



Mugai v County Public Service Board of Marsabit & 2 others (Employment and Labour Relations Claim E007 of 2021) [2022] KEELRC 4099 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4099 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CLAIM E007 OF 2021
DKN MARETE, J
SEPTEMBER 28, 2022**

BETWEEN

ELIAS NGARI MUGAI CLAIMANT

AND

COUNTY PUBLIC SERVICE BOARD OF MARSABIT 1ST RESPONDENT

**SECRETARY, COUNTY PUBLIC SERVICE BOARD OF
MARSABIT 2ND RESPONDENT**

**MINISTRY OF AGRICULTURE, (STATE DEPARTMENT OF AGRICULTURE,
LIVESTOCK AND FISHERIES) 3RD RESPONDENT**

JUDGMENT

1. This matter was originated by way of a memorandum of claim dated January 27, 2021. The issue in dispute is therein cited as;

Salary underpayment and non-payment of outstanding dues

2. The 1st and 2nd respondents in a statement of response dated May 13, 2020 deny the claim and pray that the same be dismissed with costs.
3. There is no defence, or at all for the 3rd respondent, she in toto remained mum.
4. The claimant's case is that at all material times to this suit, he was an employee of the 3rd respondent for 37 years before his retirement in 2019. He worked as an assistant leather development officer and was deployed to the county government of Marsabit at the onset of devolution.
5. The claimant's further case is that towards the close of his career, he earned Kshs 46,230.00 at job group K.

His other case comes out as follows;



6. On September 6, 2018, the claimant received a letter from the 1st respondent which letter purported to convey to the claimant the decision of the 1st respondent to have him promoted from his then position and job group to the position of CLDA, job group CPSB 08 with effect from September 3, 2018. The same letter provided that he was to enter the scale at a monthly basic salary of Kshs 39,110/-.
7. The 1st respondent's letter of promotion was prima facie a demotion letter as the claimant's basic salary was brought down from his then basic salary of Kshs 46,230/- to the basic salary of Kshs 39,110/-.
8. Aggrieved by the contents and implications of the said letter, the claimant made several demands to the 1st respondent so as to have his basic salary adjusted to reflect his new position. The 1st respondent failed, neglected and or refused to make any adjustments to the claimant's basic salary.
9. Until his retirement on November 10, 2019, the claimant received his basic salary at Kshs 39,110. This is despite the 1st respondent's letter of September 6, 2018 indicating that he had been promoted.

He prays thus;

- a) This honourable court finds that the 1st respondent's decision to lower the claimant's basic salary by a misleading letter of promotion was wrongful and unlawful and the claimant is thereby entitled to damages.
- b) An order directing payment to the claimant of all the following dues arising out of the period of his employment with the respondents;
 - a. General damages at 12 months' salary as compensation for wrongful demotion.
12 months x 46,230 = 554,760/-
 - b. Basic salary underpayment for 1 year and 2 months
14 months x (46,230 - 39,110) = 101,580/-
 - c. Unpaid per diem dues
16 1/2 days x 7000 = 115,500/-
 - d. Interest on a), b) and c) above at court rates
 - e. Costs of this claim.
 - f. Any other or further relief as this honourable court may deem appropriate.

6. The respondents case is a denial of the claim. It is his case that the claims mischievous letter of promotion was stopped and he continued to earn his legitimate salary of Kshs 46,230.00.
7. The respondents further deny a reduction in the salary of the claimant. This is further evidenced by the pay advice slip produced by the claimant.

The issues for determination are;

1. Whether the claimant's basic salary was indeed lowered by the respondents?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of the claim.



8. The 1st issue for determination is whether the claimant's basic salary was indeed lowered by the respondents. The claimant in his written submissions dated November 16, 2021 reiterates his claim and posits that he was not only overdue for promotion but also disadvantaged by this erroneous and unlawful letter that came in to confuse his employment contract and emoluments.
9. The respondent did not submit any written submissions but chose to rely on their amended statement of response dated November 17, 2021. In this they script a case of denial of the claim and render the claimant to a proof of the same.
10. It is their further case that the claim is frivolous, vexatious and abuse of the process of court as the claimant has no cause of action or claim against the 1st and 2nd respondents. They further submit that the claim lacks merit and is without basis and should be dismissed with costs to themselves.
11. I would agree with the respondents case. The claimant has not demonstrated a case of any lowering of his salary or disadvantage to his employment contract. Again, the claim on lack of promotion falls on quick sand. Promotion in employment, much as it is a right of the employee must be considered on its merits. A party who raises issues on this must demonstrate a clear case for promotion which has been violated by the employer. A mere mention of nine years of stagnation as is in this case alone is not enough to demonstrate a violation of this right. The claimant should have come out to demonstrate that such promotion was discriminatively denied to him as it was awarded to others in his cadre.
12. The substance of the claimant's case does not raise any substantive issues against the respondents. If these were, which is not the case, no evidence is adduced in their support. I therefore agree with the respondents that indeed, the claimant does not have any cause of action against themselves. I find no case of lowering his salary and find as such.
13. I am therefore inclined to dismiss the claim with orders that each party bears their cost of the same.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Omega instructed by Ndegwa & Ndegwa Advocates for the Claimant.
2. Mr. Minishi holding brief for Mr. Wario instructed by Muhamud Dambi Wario Advocates for the 1st and 2nd Respondents.
3. No appearance for the 3rd Respondent.

