Oganga DM & 24 others v University of Nairobi (Cause 387 of 2017)
[2022] KEELRC 12938 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12938 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 387 OF 2017

AN MWAURE, J

OCTOBER 13, 2022

BETWEEN

OGANGA DM & 24 OTHERS ..... CLAIMANT

AND

UNIVERSTY OF NAIROBI ..... RESPONDENT

JUDGMENT

1. The claimants are employees of the respondent, University of Nairobi. They filed the statement of claim dated the February 9, 2017 on the February 24, 2017 seeking the following remedies:-

    a. A declaration that the respondent's refusal to implement the circulars dated the December 19, 2011 and February 29, 2012 was incorrect.

    b. A declaration that the discriminative nature of implementing the risk/extraneous allowances among its employees is wrongful and unfair.

    c. An order be issued directing the respondent to implement the risk and extraneous allowances correctly and the amount due of ksh 23,160,000 be paid forthwith.

    d. The honourable court do issue such orders and give such directions as it may deem fit and just to meet the ends of justice.

    e. The respondent be condemned to pay costs and interests on items (c) above at court rates.

2. The claimants avers that they work as technologists, technicians, drivers and cleaners in the biochemistry department which falls within the College of Health Sciences. The claimants say that *vide* the circulars dated the December 19, 2011 and February 29, 2012 emanating from the office of the Prime Minister, it was directed that carders of staff working at the health institutions be paid risk and extraneous allowances.

3. The claimants state that they have for the past 57 months and for some 47 months sought for their risk allowance and extraneous allowances to no fruition. The claimants say they have appealed severally to the respondent's office to have this implemented but the respondents have been adamant despite the claimants belonging to the cadre of employees stipulated in the respective circulars.

4. The claimants are of the view that there is discrimination on how the allowances are paid by the respondent as fellow employees are getting ksh 16,000/- whilst the claimants are earning ksh 7,000/-. The claimants ask the court to intervene to ensure that the unpaid allowances which totals kshs 23,160,00.000 are paid.

5. The respondent entered a memorandum of appearance dated the April 11, 2017 and filed on the April 12, 2017 through the firm of Lutta & Co Advocates. The respondent in the response dated the October 2, 2019 avers that it has continuously paid the claimants risk and extraneous allowances of ksh 7,000/- per month since January 2012, in accordance with the approved university rates.

6. The respondent says that it observes, respects, protects and promotes the right to fair labour practices for its staff and denies that it is or at any one time withheld any monies due and payable to the claimants. The claimants' risk and extraneous allowances were according to it implemented in accordance with circular MSPS/2/1/3A Vol 111 (100) from the office of the Prime Minister and dated February 29, 2012 and that the respondent has continuously paid the claimants ksh 7,000/- per month since 2012 to date as risk and extraneous allowances. The said circular clearly outlines the categorization of persons entitled to the said allowances and not merely payment to all staff members in the college of health sciences.

7. The respondent says in answer to paragraph 8 of the claim that the allowances referred to by the claimants were negotiated as part of the collective bargaining agreement by the Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) on behalf of their members (public health workers) who work in public health institutions and it would therefore be erroneous to entitle staff at the bio chemistry department to the said allowances. They aver the claimants are not members of public health services.

8. The respondent further say that technicians, technologists, drivers, cleaners and other support staff working in the department of biochemistry are not classified as public health workers and therefore do not fall under any category enumerated in the various circulars.

9. It further avers that the budgetary allocation and payment of the said allowances was to be provided by the then Ministry of Public Health and Sanitation after receiving budgetary allocation from the Treasury. Kenyatta National Hospital and Moi Teaching & Referral Hospital was also to seek funding for the said allowances from the treasury and not the respondent.

10. The respondent also state that the increment being sought has also not been approved by the Salaries & Renumeration Commission which has the sole mandate to review salaries and allowances of public and state officers. The respondent avers that the intervention of court is accordingly unwarranted. The respondent prays that the claim be dismissed with costs.

The Claimant's Case

11. Claimant witness 1 Delphine Mongare Oganga testified that she is one of the claimants in the case and knows the other claimants in the case. She testified on behalf of the other claimants who gave her the authority to represent them and it is signed by the other parties letter dated February 9, 2017. She adopted the witness statement dated the February 9, 2017 as her evidence in chief. She produced the

list of documents as numbered 1-10 as exhibits and another list of documents dated the June 18, 2018 and August 10, 2021 also as exhibits.

12. The witness said that they work in the department of biochemistry and that they are asking for the extraneous allowances which other departments are getting but they are discriminated against. She said that the circular dated the December 19, 2011 from the office of the Prime Minister was directed to all cadres in the health institutions to be paid extraneous allowances. She says she should be getting ksh 18,000/= but gets only kshs 7,000/- as allowance.

13. The witness says the document dated April 29, 2015 from the state corporations advisory committee provides for what they should be paid and a letter dated June 24, 2014 from the university is asking for approvals of those allowances from the office of the dean. Further the university officer wrote a letter on the September 10, 2014 by chairman of Biochemistry and was requesting facilitation of that payment. She testified that all these documents show that allowances were due to them but none had been paid. She stated that they received ksh 7,000/= from 2016 and the same has not been reviewed.

14. She has attached the payslips which shows, are from human anatomy department staff who are getting 18,000/- but have no names. She says that the respondent sent them a circular from the SRC saying the amount was not approved by the SRC. She asked court to order that they be paid the amount prayed and to be paid balances upto date with interests at court rates.

15. Upon cross-examination she said that she is a lab technician at the University of Nairobi. She said that she was exposed to health hazards whilst at the place of work and hence the entitlement to risk allowance.

16. The witness further referred herein before said that the circulars apply to her as well. She said that the university is a public institution and they are part of health workers. She claimed Moi University were paid such allowance but she had no document to show that Moi University Staff were paid the said allowance.

17. Upon re-examination she stated that she worked in the Department of Biochemistry and she taught students who are health workers and all those who work in health facilities are health workers. She says that they did not have letter to demonstrate how the kshs 7,000/= was arrived at as the flat rate and that the first payslip from the medical physiology showed allowance was ksh 16,000/-.

18. She said that they did a letter showing how they were being discriminated. The letter dated June 24, 2014 was done by workers of Bio=chemistry Dept through their chairman and the university department is aware of the allowances they are claiming. The allowances claimed, she said, are called clinical allowances and their colleagues are paid the allowances claimed according to grades.

Respondent's Case

19. The respondent witness one Harrison Akala testified that he works at the University of Nairobi as a senior assistant registrar. he adopted the witness statement dated October 16, 2019 as his evidence in chief. He also adopted the list of documents dated the October 18, 2021 as exhibits. He testified that the clinical allowance payable to claimants is ksh 7000/-. The risk allowance is kshs 2000/- and extraneous is ksh 5000 and is negotiated and budgeted totalling kshs 7,000/-.

20. He also said that he is aware of the circulars referred by the the claimants. The circulars in his view are not addressed to the ministry of education as those addressed to the Ministry of Education come through the university's Vice Chancellors. He said that the documents of December 19, 2011 are addressed to public workers and the union referred to does not cover university workers medical

teaching staff. The witness gave his view that the KUSU and UASU are not medical and dentists union. He says the circulars refer to health workers and the claimants do not fall into this category.

21. On being referred to the circular dated the April 29, 2015 from State Corporation, he testified this was advice to the Vice-chancellors and that it refers to equivalent grading of university staff and does not confer a right of payment.

22. The witness said that the claimants are employees of the respondent Department of Bio Chemistry. He said that they get clinical allowance of ksh 7000/= per month. The witness also mentioned that the allowance of biochemistry staff is not in the CBA and that staff in other departments earn an allowance of ksh 16,000/-.

23. The witness further said that the human anatomy and medical physiology are paid ksh 16000/- as they are in the health department. He said UON is not a public health institution and the departments are part of the university. He said the circulars of technologists and technicians show same figures which claimants are seeking to be paid which he said the claimants are not public health workers and UON has no public health workers.

24. The witness says the respondents have not refused to pay the claimants their allowances and they are not discriminated as they do not have the comparability with the colleagues alleged to be discriminated against. The 7,000/= payable to claimants is allowance approved by University Council and negotiated with union and is extraneous and risk allowance.

25. The witness said the Department of Bio-chemistry is different from human anatomy and medical physiology. Allowances paid in those departments are different. The 7,000/= risk and extraneous allowance are negotiated with University council and union subject to approval by Salaries and Remuneration Commission (SRC).

Claimant's Submissions.

26. The claimant avers that they are entitled to payments of risk and extraneous allowance as provided by the Prime Minister's office by their circulars dated and January 12, 2011 and February 29, 2012. They say the circular provided for payment of allowances to Public health workers.

27. They say these are people who fall under the category of public health workers.

28. They further say that the state corporations advisory committee issued a letter dated April 29, 2015 guiding on conversion of grades for purposes of paying allowances. They claim that the employees of other department earn their allowances but they are the only ones who get a flat figure of kshs 7,000/- which they claim is discriminatory.

The Respondent Submissions

29. The respondent in their submissions aver that the claimants demand for extraneous allowance for public health workers is erroneous. They say that Kenya Medical Practioners and Pharmacists and Dentists Union (KMPDU) on behalf of their members of staff working in public health institutions negotiated with the government of Kenya a collective bargaining agreement for risk and extraneous allowances for the health workers and claimants are not health workers.

30. They say that the office of the Prime Minister approved the payments for public health workers circular No MSPS/2/1/3A/Vol III (77) and MSPS 2/1/3A Vol III (100) dated December 19, 2011 and February 29, 2012 respectively. He says the circulars are specific to doctors and dentists and pharmacists, clinical officers and nurses and other paramedics.

31. They emphasise that claimants are not public health workers who work in the department of Biochemistry of Medicine College of Health Sciences at University of Nairobi.

32. Finally the respondents submit that the letter from state advisory committee regarding allowances payable to civil servants dated April 29, 2015 refer to allowances and does not arise from CBAs signed between the government and KMPDU. It provides specific allowance payable to workers of various category. They says that there is no mention of allowance payable to public health workers.

33. Further they say the claimant cannot rely on negotiation between the government and KMPDU as they are not members of KMPDU.

34. The respondent relying on the case of *Samson Gwer & 5 others v Kenya Medicine Research Institute & 3 others* (2020) eKLR which held that if the claimants have claimed they are discriminated and they must prove the same as he who claims must prove. In the above case it was held that constitutional safeguards cannot have mere generalities and the act call for qualifications which call for scrupulous individual appraisal of each case.

35. In conclusion the respondent aver the claimants are not public health workers working in a public institution and so have not proved their case on the balance of probability.

Submissions

36. The court has looked at the respective parties' submissions. The court shall take into account the same in framing the issues and determination of the current dispute as reflected in the judgment.

    Issues for decision

    a. Whether the claimants have made out a case for the extraneous allowances claimed.

    b. If the answer to (a) above is in the affirmative, what are the remedies the court should grant.

37. I would wish to mention in limine an observation relating to the two documents at the centre of the claim before court written under reference numbers MSPS/2/1/3A Vol 111 (77) and MSPS/2/1/3A Vol 111 (100) from the office of the Prime Minister dated January 22, 2011 and February 29, 2012 respectively. The documents refer to the category of employees who deserve hardship and risk allowance.

38. Also, the document, MSPS/2/1/3A Vol 11 (77) makes provisions for those in what is referred to as hardship areas. Pg 14 covers those in urban areas and has different provision for the subject allowances. The document MSPS /2/1/3A Vol III (100) covers the subject allowances in 3 areas namely rural, urban and hardship areas each with different provisions. The claimants have not specified their areas of operation but would take it they are in University of Nairobi for the time being and so are in urban areas.

39. Putting aside the question whether the claimants are entitled to the subject allowances under circulars (77) or (100), the court has looked at the tabulations as contained under paragraph 12 of the memorandum of claim and would wish to proceed in the footing that the individual claimants fall under those workers in the urban areas by taking of judicial notice of the fact that the College of Health Science where they work is currently situated in Nairobi. This is not expressly stated by the claimants though, and the allowances for urban areas stated in the document 77 dated January 12, 2011 are different for those in MSPS/2/1/3A Vol 111 (100) dated the January 29, 2012.

40. The variance as can be seen in paragraph 2 of the letter dated the February 29, 2012 is explained by the revision of the earlier provisions following disharmony occasioned by the provision made in the

earlier letter dated the January 12, 2011. The letter dated the February 29, 2012 cites the classification adopted of urban, rural and hardship areas as the cause of disharmony though it still maintains the classification and proceeds to provide for the new figures leaving out the doctors, pharmacists, dentists and anaesthetists.

41. The foregoing leads the court to the inevitable conclusion that it can only validly rely on the allowances as provided under the letter dated the February 29, 2012 under reference MSPS/2/1/3A vol III (100). It is worth noting that the claimants maintained that both circulars supports the claimants as can be seen in the claim which consists of technologists, technicians, drivers and cleaners working in the health department. In the subject circular, it is stated that the drivers and support staff are those deployed in the hospitals.

42. The question then is, do the claimants, upon true construction of the said circulars truly fall under the classification as workers in public health facilities?

43. The court finds that the claimants have not demonstrated that they fall under that category and are not public health workers within the meaning of the subject circulars MSPS/2/1/3A Vol 111(100) and MSPS/2/1/3A/Vol III (77). The circular clearly lists out the cadre of people referred thereto. These include doctors, dentists, and pharmacists, clinical officers and nurses and other paramedics. They also include drivers and mortuary attendants and support staff deployed in hospitals. The court is always cognisant the circular is addressed to the Ministry of Public Health and Sanitation and not to universities or other education institutions.

44. The claimants needed to clearly demonstrate they are health workers in order to give basis to the claim that the claimants have been discriminated upon in the payment of allowances. The claimants have also not dislodged a key contention of the respondent that any negotiation taking place for salary review is conducted by the respective unions of the employees to wit KUSU & UASU which represents the claimants and was not part of the negotiations leading to the allowances claimed.

45. According to the *Lab Technician Act* medical laboratory technicians means a person including medical laboratory technology issued by the medical training college or other similar institution recognised thereto. Medical technologist as per the same Act means persons holding a diploma, higher diploma or degree in medical laboratory technology issued by Kenya Medical College or other similar institution approved by the Board.

46. The circular produced being a letter from the Prime Minister's office dated December 19, 2011 refer to negotiations between the Government and Kenya Medical Practitioners and Pharmacists and Dentists Union (KMPDU) which the claimants have not demonstrated they belong to. In fact the payslips produced as exhibits even though have no names or numbers but nevertheless show payments of union is to KUSU. So it may be safe to say that the claimants belonged to KUSU not KMPDU Union.

47. The claimants have not clearly demonstrated how they qualify to be health workers. In that case the court does not find they have been discriminated by the respondents as there is no evidence to demonstrate other employees similar to their ranks in same employment are being paid the allowance they claim and the claimants are denied the same.

48. The claimants also claim that staff of Moi University of similar ranks get the higher allowance. For one there is no such evidence established and even if there was it is not proved that both institutions are bound to remunerate their staff the same. The court finds that averment is not also relevant or indeed does not assist this case.

49. Allegation of discrimination is a serious constitutional indictment and the same must be proved by the one alleging it. In the case of *Samson Gwer & 5 others v Kenya medical Research Institute & 3 others*

2020 eKLR the Supreme Court pronounced itself on the issue of discrimination as it asserted that he who claims must prove. The court held:-

> " it is timeliness rule of the common law tradition ¾ Kenya's juristic heritage ¾ and one of fair and pragmatic conception, that the party making an averment in validation of a claim, the standard of proof is the " balance of probability" Balance of probability is a concept deeply linked to the perceptible fact- scenario: so there has to be evidence, on the basis of which the court can determine that it was more probable than not, that the respondent bore responsibility in whole or in part."
>
> The petitioners' case is set around the constitutional right of freedom from discrimination Constitution of Kenya, 2010, article 27). It is already the standpoint of this court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil claim balance of probability. The explanation is that, virtually all constitutional rights- safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which the rights-claim in the instant case, found upon racial discrimination, is to be seen.
>
> Section 108 of the Evidence Act provides that, " the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side," and section 109 of the Act declares that, " burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any" law that the proof of that fact shall lie on any particular person."

50. The court is not convinced the evidence adduced by the claimant's proves there is discrimination against the claimants in paying their risk allowance. The circulars they are citing to support them being circular MSPS/2/1/3A Vol III C77) and MSPS 2/1/2a Vol III (100) in fact sets out the cadre of those entitled to the risk allowance and the claimants are not listed thereunder and especially as they are not in health facilities. The circulars are clearly addressed to Ministry of Health & Sanitation not universities so clearly the staff covered are those in health facilities.

51. The only circular addressed to Vice Chancellors of universities refer to conversions of grading for purposes of allowances. There are several allowances payable in the universities and the document does not specify it is the hardship allowances or risk allowances but refers to general allowances.

52. The court has considered the facts of the case carefully, the pleadings, the evidence and submissions and the documents produced as exhibits and finds no proof that the claimants who work in the University Bio Chemistry Department deserve the risk and hardship allowances they are claiming they deserve. The court finds also no proof that they are discriminated against. meanwhile the claimants are paid ksh 7,000/- being risk and hardship allowance approved by the university council and also must be approved by the Salaries and Remuneration Commission (SRC).

53. The claimant furthermore cannot be paid any remuneration be it allowance or salary without the approval of salary and remuneration commission. In any event the claimants have not proved they are entitled to the prayed allowances on the balance of probability. Their claim is not found to be meritorious and so is dismissed accordingly.

54. Considering the relationship between the claimant and the respondent the court orders each party to bear their costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 13TH

OCTOBER, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE