



**REPUBLIC OF KENYA**

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

**CAUSE NO.2145 OF 2011**

**PETER MWANGI ..... CLAIMANT**

**VERSUS**

**RIFT VALLEY RAILWAYS LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The Memorandum of Claim was filed on 9<sup>th</sup> January 2012 and the issues in dispute were listed as;
  - a. Wrongful and unlawful summary dismissal
  - b. Non-payment of severance pay for years worked
  - c. Loss of employment and difference is salary and overtime pay for 56 months from 1<sup>st</sup> November 2006 to 5<sup>th</sup> July 2011.

**Introduction**

On 15<sup>th</sup> February 2012 the Respondent filed their statement of Response;

15<sup>th</sup> February 2012 the Respondent filed their List of Documents;

26<sup>th</sup> March 2013 the Respondent filed their List of Issues and witness statements;

5<sup>th</sup> February 2013 the Respondent filed their Supplementary List of Documents;

21<sup>st</sup> February 2013 the Claimant filed List of Documents and Witness statement;

17<sup>th</sup> April 2013 the Claimant filed List of Issues;

19<sup>th</sup> may 2015 the Claimant filed their written submissions; and

5<sup>th</sup> August 2015 the Respondent filed their written submissions.

**Claim**

2.The claim is that on 27<sup>th</sup> October 2006 the Claimant was employed by the Respondent as a Train Control Officer at Nairobi Yard on Job grade RG 11, in the Chief Traffic Department and was issued with a letter of appointment. There was a fixed gross salary of kshs.30, 000.00 per month which pay was subject to review per year. The Claimant was supposed to work for 52 hours per week from 8am to 1pm

and 2pm to 5pm from Monday to Friday and any overtime work was to be paid in accordance with the law.

3. The claim is also that the Claimant noted that he had a salary difference with colleagues in similar position and when he raised it with the respondent, it was adjusted and was demoted to the position of Station Master Level 2 at grade 12 that had the salary of Kshs.30, 000.00 effective from 1<sup>st</sup> August 2008. Similar colleague in his grade were earning kshs.44, 540.00.00 per month. This discriminatory practice was not explained to the claimant.

4.The Claimant was then posted to Operations department, Nairobi East Station as Assistant Station Master at a salary of Kshs.32, 118.00 per month. This salary was below his colleagues in the same grade who earned kshs.44, 540.00 per month.

In June and July 2011, the Respondent wrote to its employees intimating that there was going to be a retrenchment which was to run parallel to a Voluntary Early Retirement. Most employees were confused as to the criteria to be used for each process and the package due. This was in recognition that the

5. Respondent had taken over assets and liabilities of its predecessor, Kenya Railways Corporation and employees taken over feared they would lose their years of service. This created disquiet amongst employees as the Respondent did not offer clarification. On 30<sup>th</sup> June 2011 employees gathered at the Respondent head office seeking clarification on the retrenchment and voluntary early retirement packages. The Claimant remained at his work station and due to the commotion took cover and only came out once he was due to hand over to his colleague.

6.On 1<sup>st</sup> July 2011 the Claimant was issued with a letter of summary dismissal on the grounds that he had absented himself from work by participating in an unlawful sit-in which action disrupted operations of evening commuter trains affecting over 30,000 passengers. The Claimant lodged an appeal against his summary dismissal noting that he was at work and performed his daily duties but was dismissed. He reported the dispute and the conciliator recommended the Claimant be reinstated or the dismissal be reduced to a normal termination but the Respondent rejected the recommendations.

*The claim is for loss of unpaid salary difference amounting to Kshs.1, 095,961.18*

*Loss of employment at kshs.4, 362,960.00;*

*Loss of medical care; and*

*Costs of the suit.*

7. In evidence, the Claimant testified that he was employed by the Respondent on 27<sup>th</sup> October 2006 but letter of appointment was only issued on 31<sup>st</sup> November 2006. He was employed hurriedly after the Respondent realised that they had employee in the East cabin. The Claimant was previously with the Kenya Railways Corporation for 25 years. The Claimant had seen similar letter issued to his colleagues who had been employed earlier than him and when he saw his letter he refused to sign but the then Regional Operations officer, Michael Ayimba advised him to sign and write a complaint on the payment difference. Nothing was done to the salary differences and his colleagues continued to enjoy higher salaries. On 27<sup>th</sup> August 2008 the Claimant was demoted to Grade 12 and remained at a lower salary. Even on the grade of demotion, the salary was still lower than that paid to others. Despite several complaints on the matter, this was never addressed. This was thus an unfair practice and the Claimant is seeking the payment difference to what he was supposed to earn at his grade like his colleagues.

8. The Claimant also testified that his overtime pay was paid differently from others. The attendance register attached to the claim is evidence of working overtime but the payment for the same was not proper as there was an underpayment and he is claiming for the difference.

9. On 30<sup>th</sup> June 2011 the Claimant reported to work at 0800 hours and relieved his colleague. He worked

from the first commuter train to Kahawa which arrived at 0830 hours; second train arrived at 0842 hours; and the third arrived at 0900 hours. The next train from Kahawa arrived at 1028 hours and the next at 1055 hours with the last such train arriving at 1120 hours. The Claimant worked on all these trains, he filed all his records with regard to work for this day. That he would not have been at a demonstration since he was at work and has records to confirm the same. However, the Claimant was aware that several employees left their work stations to attend at the head office seeking clarification with regard to a memo issued by the respondent on a retrenchment and voluntary early retirement packages. The Claimant went to the head office over his free time and then resumed his duties. He was relieved at 1825 hours.

10. On 1<sup>st</sup> July 2011 the Claimant was on duty up and until the 6<sup>th</sup> of July 2011 when he was issued with a letter of summary dismissal. The Claimant appealed and the Respondent prepared a list for hearings but this was only cosmetic and did not register the issues he raised. The hearings were arbitrary and did not address the concerns noted and thus the appeal was dismissed.

11. The Claimant is seeking his terminal dues for underpayments, overtime due; general and special damages, medical cover and costs of the suit.

12. The Claimant also testified that he was underpaid for 56 months, his overtime was noted in his records to the Respondent but were not paid for and that he should be paid for loss of employment. He has suffered severely since his summary dismissal, his children could not join university due to non-payment of his dues and wrongful dismissal and has since been unable to raise funds to attend to his medical treatment as he has a weak heart due to this case and the summary dismissal. His family has gone through torture and due to his age he is not able to get new employment due to such poor health.

13. In cross-examination, the Claimant testified that he was not retrenched, he was dismissed. Before his dismissal, the Respondent had offered all employees a retrenchment package or a voluntary early retirement package. Such matters were under negotiations with the union. The Respondent employee structure was well known and the Claimant was able to know that his salary was lower than his colleague in similar grade. On 30<sup>th</sup> June 2011 the Claimant was at work, his colleagues harassing others to join in a march to head office and he had to hide amongst hawkers nearby to avoid being harassed. He later learnt that the human resource officer was addressing employees and thus joined his colleagues. He resumed work until evening. The Claimant was not a union member and did not know about the nature of negotiations taking place with the respondent.

## **Defence**

14. In defence the respondent's case is that the Claimant was employed on 1<sup>st</sup> November 2006 and not as stated. Such employment was subject to the provisions of the respondent's human resource manual and staff regulations. The work hours were also regulated by the policy manual where there were shifts and the letter of appointment had to be read together with the policy regulations. The salary to be paid was set out in the Claimant appointment letter, this was to be reviewed annually but there were job discrepancies as the Respondent inherited staff from its predecessor the Kenya Railways Corporation and this was a matter they were addressing.

15. A letter dated 29<sup>th</sup> June 2011 was written with more details but on 30<sup>th</sup> June 2011 employees went on strike which had no justification and was illegal. The Claimant had the option of taking the voluntary early retirement package or await the retrenchment. That on 30<sup>th</sup> June 2011 the Claimant without due cause participated in a strike, there had been no notice, the union was holding negotiations with the Respondent and when the union asked the employees to resume work they refused. As a result the Claimant was found absent at work hence the summary dismissal. Despite the Respondent officer addressing the Claimant and his colleagues to resume duty, they were adamant and refused. The union issued a circular noting the strike was unlawful.

16. The Claimant was allowed to appeal against his dismissal, he was heard on his case but the dismissal was confirmed. Due to the strike, the Respondent lost 30 million shillings as it had to cancel commuter

trains where the Claimant was responsible. The dismissal was justified in the circumstances of this case. Some employees were reinstated upon their successful appeal but the Claimant was found not to have good reasons for being absent from duty. The claim should be dismissed.

In evidence, the Respondent filed three (3) witness statements for Mr James Siele, Ms Elizabeth Odhiambo and Alban Mwendar. Mr Siele and Mwendar were called in Court as Ms Odhiambo had already left the employment of the respondent.

17. Mr Siele testified that at the material time subject to these proceedings he was the Passenger Service manager for the respondent. That the Respondent services are set up in two categories, passenger and cargo transportation services. In the passenger services the Respondent operates several commuter trains in various parts of the country and also 5 routes within Nairobi and its environs – Nairobi to Kahawa; Nairobi to Ruiru; Nairobi to Embakasi; Nairobi to Kikuyu; and Nairobi to Arthi River. In the 5 routes, over 28,000 commuters use the service and Respondent makes a revenue of over Kshs.950, 000.00 per day. In the cargo service the Respondent operates trains to various destinations countrywide particular 4 trains between Nairobi to Mombasa carrying an average of 79 wagons.

18. The witness testified that his role was to manage the passenger services trains and also work closely with the cargo services manager. The issue of safety with regard to commuter service trains is critical to the Respondent as it serves a large number of people and hence security is of paramount importance. To meet the strict safety requirements, the Respondent has put in place mechanisms aimed at ensuring that trains are certified as safe before they are allowed to carry passengers. Upon the trains arriving in the morning, coaches are separated from the locomotives; the locomotives are moved for repairs and maintenance and for checking; artisans then do the necessary checks and certify as safe to carry passengers; taken for cleaning; and all these processes of repairs, cleaning, maintenance and preparing the locomotives is done by various departments of the Respondent and involves various employees. Such procedures must be undertaken two (2) hours before any train can be certified as safe to leave the station.

19. On 30<sup>th</sup> June 2011 due to a strike, there were no employees to clean, check, maintain and repair the 5 locomotives which arrived that morning. The trains were left unattended. The personnel charged with the responsibility of doing the mechanical work were absent. The Respondent then made a decision not to run the evening service. A meeting was held by the witness as the general manager, Passenger Service, chief operations officer, chief commercial officer and the general manager for safety. They also consulted with the Respondent Chief executive officer who approved the cancellation of the evening service. The revenue expected for the day at Kshs.340, 000.00 was lost. The cancellation of the train's services resulted in the public confidence on reliability of the respondent's service and which led to reduced earnings in subsequent months. Until November 2011 the Respondent had lost an amount of Kshs.6, 641,996.00. Also and due to the strike, the cargo trains from Nairobi to Mombasa did not leave the station. Such trains were to transport wagons to Mombasa for loading which led to a loss of Kshs.27, 972,254.00.

20. Mr Alban Mwendar testified that he has since left the employment of the Respondent and joined Kenya Airways as the Human Resource Director. In 2011 he was with the Respondent and worked with the claimant. That on 30<sup>th</sup> June 2011 while he was at work he got information that employees did not report to their respective work stations and by 0830 hours there was a demonstration with employees converging at the head office. Upon this development, he took a register of the employees who were at their work stations, contacted the union and asked to know why the unionised employees were on strike. On this day there was a scheduled meeting with the union as part of a series of meetings on various matters that required to be resolved. This included the issues raised on the Voluntary early retirement package for employees.

21. The witness also testified that he addressed the employees on strike and advised them that there was a meeting where their issues would be addressed as the union officials were also invited. That the employees should resume their work but they did not. The union officials also told the employees to resume work but refused to do so.

22. The Claimant was dismissed due to his attendance at the demonstration leading to disruption of Respondent services and financial losses. He appealed and was heard but the dismissal was confirmed. The witness sat in at the hearings as chair and took notes. At the hearing of the claimant's case it emerged that he was at work on 30<sup>th</sup> June 2011 but was flushed out of his work station so as to participate in the demonstration but the panel hearing his case did not find any justification for the claimant's explanations of participating in the strike.

23. The witness also testified that the Respondent had taken over from the Kenya Railways Corporation in a concession agreement when in the event of retrenchment, the terms to be applied were agreed upon. The Respondent also took over the job grading previously in use by the Kenya Railways Corporation and hired a consultant to evaluate the various jobs for a review. This process was ongoing and had not been concluded. This was part of the grievances the Respondent was discussing with the union and part of the issues raised for the strike on 30<sup>th</sup> June 2011.

24. The Claimant had a specific contract that outlined his terms of employment. He cannot seek what was not an entitlement and the claim should be dismissed.

25. In cross-examination, the witness testified that before the Claimant was dismissed there was no warning, notice or hearing. He was heard on his case and defence after the summary dismissal and on appeal. Majority of employees were unionised but could not separate those who were member and those who were not.

### **Submissions**

26. At the close of the hearing, each party filed their written submissions.

27. On 17<sup>th</sup> April 2013 the Claimant filed his list of issues which can be summarised as follows;

Whether the Claimant was employed as a Train Control Officer, Grade RG 11 on 27<sup>th</sup> October 2006 at a salary was Kshs.30, 000.00 with annual reviews;

Whether the Claimant work hours were 52 and was entitled to overtime pay;

Whether the Claimant salary was as per that paid to his colleagues in the same grade, was demoted for raising questions on his discrimination and his colleagues in the same grade were paid kshs.44, 520.00;

Whether in June 2011 the Respondent issued memo and circulars intending to retrench some employees or to take voluntary early retirement and was reluctant to address the criteria applicable for the retrenchment or voluntary early retirement in respect of the years worked with Kenya Railways Corporation;

Whether on 30<sup>th</sup> June 2011 the Respondent employees gathered at the head office seeking clarification of the retrenchment and voluntary early retirement and Whether the Claimant been at his work station and only sought refuge to protect himself from harm and later resumed work;

Whether the Claimant appealed against his summary dismissal and if his case was heard on merit; and

Whether the Claimant suffered and is entitled to damages as a result as a result of the respondents action and if costs are payable.

28. With the above issues thus set out, the Claimant submitted that he underwent discrimination against

him as he was not paid the requisite salary for grade 11 and 12 and was underpaid as against his fellow colleagues in the same grade. Section 5 of the Employment Act outlaw discrimination against any employee on any ground and this should not have been done against the claimant.

29. The Claimant was summarily dismissed by the Respondent without due process. Section 44 of the Employment Act was not followed. There was no notice, hearing or adherence to Respondent policy manual on how disciplinary cases were to be addressed. There was no prove that the Claimant grossly misconducted himself to warrant the sanction of summary dismissal.

30. The Claimant has outlined in his pleadings the Claimant for a declaration that he was discriminated against, he should be paid damages; the underpayment; loss of employment and costs with interests.

31. In reply, the Respondent on 26<sup>th</sup> march 2013 filed their List of issues which can be summarised as follows;

Whether there was a strike by Respondent employees on 30<sup>th</sup> June 2011;

If so, was the strike undertaken in accordance with the law;

If not, whether the Claimant participated in the illegal strike;

Whether the Respondent suffered losses as a result of the illegal strike by the claimant;

Whether the Respondent was entitled to summarily dismissal the Claimant and if it was unfair or unfair;

Whether the Claimant is entitled to claim a higher remuneration that that provided for in his contract of employment as set out in the Statement of Claim; and

Who should bear the costs of the suit?

32. On the above issues the Respondent also submitted that the Claimant participated in an illegal strike on 30<sup>th</sup> June 2011. There were circulars issued on retrenchment and voluntary early retirement which the Claimant did not understand and when invited to make comments and ask questions, they decided to engage in an illegal strike. Section 2 of the Employment Act define what a *strike* is and section 76 of the Labour Relations Act outline what procedures apply before an employee can go on strike. In this case such procedures were not followed. Under section 79, the strike the Claimant participated in was not protected. Such an employee who engages in an illegal strike is deemed to have breached his employment contract. As held in **Kakuzi limited versus Kenya Plantation & Agricultural Workers Union, Cause no.1450 of 2011.**

33. On the issues of the packages for retrenchment and voluntary early retirement the Respondent was in negotiations with the union and there was no justification in Claimant engaging in the illegal strike. The procedures set out in law before a strike were not followed. The summary dismissal was justified in this case as he fundamentally breached his contract of employment. The Respondent applied the law and the policy manual and where the Claimant confirmed he was absent from his workplace without lawful permission and participated in an unlawful action, this was gross misconduct and the sanction taken was appropriate.

34. The Respondent also submitted that due to the illegal actions of the Claimant it suffered loss due to the cancellation of passenger and cargo trains on 30<sup>th</sup> june 2011 and subsequent resultant effects of such cancellation such loss would have been averted had the Claimant been at his work place and therefore he is not entitled to the remedies sought.

35. Section 44 of the Employment Act allow summary dismissal in cases of gross misconduct. The

Respondent by application of such legal provisions and the policy manual found the Claimant to have grossly misconducted himself resulting in summary dismissal. The dismissal was fair noting the losses incurred by the Respondent for cancellation of its commuter trains on 30<sup>th</sup> June 2011. There was hearing of his case as under section 41 of the Employment Act and since there was no satisfactory responses, the dismissal was confirmed.

36. On the remedies sought, the Claimant is not entitled to pay for loss of employment of future earnings as his contract had a termination clause. His contract was specific and was paid as such. The claims have no basis and should be dismissed.

37. The Respondent has relied on several authorities in support of their case and in submissions – **Agnes Murugi Mwangi versus Barclays Bank of Kenya Limited, Cause No.396 of 2010; Alphonse Maghanga Mwachanya versus Operation 680 Limited, Cause No.146 of 2012; DK Njagi Marete versus Techers Service Commission, Cause No. 379 (N) of 2009; Kenneth Karisa Kaseno versus Kenya bureau of Standards [2013] eklr.**

### **Determination**

38. Several issues can be set out for determination in this matter. Such are drawn from the lists of issues filed by the parties and the issues that stand out in the assessment of the Court thus;

Whether the Claimant was discriminated against

Whether there was an underpayment and demotion;

Whether there was an illegal strike on 30<sup>th</sup> June 2011 and whether the Claimant participating thus breaching his terms of contract of employment

Whether the summary dismissal was justified;

Whether the remedies sought are due; and

Who should bear costs?

39. Written contracts of employment are one of the best and accepted labour practices. Such written contracts help the parties to it understand the terms and conditions of work and at work. The written contract is also critical in Court proceedings as from it, the Court can easily draw out the intentions of the parties to an employment relationship. In this case the Claimant has submitted his letter of appointment dated 27<sup>th</sup> October 2006 forming part of his terms and terms and conditions of service and at clause 14 it notes that the Respondent staff regulations and human resource manual is applicable to the claimant. The Claimant contested that his letter of appointment with the terms and conditions of his service was not issued to him until 31<sup>st</sup> November 2006 when Mr Ayimba issued it. That he was employed hurriedly to fill in a position as there was nobody in his department to do the kind of job he was employed to do.

40. I have perused the letter of appointment dated 27<sup>th</sup> June 2006 and note that at clause 16 of this letter, it has a provisions where the Claimant was supposed to read the letter and accept its terms by appending a signature at the end in acceptance of the terms and conditions therein. At page 6, being the last page, there is the name of the Claimant and Identity Number being 0763201; there is a signature which is similar to a large extent as the signature in the Verifying Affidavit of the Claimant to the memorandum of Claim and to the naked eye without any expert review of the same, on a balance of probabilities, these are the signatures of the claimant. The letter is also countersigned by a witness Mr Ayimba and dated 31<sup>st</sup> October 2006. It is therefore not correct that such letter came to the notice of the Claimant on 31<sup>st</sup> November 2006.

41. Discrimination in employment is a matter so serious that where it happens leads to the erosion of all

matters fair and reasonable. Such discrimination in employment is outlawed. Section 5 of the Employment Act goes to the depth of the subject and directly mandates this Court to ensure that there is elimination of all forms of discrimination in employment and ensure that all employers eliminate discrimination in any employment policy or practice. Section 5(1) and (2) of the Employment Act provides thus;

5. (1) *it shall be the duty of the Minister, labour officers and the Industrial Court—*

(a) *To promote equality of opportunity in employment in order to eliminate discrimination in employment; and*

(b) ...

(2) *An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.*

42. It is therefore an act of direct discrimination against an employee where an employer does the following as set out under section 5(3) of the Employment Act;

(3) *No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—*

(a) ...

(b) *in respect of **recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.** [Emphasis added].*

43. Therefore where an employee is given different terms of employment separate and different from other employees similarly situated, such is a practice outlawed under section 5 of the Employment Act and such an act is tantamount to an unfair labour practice. The rationale for the provisions under section 5 of the Act can be deduced under section 5(5) in that;

(5) *An employer shall pay his employees equal remuneration for work of equal value.*

44. And to thus treat an employee differently from another who is on the same level, grade, and similar job and for a similar number of work hours cannot find any justification in law, policy or practice. Such treatment is specifically outlawed in employment and labour relations in Kenya. Section 6 and 7 of the Act further sets out the following;

(6) *An employer who contravenes the provision of the section commits an offence.*

(7) *In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act omission is not based on any of the grounds specified in this section.*

45. Where there is a finding of discrimination against any employee by the Labour Officer or by this Court, this is not only an offence in law punishable with sanction of fines or imprisonment or both combined but an employee so discriminated against is entitled to a remedy as under section 12 of the Employment and Labour Relations Court Act. Where there is a claim of discrimination made by an employee, the employer bears the burden of proving that the discrimination did not take place as alleged.

46. In this case, the Claimant outlined his reasons as to why there was discrimination against him, that he was employed as Train Control Officer, Grade 11 and his salary set out as KShs.30, 000.00 per month. That immediately he noted the disparity in comparison to his colleagues in similar position, he made a request for a review on 31<sup>st</sup> October 2006. Such letter is attached to the bundle of claiming documents

filed in Court and at page 9 notes;

*... But Sir, my remuneration which you have offered is not satisfactory with the line of responsibility. Some people with less responsibility are getting more than me. I kindly request you to consider the above and correct the remuneration in the right way for better performance.*

47. The Claimant does also attached his pay slip together with that of another employee, both at level 12 and on similar position of Station Master. The Claimant is paid basic pay of kshs.32, 118.00 while the other employee is paid a basic of kshs.44, 520.00. to this evidence, the Respondent did not give much attention as set out under section 5 of the Employment Act in making effort to outline as to why there were such disparities in the remuneration of the Claimant as against the other employees in a similar position save that Mr Mwendar in his evidence was emphatic that the Claimant had a contract of employment that set out his terms and conditions of employment. That he was remunerated under such a contract. There was a consultant hired to address the harmonisation of terms and by the time the Claimant was terminated such a consultant had not finished the task so as to set in motion any review and address the discrepancies. the witness also made effort to justify the disparities in remuneration noting that the Respondent had inherited most of its policies from their predecessor the Kenya Railways Corporation hence the differences in staff terms and conditions of employment. However, section 5 of the Employment Act does not look at the whole – the individual employee is the subject. Where an employee goes out of their way to address a discriminatory practice against them, this is an invitation upon the employer such as the Respondent to move with haste and address such a malpractice. It is not sufficient to state that there was a consultant hired to address the discrepancies, to the contrary, where a practice is outlawed, specifically set out by statute and constitution at section 5 of the Employment Act and article 27 of the constitution, it should not be allowed to remain in force for any single moment. This calls for immediate action. See **Peris Nyabura Kimani versus Delbit Petroleum Limited, Petition No.63 of 2014;**

*In giving effect to the provisions of the Constitution and the Bill of Rights, the place of employees is given special detail under article 41 of the constitution. Employees in this regard are to be treated fairly, without discrimination and in dignity. Article 27 outline the right to non-discrimination while Article 28 protects the right of any person to be treated with dignity.*

48. Similar issues as herein were set out in the case of **Collins Osoro versus AAA Growers Limited, Cause No.100 of 2012** thus;

*On the question as to whether there was discrimination against the claimant, where a person is treated differently from others similarly situated like him, this amounts to discrimination. If this treatment in differentiation is on a specified ground, then **whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner.** If there is a specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the Claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified. [Emphasis added].*

49. It is therefore the duty of the employer, where the challenge of discrimination has been posed, to set out in clear and precise terms as to what position the Claimant held as well as others in his position and justify the difference in salary payments. Upon such an outline give reasons as to why the difference was necessary if at all and where there was need for such difference, set out the justification for the same. Without such an outline, any practice that was set in policy of practice and created differences in employment terms and conditions was inherently discriminatory and hence unlawful. Such a practice cannot receive the sanction of the Court and is an unfair labour practices in its practice and existence.

50. I therefore find, the practice by the Respondent of paying a different salaries to the Claimant is unlawful, I find no justification to the same and this was contrary to the provisions of section 5 of the

Employment Act. A sanction is due and the Claimant is entitled to damages for such discrimination against him.

51. With the above analysis, where the Claimant was paid a different salary lower than that of his colleagues placed under the same grade/level/job title, the difference in such pay that was lower is an underpayment. On the finding that this was an unfair labour practice without justification, the difference in pay and underpayment is due.

52. The claim for demotion and subjection to deference in remuneration is similarly outlawed under section 5 of the Employment Act. For such a practice to exist, to be practiced and for the Respondent to take it as the practice in their employment of any employee is an illegality *ab initio*. This was a matter that the Respondent did not contest. That notwithstanding, it is an unfair labour practice and the Respondent should give it immediate attention.

53. On the finding that the Claimant was discriminated against and that damages are due in that regard, the issue of demotion and less payment as a result will be factored in the assessment of the damages payable to the claimant.

54. On the question of events of a strike taking place on 30<sup>th</sup> June 2011, the Claimant testified that in June 2011 the Respondent issued circulars of an intended retrenchment and voluntarily early retirement but there was confusion as to the applicable criteria with regard to the packages due. The employees were agitated and wanted to know what would happen. There was no clarity by the Respondent and this led to a demonstration where the employees marched to the Respondent head office. The leading employees flushed out colleagues who resisted in joining in the demonstration and when the Claimant heard such employees approaching his work station he quickly left and joined hawkers in the adjoining *Muthurwa* market where he remained hiding to avoid harassment by colleagues. He however returned to his duty station and when he had completed his duties proceeded and joined his colleagues at the head office where they were all addressed by the human resource officer Mr Mwendar and other officials of the union. They were advised to resume work which the Claimant did but later the train services were cancelled. He continued to report to work until 6<sup>th</sup> June 2011 when he received his letter of dismissal dated 1<sup>st</sup> July 2011. On the other hand it was the evidence from the Respondent that the Claimant participated in an illegal strike on 30<sup>th</sup> June 2011 when he joined his fellow employees in a demonstration that was at the head office. That when he was directed to resume duty he did not and this led to the cancellation of passenger train services for the evening leading to massive losses in business and revenue that extended to November 2011. That this direction in services also affected cargo trains to Mombasa and further losses were incurred. The Claimant was dismissed due to participation in an illegal strike that was not protected and should not be paid any dues and that summary dismissal was justified as this was gross misconduct.

55. In situations such as this on end particularly where the Respondent as the employer gives a sanction of summary dismissal, the rationale for the same must come into question. What led the Respondent to summary dismiss the claimant?

56. There are few instances where the law does allow an employer to dismiss an employee summarily. But such a summary dismissal is qualified. Section 44(4) of the Employment Act is one such provision of the law which provides for summary dismissal. But there are conditions to be met for an employer to enjoy such latitude. The conditions precedent are set out under section 41(2) of the Employment Act thus;

*(2) Notwithstanding any other provision of this Part, **an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance,** and the person, if any, chosen by the employee within subsection (1) make.*  
[Emphasis added].

57. Therefore, whatever the case may be, whether it is a question of misconduct or poor performance, the requirement to be met before any summary action is the all-time duty to hear the employee on their

defence. Whatever sanction that may follow, this has to come upon the employee being given the impunity to present their case in defence. These provisions under section 41(2) of the Employment Act I find them to be reasonable and practical. The requirement and the expectation placed upon the Respondent as the employer is an issue that should have been addressed before the issuance of the summary dismissal letter to the claimant. This is not fundamentally different from the human resource policy of the Respondent that has heavily been relied upon. Such a policy did set out the modalities to be adhered to before an employee could be dismissed. I find no effort to follow this policy at all. What is clear in this case is that the Respondent was keen to retrench some employees as such notice of intention had been sent out; those not retrenched would have exited through a voluntary early retirement process but the time did not allow for the same and in these circumstances, the demonstration and or strike that took place on 30<sup>th</sup> June 2011 ended up being just the opportunity for the Respondent to lay off the claimant. Even where 76, 79 and 80 of the Labour Relations Act outlaw a strike that is not protected, such facts must be put before the Court so as to arrive at the determination that that an employee participated in an industrial action and such action was not protected and hence the provisions of section 80 of the Labour Relations Act to apply.

58. In this case, the Respondent was the prosecutor, judge and did enforce instant punishment. Without giving the Claimant a chance to be heard, there was summary dismissal. It was not until the Claimant lodged his appeal that the Respondent made effort to correct what should have been done in the first instance. Where the Respondent was able to constitute panels to hear the Claimant on appeal, such a panel was therefore possible to be constituted to hear any complaints against him before the summary dismissal. In the very least, the human resource officer or any senior supervisor of the Claimant should have heard him prior to his dismissal.

59. I find that the resultant action of summary dismissal of the Claimant before he was heard is contrary to the provisions of section 41 of the Employment Act, where there is no such compliance with the mandatory provisions of the law resulting in the termination of employment, section 45 of the employment Act apply and the action taken by the Respondent against the Claimant was unfair. To therefore undertake an unfair process against an employee cannot be justified after the fact and lay blame upon him for the business loss or revenue not made.

## **Remedies**

60. On the finding that the Claimant was discriminated against, that he was unfairly treated when he was demoted in his position upon lodging his complaint, damages are due under the provisions of section 12 (3)(vi) of the Employment and Labour Relations Court Act. The Claimant was under a contract that was to run until his retirement at age 55. The Claimant did not state his age at the time of termination or at the time of giving his evidence. Based on the analysis set out above an award of Kshs.1, 500,000.00 is found as sufficient and appropriate. This shall be awarded to the claimant.

61. On the underpayments due, the set out claim is for the sum of Kshs.1, 095,961.18. On the finding that the Claimant should have been paid similar to his colleagues in the same grade at Kshs. 44,540.00, the difference in such underpayments due, the same is confirmed and shall be awarded to the claimant.

62. The claim for loss of employment and years left to retirement was also set out by the claimant. Such a claim is largely set out factoring the current age of the Claimant and the age he was at the time of termination. This the Claimant failed to set out. That aside, the claim for loss of employment particular in a case where the remedy for unfair termination is due is not appropriate. Section 49 of the Employment Act sets out the various remedies that the Claimant could seek where he was faced with an unfair labour practice which remedies allow up to a claim for 12 months compensation. These factors considered, there will be no award for loss of employment

62. The claim for loss of medical care was on the basis that the dismissal of the Claimant has resulted in poor health to the Claimant and he has been unable to look for a new job. That his colleagues got new job with *Magadi Soda* but his poor health cannot allow him to work and would in any case not be employable in his current poor health. That the Respondent caused his deteriorating poor health as upon termination

he could not be able to attend and pay for medical attention of his poor heart condition. The Claimant however failed to submit any medical record in this regard that would give a history of his poor health and relate this directly to the respondent. The Claimant also did not state what medical care he received while an employee of the Respondent even though this was a benefit under his letter of appointment. This shall not be assessed or awarded.

63. In the Memorandum of claim, the claimant has set out his issues in dispute as being unfair termination, non-payment of his dues, non-payment of severance pay, loss of employment, overtime and underpayments. These issues were however not all address in the final pleadings or in his evidence. I however note that the Claimant is also seeking *any other relief that this Court shall deem fit to grant*. Indeed in the exercise of the Court jurisdiction over matters brought before it section 12(3) (viii) gives power the Court to order and award as appropriate. In this case, noting the unfair procedural lapses in the process of dismissing the Claimant the Court shall award under the provisions of section 49 of the Employment Act. Based on the salary due for the position held by the Claimant assessed at kshs.44, 540.00 I award six (6) months' pay in compensation all at Kshs.267, 240.00.

64. Though the Claimant testified that he was not paid for all his overtime, he fails to set out as to how this arose and is not pleaded. The Claimant also fails to offer meaningful submissions in this regard. It shall not be awarded as I find no basis to so award.

65. On the question of costs, the current suit would have been unnecessary had the Respondent not discriminated against the claimant, undertaken the unfair labour practices and unfairly dismissed him. Demand was made and the Respondent failed to make good the claim. Costs are due.

**Conclusion**

**Based on the finding above, I enter judgement for the Claimant in the following terms;**

- a. **Damages awarded to the Claimant at Kshs.1, 500.000.00;**
- b. **Compensation awarded at kshs.267, 240.00;**
- c. **Underpayments awarded at kshs.1, 095,961.00;**
- d. **Costs of the suit.**

Delivered in open court at Nairobi and dated this 29<sup>th</sup> day of October 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant.....

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