



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2503 OF 2016**

**JOHN OTIENO NYAMWA & 66 OTHERS.....CLAIMANTS**

**- VERSUS -**

**THE UNIVERSITY OF NAIROBI.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 14<sup>th</sup> December, 2018)**

**JUDGMENT**

The claimants filed the statement of claim on 05.12.2016 through Nyabena Nyakundi & Company Advocates. The claimants prayed for judgment against the respondent for:

- a) A finding by the Honourable Court that the omissions or failure by the respondent to be unfair and unlawful and direct or order the respondent to implement the legal notices on basic minimum wages.
- b) The Honourable Court do issue orders directing the respondent to adjust the claimants' salary scales to conform the CBA as negotiated between the claimants' union and the respondent.
- c) The Honourable Court to order the respondent to pay the claimants underpayment arrears from May 2013 to December 2015 and other allowances as tabulated at paragraph 3.13.
- d) The Honourable Court to order the respondents to pay the claimants risk allowances as specified in the Government Circular No. MPSPS/2/1/3A Vol. III/ (77) dated 21.01.2012.
- e) That the Honourable Court to order the respondent to pay interest of the total sum of Kshs. 10, 824, 131.00 based on the market rates.
- f) Costs of this suit.

The claimants allege as follows:

- a) They were employed by the respondent on diverse dates and in various capacities as per individual claims.
- b) Despite the statutory minimum wages reviewed by the Government through the Wages General Orders 2013 and 2015 the respondent has continued to pay the claimant way below the minimum wages. Their duties or occupations are categorised under column 1(g) of the legal notices on basic minimum wages as revised from time to time.
- c) The failure to implement minimum statutory wages violates Article 41 of the Constitution of Kenya 2010.
- d) The respondent has been selective in making refunds for uniforms to its employees and the claimants have never received the refund of costs incurred in purchasing the said uniforms which they use on a daily basis while on duty.
- e) The respondent has failed to pay those of the claimants employed in medical facilities or college of health sciences risk allowance at the rate of Kshs. 2, 000.00 for the support staff as contained in the Government Circular MPSPS/2/1/3A Vol. III / (77) dated 21.01.2012 and the appeal to be paid the risk allowance has been ignored.

The memorandum of response was filed on 10.07.2017 through KTK Advocates. The respondent prayed that the claim be struck out and dismissed with costs and interest thereon. The respondent pleaded as follows:

- a) It was denied that the claimants were employed on diverse dates between 1985, 1997 and 2006 and in various capacities as alleged for the claimants.
- b) The respondent denied all claims and prayers as alleged for the claimants.
- c) The respondent denied treating the claimants unfairly and contrary to Article 41 (1) and (2) of the Constitution of Kenya 2010.
- d) The claim is scandalous, frivolous, vexatious, and did not disclose any reasonable cause of action in law as it should be struck out.

The 1<sup>st</sup> claimant was authorised to testify on behalf of the other claimants. The respondent did not call a witness.

The Court has considered the pleadings, the documents filed for parties and the submissions on record. The only issue for determination in the suit is whether the claimants are entitled to the remedies as prayed for. The Court makes findings as follows:

a) The claimants allege underpayment based on the minimum wage orders. As submitted for the respondent, the claimants have not filed letters of appointment and other evidence to show their designation and qualifications to justify their claims as set out in the statement of claim. Thus the Court returns that the claimants have failed to show their categorisation relative to the wage orders and to establish the underpayment as alleged in the statement of claim. As was submitted for the respondent, it was not enough to merely plead the special damages but they had to be strictly proved and the court has looked for but failed to find the evidence establishing the underpayment based on minimum wage orders or even the CBA as claimed for the claimants. Whereas the pay slips on record will show, on a balance of probability, that the claimants were employed by the respondent as at the date of the payslip, the same could not establish the underpayment as was prayed for. The prayer will fail.

b) The claimants prayed for refund of costs or expenses incurred in buying uniforms they used on daily basis and it was alleged that the respondent had failed to refund. However the claimants did not file evidence of purchasing the uniforms, or using such uniforms on daily basis as was alleged and more important, no receipts were filed to show the cost or price of the alleged uniforms. The prayer will fail as it was not justified and it was not established by way of necessary evidence.

c) As submitted for the respondent the claimants failed to provide the contractual basis of the claim for risk allowance. While alleging that they were in the category deserving such payment, the evidence to verify their designations and therefore to show that they were deserving of the risk allowance was not provided at all. The prayer will therefore fail as not proved at all.

d) The claimants alleged they had stagnated in the respondent's service but they gave no evidence on their prevailing grades or levels and the entitlement to promotion to designated and graded higher levels. It was not shown that their service was subject to a promise to be promoted within agreed promotional criteria. The allegation of stagnation will therefore fail.

e) The Court finds that failure by the respondent to provide a witness or evidence disputing the claimants' claims and prayers did not amount to the claimants' establishing their claims and prayers. The claimants had to discharge the burden of proving the claims and prayers for special damages as was prayed for and the Court has found that they failed to provide that necessary evidence so that their prayers and claims will fail.

f) The claimants' witness testified that some of the claimants had already left employment by way of retirement. The respondent also submitted that the claimants had failed to establish that they were employees of the respondent - a fact for which it was submitted for the respondent that the respondent had, from the outset, denied. The Court has further considered such circumstances and that the respondent did not avail a witness or comply with directions on filing of witness statements and documents and the Court returns that each party will bear own costs of the proceedings.

g) Finally in this case the Court follows the opinion on proving of special damages as cited for the respondent in **Milicent Atieno Ochuonyo –Versus- Katola Richard [2015]eKLR** (D.A. Onyanja J) thus, “**....I find the assertion by the Plaintiff not credible. The Plaintiff did not support the claim in any way. She did not produce any document to support the claim that the employer granted her a loan. She did not even call someone from the employer's organisation to testify in support of the loan claim. As much as the court would want to believe the Plaintiff, the court cannot do so since the claim has not been proved satisfactorily. Special damages are particular damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved. In this case I am not inclined to grant the damages, since the Plaintiff failed to sufficiently support with evidence, the claim that the employer demands back what was paid as a medical bill settlement.**” That was the exact situation in the present case. The Court finds that while pleading special damages, the claimants failed to provide necessary or acceptable evidence to establish the special damages as was pleaded. The claims and prayers will therefore fail.

In conclusion judgment is hereby entered for the respondent against the claimants for striking out the claimants' statement of claim dated 01.12.2016 and filed on 05.12.2016 with orders each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 14<sup>th</sup> December, 2018.**

**BYRAM ONGAYA**

**JUDGE**