



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1566 OF 2012**

WYCLIFFE LISALITSA .....CLAIMANT

VERSUS

THE CHIEF EXECUTIVE OFFICER KENYATTA

NATIONAL HOSPITAL.....1<sup>ST</sup> RESPONDENT

THE MINISTER FOR MEDICAL SERVICES.....2<sup>ND</sup> RESPONDENT

THE MINISTER FOR PUBLIC HEALTH.....3<sup>RD</sup> RESPONDENT

THE MINISTER FOR PUBLIC SERVICE.....4<sup>TH</sup> RESPONDENT

THE MINISTER FOR LABOUR.....5<sup>TH</sup> RESPONDENT

KENYATTA NATIONAL HOSPITAL.....6<sup>TH</sup> RESPONDENT

**JUDGMENT**

By a memorandum of claim dated 3<sup>rd</sup> September 2012 the Claimant WYCLIFF LISALITSA, suing on his own behalf and on behalf of workers of Kenyatta National Hospital filed this claim against the Chief Executive Officer of Kenyatta National Hospital (1<sup>st</sup> Respondent), the Minister for Medical Services (2<sup>nd</sup> Respondent), the Minister for Public Health (3<sup>rd</sup> Respondent), the Minister for Public Service (4<sup>th</sup> Respondent), the Minister for Labour (5<sup>th</sup> Respondent) and Kenyatta National Hospital (6<sup>th</sup> Respondent). The Claimants describe themselves in the Memorandum of Claim as employees of the 6<sup>th</sup> Respondent deployed in various departments such as engineering, maintenance, laundry, catering, administration, human resources and ranging between job grades K 4 and K 13 in the 6<sup>th</sup> Respondent’s grading system. The Claimants seek the following orders:-

1. A declaration that the manner in which the respondents have implemented the government Circular No. MSPS/2/1/3A Vol. III/(77) dated 12<sup>th</sup> January, 2012 as read with government Circular No.MSPS.7/1A/VOL.IV/22 dated 19<sup>th</sup> December,2011 is discriminatory, null and void;
2. A declaration that the manner in which the respondents have implemented the government Circular No. MSPS/2/1/3A Vol.III/(77) dated 12<sup>th</sup> January, 2012 as read with government Circular No. MSPS.7/1A/VOL.IV/22 dated 19<sup>th</sup> December ,2011 is discriminatory and

- contradicts the intendment of the said circular;
3. An order compelling the respondents to pay the claimants the extraneous allowances as directed in the government Circular No. MSPS/2/1/3A Vol. III/(77) dated 12<sup>th</sup> January, 2012 as read with government Circular No. MSPS.7/1A/VOL.IV/22 dated 19<sup>th</sup> December, 2011 backdated to 1<sup>st</sup> December, 2011.
  4. Costs of these proceedings and
  5. Interest on 3 and 4 above.

The 1<sup>st</sup> and 6<sup>th</sup> Respondents filed their reply to the Memorandum of claim on 30<sup>th</sup> July 2013. They aver that the claimants were not party to the negotiations at which the extraneous allowance was agreed upon and are therefore not entitled to payment of the allowance. They further allege that the claimants do not fall under the categories listed in the government circulars. The 1<sup>st</sup> and 6<sup>th</sup> Respondents aver that they implemented the circulars without discrimination and that the Claimants not being privy to the agreement that was being implement the 1<sup>st</sup> and 6<sup>th</sup> Respondent have no mandate to extend payment of the allowance to the Claimants without authority of the Government. They pray that the claim against them be dismissed with costs.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed their reply to the Memorandum of claim on 24<sup>th</sup> June 2013. They deny that the claimants negotiated any agreement with the Respondents and aver that the allowance/benefits claimed by the Claimants is not a preserve of the Respondents but based on a Constitutional body mandated to structure benefits for all Government departments and employees. They deny discriminating against any of the claimants and pray that the claim be dismissed with costs.

When the parties appeared before me on 12<sup>th</sup> November 2013, I determined that the case be argued by way of submissions as it hinged on interpretation and implementation of an agreement arising from which circulars which the claimants relied upon were issued. The parties thereafter filed written submissions and then made oral submissions in court on 18<sup>th</sup> March 2004.

Mr. Juma instructed by Rachier & Amollo Advocates appeared for the claimants, Mr. Fedha instructed by the Office of the Attorney General appeared for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents while Mr. Ouma instructed by Mereka & Company Advocates appeared for the 1<sup>st</sup> and 6<sup>th</sup> Respondents.

### **Background of the Case**

The background of this case is that following a strike by doctors through the Kenya Medical Practitioners, Pharmacists and Dentists Union, a return to work formular was signed on 12<sup>th</sup> December 2011 between the Union represented by its Chairman and Secretary General and the Government represented by the Permanent Secretary Ministry of Medical Services, Permanent Secretary, Ministry of Labour, of the other part and the Secretary General of Central Organization of Trade Unions (Kenya) (COTU). The signing of the Return to work formular was witnessed by the Minister for state for Public Service who then was acting as Minister for Medical Services. Among other issues the Return to work formular provided for payment of extraneous allowances ranging from Shs. 30,000/- to 40,000/- per month to members of the Union with effect from 1<sup>st</sup> December 2011.

On 19<sup>th</sup> December 2011 the office of the Prime Minister issued a circular to the Permanent Secretary, Ministry of Medical Services and the Permanent Secretary Ministry of Public Health and Sanitation as follows:-

***“OFFICE OF THE PRIME MINISTER***

***MINISTRY OF STATE FOR PUBLIC SERVICE***

*P O Box 30050-00100*

NAIROBI

KENYA

Ref: No. MSPS. 7/1A/VOL.IV/22

19<sup>th</sup> December, 2011

Ms. Mary W. Ngari, CBS

Permanent Secretary,

Ministry of Medical Services

NAIROBI

Mr. Mark Bor, CBS

Permanent Secretary,

Ministry of Public Health & Sanitation

NAIROBI

Dear Mary,

**ALLOWANCES FOR PUBLIC HEALTH WORKERS**

Following successful negotiations between the government and the Kenya medical Practitioners, Pharmacists and Dentists Union on 12<sup>th</sup> December, 2011, the allowances indicated here below will be payable to Public Service Health Workers.

i. **Extraneous Allowance: Payable in Two Phases**

The recognition of the fact that for Health Institutions to operate, they require the integrated support of various categories of Health Personnel, Extraneous Allowance will be paid as follows from 1<sup>st</sup> December, 2011 and 1<sup>st</sup> July, 2012:

Category	Job Group	Rate P.M	Rate P.M
		1 <sup>st</sup> December 2011	1 <sup>st</sup> July, 2012
Medical	L & N	15,000	15,000

Officer/Dentists/ Pharmacists			
	N - Q	17,500	17,500
	R & S	20,000	20,000
Clinical Officers, Nurses, Technologists & Technicians	G - J	7,500	7,500
	K - M	10,000	10,000
	N - P	12,000	12,000
	Q- R	15,000	15,000
Mortuary Attendants	K13/12	5,000	5,000
Drivers deployed in Hospital	K 14	3,000	4,000
Patient Attendants (Hospital Wards/Dispensaries/Health Centre's)	K15 – 17	2,000	3,000

ii) **Emergency Call Allowance: One Phase**

*This allowance will be payable to Medical Officers deployed in Hospitals only at the rate of Kshs. 30,000 per month for all grades with effect from 1<sup>st</sup> December, 2011.*

*These two allowances will also be applicable to Medical Officers and other Health Personnel working in Kenyatta National Hospital and Moi Referral and Teaching Hospital as specified.*

*All other issues that the Union tabled as grievances will be handled through a Committed as agreed during the meeting of 12<sup>th</sup> December, 2011.*

*Please ensure that the allowances are restricted to the specified categories for the cost to be within the budgetary commitments made by the Ministry of Finance and also ensure that they are factored during the budgetary process. The allowances should be stopped in all cases where common cadre support services staff are transferred out of Health Facilities.*

*Please take necessary action.*

Yours

Titus M. Ndambuki CBS

PERMANENT SECRETARY

cc. *Amb Francis K. Muthaura, EGH*

*Permanent Secretary, Secretary to the  
Cabinet and Head of the Public Service  
Office of the President  
NAIROBI*

*Mr. Joseph K. Kinyua, CBS  
Permanent Secretary  
Office of Deputy Prime Minister  
& Ministry of Finance  
NAIROBI”*

On 27 December 2011 the Chief Executive Officer of Kenyatta National Hospital issued the following circular to all staff.

**“INTERNAL MEMO**

*Kenyatta National Hospital*

*P O Box 20723 -0022,*

*Tel. 2726300-9*

*Ref: KNH/HR/38/143*

*27<sup>th</sup> December 2011*

*To : All Staff*

*KNH*

**RE: ALLOWANCES FOR HEALTH WORKERS IN THE PUBLIC SERVICE**

*Following the return to work agreement with Kenya Medical Practitioners and dentists Union (KMPDU)AFTER THE RECENT STRIKE,THE Government has vide circular Ref:MSPS.7/1A/VOL.IV/22 dated 19<sup>th</sup> December 2011 approved payment of the following allowances to various categories of Health Personnel as indicated below:-*

**i. Extraneous Allowance: Payable in Two Phases**

Category	Job	Rate P.M	Rate P.M
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	Group	1 <sup>st</sup> December	1 <sup>st</sup> July, 2012
<i>Medical Officer/Dentists/ Pharmacists</i>	<i>K 7 &amp; K6</i>	<i>15,000</i>	<i>15,000</i>
	<i>K5 –K3</i>	<i>17,500</i>	<i>17,500</i>
	<i>K2 &amp; K 1</i>	<i>20,000</i>	<i>20,000</i>
<i>Clinical Officers, Nurses, Technologists &amp; Technicians</i>	<i>K11- K8</i>	<i>7,500</i>	<i>7,500</i>
	<i>K 7- K6</i>	<i>10,000</i>	<i>10,000</i>
	<i>K 5 –K 4</i>	<i>12,500</i>	<i>12,500</i>
	<i>K 3 – K2</i>	<i>15,000</i>	<i>15,000</i>
<i>Mortuary Attendants</i>		<i>5,000</i>	<i>5,000</i>
<i>Drivers</i>		<i>3,000</i>	<i>4,000</i>
<i>Patient Attendants</i>		<i>2,000</i>	<i>3,000</i>

ii) ***Emergency Call Allowance: One Phase***

*This allowance will be payable to Medical Officers at the rate of Kshs 30,000 per with effect from 1<sup>st</sup> December, 2011.*

*The hospital has requested Ministry of Finance through the Ministry of Medical Services for the necessary funding. Once this is availed the payments shall be made to staff as per the rates indicated above.*

*This is to inform you of the developments as we await further communication.*

*Dr. S. Monda*

*Ag. CHIEF EXECUTIVE OFFICER”*

On 12<sup>th</sup> January 2012, the office of the Prime Minister sent another circular to the permanent Secretaries of the Ministry of Public Health and Sanitation and the Ministry of Medical Services as follows:-

“OFFICE OF THE PRIME MINISTER

MINISTRY OF STATE FOR PUBLIC SERVICE

P O Box 30050-00-100

NAIROBI

KENYA

Ref: No. MSPS/2/1/3A Vol.III/(77)

12<sup>th</sup> January, 2012

Mr. Mark Bor, CBS

Permanent Secretary

Ministry of Public Health and Sanitation

NAIROBI

Dear,

ALLOWANCES FOR PUBLIC HEALTH WORKERS

Your attention is invited to this Office Circular letters No.MSPS.7/1A/VOL.IV/22 of 19<sup>th</sup> December, 2011 on the above subject which was not in tandem with our earlier circular letter NO. MSPS/2/1/3A Vol.III/59 of 11<sup>th</sup> June, 2010 on the same subject.

In this regard, it has been decided that the provisions of the two circulars be harmonized and the Health workers be paid Extraneous Allowance and Emergency Call Allowance as follows:-

**i. Extraneous Allowance: Payable in Two Phases**

HEALTH WORKERS IN RURAL AREA

		Phase 1- w.e.f 1/12/2011	PhaseII-w.e.f 1/7/2012
Staff Category	Job Group	Rate(Ksh.p m)	Rate (Ksh.pm)
Doctors,Dentist,Pharmacists	S	20,000	20,000

<i>Doctors, Dentists, Pharmacists and Anesthetists (including Clinical Officer Anesthetists</i>	<i>All</i>	<i>15,000</i>	<i>15,000</i>
<i>Clinical Officers and Nurses</i>	<i>All</i>	<i>7,500</i>	<i>7,500</i>
<i>Other para-medics</i>	<i>All</i>	<i>3,500</i>	<i>3,500</i>
<i>Drivers and Mortuary Attendants</i>	<i>All</i>	<i>2,500</i>	<i>2,500</i>
<i>Support Staff</i>	<i>All</i>	<i>2,500</i>	<i>2,500</i>

*The allowance will be applicable to Drivers and Support Staff deployed in hospitals and other health facilities.*

#### HEALTH WORKERS IN RURAL AREA

		<i>Phase 1-w.e.f</i> <i>1/12/2011</i>	<i>PhaseII-w.e.f</i> <i>1/7/2012</i>
<i>Staff Category</i>	<i>Job Group</i>	<i>Rate(Ksh.pm)</i>	<i>Rate (Ksh.pm)</i>
<i>Doctors,Dentist,Pharmacists and Anesthetists (including Clinical Officer Anesthetists)</i>	<i>All</i>	<i>17,500</i>	<i>17,500</i>
<i>Clinical Officers and Nurses</i>	<i>All</i>	<i>10,000</i>	<i>10,000</i>
<i>Other para-medics</i>	<i>All</i>	<i>5,000</i>	<i>5,000</i>
<i>Drivers and Mortuary Attendants</i>	<i>All</i>	<i>3,500</i>	<i>3,500</i>
<i>Support Staff</i>	<i>All</i>	<i>2,500</i>	<i>2,500</i>

#### HEALTH WORKERS IN RURAL AREA

		<i>Phase 1-w.e.f</i> <i>1/12/2011</i>	<i>PhaseII-w.e.f</i> <i>1/7/2012</i>
<i>Staff Category</i>	<i>Job Group</i>	<i>Rate(Ksh.pm)</i>	<i>Rate (Ksh.pm)</i>
<i>Doctors,Dentist,Pharmacists and Anesthetists (including Clinical Anesthetists)</i>	<i>All Officer</i>	<i>20,000</i>	<i>20,000</i>
<i>Clinical Officers and Nurses</i>	<i>All</i>	<i>12,500</i>	<i>12,500</i>
<i>Other para-medics</i>	<i>All</i>	<i>7,500</i>	<i>7,500</i>
<i>Drivers and Mortuary Attendants</i>	<i>All</i>	<i>5,000</i>	<i>5,000</i>
<i>Support Staff</i>	<i>All</i>	<i>4,000</i>	<i>4,000</i>

ii. *Emergency Call Allowance: One Phase*

*This allowance should be payable to all Doctors (Medical Officers, Dentists and Pharma deployed in hospitals at the rate of Kshs. 30,000 per month, irrespective of grade, with effect 1<sup>st</sup> December, 2011. The allowance should, in addition, be paid to Provincial and District Officers.*

*The Extraneous Allowance and Emergency Call Allowance will also be applicable to Officers, Dentists, Pharmacists and other relevant Health Workers in both Kenyatta Hospital and Moi Teaching and referral Hospital as specified. The two institutions are to liaise with Treasury for funding.*

*This office Circular letters under reference are therefore varied accordingly.*

*Please take necessary action.*

*Yours*

*Signed*

The 6<sup>th</sup> Respondent also received a circular from the Permanent Secretary of the Ministry of Medical Services dated 27th January 2012 in the following terms.

“MINISTRY OF MEDICAL SERVICES

*Afya House*

*Catherdral Road*

*P O Box 30016 – 00100*

*NAIROBI*

*The Chief Executive Officer*

*Kenyatta National Hospital*

*NAIROBI*

*The Chief Executive Officer*

*Moi Teaching and Referral Hospital*

*ELDORET*

**PAYMENT OF EXTRANEIOUS AND EMERGENCY CALL ALLOWANCES TO HEALTH WORKERS**

*Attach herewith a letter Ref. No. MSPS/2 /1/3A Vol.III/(77) dated 12<sup>th</sup> January, 2012 from the Ministry of State for Public Service approving payment of Extraneous and Emergency Call Allowances to the ealth Workers in your instinstitutions.*

*Health Workers in your institutions.*

*I wish to confirm further that the Treasury has allocated funds to cater for phase 1 covering the period between December, 2011 to June, 2012. You are therefore instructed to effect the two allowances and pay the eligible officers for December, 2011 together with January, 2012.*

*Please ensure that the allowances are paid in accordance with the provisions contained in the attached circular to avoid any audit queries. It is further clarified that “Support Staff” includes Porters, Patient, Attendants, Theatre Attendants, Cleaners and Laundry Assistants only.*

*You are also required to submit your budgetary requirements for the period between February to June to enable Treasury allocate additional funding under the Revised Budget.*

*Andrew A. Nyachoga*

*For: PERMANENT SECRETARY”*

*Kenyatta National Hospital, the 6<sup>th</sup> Respondent thereafter implemented the circular and paid a total of 3645 employees as detailed in the list of documents attached to the Reply to the Memorandum of the 1<sup>st</sup> and 6<sup>th</sup> Respondents.*

Having been excluded from the implementation of the circulars set out above, the claimants filed the claim herein alleging improper implementation of the circular by the Respondents and discrimination.

### **Claimant's case**

The Claimants allege that there was both vertical and horizontal discrimination as some departments, although covered by the circular of 12<sup>th</sup> January 2012, were excluded from payment of extraneous allowance. The claimants further allege that some workers in the same office doing the same job were treated differently with some being paid while others were left out. They argue that the circular referred to public service health workers and that the Claimants were included in the circular as they were public service health workers.

The claimants submit that "public health worker" is defined as "all people engaged in the promotion, protection or improvement of the health of a population" as by Adamsahel Diallo in Counting Health workers: definition, data, methods and global results. M.R.Dal Poz , Y. Kinfu, S. Drager and T. Kinjumen, Department of Human Resources for Health, WHO, 2003. Mr. Juma submitted that the claimants include cooks and caterers who prepare food for the patients, engineers who operate and maintain the machinery and equipment used to provide health services, laundry personnel who clean all the clothing items used by patients and administrative workers who manage the hospital, co-ordinate departments within the hospital and manage the workforce and working environment.

That the Respondents recognized the difference between two categories of workers, and offered extraneous allowance to the general populace of health workers but offered emergency call allowance to medical officers exclusively. That this is the reasons why the Claimants are not demanding payment of emergency call allowance . The Claimants further submit that extraneous allowance is paid to drivers, engineers, electricians, clerical officers while no emergency call allowance is paid to non - medical officers.

That having proved that the claimants are health workers falling within the categories of health workers listed in the circular dated 12<sup>th</sup> January 2012, their exclusion from payment of the extraneous allowance was discriminatory that this has led to some employees earning more than their supervisors. The Claimants submit that the circular from the Permanent Secretary in the Ministry of Medical Services restricted the definition of the support staff and limited it to porters, patient attendants, theatre attendants, cleaners and laundry assistants only. They submit that all employees of the hospital are entitled to extraneous allowance.

The Claimants relied on the case of **Kenya Plantation & Agricultural workers Union V Coffee Research Foundation [2014] eKLR** in which the court held that payment of casual guards less than the permanent guards was in violation of Section 5(3) of the Employment Act.

The Claimants further relied on the case of **VMK V CUEA Cause No. 1161 of 2010** in which the court held that the Claimant was discriminated by not being offered salary, allowances, and leave as her counterparts and was denied maternity leave due to her HIV/Aids status.

### **1<sup>st</sup> and 6<sup>th</sup> Respondents case**

The 1<sup>st</sup> and 6<sup>th</sup> Respondents submitted that the Claimants are not members of the Kenya Medical Practitioners, Pharmacists and Dentists Union and are not part of the negotiations resulting in the granting of the extraneous allowance, that the Claimants do not fall within the categories of employees listed in the circulars of 19<sup>th</sup> December 2011 and 12<sup>th</sup> January 2012, that the two circulars referred to the same cadre of employees and there was no discrimination in the implementation of the allowance. It is further submitted that the 1<sup>st</sup> and 6<sup>th</sup> Respondents were not part of the negotiations and cannot be held responsible for the implementation of the circulars, that the circular of 27<sup>th</sup> January 2012 specified the support staff to be paid being porters, patient attendants, theatre attendants, cleaners and laundry assistants only. They Respondents further submitted that having complied with the circular they are not

guilty of noncompliance, that the funding to be utilized to pay the allowance comes from the Government, that the 1<sup>st</sup> Respondent is one of the employees who does not receive the extraneous allowance.

They relied on the case of **Lawi Duda & Others V Bamburi Cement Co. Ltd [2012] eKLR** where the court dismissed a claim by employees who filed suit to enforce implementation of a collective bargaining agreement on grounds that they were not members of the Union.

In that case the court observed that one cannot benefit from an agreement or pact where one is not a party.

### **Case of 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.**

The 2<sup>nd</sup> to 5<sup>th</sup> Respondents submitted that Claimants were not party to the Return to Work formular and that the Claimants have alleged facts which they cannot prove contrary to Section 64 of the Evidence Act. They further submitted that Section 57 of the Labour Relations Act provide for negotiation of terms and conditions of service only between parties who have signed a recognition agreement and only after signing the recognition agreement can they negotiate for unionisable members of the Union. They submitted that the Claimants have not produced a collective bargaining agreement. The 1<sup>st</sup> and 6<sup>th</sup> Respondents relied on **Petition No. 1174 of 2007 between Kenya Small Scale Farmers Forum & Others V Attorney General and HCC 620 OF 2004 between Sammy Muhia & Others V Kenya Power and Lighting Company Ltd.**

### **Issues**

Having considered the pleadings, submissions and authorities relied upon by the parties, as well as the issues as framed by the parties, in my opinion there are only two issues for determination.

- i. Whether the circular dated 12<sup>th</sup> January 2012 covered the Claimants under employees to be paid extraneous allowance and
- ii. Whether the exclusion of the Claimants from payment of the extraneous allowance was discriminatory.

#### **1. Whether the Claimants are covered under the circular dated 12<sup>th</sup> January 2012.**

The Claimants have submitted that all the staff of the 6<sup>th</sup> Respondent should be paid extraneous allowance as the circular dated 12th January 2012 refers to all public health workers which covers all the Claimants.

It is my opinion that the circular of 12<sup>th</sup> January 2012 must be interpreted in the light of the circular dated 19th December 2011 which was the originator of the allowance. That circular categorized employees to be paid as medical Officers (Dentists/Pharmacists' Clinical Officers, nurses, technologists and technicians, mortuary attendants, drivers deployed in hospitals, and finally, patient attendants in hospital wards/dispensaries/health Centre's.

The circular of 12<sup>th</sup> January 2012 varied these categories by amending the category of "patient attendants" to "support staff". The circular itself ends with the statement *"This Office circular letters under reference are therefore varied accordingly. It does not expand any other category other than the category of patient attendants.*

This means that no staff outside those in these circulars were intended to be covered unless they were under the job category of patient attendants which was substituted by the term support staff.

The circular dated 27<sup>th</sup> January 2012 attempted to clarify who was included in the category "support

staff” and stated it includes porters, patient attendants, theatre attendants, cleaners and laundry assistants **only**.

The Claimants have not demonstrated that they are all deployed within the categories included under the term “support staff”. The Claimants were not part of the categories that were agreed at the negotiations. The support staff were added by the Government to those agreed upon at the negotiations with the Kenya Union of Doctors, Pharmacists and Dentists.

From the forgoing I find that the Claimants have not proved that they were included in the circular dated 12<sup>th</sup> January 2012 or in any previous or subsequent circulars for purposes of payment of extraneous allowance.

## **2. Was the exclusion of the Claimants from the extraneous allowance discriminatory?**

The Claimants have urged the court to find that they were discriminated. Their justification for so stating is that some employees working in the same office were benefitting while others were not and further that some junior officers were earning more than their supervisors as a result of the discriminatory manner in which the allowance is paid. No evidence has been submitted by the Claimants to prove that any two or more employees who work in the same office and perform the same job have been paid while others have been left out nor has any evidence been submitted of a supervisor earning less than the staff he is supervising as a result of the allowance.

For an employee to prove discrimination the employee has to demonstrate that two or more persons doing the same work were being paid differently with one earning and the other not earning the allowance and that there is no justification or explanation for the difference such as merit, seniority or length of service. Section 5 of the Employments Act prohibits discrimination in the following terms.

*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. to promote and guarantee equality of opportunity for a person who, is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.*

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

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

- a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;*
- b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.*

*(3) It is not discrimination to –*

- a. take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;*
- b. distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;*
- c. employ a citizen in accordance with the National employment policy; or*
- d. restrict access to limited categories of employment where it is necessary in the interest of state security.*

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

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

*(6) 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 or omission is not based on any of the grounds specified in this section.*

*(7) For the purposes of this section-*

- a. "employee" includes an applicant for employment;*
- b. "employer" includes an employment agency;*
- c. an "employment policy or practice" includes any policy or practices" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment and disciplinary measures.*

From the provisions of Section 5 it is evident that there are circumstances when discrimination is permitted by law such as taking affirmative action measures consistent with the promotion of equality or elimination of discrimination or on the basis of the inherent requirements of a job. The Claimants have not shown that the payment of the extraneous allowance does not fall under any of these categories.

The Claimants have not even attempted to explain the purpose for which the allowance is paid so that they can argue that they are also entitled to the allowance. The manner in which the Claimants have framed their arguments is as if the allowance was a general wage increase which all employees were entitled to.

The circulars are categorical and explicit that the allowance is only payable to certain categories of staff as specified therein.

For these reasons, I find that the Claimants have not demonstrated that there was any discrimination against them in the manner in which the extraneous allowance was implemented.

The Claim is therefore not meritorious and I dismiss the same with no orders for costs.

Orders accordingly.

**Read in open court this 12<sup>th</sup> day of May, 2014.**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

Juma for Claimants

Fedha holding brief for Jemator for 1<sup>st</sup> & 6<sup>th</sup> Respondents

Fedha for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents