



**Ngurusi v County Government of Marsabit (Employment and Labour Relations
Petition E009 of 2023) [2024] KEELRC 1251 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1251 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS PETITION E009 OF 2023**

ON MAKAU, J

MAY 13, 2024

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS AND ARTICLES 2, 3, 22, 27,
41 AND 48 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION AND VIOLATION OF ARTICLES
2, 3, 22, 27, 41 AND 48 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF NON-PAYMENT OF GRATUITY
BENEFITS AND DISCRIMINATION OF ABDI NGURUSI**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

BETWEEN

ABDI NGURUSI APPLICANT

AND

COUNTY GOVERNMENT OF MARSABIT RESPONDENT

JUDGMENT

1. In a nutshell, the Petitioner’s case is that he was employed by the Respondent as a Liaison Officer from September 1, 2013 to September 30, 2017. His salary was Kshs.51,840.00 but it was increased to Kshs.58,840.00. The contract entitled him to gratuity payment of 31% of the annual basic salary, the Respondent has continued to refuse to pay him the same.
2. He outlined the particulars of discrimination against him as follows:



- a. Paying gratuity to all the other workers and failing to pay the Petitioner.
 - b. Withholding the Petitioner's gratuity pay without a lawful justification.
 - c. Treating the Petitioner in a different manner from the other workers.
 - d. Violating the rights of the Petitioner to equal treatment.
3. The Petitioner urged the Court to declare the non-payment of the gratuity as a violation of his constitutional rights and that the Respondent be compelled to pay the same.
4. This Petition is premised on articles 2, 3, 22, 27, 41 and 48 of Constitution under which the Petitioner has buttressed his claim of discrimination and violation to his rights to; fair administrative action, fair labour practices, reasonable working conditions, and access to justice. The Petition is for orders that:
- i. A declaration that the acts of the Respondent are discriminatory against the Petitioner and in violation of the Constitution of Kenya, 2010 and the Employment Act 2007.
 - ii. A declaration that the Respondent's refusal to pay the Petitioner's gratuity pay is a violation of the Petitioner's constitutional and statutory rights.
 - iii. An order that the Respondent pays the Petitioner a lumpsum gratuity pay at the sum of Kshs. 779,4470.20.
 - iv. An order that the Respondent pays the Petitioner an interest of lumpsum gratuity pay at the sum of Kshs. 826,389.33.
 - v. An award for compensation and general damages for the violation of the Petitioner's constitutional and statutory rights.
 - vi. An order that the Respondent issues a certificate of service to the Petitioner.
 - vii. Interest on 3 and 4 above at court rates.
 - viii. Costs of the petition.
 - ix. Any other relief that the court may deem just and fair.
5. The Petition was unopposed and thus the same was canvassed by way of written submissions.

Petitioner's submissions

6. The Petitioner in his submissions dated 31st January 2024 outlined the issues for determination as follows:
- a. Whether the Respondent discriminated against the Petitioner.
 - b. Whether the Petitioner is entitled to gratuity.
 - c. Costs.
7. On the first issues, it was submitted that the Respondent paid all the other workers save for the Petitioner. He submitted that the same amounted to discrimination as it was without reason. He submitted that Article 27 prohibited against direct or indirect discrimination on any grounds. He cited section 5 of the Employment Act and the case of Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) to buttress his argument. He urged me to be guided by the above case supra and award the Petitioner Kshs. 2,000,000/= as damages for discrimination.



8. On the second issue it was submitted that the Petitioner was entitled to gratuity at the end of his contract which was yet to be paid from 2017. It was argued that the Petitioner was entitled to gratuity under the contract. It was argued that the total amount owing to the petition as gratuity plus interest was Kshs. 1,605,859.53.

9. The Court was urged to allow the Petition as prayed plus costs.

Analysis and determination.

10. Having considered the Petition, the evidence and the submissions therein, the issues that arise for determination by this Court are as follows:

- a. Whether the Petition meets the competence threshold.
- b. Whether the petitioner's Fundamental freedom from discrimination has been violated.
- c. Whether the Petitioner is entitled to the reliefs sought.

Competence threshold

11. The threshold for constitutional reference pleading was enunciated by the High Court in case of *Anarita Karimi Njeru v Republic* [1979] 1 KLR, 54 where the court held that: -

“We would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to the *Constitution*, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”

12. I have carefully considered the petition, and confirmed that it sets out with a degree of precision the violations complained of, the provisions of the *Constitution* that are alleged to have been violated, and the manner in which the violation has been done. The violation complained of is discrimination contrary to article 27 of the *Constitution* and it is particularized in paragraph 10 of the petition. Consequently, I find that the petition meets the competence threshold established in the above precedent.

Violation of fundamental freedom from discrimination

13. The petitioner's complaint is that he was employed by the respondent under a fixed term contract of service which provided for payment of gratuity at the rate of 31% of his annual basic salary. He served the whole term of the contract but the respondent has failed to pay his gratuity like the other employees of the respondent. He sets out the particulars of the discrimination in paragraph 10 of the petition. He has also produced as exhibits the contract of employment and a letter by the respondent's County Secretary dated March 4, 2020 acknowledging the petitioner's claim for retirement benefit.

14. The above facts and exhibits have not been controverted by the respondent since it never entered appearance despite being served with the petition and hearing notice. Consequently, I find that, the petitioner has proved that the employer has treated him differently from the other employees of the government whose contracts are governed by statutes and regulations thereunder. The said differential treatment has not been justified.



Reliefs

- 15. The petitioner prayed for general damages for discrimination. In the case of *Ol Pajeta Ranching Limited v David Wanjau Muboro* [2017] e KLR the Court of Appeal awarded Kshs. 7,500,000 to the employee as damages for racial discrimination in the payment of salary. In this case the petitioner submitted that Kshs 2000,000 would be reasonable compensation. The circumstances between this case and Ol Pajeta Case, supra are different. Guided by the said precedent and considering the continued denial of the right with impunity, I award the petitioner Kshs. 1000,000 as general damages for discrimination.
- 16. As regards the claim for gratuity, the petitioner computed the same in paragraph 11 of the petition Kshs. 779,470.20 for the four years served. The computation is based on 31% of the annual basic salary for each year served. I wish to reiterate that the said claim has not been contested. The failure or the delay to pay the gratuity also amounts to breach of the contract of service between the parties. Therefore, the I award the petitioner the sum of Kshs 779,470.20 as prayed.

Conclusion

- 17. I have found that the petition herein meets the competence threshold required of a constitutional reference claim. I have further found that the respondent has discriminated the petitioner by failing to pay his gratuity like other employee of the government who were employed on contract basis. I have further found that he is entitled to the reliefs sought and consequently, I enter judgment for him against the respondent in the following terms:
 - a. General damages for discrimination.....Kshs. 1,000,000.00
 - b. Gratuity..... Kshs. 779,470.20

Total Kshs.1,779,470.20

The award is subject to statutory deductions but in addition to award of costs and interest at Court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF MAY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

