



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**Cause No. 11 Of 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 23<sup>rd</sup> February 2018)**

**ADOW MOHAMED KANYARE.....CLAIMANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL (Sued for and on behalf of the**

**Permanent Secretary Ministry of Education).....1<sup>ST</sup> RESPONDENT**

**BOARD OF GOVERNORS**

**(Mandera DEB boarding primary school).....2<sup>ND</sup> REPENDENT**

**JUDGMENT**

1. The Claimant filed Suit on 17<sup>th</sup> December 2012 seeking salary increments, salary underpayment and unpaid retirement benefits including medical, hardship and house allowance for 16 years. He states that vide a letter of offer dated 23<sup>rd</sup> May 1970, he was absorbed from Mandera County Council into the Government Service on transfer as Subordinate staff. He worked under the Ministry of Education in the same capacity and grade up to 1977 (see document number 1 of the Claimant's list of document).
2. He avers that in 1978, he was moved again to serve under the District Education Board in the same capacity.
3. The Claimant states that by a letter dated 4<sup>th</sup> November 1988 from the Ministry of Education, the 1<sup>st</sup> Respondent herein promoted the Claimant to the position of Senior Subordinate Staff and his salary was to be adjusted with effect from 1<sup>st</sup> January 1989. (See document number 3 of the Claimant's list of documents).
4. The Claimant avers that he was to get an increment in the gross salary from Kshs. 2,490/= to Kshs. 3,090/= per month. In addition, he was to get an increment in his hardship, medical and house allowances but it was never effected. (see document number 38 in the Claimant's list of document are copies of Mandera Arid Zone Primary School pay sheets for the support and non-teaching staff for the months of March 2003, April 2003, May 2003, June 2003, February 2004 and August 2004).
5. The Claimant proceeded to lodge a complaint to the Permanent Secretary, Ministry of Education Director, District Education Office, District Commissioner and the Headmaster, Mandera Arid Zone Primary School but no action was taken. (see document number 4 in the Claimant's list of documents).
6. The Claimant states that despite the complaint, he continued receiving the same salary and allowances without factoring into account the national increment percentage in salaries as outlined below:-
  - a. **Personnel circular No. 2 dated 8<sup>th</sup> April 1993 indicating salary increases recommended by the Civil Service Review Committee (1990/1991) (Third phase) and accepted by the Government to be implemented in three phases clearly indicating that the first and 2<sup>nd</sup> phases took effect on 1<sup>st</sup> July 1991 and 1<sup>st</sup> July 1992 consecutively.**

**b. Personnel General letter No. 12 from the Directorate of Personnel Management to the Attorney General et al dated 1<sup>st</sup> August 1994 with regard to amendment of conversion tables related to salaries and medical allowance.**

c. Personnel circular No. 6 on new conditions of service for the Kenya Civil Service dated 7<sup>th</sup> July 1994 outlining revised salary scales and conversion tables to be implemented with effect from 1<sup>st</sup> July 1994.

d. Personnel circular No. 16 dated 27<sup>th</sup> October 1997 indicating salary increases of 10% for Civil Servants which was to take effect from 1<sup>st</sup> November 1997.

e. Letter from the permanent secretary, secretary to the cabinet to the Attorney General et al dated 18<sup>th</sup> June 2001 on harmonization of terms and conditions of service in the public service: Housing.

f. Personnel Circular No. 1/2001 dated 19<sup>th</sup> June 2001 on compliance of statutory minimum wage after the government's announcement of 7% salary award for the lowest paid categories of workers.

(see document number 5, 7, 8, 10, 11 and 12 of the Claimant's list of document).

7. The Claimant continued to work for the Respondents diligently as Senior Subordinate Staff although his salary and his allowance remained stagnant, furthermore, he states that his monthly contributions towards the National Social Security Fund was deducted in his pay slip on various occasions but were never transmitted to the National Social Security Fund.

8. The Claimant avers that he worked diligently until he was issued with a Retirement Notice by the 2<sup>nd</sup> Respondent on 17<sup>th</sup> May 2004 after attaining the retirement age of 55 years. (Document number 14 of the Claimant's list of document is a copy of the said retirement notice). He retired from service on the 18<sup>th</sup> of August 2004 and was issued with a commendation letter dated 22<sup>nd</sup> July 2004 by the 2<sup>nd</sup> Respondent. (see document number 15 of the Claimant's list of document is a copy of the said letter).

9. Vide a letter dated 12<sup>th</sup> October 2004, the District Schools Auditor wrote to the 2<sup>nd</sup> Respondent advising the 2<sup>nd</sup> Respondent to convene a board meeting and make arrangements for the payment of the salary but he failed and/or refused to take action. (see document number 20 of the list of document is a copy of the said letter).

10. The Claimant states that A.S Osman the Provincial Director of Education North Eastern Province by a letter dated 17<sup>th</sup> December 2004, wrote to the District Education Officer in reference to the District School Auditor's letter dated 12<sup>th</sup> October 2004 outlining the 2<sup>nd</sup> Respondent's failure to heed the contents of the letter. Particularly the content of the letter stated;

**“The headmaster who is the Board's Executive Officer seems oblivious of the gravity of what is at stake. It is a grave issue sending off a staff on retirement without clearance of their benefits, it is a breach of trade laws”. (See document number 21 of the Claimant's list of document).**

11. By a letter dated 12<sup>th</sup> April 2006, the Claimant once again lodged a complaint to the Permanent Secretary Ministry of Education through the Provincial Director of Education North Eastern Province, the District Education Officer Mandera, the Education Officer Mandera and the head teacher Mandera Arid Zone Primary School concerning his unpaid retirement benefits by the 2<sup>nd</sup> Respondent. (see document number 23 of the Claimant's list of document ).

12. The Ministry of Education by a letter dated 19<sup>th</sup> May 2006, wrote to the teacher of Mandera Arid Zone Primary School advising them to convene a board meeting and reach an amicable solution regarding the salary arrears. (See document number 24b of the Claimant's list of document).

13. The Claimant avers that despite numerous correspondence particularly letters dated 6<sup>th</sup> May 2008, 24<sup>th</sup> September 2010 and 24<sup>th</sup> February 2011 consecutively to the Permanent Secretary, the Ministry of Education, his efforts to receive retirement benefits have proved futile, which is a gross contravention of the Claimant's employment rights under the Constitution of Kenya 2010 and the Employment Act 2007. (See document number 27, 29 and 30 of Claimant's list of document).

14. The Constitution of Kenya 2010 under Section 41 provide for employees “*right to labour relation*” which includes right to fair remuneration provided for under Section 41(2). The Claimant ought to have been paid his full salary due every month during his duration of employment and despite his numerous attempts to address the matter through the Respondents, elicited no action.

15. Section 18(5) of the Employment Act clearly provides:-

**“Upon the termination of a contract of service by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowance due to him as have not been paid”.**

16. Furthermore, Article 23(2) of the Universal Declaration of Human Rights clearly recognizes that every individual without any discrimination has right to equal pay for equal work done. Sub-article (3) further states:-

**“Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection.”**

17. The Respondents therefore, even after the Claimant's retirement from service failed to pay the Claimant his salary arrears and his retirement benefits due to him at the particular time of the said retirement, which was totally unjust to the Claimant.

18. The Respondents deny each and every allegation contained in the Claimant's Memorandum of Claim.

19. The Respondents deny the contents of paragraph 4 of the Statement of Claim and puts the Claimant to strict proof thereof and aver that the Claimant was not a civil servant but an employee of the District Education Board and as such was not to be paid according to the Kenya Civil Servants Regulations as averred.

20. That upon transfer to the Mandera Arid Primary School, the Claimant continued to work under the same capacity and terms of service i.e Subordinate Staff on temporary terms of service and as such the school adopted the same payroll the District Education Board used. (Attached and marked AG 1 is the payroll).

21. The Respondent states that the Claimant has since then received all his dues from the NSSF Garissa Regional Office and that the Non-teaching staff is paid by the District Education Office in terms agreed upon by them and the Claimant.

22. The Claimant is alleging increases in salary claiming promotions that are yet to be evidenced.

23. The Respondents aver that the Claimant's claim is clearly time barred as he was retired on the 18<sup>th</sup> August 2004 and has only brought out his claim filed on 6<sup>th</sup> January 2013. This is contrary to Section 90 of the Employment Act. The Respondent shall raise a Preliminary Objection at the earliest time possible.

24. The Respondent submits that the Claimant is not entitled to retirement benefits amounting to Kenya shillings 914,207.00 because on 7<sup>th</sup> March 2011, the Claimant presented payment vouchers to be signed by the Chief Executive Officer. It was later discovered that some of the said payment vouchers had already been paid out a month earlier and so the Claimant is not owed any underpaid salaries, allowances and general damages.

25. I have considered the averments of both parties. It is evident that the Claimant was retired on 18<sup>th</sup> August 2004. The prayers sought are for cause of action if any that accrued before this period. For the Court to be properly ceased of this matter, the Court should take cognizance that it has jurisdiction to handle the matter, which is properly before it.

26. Jurisdiction is everything. This is the position in the celebrated case of **Lilian 'S'**. If a matter is time barred, this Court clearly has no jurisdiction to handle it. Under Section 90 of Employment Act states:-

**“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”.**

27. This Court therefore has jurisdiction to entertain claim brought before it if the same is filed within 3 years from the time the cause of action arose. This Court also has no jurisdiction to extend time in case where a matter is time barred.

28. This was the holding of Court of Appeal in the case of **Kenya Airports Authority vs Shadrack Abraham Kisongochi eKLR (2015)**.

29. In the current case, it is apparent that the cause of action occurred over 3 years before the filing of this claim on 17<sup>th</sup> December 2012. I therefore find the claim untenable and I dismiss it for being time barred in it's entirety.

**Dated and delivered in open Court this 23<sup>rd</sup> day of February, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Muchoki for Claimant

No appearance for Respondent