



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v Family Bank Limited (Civil Appeal 374 of 2019)  
[2025] KECA 2043 (KLR) (28 November 2025) (Judgment)**

Neutral citation: [2025] KECA 2043 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 374 OF 2019  
PO KIAGE, K M'INOTI & JM NGUGI, JJA  
NOVEMBER 28, 2025**

**BETWEEN**

**PETER MUNYIRI MAINA ..... APPELLANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

*(Appeal from the judgment of the Employment & Labour Relations Court of Kenya at Nairobi (Maureen Onyango, J.) dated 14th June, 2019 in ELRCC No. 1396 OF 2017)*

**JUDGMENT**

1. This appeal arises from the judgment and decree of the Employment & Labour Relations Court (ELRC), (Onyango, J.) dated 14<sup>th</sup> June 2019. It raises four issues, but the main one is what rate of gratuity the appellant, Peter Munyiri Maina, was entitled to in the 2<sup>nd</sup> to the 5<sup>th</sup> year of his employment with the respondent, Family Bank Limited. The ELRC found that he was entitled to 18% of his gross basic annual salary, but the appellant contends that he was entitled to 31%. Our task in this appeal is to interpret the contract of employment between the parties against the evidence on record pertaining to the applicable rate of gratuity.
2. Before considering the merits of the appeal, it is apt to briefly set out the background to it. On 15<sup>th</sup> July 2011, the appellant and the respondent entered into a five-year fixed term contract of employment for the position of managing director and chief executive. Clause 8 of the contract of employment, which is the provision in contention in this appeal, provided as follows:
  - “8. Gratuity Will be calculated at 10% Gross Basic (Salary) for year one of employment and thereafter the applicable rates will be aligned with banking industry rates.” (Emphasis added).



3. The appellant's employment came to an end on 14<sup>th</sup> July 2016 and a dispute arose regarding the rate of gratuity payable to him for the 2<sup>nd</sup> to 5<sup>th</sup> year of employment. On 18<sup>th</sup> July 2017 the appellant filed a claim in the ELRC demanding a total sum of Kshs. 57,057,300 as gratuity due to him under clause 8 of the contract of employment, interest and costs. Specifically, as regards gratuity for the 2<sup>nd</sup> to 5<sup>th</sup> year of employment, the appellant claimed Kshs. 54,220,400 being 31% of his annual gross salary.
4. The appellant averred that the respondent was classified by the Central Bank of Kenya as a Tier 2 bank in the same band as the Housing Finance Company of Kenya Ltd. and the National Bank of Kenya Ltd., which were paying chief executives gratuity at the rate of 31% of the last gross annual basic salary. He also pleaded that the consultancy and audit firm, Pricewaterhouse Coopers Kenya (PWC), had carried out a survey on employee benefits guide for the year 2016 in which it concluded that the average market rate of gratuity payable to chief executives in the banking industry was 30% of the gross annual basic salary. Further, that Manpower Services Kenya Ltd, another firm, had found the gratuity payable by banks to be 31%.
5. The respondent filed a statement of response to the claim on 15<sup>th</sup> September 2017 in which it averred that the appellant's claim was grossly exaggerated and did not reflect the rate of gratuity payable by Tier 2 banks and that, the PWC survey had, contrary to the appellant's assertions, concluded that the average gratuity payable in the banking industry by Tier 2 banks to officers in the appellant's cadre was 18%.
6. By agreement of the parties, the suit was heard through the documentary evidence on record and written submissions. By the judgment impugned in this appeal, the ELRC found that the rate applicable to the appellant's gratuity to be 18% rather than 31%. That translated to Kshs. 6,696,000.00 per year for four years, totalling to Kshs. 26,784,000.00. The award was based on a monthly salary of Kshs. 3,100,000.00. Together with the 10% gratuity for the first year of employment, which was not in dispute, the ELRC awarded the appellant a total of Kshs. 30, 655,800.00. The court did not award any interest and as regards costs, it directed each party to bear its own costs. The appellant was, however, aggrieved and lodged this appeal.
7. In the appeal the appellant raised four issues, faulting the ELRC for adopting the rate of interest of 18% rather than 31%; for computing the award on the basis of an erroneous gross annual basic salary; and for failing to award, first, interest and second, costs.
8. In support of the appeal, Mr. Mose, learned counsel for the appellant, relied on two sets of written submissions dated 30<sup>th</sup> July 2020 and 7<sup>th</sup> July 2025. Counsel submitted, as regards the first issue, that the ELRC erred by ignoring the evidence on record which showed that chief executive officers of Tier 2 banks were entitled to gratuity at the rate of 31% of their gross annual basic salary. He relied on the PWC survey in support of the contention, adding that the same was prepared by experts on the issue, who were commissioned by the respondent, and therefore, the court ought not to have ignored their opinion. Counsel added that the rate of 18% adopted by the ELRC was not supported by experts and was not based on the banking industry rates.
9. The appellant also relied on a survey undertaken by Manpower Services (K) Ltd and submitted that the survey concluded that the rate of gratuity for departing Managing Directors in banks was between 30% and 31% of the last or current monthly salary of the Managing Director. It was contended that the ELRC erred by completely ignoring that evidence.
10. The appellant further submitted that the ELRC erred in ignoring the rates paid by HFCK and National Bank on the ground that they were parastatals. It was contended that the agreement between the appellant and the respondent provided as a benchmark, the rates applicable in the banking industry,



without distinction whether banks were parastatals or not. Counsel added that the ELRC approach amounted to rewriting the contract between the parties and further that there was no evidence to show that HFCK was a parastatal.

11. .On the second issue regarding computation of the gratuity, the appellant submitted that the ELRC erred by making an award based on the salary of Kshs. 3,100,000.00 per month rather Kshs. 3,642,500.00 per month, which was his salary for the 5<sup>th</sup> year of employment. As far as he was concerned, there was no dispute between the parties about his monthly salary during his year of exit and that is the amount that ought to have been used in computing his gratuity.
12. On the third issue on failure to award interest, the appellant submitted that there was no basis upon which the ELRC denied him interest. The court was further faulted for failing to give any reason for denial of the interest. It was the appellant's view that he was entitled to interest at court rates from 14<sup>th</sup> July 2016 when the gratuity became due and payable or, in the alternative, at the ruling rate of interest of treasury bonds, where he could have invested the money.
13. Lastly, as regards costs, the appellant faulted the ELRC for denying him costs without giving any reasons. It was submitted that although costs were at the discretion of the court, the discretion has to be exercised judiciously rather than arbitrarily and that in the present case, the denial of costs was arbitrary.
14. On its part, the respondent opposed the appeal on the basis of written submissions dated 8<sup>th</sup> September 2020.
15. On the first issue, the respondent submitted that the ELRC did not err in holding that the applicable rate of gratuity was 18% because the evidence produced by the appellant to justify the rate of 31% did not authoritatively state that the rate of interest applicable to banks like the respondent was 31%. As regards the PWC survey, the respondent submitted that it was not restricted to banks and only sampled seven banks. Further, that HFCK and National Bank which had rates of 31% were owned by the Government or controlled by entities owned by the Government and, therefore, their rate of gratuity was understandably similar to that of parastatals, and, therefore, was not a true reflection of the general banking industry. It was also the respondent's contention that the PWC survey actually found that average gratuity for Tier 2 banks was 18%.
16. Turning to computation of gratuity, the respondent submitted that for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> years of employment, the appellant's monthly salary was Kshs. 3,100,000.00 whilst for the 5<sup>th</sup> year it was Kshs. 3,642,000. The respondent contended that there was no basis for applying the salary of the last year of employment to the other three years of service. Instead, the respondent submitted that the contract provided for computation of the gratuity based on the gross salary for each year, rather than a global gross salary of the last year. Relying on the decision in *Pathfinder International Kenya Ltd v. Stephen Ndegwa Mwangi* [2019] eKLR, the respondent submitted that the *Employment Act* does not make payment of gratuity mandatory and that the same is only payable as provided in the contract of employment. Accordingly, the respondent submitted that the appellant was entitled to a gratuity of Kshs. 6,696,000.00 for the 2<sup>nd</sup>, the 3<sup>rd</sup> and 4<sup>th</sup> year each and Kshs. 7,867,800 for the fifth year. In its view, to award a global rate would amount to re- writing the parties' contract.
17. On award of interest the respondent submitted that there was no basis for award of interest from the appellant's date of exit (14<sup>th</sup> July 2016) because as of that date the gratuity due had neither been settled nor agreed upon. The respondent submitted that the parties entered the agreement believing, erroneously, that there were clearly established banking rates of interest for gratuity, but the evidence adduce in court established that was not the case. It was contended, therefore, there were valid reasons



why the respondent was unable to pay the gratuity immediately and that the appellant hurriedly filed the claim whilst the parties were trying to establish and agree on the applicable rates.

18. The respondent relied on the decision of this Court in *Supermarine Handling Services Ltd v. Kenya Revenue Authority* [2010] eKLR in support of the proposition that interest is awarded to compensate a plaintiff for deprivation of money or goods through the wrongful action of a defendant. Also cited was the decision of the High Court in *Jane Wanjiku Wambu v. Anthony Kigamba Hato & 3 Others* [2018] eKLR for the proposition that interest prior to the date of the suit is a matter of substantive law and is payable only where the parties have agreed on the rate of interest; where the interest is pleaded and proved as a matter of mercantile usage; where there is a statutory right to interest; or, where an agreement to pay interest can be implied from the course of dealings between the parties.
19. Lastly, as regards award of costs, the respondent submitted that costs were at the discretion of the court based on good reason and justice of the case. It was contended that from the peculiar circumstances of this case, an order that each party bear its own costs was a reasonable and just order and that there was no basis for this Court to interfere with the exercise of discretion by the ELRC in that regard. Relying on *Supermarine Handling Services Ltd v. Kenya Revenue Authority* (supra) the respondent submitted that this Court will not interfere with exercise of discretion of the trial court as regards costs, unless the discretion is demonstrated to have been exercised injudiciously or on wrong principles.
20. For the above reasons, the respondent urged the Court to dismiss the appeal with costs.
21. In his submissions dated 7<sup>th</sup> July 2025, which were a rejoinder to the respondent's submissions, the appellant introduced issues that had neither been raised nor addressed by the respondent, such as the fact that the appellant was head-hunted; his performance was beyond target; and his shareholding in the respondent. As we have already indicated, the rate of the appellant's gratuity was a matter of contract and did not depend on the extraneous issues he belaboured in his submissions in rejoinder.
22. We have carefully considered the record of appeal, and in particular the impugned judgment, grounds of appeal, the submissions, and authorities cited by the parties. As earlier pointed out, at the heart of the appeal is the question of the proper interpretation and application of clause 8 of the contract of employment, which provided how the appellant's gratuity was to be determined and paid.
23. In *Bamburi Cement Ltd v. William Kilonzi* [2016] eKLR, this Court observed that, as suggested by the name, gratuity is a gratuitous payment by an employer for services rendered, which is made at the discretion of the employer but will be enforced if and when provided for in the contract of employment. In this appeal, clause 8 of the contract of employment provided for payment of gratuity to the appellant. The parties, having reduced the issue of gratuity into a term of the contract of employment, payment thereof was no longer at the discretion of the respondent, but rather, crystallised into a right of the appellant, but awardable strictly in accordance with the terms of the contract of employment.
24. Under clause 8, the appellant was entitled to gratuity in two stages. The first stage was in regards to the first year of employment, which was set at the rate of 10% of the gross basic salary. It is common ground between the parties that during his first year of employment, the appellant's salary was Kshs. 3,100,000.00 per month. The award for gratuity for the first year of employment translates to Kshs. 2,700,000, which is the sum that was awarded by the ELRC.
25. The second stage was in regards to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> years of employment. Here, the parties did not set the rate of gratuity, like they did in respect of the first year of employment. Instead, they agreed that the rate would be aligned with the rates applicable in the banking industry. It is common ground



- between the parties that the respondent was classified by the Central Bank of Kenya as a Tier 2 bank. In all, at the material time there 3 Tiers of banks, with 6 banks in Tier 1; 16 in Tier 2, and 21 in Tier 3.
26. Both the appellant and the respondent relied heavily on the PWC report as indicative of the applicable rates of gratuity in the banking industry. The report, entitled “A Survey Report by PricewaterhouseCoopers Kenya: Employee Benefits Guide 2016”, was issued in April 2016 and was based on data provided by 41 organisations from all economic sectors and industries, both large and small. Of those 41 organisations, there were 8 banks, namely, Barclays Bank Kenya; Chase Bank Kenya Ltd; Commercial Bank of Africa Ltd; Co-operative Bank of Kenya Ltd; Ecobank Kenya Ltd; I & M Bank Kenya Ltd; National Bank of Kenya Ltd; and Oriental Commercial Bank Ltd. As is readily apparent, the data sample was not restricted to the banking industry and even as regards that industry, it was not restricted to Tier 2 banks, but included data from other tiers of banks. It was after considering the data sample from the 41 organisations that PWC concluded that the top management or executives who were entitled to gratuity upon expiry of their contracts of employment were getting gratuity of 30% of the basic salary.
27. The critical question is whether, in those circumstances, it can be concluded that 30% gratuity was the rate applicable to the banking industry and in particular to Tier 2 banks. The record indicates that in October 2016, the respondent requested PWC to conduct a gratuity survey specific to Tier 2 banks. The instructions to PWC were to find out the gratuity rate from the market for Tier 2 banks from 2012 to 2016, analyse the market data and interpret and present a report on the findings.
28. PWC considered data from 14 of the 16 banks in Tier 2 and found that only 5 had provision for gratuity. It found that the average gratuity rates among the said Tier 2 banks was 18%. The report contained the following rider:
- .“The Government Parastatals offer gratuity at 31% to their executives on fixed term contracts.”
29. What is readily apparent to us is that the PWC report of April 2016 which concluded that top management or executives were getting gratuity at the rate of 30% of the basic salary was neither specific to banks nor to Tier 2 banks. That of October 2016 was specific to Tier 2 banks and found the average gratuity from the sampled 14 of the 16 banks to be 18% of the basic salary. The appellant’s rate is clearly based, not on the average gratuity paid by Tier 2 banks that were considered by PWC, but on gratuity awarded by two specific banks, which the ELRC found, reasonably in our view, to be aligned to what was awarded by non-bank parastatals.
30. As regards the alleged failure of the ELRC to consider the report by Manpower Services (K) Ltd., we note that consistent with its rules of procedure, the ELRC directed that the appellant’s claim be heard and determined on the basis of the pleadings, documentary evidence and submissions.
- The Manpower Services Report was not among the documents listed in paragraph 16 of the appellant’s statement of claim dated 18<sup>th</sup> July 2017 or the appellant’s list of documents of even date. That document was first referred to in paragraph 13 of the appellant’s written submissions dated 18<sup>th</sup> October 2018. The respondent neither referred to it, nor did the court. It is not clear from the record how the document was introduced in evidence granted the directions given by the court, and for that reason, we find no basis for faulting the ELRC for not advertng to it.
31. Accordingly, we are not persuaded that the ELRC erred by adopting the rate of 18% gratuity instead if 31%. The latter was based on data sample from organisations in all economic sectors and industries, while the former was specific to Tier 2 banks. Further, whilst clause 8 of the contract of employment required the rate of gratuity to align with the banking industry rates, in view of the classification of



banks adopted by the Central Bank, the correct banking industry rates would be those of the Tier in which the respondent was classified. Accordingly, the rate of 18% reflected more correctly the rates that aligned with the relevant banking industry rates. We find no merit in ground No. 1 of the appeal.

32. The second ground of appeal relates to computation of the gratuity that was due to the appellant. The ELRC awarded the appellant gratuity based on a monthly salary of Kshs. 3,100,000.00 for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> years of employment. The appellant contends that as of the time his contract ended by effluxion of time, his monthly salary was Kshs. 3,642,500.00 and that his gratuity should be computed on the basis of that figure for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> years of employment.
33. There is no dispute that for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> years of his employment, the appellant was earning Kshs. 3,100,000 per month. There is a letter on record from the respondent dated 23<sup>rd</sup> September 2015 in which the appellant's monthly salary was reviewed from Kshs. 3,100,000 to Kshs. 3,642,500 with effect from 1<sup>st</sup> August 2015. From the evidence on record, therefore, the appellant's monthly salary was 3,100,000.00 for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> years of employment and Kshs. 3,642,500 for the 5<sup>th</sup> year.
34. There is no merit in the appellant's contention that his gratuity for the four years should have been computed on the basis of the Kshs. 3,642,500. Similarly, the ELRC was clearly in error by computing the appellant's gratuity for the four years on the basis of the monthly salary of Kshs. 3,100,000.00. The PWC reports indicated that the payment of gratuity upon expiry of the contract of employment was based on the monthly salary. There is, therefore, no basis for calculating the gratuity for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> years based the salary for the 5<sup>th</sup> year, because that is not what the appellant was earning for those years. Similarly, and for the same reason, the gratuity for the 5<sup>th</sup> year cannot be based on the salary of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> years because the salaries were different.
35. The correct computation, in our view, based on 18% gratuity, should have been Kshs. 6,696,000 for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> year and Kshs. 7,867,800 for the 5<sup>th</sup> year.
36. The 3<sup>rd</sup> and the 4<sup>th</sup> issues relate to award of interest and costs. The starting point to bear in mind is that whether or not to award interest and costs is at the discretion of the trial court, and that this Court does not readily interfere with exercise of discretion by the trial court unless it is demonstrated that the exercise of discretion was wrong in principle or based on failure to consider relevant factors or on consideration of irrelevant factors. The approach of the Court in this respect was succinctly stated as follows by Madan, JA (as he then was) in *United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd.* [1985] E.A 898:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

37. As regards award of interest and costs, rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows:

“(1) The Court shall be guided by section 12(4) of the *Employment and Labour Relations Court Act* and the Advocates (Remuneration) Order in awarding costs.



2. The Court may order reasonable reimbursements of money spent by litigants in the course of litigation.
  3. Where a suit involves a liquidated amount that is claimed and specified at the time of filing a statement of claim and the Court orders that the amount claimed or part of the amount be paid to the claimant, it may, in addition to that order, direct that interest be paid on the liquidated amount awarded at Court rates.
38. For its part, section 12(4) of the [Employment and Labour Relations Court Act](#), provides as follows, on award of costs:
- “In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.”
39. Under rule 29(1) of the Act, the ELRC has discretion whether or not to award interest. While the appellant is right to submit that the ELRC did not assign any reasons for failure to award interest, this is a first appeal where this Court is required to re-evaluate the evidence on record and come to its own independent decision. In the circumstances of this appeal, the question is whether from the record it can be concluded that the court erred in refusing to award interest. The rules provide for payment of interest at court rates and clearly there was no basis on which the ELRC could have pegged the interest at rates payable for treasury bonds as submitted by the appellant.
40. Secondly, although the appellant’s claim was liquidated and specified, the claim did not succeed as specified. The parties had not set a specific rate for gratuity the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> years of employment and this rate had to be ascertained. The parties were not agreed on the applicable rate and the ELRC found that the rates claimed by the appellant were not those contemplated by the contract of employment, a view which we have upheld. In these circumstances, it cannot be said that the respondent wrongfully denied the appellant the money he was entitled to. In terms of rule 29(3) of the Employment and Labour Relations Court (Procedure) Rules, there was also no basis for awarding interest for the period before the filing of the suit. The decision of the High Court in *Jane Wanjiku Wambu v. Anthony Kigamba Hato & 3 Others* (supra) on the principles for awarding interest, albeit based on section 26 of the [Civil Procedure Act](#), is a correct statement of the law.
41. On costs, once more, the issue is in the discretion of the trial court. The appellant did not succeed in the claim that he had pleaded and specified, and bearing in mind the employer- employee relationship between the parties, the fact that the contract of employment ended by effluxion of time rather than by violation by the respondent, and the unspecified rate of gratuity in the contract of employment for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> years of employment, the order, basically that each party bears its own costs, was reasonable and justified in the circumstances.
42. For the foregoing reasons, the appeal succeeds only as regards computation of the gratuity for the 5<sup>th</sup> year of the appellant’s employment. All the other grounds of appeal have no merit and are hereby dismissed. The final award of the appellant’s gratuity is as follows:

Year 1 Kshs. 2,700,000

Year 2 Kshs. 6,696,000

Year 3 Kshs. 6,696,000

Year 4 Kshs. 6,696,000



Year 5 Kshs. 7,867,800

TOTAL Kshs. 30,655,800

43. As regards costs of this appeal, and bearing in mind that the appeal has succeeded in only one of the issues, we direct each party to bear its own costs. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2025.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR.**

