



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 445 OF 2017

[FORMERLY NAKURU CASE NO. 262 OF 2006]

(Before Hon. Justice Mathews N. Nduma)

MESHACK OTIENO KACHUODHOCLAIMANT

VERSUS

THE COMMISSIONER GENERAL KENYA REVENUE AUTHORITY..... RESPONDENT

J U D G M E N T

1. The claimant was employed by the Ministry of finance on 19th January 1990 as an income Tax assessor trainee.
2. The respondent, Kenya Revenue Authority was created in 1995 under the Kenya Revenue Authority Act, 1995. The claimant was transferred to the respondent on 23rd September 1996 as an assessor 1.
3. On 13th January 2000, the claimant was promoted to the position of Senior Assessor grade KRA “7” and on 29th November 2002 was promoted to the position of Assistant Commissioner as KRA “6”.
4. Sometimes in 2007, the respondent internally advertised to fill 27 vacant positions in the post of Senior Assistant Commissioner Grade KRA “5”.
5. The claimant was then an Assistant Commissioner in the Domestic Tax Department in Large Tax Payers Office.
6. The claimant applied and was shortlisted for the advertised positions. The claimant attended interviews held on 5th and 6th November 2007.
7. There were 60 applicants and he was ranked position 50 out of 60 with a score of 77.17%. The claimant was not promoted.
8. In 2015, similar positions i.e Senior Assistant Commissioner Positions currently referred to as Manager KRA “6”, fell vacant and were advertised. The claimant applied, was shortlisted and interviewed. The claimant was successful this time and was promoted to the position of Manager Domestic Tax Department.
9. The claimant retired from service on 31st December 2015, and he wrote a letter dated 12th January 2016 to the Deputy Commissioner, Human Resource Department, KRA stating that whilst he was perusing his file to clear upon retirement, he had discovered a letter dated 12th June 2008 written to him promoting him to the position of Senior Assistant Commissioner (SAC) with immediate effect. That as at the time he was invited to do the interview for the position, he had been performing duties of the position of Senior Assistant Commissioner. The duties which the claimant states he performed until his retirement on 31st December 2015 included:-

2005 – In charge of Debt unit

2006 – 2009 – Relationship manager in charge of a sector.

2009-2014 – in charge of Return process unit.

2014 – 2015 – In charge of Dispute Resolution.

10. The claimant prays for the payment of the difference in remuneration from 12th June 2008 to 31st December 2016; Damages for the malicious and unlawful concealment which led to prejudice; loss and damages; costs and interest.
11. The claimant testified in support of the particulars of claim set out herein before as CW1 and called CW2 Mr. Onyango, a certified Human Resource Practitioner registered with the Kenya Institute of Human Resource Management. CW2 gave testimony on oath and produced computation of the loss suffered by the claimant due to the failure by the respondent to implement his promotion with effect from 12th June 2008.
12. The witness testified about the difference in remuneration to the date of claimant's retirement and the impact of failure by the respondent to confirm the claimant to the positions he held in acting capacity and not confirmed to from the year 2005 to the year 2015.
13. According to his report and testimony, the claimant lost a sum of Kshs 16,045,512 as shown in a detailed table marked as item 4.0 Analysis and findings and 4.1 Summary of the report filed on 12th March 2018 and discussed by CW2 in his testimony before court. According to CW2, the claimant ought to have earned a basic salary of Kshs 250,000 per month and not 119,582 as from 12th June 2008 making a difference of Kshs 130,418 per month; difference of Kshs 5,000 house allowance per month; Kshs 17,000 commuter allowance per month; 30,000 other allowances not earned per month; Kshs 5,000 airtime per month; Kshs 3,600 newspaper provisions per month.
14. The total difference for the period 12th June 2008 to 18th June 2015 according to CW2 was Kshs. 16,045,512. The claimant prays to be paid the sum accordingly.
15. Under cross examination, CW2 admitted that in June 2008, the claimant if promoted would have earned Kshs 119,702. That according to the claimant's pay slip for August 2008, he earned Kshs 119,582 making a difference of Kshs 120 approximately. He would have earned Kshs. 40,000 house allowance but earned Kshs 27,000. Report disfavors the claimant as it recommends Kshs 5,000 for the entire period. CW2 admitted that the purported letter of appointment did not provide for other allowances of Kshs, 30,000 but the letter of promotion dated 18th June 2015 mentions other allowances. CW2 did not know when KRA started paying other allowances. CW2 admitted that the figure of Kshs. 250,000 per month was not based on any documentation. He said if he had all documents, he would have provided a more objective estimate of salary increment.
16. The respondent called RW1 Grace Mwangi the Human Resource Manager Divisional Corporate Support Department KRA. She testified that she was employed by KRA in 1996 but joined Human Resource Department in the year 2003. She was a Human Resource expert and a member of the Institute. RW1 confirmed the employment and retirement details of the claimant. She was not involved in the matter in dispute. She relied on the records in the claimant's file. RW1 confirmed that in the 2008 interviews the claimant was ranked 50 out of 60 candidates. He was the lowest ranked in the DTD/LTO category. That only 14 candidates were to be promoted in DTD/LTO and 13 in DT/DR. That the respondent needed 27 officers to be promoted then. About 4-5 persons did not attend interview.
17. The results of the interview as per procedure were sent to the commissioner General for approval in the order of merit according to a memorandum dated 19th February 2008. The claimant did not qualify for promotion therefore according to CW2. CW2 told the court that the purported letter of promotion dated 12th June 2008 written to the claimant promoting him with immediate effect was issued in error but it was withheld and did not reach the claimant. That the note on the letter states "PCA" be not be issued. That "PCA" means 'Pay Change Advice'. According to the witness the letter was orated but not destroyed. That it could not be destroyed because it was an official document. RW2 was not sure who made a note on the letter but stated that same must have emanated from the Human Resource Department.
18. RW2 therefore concluded that no promotion took place and the claimant is not entitled to the reliefs sought. RW1 denied that the letter was withheld maliciously asserting that the claimant did not qualify for the promotion in terms of the report of the interviews. The claimant was later appointed on an acting capacity in the year 2012 by Mr. Njiraini who the claimant alleges was malicious. Furthermore when Mr. Njiraini was the commissioner he confirmed the claimant to the position in June 2015. In 2008 Mr. Njiraini was a head of department and was not an appointing authority at the time. RW2 explained that candidates Tom Okumu and Anne Irungu who were not in the top 13 and 14 positions required were later promoted when additional positions arose in their respective departments. In any event, RW1 stated that the two were ranked higher than the claimant in 2008.
19. RW1 withstood very close examination by Mr. Brian Mboya counsel for the claimant. RW1 did not waver in her testimony and her credibility remained sound based on the observation by the court and documentary evidence during the hearing.
20. The respondent prays that the suit be dismissed with costs.

Determination

21. The issue for determination in the suit is whether the claimant was promoted on 12th June 2008 with immediate effect upon attending the interview described in the suit.
22. The claimant discovered a letter purporting to have promoted him while he was clearing upon his retirement in December 2015. The writing of the letter for promotion is not denied by RW1 for the respondent who testified that the same was written in error by the Human Resource Department and was arrested immediately and therefore no communication was made to the claimant. That the claimant served in his previous terms and conditions of service until he was formally promoted after attending another interview in June 2015, just before his retirement.

23. In terms of *Section 107 of the Evidence Act, Cap 80 laws of Kenya*;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

This is referred to as the burden of proof which in a civil matter is on a balance of probabilities. Furthermore, *Section 108 on incidence of burden* provides:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

24. In the present case, it is the court’s considered view and finding that existence of a letter that was not communicated by the employer to the claimant did not confer the promotion to the claimant with effect from 12th June 2008 or at all. The respondent ably rebutted the evidence adduced by the claimant by demonstrating that the interview panel had not rated the claimant favourably at the time to qualify for the 27 slots that were available for internal promotions. This documentary evidence presented by RW1 was clear and unequivocal. The notation on the letter of promotion that was written in error clearly directed that the letter be not implemented and the same was filed for the record hence it was not destroyed.

25. The elements of a contract that must be established to demonstrate the consummation of a legally binding contract are:

- i. Offer
- ii. Acceptance
- iii. Consideration
- iv. Mutuality of obligation
- v. Competency and capability; and, in certain circumstances,
- vi. A written instrument.

See <https://contracts.uslegal.com> >elements-o

26. In the present case, the elements of offer and acceptance of the promotion are lacking since no communication came from the employer to the claimant. The letter found in the file years later was not intended to be communicated to the respondent and if that was the case, the claimant had already reached mandatory retirement age and the contract was no longer capable of implementation. Therefore, both parties lacked competency and capacity to consummate the contract by operation of the Public Service law and policy in place on retirement. Finally, the contract had been cancelled by a notation on it which directed that it be not implemented. There was no offer therefore communicated to the claimant while he had capacity to accept the same.

27. Accordingly, the suit by the claimant lacks merit and in answer to the 2nd issue for consideration, the reliefs sought by the claimant are not merited. The suit is therefore dismissed in its entirety.

28. Considering the circumstances of the case which in court’s view are regrettable the respondent does not merit an award of costs. Consequently, the court makes no order as to costs.

Judgment Dated, Signed and delivered this 7th day of March, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Mboya for Claimant

Mr. Rewiso for Respondent

Chrispo – Court Clerk