



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 86 OF 2019

(Formerly HCCC NO. 709 of 2003)

LAWRENCE PAUL MUNYI.....1ST PLAINTIFF

ANDREYA O. WANEKEYA.....2ND PLAINTIFF

WILLIAM LUVISIA MAJANI.....3RD PLAINTIFF

(Suing on their own behalf and as representatives of affected officers of the Kenya Meteorological Department of the Ministry of Transport and Communications of the Government of Kenya employed as public officers designated Meteorological Assistants)

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

(sued under the Government Proceedings Act Cap 40 of the Laws of Kenya on behalf of

(a) The Permanent Secretary Ministry of Transport and Communications

(b) The Director, Directorate of Personnel Management in the Office of the President

(c) The Permanent Secretary to the Treasury

(d) The Public Service Commission of Kenya).....RESPONDENT

JUDGMENT

Introduction

1. The claimants are pensionable Public Officers duly appointed by the Public Service Commission and deployed as Meteorological Assistants of various cadres in Kenya Meteorological Department of the Ministry of Transport and Communication of the Government of Kenya.

2. By a Personnel General letter No. 15 Ref. DPM PA 8/8 Vol. III (78) dated 9.1.1995, the Permanent Secretary/Director of Personnel Management pointed out to the Public Service generally that there was to be harmonisation of appointment of Certificate and Diploma holders in the Civil Service so that holders of recognised certificates would enter the service in Job Group G while Diploma Holders would enter at Job Group H with effect from 1.1.1995.

3. The said directive was not implemented immediately with respect to Claimants Department and after all other methods failed to solve the impasse, they brought this suit on 11.7.2003 on their own behalf and all their colleagues in the department, who were affected by the failure to effect the said directive. The suit seeks the following reliefs:-

(a) A declaration that the Meteorological Assistants are Public Officers appointed to their offices by the Public Service Commission of Kenya and are entitled to any and all benefits flowing from such orders, directions, directive or guidance affecting their services as may from time to time be given by the Public Service Commission.

(b) A declaration that the realignment/harmonization of the scheme of service for Meteorological Assistants is with effect from the 1st January 1995 in accordance with Personnel General Letter No. 15 of 9th January 1995 issued by the Permanent Secretary/Director of Personnel Management.

(c) An order that the Meteorological Assistants cadre of employees be upgraded with commensurate salaries according to the following regarding specified in Directorate of Personnel Management letter Reference No. DPM 1/8/2A VOL.III/(69) dated 19th March, 2001 which stated that:

- Those officers who acquired WMO Class III qualification before 9th January, 1995 will adopt the grading structure indicated in my letter No. DPM 1/8/2A VOL. III/(60) of 24th January, 2000 with effect from 1st January, 1995;
- Those officer who acquired the same qualification later than 9th January, 1995 which was the date of our Personnel General Letter No. 15 on Appointment of Certificate and Diploma Holders, will adopt the grading structure with effect from the date each officer acquired WMO Class III Certificate;
- In the case of all other officers in the cadre, and in conformity with current practice, the effective date of their upgrading/adoption of the new grading structure should be 24th January, 2001, the date of my letter authorising the upgrading;

and the regrading be as follows:-

<u>Designation</u>	<u>Present</u>	<u>New</u>
	<u>Job Group</u>	<u>Job Group</u>
Senior Meteorological Superintendent	M	N
Meteorological Superintendent	L	M
Senior Meteorological Assistant	K	L
Meteorological Assistant I	J	K
Meteorological Assistant II	H	J
Meteorological Assistant III	G	H

(d) Damages for breach of contract, frustration, pain and suffering.

(e) Damages for breach by the Attorney General, the Permanent Secretary Ministry of Transport and Communications and the Director of Personnel Management of fundamental right of protection from discrimination in the case of those plaintiffs who have not at the date this suit is instituted been regraded or upgraded and their scheme harmonized with other officers affected by the directive of Public Service Commission of 12th July 2000 Ref. No. 281/51/TPY.

(f) An order that the Permanent Secretary to the Treasury with such consultations as may be necessary and on priority basis to provide the funds necessary for the smooth realignment and harmonization of the terms and conditions of service for the Meteorological Assistants in the Ministry of Transport and Communications if such funds are not provided for in the estimates at the date of judgement in this suit.

(g) Such other reliefs as will be relevant in the circumstances of the case and which the honourable court deems fit to grant.

(h) Costs be awarded to plaintiffs against the Permanent Secretary, Ministry of Transport and Communications, the Permanent Secretary/Director of Personnel Management and the Attorney General severally and jointly.

4. The respondent failed to file defence within the required time and the claimants sought interlocutory judgment. On 10.5.2004 Hon. Justice P. Kihara Kariuki (as he then was) allowed the Claimants' application dated 10.12.2003 by granting prayer (a), (b), (c) and (f) above and directed the parties to fix the suit for formal proof with respect to prayer (d) and (e) in the main suit. However the parties opted to give out of court settlement a chance but as the record would show, the two outstanding issues were never resolved even after 15 years.

5. Due to the new constitutional dispensation, the High Court transferred the suit to this court vide the order dated 8.2.2019 and it was fixed for hearing before me on 6.2.2020. However, on the said date, the counsel for the two sides agreed to dispose of the two outstanding issues by way of written submissions on the basis of the material on record. Both counsel filed submissions but due to the Covid 19 pandemic, the court closed down and handling of hard copies was restricted. The hard copies of the submissions were finally traced and placed in the court file on 22.6.2021.

6. The issues to be determined herein are:-

(a) The measure of damages for breach of contract, frustration, pain and suffering.

(b) The measure of damages for breach of the fundamental right of protection from discrimination by the Respondent, Permanent

Secretary Ministry of Transport and Communication and the Directorate of Personnel Management with respect to the Claimants who at the date of filing the suit, had not been regraded or upgraded and their schemes harmonized with the other officers affected by the directive of the Public Service Commission of 12.7.2020 Ref. No. 281/51/TPY.

(c) Who pays costs of the suit?

Measure of damages for breach of Contract, frustration and suffering

7. The Claimants' case is that their employer (Public Service Commission) approved their promotion and upgrading pursuant to the commissions directive of 9.1.1995. They contended that, they had a legitimate expectation that the PS, Ministry of Transport and Communication and the Directorate of Personnel Management would facilitate the smooth and effective implementation of the directive with minimum delay. However all pleas urging the Permanent Secretary to take prompt and necessary action fell through the cracks.

8. The Claimants filed as exhibits correspondents to support that foregoing assertion which point to the fact that on certain occasion, staff in the Department participated in subtle industrial action. The Claimants have also filed as exhibits, correspondences from the Public Service Commission and the Directorate of Personnel Management urging the same Permanent Secretary to implement the directive but all was in vain.

9. According to the Claimants, their legitimate expectation aroused by the employer's directive was thwarted and prayed for damages for breach of contracts. They relied on **Communications Commissions of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR** where the Supreme Court of Kenya held that legitimate expectation would arise when a body by representation or by past practice, has aroused an expectation that is within its power to fulfill.

10. The Claimants submitted that the Permanent Secretary delayed the implementation of the employer's directive from 1.1.1995 to 23.4.2015 when the issue of upgrading and payment for salary arrears was settled. They contended that for the said period of 20 years they endured uncertainty, frustration and anguish. They also contended that Respondent's conduct was in breach of the Claimants' contract of service and the Claimants suffered;-

- (i) Loss of investment opportunities;
- (ii) Frustration of employment contractual benefits;
- (iii) Inability to afford standard housing, clothing, transport and subsistence;
- (iv) Cost of litigation in enforcing their claim.

11. They prayed for damages for the said breach amounting to 12 months gross salary per Claimant based on the adjusted salary scales. For emphasis, they relied on **CPC Industrial Products v Angima [LLR No. 3472 [(CAK)]** where the Court of Appeal awarded 12 months gross salary where the employer's conduct was found to be callous, malicious, oppressive and had failed to justify its conduct.

12. The Respondent submitted that the proper remedy for breach of contract is not general damages but an award of special damages which ought to be specifically pleaded and specifically proved. For emphasis he referred the Court to **Chain Overseas Engineering Company Limited v Isaaq Kichweu Kijo [2019] eKLR**.

13. In the Respondents' view, the Claimants having been paid Kshs.116, 453,524 as salary arrears arising from the said upgrading, they ought not to be paid general damages for breach of contract as the financial loss they had suffered was offset by the payment of their salary arrears and thus they were put as far as possible in the same position they would have been if the breach complained of had not occurred. He further submitted that awarding general damages would amount to punishing the employer and double compensation. He relied on **Standard Group Limited v Jenny Lusesby [2018] eKLR** where the Court of Appeal held that compensating damages are not meant to be a punishment for employer but rather an attempt to offset the financial loss resulting from the wrongful acts of the employer.

14. The respondent further submitted that the claimants ought not to impute malice, oppression and callousness on the employer contending that parties were negotiating in good faith and that the funds were not readily available. He contended that, should the court find the Claimants are entitled to general damages, then an award of one month salary each would be most suitable as general damages for breach of contract.

15. Having carefully considered the pleadings, evidence and the submission presented by both sides on the issue at hand and also the authorities cited, I would restate the general principle of law in employment contract that the damages for breach payable to the employee is the total financial loss suffered as a result of the breach of the contract by the employer, subject to the qualification that the employee must show his or her effort to mitigate the loss was unsuccessful.

16. In this case the breach involves the delay to implement the directive by the employer dated 9.1.1995. The directive was meant to harmonize appointment of Certificate and Diploma holders in the Civil Service so that holders of Certificates would enter at Job Group G, while Diploma holders were to enter at Job Group H. The effect of the said harmonization was to regrade and upgrade the employees with the natural consequence that the employees' salaries were to go up.

17. It follows that the financial loss suffered by the Claimants as a result of the breach of their contract was equal to the unpaid salary increments withheld from the time they became due to the time when they were paid in full, and I would say, plus the cost of waiting. The Claimants admitted that the employer paid the salary arrears in 2015 following the partial Judgment by Justice P. Kihara Kariuki (as he then

was). Consequently there is no further damages payable to them save the cost of waiting for the said payment.

18. In arriving at the above decision, I find that the precedents cited by the Claimants are distinguishable from this case.

19. In economics, it is a well settled principle that, the cost of waiting for payment is interest on the principle sum. In this case the periods of waiting stretched to 20 years. Calculating the interest even at Court rates or otherwise would pose a challenge considering that the Claimants are in excess of 500 and the arrears in issue fell from year to year. Consequently, I find that it is reasonable and time-saving to just award each Claimant a flat figure of Kshs.70, 000 as the interest on the delayed payment of salary arrears which resulted from the upgrading contemplated under the employer's circular dated 9.1.1995.

Measure Damages for breach of the right to protection from discrimination

20. The Claimants averred at paragraph 23 of the plaint that only a few Public Officers in the Department were upgraded as directed by the Commission and that the Permanent Secretary did not disclose the procedure that was followed in the partial implementation of the directive. In their view the Respondent exposed them to discrimination contrary to section 82 of the retired constitution and Article 27 of the current Constitution.

21. The Respondent submitted that the Claimants were never discriminated and averred that the claimants have not pleaded or named any officers who were treated different from them. They further averred that the Claimants have not pleaded particulars of the discrimination with precision as was held in **Anarita Karimi Njeru v Republic**.

22. I have carefully considered the above submissions and find that the claim that the failure to upgrade Claimants pursuant to the directive made on 9.1.1995 like some of their colleagues was unjustified. Matters were made worse by the delay to implement the directive for 20 years despite advice by the Directorate of Personnel Management and the Public Service Commission. Consequently, find and hold that the Claimants were treated differently from other officers in their cadre by the failure to upgrade them as directed by the Public Service Commission.

23. The foregoing view is fortified by the letter dated 5.9.2014 from the Permanent Secretary Ministry of Environment, Water and Natural Resources annexed to Respondent submissions. The letter attached a list of Meteorological Assistants which show that some had already been upgraded to their rightful grades including Mr. Alan Lijodi, Peter O. Ouma, Agnes G. Nyawira, Caroline L. Amukono, Paul Lukole Kunyuk, Njuguna H. Ndirangu, Margaret Tanui, Leonard M. Kimotho and Annet W. Nyaga.

24. Having found that the Claimants' right to protection from all forms of discrimination was violated contrary to Section 82 of the retired Constitution and Article 27 of the current Constitution, I proceed to hold that they are entitled to General damages. The claimants proposed an award of Kshs.1,000,000 to each claimant as the reasonable compensation while the Respondent proposed an award of Kshs.10,000 per Claimant.

25. The deliberate and prolonged delay in implementing the directive and violating the Claimants' said right for 20 years was grave and unjustified. It was the kind of indolence that amounts to abdication of obligation that was owed to the Claimants regarding the directive by the Public Service Commission. It was also callous, immoderate, unacceptable and inhuman.

26. In the **Standard Group Case** cited by the Respondent, the Court of Appeal held that:

“so long as an employee can plead and prove breach of a constitutional right within the context of the employee's contract of employment or demonstrated that he is entitled to damages... we see no impediment for the trial court granting such relief... The caution must, however be borne in mind that a balance should be maintained between the interest of the employer and employee and the socio-economic interest of the country as a whole.”

27. Putting into consideration the interest of both sides of the divide and the numbers of the claimants involved, I award Kshs.200,000 to each Claimant who was affected by the said violation by the concerned Respondents.

Costs

28. The Claimants served Statutory Notice of intention to institute Court proceedings against the offending Ministry but the Respondent wrote back denying liability and indicating that the intended suit will be strongly defended. As already stated above, no defence was filed even after leave to do so was granted. Thereafter the respondent caused the proceedings to drag for 17 years. Consequently, it is only fair that I award the Claimants costs of the suit.

Conclusion and disposition

29. I have found that the Respondent breached the Claimants' contract of employment and further breached their right to protection from discrimination, contrary to Section 82 of the retired Constitution and Article 27 of the current Constitution. Consequently, I enter Judgment for the Claimants in the follow terms:-

- (a) Each claimant is awarded Kshs.70,000 as interest on the salary arrears paid to them after the delay in upgrading their positions.
- (b) Each Claimant who was affected by the Respondent's violations of their right to protection from discrimination is awarded Kshs.200, 000 as general damages for violation.

(c) The Claimants are also awarded costs plus interest at Court rates from the date hereof.

(d) The awards herein are in addition to the orders and reliefs granted by Hon Justice P. Kihara Kariuki (as he then was) in his partial Judgment rendered on 10.5.2004.

SIGNED, DELIVERED, DATE AT NAIROBI THE 30TH DAY OF SEPTEMBER, 2021

ONESMUS MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE