



**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE 473 OF 2011**

**MIGUNA MIGUNA ..... CLAIMANT**

**VERSUS**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

**Issue in dispute –**

**Discriminatory terms of service of employment.**

The Claimant herein Miguna Miguna filed his memorandum of claim on the 29<sup>th</sup> March, 2011 through the firm of Mugambi/Manyara and Company Advocates.

He sought the following prayers:

1. That he be paid the sum of Ksh,4,624,080/= with interest thereon from the date of filing suit till payments in full.
2. An order that his monthly salary and allowances amounts to 742,270 with effect from the date of filing suit.
3. An order that the Respondent do pay the difference in salary and allowances with interest to be calculated and quantified by this court.
4. An order for specific performance.
5. A declaration that he is entitled to salary, allowances and benefits at a commensurate rate with those of Prof. Kivutha Kibwana.
6. General, specific, aggravated and exemplary damages for discrimination.
7. Costs for this suit.
8. Any other relief this Hon. Court may deem fit to grant.

**Facts of the case**

The claimant through his memorandum of claim and oral evidence adduced before court stated that he

worked for the Orange Democratic Movement (ODM) as a Member of the strategic team and also as Advisor to the Prime Minister and served in his think tank. He indicated that before March, 2009, the Prime Minister called him to his office and asked him to meet him. The meeting did take place whereby the Prime Minister offered him a job as his Advisor. The Prime Minister further informed him that he had discussed the matter with the President H. E Hon. Kibaki who had agreed that the claimant could serve as Prof. Kibwana's counterpart in the coalition government. The claimant stated the coalition government had been established in March, 2008 and that he had been involved at that time.

The claimant further informed court that the Prime Minister informed him that he wanted the claimant to advise him on all matters pertaining to the coalition government i.e. coalition management implementation of Agenda 4, Institutional Reforms, Management of Parliamentary affairs and leadership. To this, the claimant says he agreed. The claimant was also expected to research on these issues. It was also agreed that the claimant would be Joint Secretary to the Permanent Committee on Management of Coalition affairs. The other Secretary was Prof. Kivutha Kibwana and their roles would include preparing agenda, summoning meetings, preparing minutes, preparing briefs for the grant coalition and monitoring the implementation of Agenda 4.

At the end of the meeting, the claimant stated that the Prime Minister asked him to have a meeting with the Permanent Secretary in the office of the Prime Minister Dr. Mohamed Isahakia. A meeting with Dr. Isahakia confirmed that they already had claimant's resume and would contact him on other modalities of his job.

On 6<sup>th</sup> March, 2009 the claimant stated that he had a meeting with the Head of Public Service Ambassador Francis Muthaura at his office at Harambee House at 6 p.m. At the meeting was also Sam Mwale who is a Deputy in the Cabinet Office. In the meeting, what claimant had discussed with the Prime Minister earlier on this appointment was confirmed. The Head of Public Service informed the claimant that his role would be identical to that of Prof. Kivutha Kibwana.

Issues on remuneration of claimant were also discussed. Prof. Kibwana apparently informed claimant what he earns and claimant wrote this down as per his Appendix No. 4 which is as follows:

1.	Basic salary	-	Ksh.423,280/= per month
2.	House allowance	-	Ksh.100,000/= per month
3.	Medical cover	-	Ksh.2490 per month
4.	Entertainment allowance	-	Ksh.100,000/= per month
5.	Extraneous allowance	-	Ksh.100,000/= per month
6.	Domestic help	-	Ksh.16,500/= per month
	<b>Net pay</b>	-	<b>Ksh.424,000/=</b>

The claimant indicated that he was also informed that he would also be entitled to other benefits such as chauffeur driver car, armed security at his home, office and staff. The claimant states that he was also informed that he would be entitled to 2 duty free vehicles within 3 years and his contract was to run for 3 years and was renewable for the period of the coalition government.

The claimant avers that on 11<sup>th</sup> March 2009, the Director of Administration at the Prime Minister's office had a meeting with him and informed him that he had been hired on Job Group 'S' and he indicated that was not the correct position. On the same day the claimant wrote a memo on the terms of the engagement. He indicated in the memo what had been agreed upon as his remuneration package as per his Appendix 1. In the meantime, the claimant was allocated an office and given a vehicle and was promised that security would be provided later.

On 6<sup>th</sup> March, 2009, he also received his letter of appointment which is attached herein as Appendix 2. The letter contained his terms and conditions of service as follows:

1. Basic salary - Ksh.254,000/= per month
2. House allowance - Ksh.80,000/= per month
3. Entertainment allowance - Ksh.100,000/= per month
4. Extraneous allowance - Ksh.100,000/= per month
5. Domestic staff allowance - Ksh.15,600/= per month

Further it was indicated that he was being appointed for a period of 3 years with payment of service gratuity on expiry at the rate of 31% basic salary. Other benefits included:

1. Comprehensive medical cover for self, spouse and up to 4 children with Pioneer Insurance.
2. 30 days annual leave with a leave allowance of Ksh,50,000/=.
3. One chauffer driver car for official use.

The letter indicated that he had been appointed by His Excellency the President as Advisor, Coalition Affairs and was to be attached to the Secretariat for the Cabinet Committee on Coalition Coordination of the office of the Prime Minister, Treasury Building. He was asked to acknowledge receipt of the said letter.

The claimant told court that he responded to this letter through his letter Appendix 3. He pointed out the discrepancy in terms of engagement. He copied the letter to the Permanent Secretary, Prime Minister's office and Public Service and requested that the letter of appointment be amended. He never received a response to this letter. He approached the Prime Minister to intervene to have the letter amended and the Prime Minister apparently instructed his Chief of Staff Caroli Omondi to write to the Head of Public Service Amb. Muthaura and ask him to amend the said appointment letter. Mr. Omondi did write the letter as requested to Amb. Muthaura. To this letter, again there was no reply. The claimant now indicated that he approached the Attorney General for intervention. The Attorney General wrote a letter to Amb. Muthaura, Head of Public Service as per Appendix 5 which was also not replied to. Even after replying to this letter from the Attorney General, no response was received. It is then that the claimant decided to institute this case. This contract was never terminated until it expired on 6<sup>th</sup> March, 2012. He was suspended on 6<sup>th</sup> March, 2011, and his pay was stopped. On 27<sup>th</sup> December, 2011 he was reinstated again but he declined to accept that appointment.

He seeks the difference in payment between what he was earning and what Prof. Kibwana was earning for the 36 months as follows:-

Prof. Kibwana's	-	Ksh.26,721,720
Claimant's	-	Ksh.19,785,600
Difference	-	Ksh.6,361,120

He indicates that he was treated in a discriminatory manner and seeks to be compensated accordingly.

He also indicates that the arbitrary and unexplained breach of the agreed terms of service amounts to discriminatory treatment and a breach of his fundamental rights enshrined in Section 27 (4) and 27 (5) of the Constitution of Kenya, 2010.

When cross-examined the claimant told court that he did not have a copy of Prof. Kibwana's pay slip and neither has he produced it in court as an exhibit.

He also told court that he was appointed by His Excellency the President through his letter of Appointment Appendix 2. He also indicated that he is not a Professor of law and he does not have prior ministerial experience. When asked if he has any written contract with the government, the claimant declined to answer but he told court that he is an advocate of the High Court of Kenya. He indicated that he was paid the salary as Appendix 2 until 26<sup>th</sup> July, 2011. He indicated that as Appendix 4, paragraph (1) (b) his terms are to be comparable to those of his counterpart Prof. Kibwana and this to him implies same pay.

He says he does not know if the terms of Prof. Kibwana were altered at any one time. He also told court that he is aware Permanent Secretaries are paid at various rates. He also told court that appointments in government can be made orally.

The Respondent on the other hand filed their reply on 13<sup>th</sup> October, 2011 through their Counsel Emmanuel Bitta. They also called one witness Peter Kiplangat Koros who works as an Assistant Director of Human Resource Management at the Prime Minister's Office. In their response, the Respondent told court that there is a pending JR application before the High Court arising from the same matter. They also indicated that the claim made by the claimant to the effect that he was promised that his remuneration and benefits would be identical to those of Prof. Kibwana are inaccurate as remuneration determination within the Civil Service is never handled through verbal promises as alleged by the claimant.

The RW 1 told court that he had custody of the claimant's personal file as the claimant worked as Advisor Coalition Affairs. That as an office, they received communication on terms of his engagement from the Office of the President. The terms were communicated in writing and they effected payments based on those terms and paid to the claimant's bank account as per appendix 2 (Respondents list). The Respondents witness produced sample copies of claimant's pay slips to show he was paid. He also told court that the claimant at one time complained about his terms of employment. The authorized officer, the Permanent Secretary wrote to the Office of the President pointing out the said complaint. A reply received showed that Prof. Kibwana previously served as a Cabinet Minister immediately prior to his appointment as Presidential Advisor on Constitutional Affairs. Determination of his benefits therefore took into consideration his previous salary and benefits as a Cabinet Minister and his experience in public affairs. Prof. Kibwana was also assigned an additional role of Joint Advisor of Coalition Affairs. In view of this, there was need to maintain the remuneration and benefits of Public Service and within Approved Limits, and so the package of the claimant was to remain as communicated to him. The claimant was advised accordingly of this position.

When cross examined by claimant, R.W1 told court that he never attended any meetings with claimant and Head of Public Service nor with the Permanent Secretary. He further told court that the claimant was employed on 31<sup>st</sup> March 2009 and worked for over 2 years. He says his benefits were calculated up to 31<sup>st</sup> October 2011.

The parties also filed their submissions which this court has also considered.

### **Issues for determination**

1. What were the terms of engagement of the claimant?
2. Whether the claimant was treated in a discriminatory manner.
3. Whether the claimant is entitled to any prayers sought.

## **Terms of engagement**

The Claimant told court that he was verbally informed by the Prime Minister and subsequently by the Head of Public Service that he was being engaged as Advisor to the Prime Minister and was also to be a Joint Secretary to the Permanent Committee on Management of Coalition Affairs. This initial communication followed a meeting where the claimant avers that the Head of Public Service informed him that he was going to have remuneration and benefits similar/identical to that of Prof. Kivutha Kibwana's. Apparently Prof. Kibwana's gross pay came to 742,270/= and this is what the claimant expected but he ended up being paid Ksh.549,600/= gross.

The issue of terms and conditions of an employment contract are well grounded in the Employment Act, 2007. Section 7 of the said Act states;

***“No person shall be employed under a contract of service except in accordance with the provisions of this Act.”***

The Act envisages that there can be both oral and written contracts of employment. However Section 9 of the Employment Act 2007 states that:

***“A contract of service?***

***(1) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or ..... shall be in writing .....***

***(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)***

***(3) For the purpose of signifying his consent to a written contract of service an employee may?***

***(a) sign his name thereof, or***

***(b) imprint thereon an impression of his thumb .....***

This provision in the Employment Act 2007, is similar to what pertain in other jurisdiction for example the Employment Act, 2002 of England provide that employees with one month's services are entitled to a written statement of their main terms and conditions; although the employer can provide it within two months.

The underlying principle on insistence of a written statement lies in the fact that where there is a misunderstanding, recourse will be heard to the written contract to establish what the parties intended.

**Gwyneth Pitt** in his book ***“The Employment Law Maxwell 7<sup>th</sup> Edition”*** at page 111:- alludes to this as he states that

***“The result is that where there is a question about the respective rights and liabilities of the employer and the worker, the answer may require a fairly complex analysis of a variety of different sources to establish first what the parties actually agreed and secondly whether there are other constraints affecting the position”.***

Section 10 of the Employment Act 2007 provides what must be included in an employment contract and provides that:

***“(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection(3) be given in instalments and shall be given not later than two months after the beginning of the employment?***

**(2) A written contract of service shall state?**

**(a) the name, age, permanent address and sex of the employee;**

**(b) the name of the employer;**

**(c) the job description of the employment;**

**(d) the date of commencement of the employment;**

**(e) the form and duration of the contract;**

**(f) the place of work;**

**(g) the hours of work;**

**(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;**

**(i) the intervals at which remuneration is paid; and**

**(j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and**

**(k) any other prescribed matter."**

Other terms of an employment contract include terms and conditions relating to leave, public holidays and holiday pay, incapacity to work due to sickness or injury, including any provisions for sick pay and pensions and previous schemes. Other important terms in an employment contract include length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment; where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end, either the place of work or where the employee is required or permitted to work at various places, an indication of that place of work and of the address of the employer; any collective agreements which directly affect the terms and condition of employment including where the employer is not a party, the person by whom they were made among other issues.

It is worth pointing out here that terms of an employment relationship can either be express or implied. The express ones are what are stated in a contract and they are mandatory. Such terms cannot be varied without the mutual consent of the parties. The implied terms – these are those necessary to give the transaction such as efficacy as the parties must have intended. Implied terms include provision of safety to the employee, trust and confidence, and other raft of terms as a reasonable bystander even hearing the two discuss their contract would definitely say yes they meant this and that.

Now back to the contract between the claimant and the government. The claimant contends that what was agreed upon orally between himself and the Head of Public Service representing his employer was never affected. The Respondent contends that the oral contract could not have been enforceable and it had to be couched according to prevailing civil service regulations. I have already alluded to the fact that the Employment Act 2007 envisages that all contracts for a term exceeding three years must be in writing. Is the oral contract if any between the claimant and Respondent enforceable then? I must say what is enforceable is the three year contract made in writing between the claimant and the Respondents.

This appointment letter given to the claimant however falls below the threshold of what a contract of employment should be like as envisaged under Section 10 Of the Employment Act. The claimant was asked to acknowledge the appointment letter given to him and he did acknowledge it. Not only did the claimant acknowledge it but he continued to work in the capacity appointed and received salary and was

allocated an office which he occupied. It is at this point that he should have declined to take up the appointment given that he felt that the terms and conditions befitting the office were not met. However, the claimant took up his appointment despite the fact that the remuneration package was below his expectation. He continued servicing and receiving salary and allowances as per the captioned appointment letter for over two years only to take up this case to court when the contract period he was serving was a few months to terminate.

The Appointment letter given to the Applicant was not a contract of employment though.

**Gwyneth P.H. in Employment Law, Sweet and Maxwell 7<sup>th</sup> Edition at 116** states as follows:

***“A written statement is not the same thing as a written contract of employment. A contract creates the rights and duties of the parties; the written statement merely declares they are what they have been agreed and it follows that it is therefore capable being inaccurate.... It is an important distinction for it a document is held to be a written contract, it will be presumed that it accurately records the terms agreed by the parties and it will be very difficult to persuade a court that the terms are otherwise. If it is a statement then it has no special legal status and could be a mistaken record of what was agreed .....*”**

Given that the claimant was offered this appointment and he took it up and continued to receive the salary, allowances and benefits attached to it, he cannot turn around and deny that he accepted the offer given to him. Had he declined to take up the appointment at that time, then he could have seen a situation where the contract may have been renegotiated. However, having taken up the appointment as it was and on terms as per the appointment letter, the claimant cannot turn around and demand what was not in this, letter. In answer to question I therefore find that the terms and conditions that effected the claimant's employment with the Respondent are as per contained in the appointment letter dated 6<sup>th</sup> March, 2009 that was exhibited before the court.

Now in relation to the issue of discrimination the constitution of Kenya 2010 expressly prohibits discrimination in no uncertain terms Article 27 states:-

***“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***(2) equality includes the full and equal enjoyment of all rights and fundamental freedoms***

***(3) .....***

***(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, ..., language or birth ...”***

Article 24 (3) of the Constitution further provides that-

***“The state or a person seeking to justify a particular limitation shall demonstrate to the court's tribunal or other authority that the requirement of this Article have been satisfied”.***

Despite the fact that the claimant served as special advisor to the Prime Minister and also served as a Joint Secretary to the permanent Committee on Coalition affairs a position he says is equivalent to that of Prof. Kivutha Kibwana, the claimant states that he was discriminated against in terms of his remuneration and benefits. Discrimination is expressly prohibited by the Supreme law of the land and can only be applied in terms of Article 24 (3) above.

The Employment Act 2007 at Section 5 also expressly prohibits discrimination as follows:

***(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....”**

The question then is, was the claimant discriminated against when he was remunerated lower than Prof. Kibwana who was serving in same position as claimant.? In his letter of 3<sup>rd</sup> April 2009 addressed to the Permanent Secretary Office of the Prime Minister, the Head of Public Service stated as follows:

**“As you are aware, Prof. Kibwana served as a Cabinet Minister immediately prior to his appointment as a Presidential Advisor on Constitutional Affairs. Determination of his benefits therefore took into consideration his previous salary and benefits as a Cabinet Minister and his experience in public affairs. You are also aware that Prof. Kibwana has also been assigned the additional role of Joint Advisor on Coalition Affairs.**

**In view of the above reasons, and the need to maintain remuneration and benefits of public servants within approved limits, the remuneration and benefit package of Mr. Miguna as communicated in this office letter Ref. No. OP 2/1/938A of the March 2009 will remain.**

**Please advise him accordingly.**

**Yours sincerely**

**SIGNED**

**Amb. Francis K. Muthaura, EGH”**

The Head of Public was trying to justify why salary of claimant herein had to be lower than that of the Prof Kibwana. This is as envisaged under Article 24 (3) of the constitution. Is this reason justifiable? It is true Prof. Kibwana had served as a Cabinet Minister. He had been appointed Presidential Advisor on Constitutional Affairs before Claimant was appointed. It is apparent that salaries of officers who may be serving in same capacity change due to seniority in rank and even due to experience. That is why salaries for public servants are placed in bands with incremental dates varying from one officer to another. This is even true of constitutional office holders like Judges who may judges of one court like the High Court. However a Judge of the High Court appointed in 2012 cannot be on same salary scale as one appointed in 2010. This perfectly explains why the salary of Prof. Kibwana had to be different to that of the Claimant herein.

Section 5 (3) of Employment Act states that:

**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) .....**

**(d) .....**

The fact that Prof. Kibwana is distinguished for his higher pay having been a former Minister is also not

discrimination. I therefore make a finding that the claimant was not discriminated against in the circumstances.

Are there any remedies the claimant is entitled to?

I find that the claimant was appointed as per his appointment letter. He was consistently and periodically paid at the end of every month for the time he worked. He was accorded all benefits commensurate with his office. The orders he seeks are therefore unsustainable. I dismiss his case accordingly with costs to the Respondent.

Signed, dated and delivered in court at Nairobi this 28<sup>th</sup> day of November, 2012.

**HELLEN WASILWA**

**JUDGE**

**Appearances:**

Claimant in person

Mr. Emmanuel Bitta      for Respondent

Rachel Gichuki              Court Clerk