



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2000 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

ELIUD GATUNGU WANJOHI.....1ST CLAIMANT

WALLACE KAMAU KIRAGU.....2ND CLAIMANT

ANDREW DISHON MWANGOLA.....3RD CLAIMANT

JOHN FRANCIS KABUCHU.....4TH CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

JUDGMENT

By Statement of Claim dated 4th December, 2013 and filed in Court on 16th December, 2013 the Claimants herein alleging Underpayment of Salary arrears by the Respondent and seeks for the following remedies:-

a) Costs of this Suit

b) Payment of Salary arrears to the various Claimants as follows:

i. Mr. Eliud Gatungu Wanjohi.....Kshs.104,739.65

ii. Mr. Wallace Kamau Kiragu.....Kshs.145,188.45

iii. Mr. Andrew Dishon Mwangola.....Kshs.150,887.15

iv. Mr. John Francis Kabuchu..... Kshs.145,422.65

c) Interest on b) above at Court rates

d) Any further reliefs that this Court may deem fit and just to grant.

The Respondent a state corporation within the Republic of Kenya filed a Memorandum of Response 22nd March 2015 and filed in Court on 25th March 2015 in which it admits having engaged the Claimants herein on diverse dates in the years 1960, 1962, 1963 and 1964. It is further admitted that the said Claimants were placed under retirement on diverse dates in the years 1993 and 1994 as contained in the statement of Claim respectively.

The Respondent further contended that all salary rightfully owing to the Claimants were duly paid as indicated and acknowledged by the Claimants. It is further averred that the said payments were made in full and final settlement of all owing arrears and that the Claimants do not dispute receipt of the said amounts.

The Respondent avers that the payments were made following the Claimants' salaries inadvertently converted wrongly and that following inter-ministerial committee after complaints were raised.

The Respondent contends that there existed two categories of corporation staff that is unionisable and management and the Claimants were initially unionisable staff prior to their promotion on a managerial cadre. It is further averred that the salary structures for the two groups was different.

The Respondent further contends that the Claimants at all times during the subsistence of their employment agreed to perform under the same terms and are estopped from claiming otherwise

The Respondent stated that the Claimants' Claims are meritless, frivolous and vexatious and urged the Court to dismiss the same with costs to the Respondent.

Claimant's Case

The Claimants' case proceeded for hearing on 3rd May, 2017 when the 3rd Claimant, Andrew Dishon, CW1 testified that he was first employed by the then East African Railways and Harbours Administration on 2nd January, 1962, as a trainee Clerk division IIB and worked for a total of 32 years.

CW1 sought and was allowed to have his witness statement dated 10th June 2016 and filed in Court on 16th June, 2016, which request was allowed by the Court. In his statement CW1 avers that in his career spanning 32 years in Human Resources Management with the Respondent he progressed through a series of promotions up to the rank of Assistant Personnel Officer (Policy Research) Group 'RA' on 25th April, 1988 and continued to serve under the same terms and conditions of service as set out in the KRC Personnel Regulations, 1988 without any variation whatsoever until his retirement from service effective from 19th October, 1994.

CW1 contended that their promotions came with salary increments from K£3,144 per annum, K£3, 672 per annum, K£ 3,804 and K£4,116 per annum respectively for all the Claimants' after their promotions.

CW1 further contended that after they (the Claimants) retired from the Respondent's service the Respondent publicly admitted that anomalous situation had been created between the years 1988 and 1993 in salary payments for Group 'RA' officers.

On Cross examination CW1 averred that he joined the Respondent on 2nd January 1962 in the position of Trainee Clerk Division 2B. Further, that the terms of engagement were permanent and pensionable. CW1 stated that he worked for 1 year then was promoted on several occasions finally to position RA. Promotions were done as per the attached bundle in the Claimants' Bundle of documents.

On further cross examination confirmed that the Respondent revised its salaries for non unionisable staff. He further stated that on 1st July 1987 there was a general notice for salary increment for non unionisable staff that also applied to him on retirement. He further testified that his new salary would fall under RA where the minimum salary was 3276 and maximum being 4956.

CW1 further testified that the officers got annual increments until the maximum salary was attained as provided for under the Respondent's personnel regulations. He further stated that the revised salary scale for unionisable staff and is dated 1st September, 1987, at which point he was yet to be promoted to the position of RA. CW1 further stated that at that point in time he was earning a salary of K£3,144 which was top of that scale.

On further cross examination CW1 stated that since his promotion was accelerated, his entry point was therefore meant to be K£ 4,272. CW1 also admitted having not worked in the position of RB prior to his promotion. CW1 further testified that his promotion was done in the year 1988 and that he retired from the corporation on 19th October, 1994.

CW1 stated that the Claim seeks for payment of underpaid salaries. CW1 further stated that he worked in the same grade with Mr. John Shilavula who was equally underpaid and lodged a complaint with the inter- Ministerial Committee and was paid more money yet worked on the same scale. CW1 stated that he was not happy with the amount that was paid out to him.

On re-examination CW1 stated that since his retirement they have not been paid based on special notice no. 3 of 1995. He further stated that they (the Claimants) lodged a complaint immediately following their promotion in 1988 and 1989. That the same was made via a letter to the Respondent which letter was duly responded to.

CW1 testified that the Respondent's offer of Kshs.65,000/- was based on 2nd pay point not grade RA and as a result he was not satisfied and proceeded to file the instant Claim.

CW1 further testified that his promotion and that of his colleagues was based on merit as they were more productive and were more experienced than their junior colleagues.

The Claimants' urged the Court to refer to witness statement filed by the other Claimants on 10th June, 2016 and opted not to call them to give oral evidence in Court as their cases are similar.

CW1 prays that the Memorandum of Claim be allowed as drawn.

Respondent's Case

The Respondent's case was heard on 24th July, 2018. RW1 (**Nemwes Mogere Atemba**) formerly the Human Resource Officer up to the year 2016 when he retired. RW1 testified that before his retirement from the Respondent he recorded a statement dated 3rd October, 2016, which he sought to have it adopted as his evidence in chief. The request was duly allowed by the Court.

It was RW1's testimony that the Claimants' were employees of the Respondent Corporation and that the issue pending for determination before this Court is the contention that the Claimants were not given the correct salary following their promotion as provided under the corporation policy on salaries and remuneration as well as the staff personnel regulations of 1988.

RW1 further testified that the scale that was applicable to the Claimants was the maximum at Executive 1 as they were unionisable staff under grade RB Executive 1, which amount was K€ 3,144 PA. Further, that the Claimants were subsequently promoted to assistant personnel officers Grade RA and were placed on 3276 PA pursuant to the Respondent's Regulations.

RW1 further testified that the difference between Executive 1 and RA is that the latter referred to management staff and the former to unionisable staff and that unionsable salaries were subject to negotiation and the CBA while management salaries were done by the board.

RW1 clarified on the promotion levels that once an employee was promoted from Executive 1 they move to Senior Executive C, Senior Executive B and Senior Executive A. After that the employee on successful promotion would move to RA. He added that the Claimants in the instant claim did not serve in Senior Executive A, B and C and that they were given accelerated promotion whereby they skipped to RA and placed on a salary of K€ 3276.

RW1 testified that one of the Claimants' colleagues proceeded to the Ministry of Transport and further to the office of the president to appeal to be placed on the higher point prompting the then Minister of Transport to come up with an Inter-Ministerial committee to look into the issue. Subsequently, the committee formed conducted its investigations and advised that the employees be given a higher increment than he was promoted to. He further stated that the Claimants' herein have cited and are relying on the said case as precedent. RW1 contended that the said case was different and unique to that of the Claimants' herein.

On cross examination RW1 testified that the position of Executive 1 was unionisable while that of Executive Senior are under management and that the Claimants were promoted from Executive 1 to RA in accelerated promotion and skipped the positions of Executive C, B and A. He further explained that the skip was due to the fact that there were vacancies in the position of RA and that the Respondent was of the view that the Claimants were competent to hold the positions.

RW1 further stated that Clause 7 (e) provided that the Managing Director of the Corporation had discretion in promotions. He further testified that the Claimants were not disadvantaged as alleged in their statement of Claim.

RW1 further testified that from his experience promotions were not automatic. It was his further evidence that the Claimants earned more than their previous positions prior to their promotions. He however admitted that the Claimants earned less than their juniors.

On further cross examination RW1 stated that the circular dated 31st July, 1995 attached to the Claimants' Bundle of Documents introduced salary scales for unionisable staff. Further that Clause No. 4 thereto extended the salary scales. He further testified that the circular is done in 1995 July yet the promotions were done in 1986.

RW1 also confirmed that the Claimants have been raising the issues raised in their Memorandum of Claim since they retired from the Respondent's employment.

On re-examination RW1 stated that the computation circulars take effect on the effective date. He further testified that the document relied on by the Claimants came to effect on 1st July, 1995. He also confirmed that the Claimants did not serve the Respondent in the positions of Executive A, B and C and that there is no provision in the regulations for employees to earn salaries which they have not worked for.

On further re-examination RW1 stated that the policy on promotion is 2 years and was not automatic. He further confirmed that for an employee to be considered for promotion they ought to have worked for more than 2 years.

On examination by the Court, RW1 confirmed that the document attached at page 33 of the Claimants' Bundle of documents is for revision of salaries which is both in Kenya Shillings and pounds. He also confirmed to the Court that the date of promotion of the Claimants was 25th April 1988. He further confirmed that the effective date for the review was 1st July 1987.

The parties thereafter filed and exchanged written submissions.

Claimant's Submissions

In the written submissions the Claimants reiterated the contents of the Memorandum of Claim and the CW1's oral evidence in Court.

It was submitted by the Claimants that they are entitled to the reliefs as their argument is anchored on the Kenya Railways Corporation staff Regulations, 1987 – Clause C. 7 (e) which provides that:

“Any case of promotion to an office carrying salary on an increment scale in which the application of the arrangements set out in this regulation is unsuitable or would act to the disadvantage of the employees, will be decided in such a manner as the Managing Director may determine.”

The Claimants further submitted that there are instances i.e the cases of Mr. J. M Ngovi and Mr. Shilavula where the Respondent failed to pay salaries based on promotions and in both instances the Respondent rectified the anomalies by paying the correct salaries as per its regulations.

The Claimants further submitted that in their case the Respondent took cognisance of the anomaly vide its special notice No. 3 of 1995 at Clause 4.

It is the Claimants' submission that the Respondent failed to comply with the **International Labour Organisation- Equal Remuneration Convention, 1951 (No. 100)** that sets out measures to be taken by an employer to promote objective appraisal of jobs on basis of the work performed.

The Claimants contend that the Respondent failed to comply with the provisions of Section 5(4) of the Employment Act, 2007 that provides that "An employer shall pay his employees equal remuneration for work of equal value." In that the Claimants were not being paid commensurate to their rank as they earned lower salaries than their counterparts in much lower grades. The Claimants cited the Authority of **David Wanjau Muhoro Vs Ol Pajeta Ranching Limited (2014) eKLR**.

The Claimants urged this Court to allow their Claim for salary arrears at K€ 4,272 as prayed in their Memorandum of Claim. They cited the case of **Industrial Court of Kenya Cause No. 1029 of 2011 Mussawa Zachaeus Mumali Vs Nzoia Sugar Company Limited** where the Employee's salary was reviewed at Kshs.28,881 per month on 16th May 2005. The implementation date was backdated to 1st July 2004, but the employer did not implement the decision. Instead, the employer later reviewed the old salary ignoring the earlier review. The Court granted the Claimant the sum of Kshs.1,339 per month from the 1st July, 2004, being the increment that was not acted on.

In conclusion the Claimants' urged the Court to allow their Claim as drawn having proved their case to the required standard of proof.

Respondent's Submissions

The Respondent on its part admitted having engaged the Claimants in the manner described by the Claimants. Further, that the Claimants were promoted and their salaries were regulated by the Kenya Railways Corporation Personnel Regulations, 1988 with the relevant portion being Clause C (7) thereto.

The Respondent submitted that it did inform the Claimants vide its letter dated 27th April 1988 of their salary increments which was raised from K€ 3,144 per annum to K€3,276 per annum as they were non unionisable as stipulated by Regulation C7(a) of the KRC Personnel Regulations, 1988. To fortify its argument the Respondent relied on the Authority of **Lawrence Adiyio Vs Kenya Revenue Authority (2018) eKLR**.

The Respondent contended that the difference in salary between the Claimants and their junior colleagues in Grade RB Executive 1 was due to the fact that the later were unionisable staff whose salaries were subject to negotiation between the union and the Respondent which was implemented on 1st July, 1989. That this largely contributed to the difference in salaries. The Claimants on the other hand upon their promotion became management staff who only obtained salary increments upon approval by the Government which coordinated all salaries through the Directorate of Personnel Management Office. The Respondent cited that case of **Fredrick Ouma Vs Spectre International Limited (2013) eKLR**.

The Respondent further submitted that the Claimants lodged an appeal on the issue of the discrepancy in salaries and as a result an Inter-Ministerial Committee looked into the cases and recommended adjustment. It was on that basis that the Respondent calculated and paid the Claimants as follows:

- i. Mr. Eliud Gatungu Wanjohi.....Kshs.45,383
- ii.....Mr. Wallace Kamau Kiragu Kshs.54,650
- iii.....Mr. Andrew Dishon Mwangola Kshs.65,000
- iv.....Mr. John Francis Kabuchu Kshs.55,000

The Respondent further submitted that the above payments were made in full and final settlement of the Claimants salaries in accordance with the Inter Ministerial Committee's report and that the Claimants did not dispute the same and accepted the payments.

The Respondent sought to distinguish the Claimants case from that of **David Wanjau Muhoro Vs Ol Pajeta Ranching Limited (2014) eKLR** that is cited by the Claimants in that in the cited Authority the Claimant therein claimed to have been earning less than his white colleagues for equal work of equal value despite having similar qualifications and experience. In the instant claim all the Claimants as well as 20 other colleagues with similar qualifications were earning the same salary upon promotion on 25th April, 1988.

In conclusion the Respondent urged the Court to be guided by the case of **Lawrence Adiyio Vs Kenya Revenue Authority (2018) eKLR** and dismiss the instant Claim as the Claimants were treated well within the provisions of their terms and conditions of service as contained in the KRC Personnel Regulations, 1988. They further urged the Court to award it costs of the Claim.

Analysis and determination

There is no dispute that the Claimants were employed by the Respondent herein on diverse dates between 1960 and 1964. There is further no dispute that the Claimants retired from the Respondent's employment on diverse dates between 1993 and 1994 and that prior to their retirement they were promoted to Job Grade RA leapfrogging junior grades of Grades RB Senior Executive 'A', 'B' and 'C'. The only issue in my view is whether or not the Claimants are entitled to the reliefs sought in the Statement of Claim.

The Claimants have urged this Court to award the reliefs as sought in their Statement of Claim. That they are victims of discrimination whereby officers of similar rank and even junior officers within the corporation were earning more than them. They submitted that they immediately complained to the corporation of the anomaly but were dissatisfied with what the corporation offered them prompting them to file the instant claim.

The Respondent on the other hand submitted that the terms and conditions of engagement were regulated by the Kenya Railways Corporation Personnel Regulations, 1988 and more specifically Clause C (7) that provided:

(a) when an employee is promoted to an office carrying salary on incremental scale on the date of his promotion the salary of the employee is less than the minimum of the new office, he will receive the minimum, and the date of the promotion will become his future incremental date.

(b) if in similar case the employee's salary is not less than the minimum of his office, his salary will be increased to the point in the new scale next above the salary he is receiving in the old scale, and he will subject to the provisions of paragraph (d) below, retain his previous increment date unless he had reached the maximum of the old scale, in which case the date of promotion will become his future incremental date.

(c) for purposes of paragraph (a) and (b) above, in any case where the date of promotion and incremental date coincide the employee will be deemed to have been granted any increment for which he would have been eligible in his old scale on the date due and his point of entry to the new scale will be determined accordingly.

(d) Notwithstanding any of the foregoing, if in such a case the employee's former office was one to which no duty or a similar non pensionable allowance was attached and he is promoted to an office carrying such an allowance, he will serve for a full incremental period in the new office before becoming eligible for any increment.

(e) Any case of promotion to an office carrying salary on an incremental scale in which the application of the arrangement set out in this regulation is unsuitable or would act to the disadvantage of the employee, will be decided in such manner as the Managing Director may determine."

The Respondent further submitted that the discrepancies in the salaries were

due to the fact that the Claimants upon promotions were management staff whose salaries were reviewed upon consultation with the Minister of Transport through the Directorate of Personnel Management while for those staff who were union members their salaries were negotiated between the union and the Respondent with their last increment implemented on 1st July, 1989.

The Respondent further stated that it received complaints from the Claimants and an Inter-Ministerial Committee formulated and out of its report the Claimants were compensated which compensation was duly accepted by the Claimants.

Having considered the pleadings, the evidence of CW1 and RW1 and the submissions of both parties, it is evident that the complaint by the claimants is that they were disadvantaged by their promotion from Grade RB Senior Executive 1 to RA. They are aggrieved that by the time they retired, their counterparts who remained in Grade RB Senior Executive 1 were earning a higher salary.

The claimants anchored their argument on Kenya Railways Corporation Staff Regulations Clause C.7(e) which provides that –

"Any case of promotion to an office carrying salary on an incremental scale in which the application of the arrangements set out in this regulation is unsuitable or would act to the disadvantage of the employee will be decided in such a manner as the Managing Director may determine."

The position of the claimants is summarised in the appendix at page 24 of the claimant's bundle titled –

"CONFIDENTIAL

REFERENCE NOTES

RE: ADJUSTMENT OF SALARY ON PROMOTION FROM GRADE RB EXECUTIVE 1 TO GROUP 'RA' W.E.F 25TH APRIL 1998."

At paragraphs (1) to (3) the claimants state as follows –

(1) Group /RA/ is next to the Superscale, i.e. Group 'RS' and a Senior Grade to Grades RB. Senior Executive 'A' 'B' and 'C' and RB. Exec. 1.

(2) A scrutiny of the Group 'RA' salary scale and the salary scales applicable to Grades RB. Senior Executive 'A', 'B' and 'C' and RB. Exec. 1 (in the common Salary Structure) in the period 1st September, 1988, to 1st July, 1993 reveals the provision for overlapping of scales between the main Groups to the extent that common pay points have been used. To that extent the minimum pay point in the Salary scale attached to Group 'RA' is far below the minimum pay point of Grade RB, Senior Executive 'C'. As a result, there have been inconsistencies, anomalies, errors and omissions on the several revisions of salaries that bedeviled these scales, then, since an employee is Grade R3 Executive 1 promoted to Grade RB. Senior Executive 'C' or 'B' enjoyed a much higher salary than another employee in Grade RB. Executive 1 (earning equal salary) who was promoted to Group 'RA'.

(3) A perusal of the attached paper on "Salary Progression" in respect of Group and those in Grade RB Exec. 1 reveals that the difference between the minimum pay point in the salary scale attached to Group 'RA' and the maximum salary of Grade RB. Exec. 1 is Kshs.55.00 per month as at 1st September, 1988. Thus the monetary gain we, literally, earned immediately upon our promotion to Group "RA7 is Kshs. 55.

(a) Each one of us earned the first Annual increment in Group "RA' effective from 1st April, 1989, which raised our salary from Kshs. 5,460/= pm to Kshs. 5,680.00 pm. On 1st July, 1989, the salary revision raised the maximum of Grade RB. Exec. 1 to Kshs. 5,855.00 pm. In effect, each one of us was earning Kshs. 175.00 pm, then less than what we would have earned had we remained in Grade RB. Exec. 1

(b) We earned our second Annual increment on 1st April, 1990, which raised our pay point to Kshs. 5,900.00, and upon receipt of the third Annual increment effective from 1st April 1991, our pay point was raised to Kshs. 6,120.00 pm. On 1st July, 1991, however, the Salary Revision raised the maximum salary in Grade RB. Exec. 1 from Kshs. 5,855.00 pm to Kshs. 7,035.00 pm whereas our pay point was raised from Kshs.6,120.00 pm to Kshs.6,805.00 pm. Thus each one of us was earning Kshs.230.00 pm less than what we would have earned had we remained in Grade RB. Exec. 1.

(c) Having earned our fourth Annual increment in Group 'RA' effective from 1st April, 1992, our pay point was raised from Kshs.6,805.00 pm to Kshs.7,035.00 pm, and on which date our salary point was on par with that of the maximum of Grade RB Exec. 1.

(d) Following the Revision of Salaries effective from 1st July, 1992, our pay point was raised from Kshs.7,035.00 pm to Kshs.7,665.00 pm while the maximum of RB Exec. 1 was likewise revised to Kshs. 7,665.00. In effect, we did not get any monetary gain as a result of our promotion to Group 'RA'.

(e) Having earned our fifth Annual increment in Group 'RA' with effect from 1st April, 1993, our salary point was raised from Kshs. 7,665.00 pm to Kshs. 7,950.00 pm

(f) With effect from 1st July, 1993, the Salary Review raised our pay point from Kshs. 7,950.00 pm to Kshs. 9,285.00 pm, and it is not without surprise that the Minimum of Grade RB Exec. 1 was raised from Kshs. 7,665.00 pm to Kshs. 9,605.00 pm and which was more by Kshs. 320 per month than what each one of us was earning.

(g) From the trend as stated herein above, it is crystal clear that we did not benefit monetarily from promotion to Group 'RA' for the period up to 1st July, 1993, our salary point in Group 'RA' was lower than the maximum of Grade RB, Exec. 1."

It is on this basis that they urged the Managing Director to intervene.

From the foregoing it is clear that the claimants do not accuse the respondent of failing to comply with the Regulations that affected their pay. They are complaining that by compliance with the Regulations, they were disadvantaged.

As explained by the respondent, the salary of £3,276 x 132 communicated to the Claimants was the minimum, salary for Non-Unionisable Job Group RA in accordance with Clause C 7(a) KRC Personnel Regulations 1988 which stipulates that when an employee is promoted to an office carrying salary on incremental scale and on the date of his promotion the salary of the employee is less than the minimum of the new office, he will receive the minimum of the new office.

It is obvious that the circumstances that the claimants found themselves in was not from the commissions or omissions of the respondent, but from the fact that their promotion was from a unionisable grade to a non-unionisable grade. At the time of promotion they were given higher salaries. However while the non-unionisable grades had to wait for salary increments by the Public Service Commission which were far apart, the unionisable staff salaries were adjusted every time there were negotiations of terms and conditions of service by the union. This was more frequent and led to the salary of RB Exec. 1 catching up and sometimes overtaking the salaries for the non-unionisable but more Senior Grade 'RA' which the claimants had been promoted to.

The Regulations were clear that only the Managing Director could intervene at

his own discretion where an employee was disadvantaged by the application of the Regulations hence the wording in Clause C.7(e) of the Regulations to that effect.

The Claimants registered their complaint on the same issue with the Respondent and as a result an Inter-Ministerial Committee was formed to look into the issue. Out of the discussions the Claimants were duly paid as follows:

i.Mr. Eliud Gatungu Wanjohi.....Kshs.45,383

ii.Mr. Wallace Kamau Kiragu.....Kshs.54,650

iii. Mr. Andrew Dishon Mwangola.....Kshs.65,000

iv. Mr. John Francis Kabuchu.....Kshs.55,000

CW1 in his evidence confirmed receipt of the payments but stated that he was dissatisfied with the decision of the committee thus the filing of the instant Claim.

The formation of the Inter-Ministerial Committee was well within the Respondent's mandate and the resolution reached communicated to the Claimants and their recommendations duly implemented.

From the foregoing, I find no merit in the claim by the claimants. They had already received salary adjustments following intervention of the Inter-Ministerial Committee. Their dissatisfaction with the adjustments made as a result of the intervention is not a ground for intervention by the court. They have not demonstrated that there was any discrimination by the respondent or that the respondent failed to comply with the Regulations to their disadvantage.

For these reasons the claim is dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE