



**Muhura v Kenya Rural Roads Authority (Cause 881 of 2018)
[2022] KEELRC 13335 (KLR) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13335 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 881 OF 2018
SC RUTTO, J
NOVEMBER 25, 2022**

BETWEEN

PETER MUCHUI MUHURA CLAIMANT

AND

KENYA RURAL ROADS AUTHORITY RESPONDENT

JUDGMENT

1. This suit was instituted through a Statement of Claim dated 9th November, 2017 and which was subsequently amended on 12th October, 2021. The claimant avers that he was employed by the respondent as a Human Resource Assistant on 1st July, 2012 and was initially placed at job group KeRRA grade 5. That his starting salary earning Kshs 112,300.00. That after recategorization, the grading structure was inverted as per the letter from the respondent's Director General thereby placing him at KeRRA grade 6 and entitling him to a gross salary of Kshs 215,600.00.
2. That he was neither demoted nor his inverted grade 6 revoked, hence is entitled to the salary structure set out by the respondent to all employees.
3. The claimant contends that without any reasonable explanation or legally justifiable cause, the respondent unilaterally reduced his gross salary to Kshs 65,900.00 per month resulting in an underpayment of Kshs 49,200.00 every month.
4. He further avers that over the years, he has raised complaints over the illegal salary reduction but the respondent has failed and or refused to reinstate him to his rightful salary.
5. It is on account of the foregoing that the claimant seeks against the respondent, the sum of Kshs 7,718,098.80 being salary underpayments from July, 2012 to October, 2021 with interest at the rate of 12% per annum from the date of filing the claim until payment in full. The claimant has further asked to be restored to his correct grade and salary structure as per his letter of employment at KeRRA grade 5 and subsequently at KeRRA grade 6, after recategorization.



6. In answer to the statement of claim, the respondent denied that after recategorization and inversion of the grading structure, the claimant was placed at KeRRA grade 6 and was entitled to earn a monthly salary of Kshs 215,600.00. That its grading system has since been readjusted and all employees translated depending on the salary they were earning at the point of recategorization. That it would be unfair and discriminatory to have the claimant earn at a salary of KeRRA grade 6 under the new employment and pay structure when he lacks the necessary qualifications for the said grade.
7. The respondent has further denied violating any term of the claimant's letter of appointment and has termed the claimant's action as malicious and meant to unjustly enrich him as he is earning his rightful salary commensurate to his qualifications. Consequently, the respondent has asked the Court to dismiss the claimant's suit with costs.
8. The matter proceeded for hearing on 22nd June, 2022, and each side called oral evidence.

Claimant's case

9. The claimant testified as CW1 and to start with, sought to rely on his amended memorandum of claim, witness statement and bundle of documents as his evidence in chief. The said documents were also produced as his exhibits before Court. This was with the exception of the letters from the Commission on Administration of Justice (Ombudsman) whose production was successfully objected to, by the respondent's advocate.
10. The claimant told Court that he is an employee of the respondent and that his claim is for unlawful reduction of salary. He testified that he joined the respondent organisation as a Human Resource Assistant and was placed at KeRRA grade 5 with the salary payable being as per his letter of appointment. That he was only paid salary as per his contract of employment in July, 2012. That thereafter, the respondent reduced his salary without any justification.
11. It was his further testimony that he has raised the issue with the respondent on numerous occasions as per the grievance handling mechanism and through the Ombudsman, which pronounced itself on the matter, thereby directing the respondent to reinstate him to KeRRA grade 5 and pay him all arrears due.
12. That in 2018, the respondent adopted a new salary and grading structure following its recategorization from PC 3A to PC 7A1. That following the new grading and salary structure, a formulae was developed to apply to the existing grades. That this development affected all employees and on his part, he was given a letter for KeRRA grade 8 with a gross monthly salary of Kshs 113,500.00, instead of grade 6 with a gross monthly salary of Kshs 223,700.00. That at the point of filing the suit, the amount of underpayments was Kshs 7,718,098.00 and continues to accrue.
13. The claimant summed up his testimony by asking the Court to allow his amended statement of claim as payed.

Respondent's case

14. The respondent called oral evidence through Mr. Charles Wambugu who identified himself as its acting Deputy Director Human Resource and Administration. Similarly, he sought to rely on his witness statement, which he asked the Court to adopt as his evidence in chief. He also produced the respondent's bundle of documents, as exhibits before Court.
15. RW1 stated in his testimony before Court that the claimant was issued with a letter for KeRRA grade 5 on 8th May, 2012. That the policy requirements for the position at the time, was a Bachelor's degree,



professional qualifications and membership to a professional body where applicable, experience of five years, Chapter six requirements and proficiency in computer applications. That it was a further requirement that an officer must have demonstrated competence in work performance and results.

16. It was RW1's further evidence before Court that the requirements were mandatory. That the claimant did not meet the requirements as he did not possess a Bachelor's degree and membership to a professional body.
17. That therefore, the claimant was erroneously graded at the point when he was being employed.
18. It was his further testimony that the claimant has now been placed at the job grade where he possesses the necessary qualification hence is not owed any money by the respondent and in this case, the sum of Kshs 7,718,098.00.
19. He further stated in evidence that it would be unfair and discriminatory to have the claimant earn at a salary of KeRRA grade 6 under the new employment and pay structure when he lacks the necessary qualifications.

Submissions

20. The claimant submitted that his letter of appointment has never been revoked or varied to exit his position of Human Resource Assistant. That further, the reduction of his salary has never been explained to him by the respondent by way of a letter or notice to that effect. That legally, an employee's salary can only be reduced by consent. That in this case, his salary was reduced without his consent coupled with lack of an explanation of the circumstances leading to the reduction of the salary.
21. It was the claimant's further submission that the issue of the qualifications is an afterthought which has only been introduced in Court but has never been raised with him.
22. The respondent did not file submissions as none were on the Court's physical record and could not be traced on the online portal.

Analysis and Determination

23. Flowing from the pleadings and evidence on record, this Court singles out the following issues for determination:
 - a. Whether the respondent's action of downgrading the claimant and reducing his salary was lawful.
 - b. Whether the claimant is entitled to the reliefs sought.

Downgrade and Salary Reduction

24. At the heart of this dispute is the reduction of the claimant's salary and down grade. It is the claimant's case that at the time of his employment on 1st July, 2012, his starting gross salary was Kshs 112,300.00 and his job group was KeRRA grade 5. That his salary was later reduced to Kshs 65,900.00 per month hence resulting in a salary underpayment of Kshs 49,200.00 per month.
24. In its defence, the respondent states that the claimant did not possess the necessary qualifications to hold KeRRA grade 5 at the time. That subsequently, he was rightfully placed at the job grade where he possesses the necessary qualifications to draw a salary.
25. It is discernible from clause 7 of the claimant's letter of appointment dated 8th may, 2012, that his grade was KeRRA 5 with his monthly salary being Kshs 112,300.00. Upon recategorization of the



- respondent and subsequent inversion and conversion of its salary and grading structure, what was erstwhile KeRRA 5 translated to KeRRA grade 6. It is this grade that the claimant now seeks to be reinstated to and paid salary arrears he claims he ought to have earned in the said grade.
26. It is notable that the respondent did not dispute reducing the claimant's salary thereby downgrading him from KeRRA grade 5 to KeRRA grade 3.
27. Under cross examination, RW1 admitted that the claimant's letter of appointment has never been revoked or varied. He further testified that the respondent had given the claimant an explanation as to the reason behind the salary reduction.
28. Section 10(5) of the *Employment Act*, which is relevant in this case, provides as follows:
- “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.”
29. The import of the foregoing provision is that the law permits change in employment particulars for instance; employee's job description, duration of the contract, place of work, hours of work, remuneration and related benefits.
30. Be that as it may, such changes ought to be consultative as opposed to unilateral and the same should be reduced into writing.
31. In this case, there is no evidence that any of the above was done. There is no evidence that the claimant was notified of the salary reduction in writing and that the same was preceded by consultations. It can therefore be implied that the respondent effected the claimant's salary reduction unilaterally.
32. The change in the claimant's remuneration was very significant hence the respondent ought to have communicated the same in writing. What was the difficulty in relaying the information to the claimant in writing? After all he is its employee and the interaction is on a daily basis.
33. As it were, the actions of the respondent amounted to an adverse administrative decision against the claimant and he ought to have been informed of the same in writing. This is the very essence of Article 47 of *the Constitution*.
34. As RW1 maintained that the initial placement of the claimant at KeRRA grade 5 was in error, one wonders why the respondent failed to correct the error procedurally.
35. That said and notwithstanding the lapses on the part of the respondent, this being a Court of law, it cannot shut its eyes and sanction an irregularity.
36. As stated herein, the respondent contended that the claimant does not possess the necessary qualifications to be appointed to KeRRA grade 6. RW1 testified under cross examination that the error regarding the claimant's grading occurred at the point when he was being recruited.
37. To support its assertion, the respondent exhibited its grading structure which provides the following requirements for appointment to KeRRA grade 6:
- a. Bachelor's degree from a recognized institution;
 - b. Proficiency in computer applications; and
 - c. Fulfilling the requirements of chapter six of *the constitution*.



38. It is worth noting that the claimant admitted during cross examination that he does not possess a Bachelor's degree. What this translates to is that he does not possess the key requirements in order to be appointed and retained at KeRRA grade 6. Therefore, the initial appointment of the claimant to a grade he did not qualify to hold, amounted to an irregularity.
39. In as much as the respondent erred in not consulting the claimant and notifying him of the changes to his remuneration in writing, the respondent has advanced a plausible reason for acting the way it did just that it neglected to communicate as much to the claimant.
40. On this issue, I will follow the holding in the case of *Nicholas Muturi Okemwa & 8 others versus Judicial Service Commission* [2016] eKLR where the Court determined that:
- “ [66]. In my view, the Respondent was not only mandated but was in fact obligated to right the wrongs that had occurred. More importantly, a court of law cannot confirm actions taken illegally (see Saunders v Edwards [1987] WLR 1116).”
41. The respondent being a public institution hence drawing funds from the public coffers, had a duty and responsibility to correct the anomaly resulting from the claimant's appointment at the wrong grade. Its only mistake was failure to communicate the reasons for its actions to the claimant.
42. Ultimately, it is my finding that the actions of the respondent though justified were undertaken in an unprocedural manner.

Reliefs

43. The claimant has asked for reinstatement to KeRRA grade 6 and payment of salary arrears being the underpayments in the sum of Kshs 7,718,098.00. As stated herein, the claimant admitted not being in possession of a Bachelor's degree which is a key requirement for being appointed to KeRRA grade 6.
44. The Court cannot right a wrong with another wrong. An order of reinstatement of the claimant to KeRRA grade 6 would be perpetuating an irregularity as it would be against the respondent's salary and grading structure policy. Further, ordering payment of salary arrears would have the same effect of reinstating him as it would amount to paying him salary for a grade he does not qualify to hold.
45. I must add that in view of the manner in which the respondent acted unprocedurally by not notifying the claimant of the downgrade and salary reduction, he would have been entitled to an award of general damages. However, he did not pray for the same hence the Court has no basis to make such an award.

Orders

46. Against this background, the claim is dismissed in its entirety.
47. The respondent shall bear the costs of the suit as the court action was provoked by its actions and omissions.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant In person



For the Respondent Mr. Chege

Court Assistant Abdimalik Hussein

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.

STELLA RUTTO

JUDGE

