

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

CAUSE NO. E058 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL
INSTITUTIONS, HOSPITALS AND ALLIED WORKERS
(KUDHEIHA)**

.....**CLAIMANT**

VERSUS

**BOARD OF MANAGEMENT, WAMBASA GIRLS
SECONDARY SCHOOL..**

.....**RESPONDENT**

JUDGMENT

The claimant commenced the instant suit vide a claim dated 26th June 2025 alleging that the respondent had refused or failed to pay him service gratuity contrary to Article 40, 41(1) and 2(b), 4 and 43 of the Constitution of Kenya, Section 26 of the Employment Act, Section 5(1) of the Pension Act and the Ministry of Education Guidelines on Personnel in Government maintained schools under Ref:Min/P/SP/9/3.

The grievant's case was that he was employed by the respondent as a driver in August 2013 and left on 1st

September 2022 after giving the employer a one (1) months notice vide letter dated 3rd August 2022 and was a member of the National Social Security Fund (NSSF) and contributions were up to date and was praying for service gratuity, Kshs.149,076.00, certificate of service and costs.

The respondent on the other hand admitted that the grievant was its employee as alleged but denied having violated his rights and maintained that since the grievant was a member of the NSSF, he was unqualified for gratuity and the grievant was employed on permanent and pensionable terms.

The respondent admitted having seen the Circular Ref. Min/P/SP/9/3 dated 27th June 1996 filed by the claimant, under which service gratuity was payable to all employees of Board of Governors.

The respondent sought dismissal of the claimant's case with costs.

On cross-examination, the grievant admitted that his resignation letter had no acknowledgment stamp and the

respondent's copy had been received on 23rd August 2022 but insisted that he had given a one month's notice.

RWI confirmed on cross-examination that the respondent did not issue a certificate of service and that gratuity was not payable since the grievant was a member of the NSSF.

Claimant's submissions

Mr. Wambani for the claimant cited the provisions of Section 26(2) of the Employment Act on terms and conditions of service and made reference to a CBA whose details and duration he did not disclose.

He also cited the Ministry of Education Circular Ref Min/P/SP/9/3 dated 27th June 1996 whose clause 20 provided for service gratuity and cited Section 35(6) of the Employment Act to urge that it was a minimalistic provision and parties could agree on other payments, urging that the Ministry of Education letter contained more favourable terms for the claimant and was thus entitled to the sum of Kshs.149,076.00 as gratuity for 9 years.

Reliance was placed on the decision in **Kudheiha Workers V Board of Management Kiangochi Secondary School** ELRC No. E020/2024 where the court awarded gratuity as was the decision in **Kudheiha V Kibos School for the Deaf** ELRC No. E021 of 2021, to urge that the Ministry of Education letter dated 27th June 1996 was binding.

Mr. Wambani submitted that during the hearing RWI acknowledged having seen of the circular in question.

Finally, Mr. Wambani appeared to be relying on an unidentified and undated circular from the Chairman of the Public Service Commission which provided that all employees in the Public Service “shall be guided by the fact that gratuity and other terminal dues or benefits ought to be paid on termination, to urge that the claimant’s claim for gratuity was sustainable.

Respondent’s submissions

Counsel submitted that since the claimant was a registered member of the National Social Security Fund (NSSF), Section 35(6) of the Employment Act disqualified him from the award of gratuity and cited the sentiments of the court in **Kenya Revenue Authority V Kiragu Muga & 5 others** [2019] eKLR and **Abubakar**

Mohamed V Mumias Sugar Co. Ltd [2009] eKLR to reinforce the submission.

Counsel urged that there was no other gratuity scheme and no Collective Bargaining Agreement (CBA) was availed or another gratuity scheme.

Concerning the Ministry's Guidelines Ref: Min/P/SP/9/3, on gratuity, reliance was placed on the decision in **Council of Governors V Salaries and Remuneration Commission** [2017] eKLR for the proposition that circulars and policy directives could not supplant statutory provisions and in the instant case, the circular was silent on the provisions of Section 35(6) of the Employment Act.

On violations of the Constitution of Kenya, specifically Articles 40, 41(1)(2)(b) and 43, counsel contended that none of the claimant's rights had been violated.

Reliance was placed on the sentiments of the court in **Kudheiha V Nairobi Hospital** [2020] eKLR, to urge that the Constitution of Kenya did not confer gratuity in the absence of statutory or constitutional provisions.

On payment of final dues, counsel submitted that the claimant's resignation notice fell short of the mandatory notice period and no gratuity was payable and the suit was for dismissal with costs.

Analysis and determination

Documentary evidence availed by the claimant revealed that the grievant was a member of the claimant union from January 2021 and resigned from employment voluntarily vide a written notice dated 3rd August 2022 to take up church duties.

Strangely, the unions letters dated 23rd October 2023 and 2nd February 2024 to the respondent were referenced "service pay" as opposed to gratuity which was repeated in the letter dated 28th June 2024.

However, the letters dated 10th September 2024 and 18th September 2025 were correctly referenced a service gratuity.

Although the respondent received these letters, it did not respond to any and tendered no evidence of a response.

Further documentary evidence revealed that the dispute was reported to the Ministry of Labour and Social Protection and a conciliator appointed but his invitation for conciliation meetings dated 18th February 2025 and 26th February 2025 to the respondent were neither responded to nor honoured and issued a certificate of unresolved dispute dated 19th March 2025, paving way for the instant suit.

The only issue for determination is whether the grievant was entitled to gratuity as claimed.

Before delving into the issue of gratuity, it is important to dispose of the peripheral issue of notice of the resignation.

It is common ground that the grievants resignation letter dated 3rd August 2022 was not received by the respondent until 23rd August 2022.

Similarly, the grievant confirmed on cross-examination that he left employment on 1st September 2022.

Clearly, notwithstanding the fact that the grievant testified that he had given the respondent the requisite one month's notice, he did not as his resignation letter

was received on 23rd August 2022 and had provided no proof to show that he delivered it before 23rd August 2025.

The foregoing implies that the grievant did not accord the employer the requisite notice and ought to have paid the employer one (1) month's salary in lieu of notice.

However, the respondent's response to the claim dated 4th September 2022 neither contested the resignation notice nor embody a counter-claim for the one (1) months salary.

In the circumstances, nothing turns on this issue.

Concerning gratuity the claimant cited the provisions of Section 5 of the pensions Act, which provides:

(1) Every officer shall have an absolute right to pension and gratuity.

Regrettably, the Pension Act does not define the term gratuity or gratuities in this context.

The respondent's contention was that because the claimant was employed on permanent and pensionable

terms and a member of the NSSF no gratuity was payable by dint of Section 35(6) of the Employment Act.

It is necessary to indicate that pension and gratuity do not refer to the same thing, nor does gratuity and service pay mean the same thing.

The terms gratuity and service pay cannot be used interchangeably because they refer to different entitlements. Whereas service pay is payable to all employees who are not covered by Section 35(6) of the Employment Act, namely; those who are not members of any pension scheme or provident fund, gratuity is contractual and must have been agreed upon by the employer and employee either under the employment contract or under the terms of a Collective Bargaining Agreement (CBA) between the employer and a trade union representing unionisable employees of the particular employer.

Thus, gratuity is not a statutory right.

The foregoing is fortified by the authoritative rendition of the Court of Appeal in **Bamburi Cement Co. Ltd V William Kilonzi** [2016] KECA 546 (KLR) as follows:

“Turning to the award of gratuity the first thing we must emphasize is that gratuity as the name implies, is a gratuitous payment for services rendered.

It is paid to an employee or his estate by the employer either at the end of a contract or upon resignation or retirement or upon death of an employee. The employee does not contribute any sum or portion of his salary towards payment of gratuity.

An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct. But where, like here, the dismissal is not justified and is wrongful, the employee will be awarded gratuity if it is provided for in the contract of employment”.

In urging its case, the claimant union relied on the Guidelines on Personnel in Government Maintained/Assisted Secondary and Special Schools Ref Min/P/SP/9/3 dated 27th June 1996 whose paragraph 20 entitled ‘SERVICE GRATUITY’ stated:

“Payment of service gratuity is mandatory for all employees of Board of Governors, it shall be paid at the rate of one month’s basic salary for every year worked. It

shall be given before the employee is relieved of his/her function”.

However, the copy of the letter on record has no authentication as page 13 of the claimants claim is patently not a continuation of pages 1 and 2 of the letter from the Ministry of Education Science and Technology.

A court of law cannot rely on an incomplete document, and in particular one which does not have the authentication page of the writer and his/her designation. Such a document lacks authenticity and is of no evidential value. It lacks ownership.

Although the respondent did not contest the guidelines, the two pages of the document availed by the claimant had another page(s) which were not attached and the copy of a document attached as the third page was undoubtedly plucked from another letter or circular or memo or write up signed by A. M. Muchiri (AMB), the chairperson of the Public Service Commission. The page has no letterhead, address or addressees.

Intriguingly, the claimant had no list identifying the documents annexed to the claim.

The court is at a loss as why the signature page of another letter document, memo or circular by the Public Service Commission was attached to Ministry of Education, Science and Technology letter dated 27th June 1996 when A. M. Muchiri was neither the Permanent Secretary of the Ministry nor the Chairperson of the Public Service Commission.

Unfortunately, the Ministry's letter was the only document on which an award of gratuity to the grievant would have been grounded upon as the claimant had no other evidence in support of the claim and being unauthenticated, the letter had not probative value and the claim for gratuity lacked a justification as was the case in **Warari Githengi & 4 others V Waithaka Kamau alias Waithaka Kirau** [1998] KECA 223 (KLR), where the Court of Appeal stated:

"However, in his submissions before us Mr. Kimwere, counsel for the appellants, conceded and, in our view rightly that in view of the unauthenticated documents upon which the success of the suit rested, the suit was not sustainable..."

Strangely, in his submissions dated 11th November 2025, Mr. Wambani made reference to an unidentified and undated circular from the Public Service Commission on payment of gratuity but did not avail a copy of the document.

It is trite law that he who alleges is obligated to prove the allegation and the claimant failed to discharge the burden of proof.

Without any other basis upon which an award of gratuity would have been anchored, the claimant's case had no legs to stand on and it is for dismissal.

In the upshot, the claimant's claim dated 26th July 2025 is unsustainable and it is accordingly dismissed.

The claimant is, however, entitled to a Certificate of Service by dint of the provisions of Section 51 of the Employment Act.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 27TH DAY OF NOVEMBER 2025.**

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

ORIGINAL