



REPUBLIC OF KENYA

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

COURT NAME: MILIMANI COMMERCIAL

CASE NUMBER: ELRC.C/66/2019

CITATION: ROWLAND THIONGO KINUTHIA VS NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED

JUDGMENT

1. The claimant retired from employment with the respondent on the 25th of August 2018. Being dissatisfied with the terminal dues and pension, inter alia, the claimant filed a statement of claim dated 30th January 2019 and amended on 20th November 2019 and received in court on the 27th November 2019 seeking the following orders:-

- a. Kshs. 7,140, 000, 59,577,232 as itemized in paragraph 6,7,8,9,10,11,12 and 13 of the statement of claim.
- b. Interest at court rates from the date of filing this suit until payment in full
- c. Costs of the claim.

2. Together with the claim the claimant filed his amended witness statement dated 30th June 2022 and list of documents of even date and annexed the bundle.

3. The claim was opposed by the respondent, who entered appearance and filed an amended statement of response received in court on the 19th of September 2020 together with a supplementary list of documents dated 12th February 2020. The respondent had in the original response filed a witness statement of George Okech (RW1) dated 7th May 2019 and a list of documents dated 26th April 2019 and annexed the bundle.

Hearing and evidence

4. The claimant's case was heard on the 2nd October 2023 before Justice Ocharo Kebira where the claimant testified on oath and adopted his witness statement dated 30th June 2022 as his evidence in chief. He produced his filed documents as his evidence (see claimant's bundle of trial) and was cross-examined by counsel for the respondent, Kimiti.

5. The respondent's case was heard this Court on the 18th November 2024 where George Okech testified on oath and adopted his witness statement dated 7th May 2019 and amended response to the claim dated 19th February 2019, produced documents under list dated 26th April 2019 as Respondent's exhibits 1-9 and the supplementary list dated 12th February 2020 as R-exh10,11,12 a-



k as the respondent's evidence in chief. RW1 was cross-examined by counsel for the claimant, Kinyua.

Claimant's case in summary as per amended witness statement adopted as evidence in chief.

6. The claimant was employed by the respondent from September 2005 to August 2018 when he retired. While in service through an internal memo dated 29th January 2008, he was transferred on a temporary basis to Ngethu Water Works and stayed there for 4 years and three months. That due to the temporary nature of the transfer, he could not settle on a permanent basis so he was spending night out of the original station. That according to the company structure and regulations and benefits/allowances as per the CBA and Board approval, he was entitled to payment of per diem payment for 20 days every month worked at Kshs. 7000 per day. That the per diem was not paid and he thus claimed it for a total sum of Kshs. 7,140,000.

7. The claimant stated that the respondent failed to remit statutory deductions amounting to Kshs. 2,083,872. The claimant did not substantiate this claim. What were the statutory deductions? The claimant claimed that the respondent paid him salary on wrong grade from September 2005 to August 2018 leading to a loss of Kshs. 13, 5896,233 and tabulated the underpayment from 2005 to 2018. The claimant further stated he was underpaid house allowance, leading a loss of 102,700 in house allowance difference which he claims. The claimant claimed that the respondent miscalculated his pension and left out Kshs. 36,079.15 which he claims.

8. The Claimant further contended that the respondent failed to remit income tax deducted to KRA for a total sum of Kshs. 585,272. He stated that KRA had been demanding the tax from him and had consequently blocked him from getting a tax compliance certificate, leading to a loss of business. He claimed the unremitted tax and damages for loss of business. He further stated there were some pension deductions that the respondent did not remit and that the respondent should supply evidence of remittance.

Respondent's case in summary as per the witness statement of Okech and amended response all adopted as evidence in chief

9. The respondent stated that the claimant began employment in 2004 at Dandora Sewer Treatment Works Duty Station where he worked until 2007. In 2007 as a result of post-election violence that rocked the country with a view of protecting its employees, the respondent temporarily transferred the claimant from Dandora to Ngethu Water Works vide HR Memo dated 29th January 2008 (R-exh 1). The claimant received transfer allowance as per the HR manual. On the 12th March 2009 the claimant sought for transfer from Ngethu Water Works on basis of a medical problem to be stationed close to his physician in case he required medical attention (R-exh 2). The respondent transferred the claimant to Dandora Sewer Treatment Water works via memo dated 7th May 2012. (R-exh 3) On 18th June 2012 the claimant wrote to the respondent claiming per diem allowance for the period he had been stationed at Ngethu Water Works. The respondent in response dated 18th June 2012 explained that the claimant was not entitled to per diem allowance as the same was only payable to an employee away on official duty and not expected to come back on the same day and for a maximum period of 14 days. That the claimant was on temporary transfer and therefore not on out-of-duty station but rather at a new station. That the new position at Ngethu Water Works had a job designation and the claimant's duties at the previous station were being undertaken by another employee. The claimant dissatisfied with the response sought aid of the National Union of Water and Sewerage Employees (NUWSE) and the respondent explained to the union the claimant was not out of duty station but on transfer.

10. The respondent stated that the claimant was employed as a maintenance supervisor which was the position he held until retirement. He was employed on a gross salary Kshs. 35806 which was



regularly reviewed upwards and retired at a gross salary of Kshs. 140.000.

Written Submissions

11. After the hearing the parties filed written submissions

Determination

12. The parties addressed the question of whether the claims were merited and the court proceeded to make determination on merit of the claims.

On the claim for unpaid per diem

13. The claimant received a memo dated 29th January 2008 titled "temporary transfer " by the Director HR & Administration services of the Respondent which stated as follows:- " due to the current skirmishes and political tensions being experienced in the country you have been temporarily transferred to Ngethu Water works with immediate effect. Kindly note the transfer allowance will be paid with your next month's salary , the transfer takes place with immediate effect and not later than 31st January 2008. By a copy of this memo , the production manager is to ensure proper take over. I wish you well in your new assignment". (at page 25 of the claimant's bundle of documents)

14. The Response was that the per diem was not payable as the claimant was on transfer and not out of station. During the hearing on cross-examination the claimant stated Ngethu Water Works was not a station but field. That he worked there 2008-2012 and while there received his monthly salary and all allowances he was entitled to. RW1 on cross-examination stated that the claimant was on transfer and was paid transfer allowance and when he later asked for transfers on medical reasons it was done.

15. Both parties relied on the definition of per diem under the Black Law Dictionary which the court adopted as:- "by the day; an allowance or amount of so much per day.. generally , used in connection with compensation ... means pay for day's service. "The claimant submitted per diem, meant pay for work of temporarily nature as was the claimant's case. That per diem was payable as per the policy. It was not in dispute that per diem was payable for out of station work for not more than 14 days under the Respondent's human resources' policy.

16. The court taking into account the contents of memo of 29th January 2008 which stated the claimant's mobility to be a temporary transfer for reasons of the 2007 post-election violence, the payment of transfer allowance, the and the words "the production manager is to ensure proper take over. I wish you well in your new assignment" in the memo, held there was no ambiguity on whether the memo communicated a transfer. The court took into account that transfer of employees is a prerogative of employer. The mere wording of the transfer of as temporary was neither there nor there, taking into account the entire wording of the memo. The claimant was on a new assignment and was paid a transfer allowance.

The claimant was not entitled to per diem under the HR policy as he was not out of station and expected to return in less than 14 days. His duties were taken over by another employee. The foregoing were hallmarks of transfer and not out of station duties.

17. On claim for underpayment, the same was denied. The respondent stated that the claimant was employed as a maintenance supervisor which was the position he held until retirement. He was employed on gross salary Ksh 35806 which was regularly reviewed upwards and retired at gross salary of Kshs. 140000. During the hearing the claimant stated he was under job group N. During cross-examination the claimant admitted he received letter of employment dated 15th September 2005 and was offered position of maintenance supervisor, he signed on 22nd September 2005. The



Claimant stated that he was told on failing to sign he will not get salary.

18. The court held that a claim for underpayment can only arise under the contract of service. Since the claimant alleged he was placed on wrong grade at employment, having signed the contract of service he accepted the terms. It is trite that the court cannot rewrite contract of parties. The claimant having retired the contract was fully performed. The claim for housing allowance was pegged on the said alleged wrong grade and is disallowed consequently.

19. On claims for unremitted KRA income tax. The claimant produced an Itax assessment (page 42 of claimant's trial bundle) which indicated income tax for year 2017 as Kshs. 553887.

On this issue the court finds that it is not an expert on tax matters and further has no capacity to determine whether the employment was the only income of the claimant. Further, it is not an agent of the KRA to aid in collections. The tax claim can be pursued with KRA tax appeals tribunal or even the commercial courts. The court returned it had no jurisdiction to determine the tax dispute.

20. On pension dues, the court has no jurisdiction as held by Supreme Court in *Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others* [2016] KECA 160 (KLR at paragraph 146, :- "In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the Retirement Benefits Act, Trustees Act, Cap 167 of the Laws of Kenya and the general common law on trusts. It is important to note that nowhere in the Employment and Labour Relations Court Act is there jurisdiction conferred on the Employment and Labour Relations Court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners)." The claimant ought to take up any claim on pension with the pension scheme trustees and/or the Retirement Benefits Authority.

21. The claim for housing allowance was pegged on the said alleged wrong grade and falls consequently,

22. In conclusion, the claim is held as unmerited on underpayment and per diem. The claim for other statutory deductions was unsubstantiated. The court held it had no jurisdiction on the alleged unremitted tax to KRA and pension underpayment. Consequently, entire claim is dismissed.

23. On who bears the costs of the suit the principle being costs follow the event, the claimant being a retired ex-employee of the respondent, the court taking into account the nature of claims tempered justice with mercy and made no order as to costs in the claim.

24. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

SIGNED BY: HON. LADY JUSTICE JEMIMAH WANZA KELI



THE JUDICIARY OF KENYA.
NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT
CLAIMS AND LABOUR RELATIONS DIVISION
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