without consultation and prayed for the same to be restored.
19. Upon cross examination by Kanyi Advocate, CW-3 testified that it's only the four (4) of them among the other ward administrators whose house allowance was lowered. She states that she did not sue SRC because its not her employer. She added that the reason for the reduction was never communicated to them and on inquiry they never received any response.
20. The forth witness was John Hathi Mwangi testified as CW-4 and adopted his witness statement dated 15.9.2016 and prayed for his house allowance to be restored to the initial pay of Kshs.24,000/=:.
21. Upon cross examination, CW-4 testified that SRC is the one responsible for setting their salaries and allowances, however that since the County Public Service Board is the one that employed them, they rightfully sued it.

Respondent's case

22. The Respondent called the Chairman of County Public Service Board, Willium Goko, as its RW-1. The witness adopted his statement dated 15th September 2021 and produced the documents as appearing in the list pf documents dated 16th September, 2021.He added that the reduction of House allowance was done by SRC and they never received any complaint from the Claimants on the said deductions.
23. Upon cross examination by Kamau Advocate, RW-1 confirmed that the letter of employment showed the House allowance of the Claimant as Kshs.24,000/= however that there were changes on the same that was communicated through circulars and that it's the work of Human Resource to inform the Claimants.
24. The 2nd Respondent witness was Anne Muthoni Gakina, who is the Respondent Director Human Resource Officer testified as RW-2. She adopted her witness statement dated 15th September, 2021 and stated that its SRC that regulates all emoluments of Public servants and they are paid through IPPD



system that is managed by the National Government as such they did not have any hand in the said reduction of House allowance.

25. Upon cross examination by Kamau Advocate, RW-2 testified that the Claimants were offered employment when the House allowance was Kshs.24,000/= however circulars were issued reducing the said House allowance. She admitted that they failed in communicating the reduction to the Claimants.

Claimants' Submissions.

26. The Claimants submitted that their respective employment contracts indicated their House allowance as Kshs.24,000/= however upon employment they were paid the said House allowance in full for the month of August and September, 2015 and the same was reduced without Notice to Kshs.12,467/= from October, 2015 to June 2016, then raised to Kshs.13,934/= from July 2016 to June 2017 and thereafter the Claimants have been receiving House allowance of Kshs.15,400/=. It was argued that the deduction was unlawful in light of the fact that they were never consulted. To support this argument, the claimant relied on the case of *Kenya County Workers Union V Wajir County Government and another* [2020] eKLR where this Honourable Court Held that;

“The Petitioner have submitted that the Respondents breached various provisions of constitution the Constitution including article 41 on fair labour practice and article 10. I agree with the Petitioner on this as the respondent’s action is against the correct position of the law as decided by this Court in various cases see Cause No. 1026/2013 – Ronald Kampa Lugaba vs Kenol Kobil Limited (2016) eKLR (J Wasilwa), Mombasa ELRC Cause No. 212/2013 – Jackline Wakesho vs Aroma Cafe (2014) eKLR and Nakuru ELRC Petition No. 29/2016 Maxwell Miyawa & 7 Others vs JSC (2017) eKLR where this Court held as follows:-

61. “Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle.

65. The respondent also did not suggest that the variation(s) involved consultations with these Petitioners.

66. The decision by the respondent in regard to the contracts of the 7th and 8th petitioners as conveyed through letters of 6 August 2013 were therefore not only unlawful for being unilateral but also for lack of consultation and therefore amounted to a violation of the right to fair labour practices as it took away vested rights and entitlements”. I make a finding that indeed the action of the Respondent in unilaterally reviewing the salaries of their employees without consultation, was unfair and unjustified and amounts to an unfair labour practice.

The respondents also violated article 27(1) and (2) of the *Constitution*”



27. Similarly, the claimants submitted that the change of their House allowance was unilaterally done by the respondent without any consultation as such in breach of the employment contract therefore the respondent should be compelled to pay the claimant the said House allowance withheld.
28. It was submitted that the respondent owed the claimants a duty of care of informing them the alleged salaries and remuneration commission regulations as was held in *Rachel Njambi Thuo V County Government of Nyandarua* [2022] eKLR where this court held that;
- “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 silence 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 1 million 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. In conclusion the claimant submitted that there are other ward administrators who are paid house allowance as per their employment contract as such the respondent should be compelled to pay them as per their contract of employment.

Respondent’s Submissions

30. The respondent submitted on two issues; whether there is a competent claim against the respondent on the account of failure to sue or enjoin the S.R.C and whether the Claimants are entitled to the reliefs sought.
31. On the first issue, it was submitted that the respondent was merely following the regulation of Salaries and Remuneration Commission in effecting the changes of House allowance that was reduced from a standard of Kshs.24,000/= to payment made in Zones which awarded Ward administrators under Job Group N in Nairobi House allowance of Kshs.35,000/= while those under the same Job Group but working under other areas such as Nyandarua are paid Kshs.15,400/=. It was argued that the changes were made by SRC and their work was to simply implement the regulation. It was further submitted that SRC is empowered under statute and Constitution to among other roles regulate salaries payable to public officer. To support their argument the respondent relied on the case of *Teachers Service Commission (TSC)-V- Kenya Union of Teachers (KNUT) & 3 Others* [2015] eKLR where the Court held that;-

“The very composition of SRC indicates that its advice has to be given great weight. The phrase “only on that advice...” used in article 259(11) shows that the advice is a mandatory condition precedent for a valid exercise of power or function. If the word “advise” in article 230 (4) (b) is construed to be not binding, the country would be returned to the pre-Constitution 2010 era which would defeat the purposes, values and principles of *the Constitution* and of the institutionalization of SRC under *the Constitution*. It is conceivable and indeed inevitable that many employers in public sector would defy SRC’s advice leading to unimaginable financial crisis in the management of national wage bill.^[28] Having regard to the mischief that the institutionalization of SRC under *the Constitution* was intended to cure the principles of public finance and fiscal responsibility, the budgetary process



and the complexity of salaries and benefits determination for public officers, I hold that the advice of SRC under article 230(4)(b) on remuneration and benefits of all public officers is binding on national and county governments and any power or function exercised without that advice is invalid.[29] That finding paves the way for the consideration of the constitutional jurisdiction of the labour Court to determine the dispute. It is clear from the foregoing that an effective and valid resolution of the teachers claim involves at least five constitutional institutions – TSC as employer for the decision and preparation of the budget; SRC for advice on fiscal sustainability of the claim; National Treasury for preparation of National Budget, National Parliament for approval of the budget and Appropriation and Controller of Budget for implementation of the budget by authorizing withdrawals from public funds. The decisions of those constitutional bodies are subject to, inter alia, principles of public finance articulated in article 201 and principles of financial control of public funds in article 225 and article 10 National values and principles of governance... Disputes relating to revenue allocation and public wage setting are complex, intricate and of technical nature and are best handled by the institutions with institutional competence. *The Constitution* conferred that jurisdiction to the five institutions to which I have referred. In *Narok County Council v Trans Mara County Council* [2000] 1 EA 161 this Court held that the repealed Constitution did not clothe the High Court with jurisdiction to deal with matters that statute had directed should be done by a Minister as part of statutory duty and that the jurisdiction of the High Court could only be invoked where the Minister refuses to give a direction or in purporting to do so, arrived at a decision that was grossly unfair or perverse. The Court further held that where a Minister refused or neglected to act, the proper course was for either party to apply to the High Court for an order of mandamus compelling the Minister to perform his statutory duty. In the instant case, *the Constitution* has conferred the duty to determine remuneration and benefits of public officers to specialized constitutional institutions which are democratically accountable, particularly the SRC. Those institutions have made a decision in accordance with their constitutional power which decision was not favourable to the unions. Although the doctrine of separation of powers cannot be invoked to undermine the operation of a specific provision of *the Constitution*, it nevertheless requires that constitutional actors should respect the role and mandate of other constitutional actors by refraining from usurping their functions.[32] The only lawful remedy to challenge the decision already made by constitutional bodies is a constitutional remedy in the nature of a constitutional petition in the Court invested with jurisdiction seeking appropriate orders or declarations or alternatively, a remedy under the Fair Administrative Action – Act No. 4 of 2015 where applicable. The remedy does not lie in the institution of private law or statutory proceedings for the same relief that the constitutional institutions failed to give.”

32. It was also submitted that the claimants were made aware that their remuneration both salaries and remuneration are made by SRC and the calculation of the same done through Integrated Personnel Pay Roll Data (I.P.P.D) as such the Respondent does not participate in any way be it in setting the salaries payable or at all therefore the case herein ought to be dismissed since the SRC that is tasked with the issue at hand was not enjoined in the proceedings herein.
33. On the reliefs sought, the respondent submitted in light of the fact that it did not have any hand in the setting of salaries payable, that the reliefs sought is not payable as such the claim ought to be dismissed.
34. I have examined all the evidence and submissions of the parties herein.



35. As submitted by the claimants and as admitted by the respondents, the appointment letters of the claimants indicated that their house allowance would be 24,000/= but the claimants were finally paid less.
36. The respondents attributed the changes in the payments to a subsequent circular by the SRC which reduced the house allowances to a lower rate based on the towns the administrators were situated.
37. The respondents however aver that due to inadvertence on their part, they failed to communicate these changes to the claimants.
38. As submitted by the claimant and as has been held by this Court on various causes – see *Ronald Kampa Lugaba VS Kenol Kobil Limited* (2010) eKLR (Wasilwa J) Mombasa ELRC Cause 212 of 2013 – *Jackline Wakesboi VS Aroma Cage* (2014) eKLR & Nakuru ELRC Pet. No. 29 of 2016 *Maxwel Miyawa & 7 others Vs JSC* (2017) eKLR, the Respondents cannot unilaterally vary the terms of the Claimant’s contract without consultation. The changes or variation must also be communicated to the Claimants officially vide a revised contract.
39. This is the law as provided for under section 10(5) of the *Employment Act* 2007 which provides 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”.
40. There is no indication that the respondents upon realizing that there was an error in the appointment letters which ought to be rectified to tally with the SRC circular proceeded to consult with the claimants accordingly or even issued them with a revised appointment letter to reflect the changes.
41. The Respondents action of paying the claimants less than stipulated in the contract letters was in breach of law and in breach of the employment contract.
42. I therefore find the respondents guilty of the breach as indicated above.
43. I therefore award each claimant damages equivalent to Kshs.1 million for the breach of contract.
44. 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 or in alternative consult with the claimants and issue them with revised contracts to reflect the correct position.
45. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 12TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjeri Kamau for Claimant – present

Kanyi Ngure for Respondent – present

Court Assistant - Fred

