

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E386 OF 2021

SOKOIPEI OLE

LESHISHI.....CLAIMANT

-VERSUS-

**KENYA BANKERS SAVINGS &
CREDIT CO-OPERATIVE SOCIETY LTD.....
RESPONDENT**

JUDGMENT

Introduction

1. The Claimant lodged this suit through a Statement of Claim dated 10th May 2020, and later amended on 10th May 2021. He seeks the following reliefs:-
 - i. Pension dues as per service pay at 3 months' pay per completed year of service, amounting to Kshs.3,505,038.92/-
 - ii. Interest on (a) at the court's rates from the date of retirement
 - iii. Costs of the suit

2. The Respondent entered appearance on 31st May, 2021, and subsequently filed a Response to the Claim and a counterclaim dated 22nd June, 2021. The Respondent later, by notice, withdrew the counterclaim.

3. The Claimant's case was heard on 23rd April, 2025, when he testified in support of his case. He adopted his witness statement dated 10th May, 2021, and produced his list and bundle of documents of even date, and a further list dated 5th June, 2022, as exhibits in the matter.
4. The Respondent's case was heard on 2nd October, 2025, when Mr. Fredrick Wanjala testified in support of the Respondent's case, adopted his witness statement, and produced the Respondent's list and bundle of documents as exhibits in the case.
5. Both parties filed submissions in the matter, and the submissions have been duly considered.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent from 1st January 2004, on permanent and pensionable terms, earning Kshs.83,453.26 per month as at the time of his retirement on 30th June 2018.
7. It is his case that he served the Respondent diligently until 1st February, 2016, when he received a retirement notice indicating that his last working day would be 25th July 2016, upon attaining the 55 years retirement age.
8. The Claimant further states that his contract was later extended to 30th June 2018, and that upon his retirement, the Respondent promised to process his pension dues, but

failed to do so despite repeated follow ups and a demand by his advocates.

9. The Claimant states that the Respondent has unlawfully withheld his terminal dues, noting that some of his colleagues have already been paid their terminal dues.

10. The Claimant states that the denial of his dues has caused him significant suffering. It is his case that his claim is based on the terms of his contract of employment, which governed his relationship with the Respondent.

11. On cross-examination, the Claimant told this court that what he claims are his pension benefits, having retired on 27th July 2016. It is his testimony that the Respondent employed him on contract upon his retirement.

12. The Claimant asserts that he also seeks payment of his gratuity. It is his testimony that he was hired as a driver and had no knowledge of the Respondent's Human Resources Policy.

13. The Claimant prays that his claim be allowed.

The Respondent's Case

14. The Respondent states that it first employed the Claimant as a driver on 19th January 2004, under a permanent and pensionable contract with a monthly salary of Kshs.12,197.

15. The Respondent avers that the Claimant's first contract ended upon his retirement on 25th July 2016, when he reached the mandatory retirement age of 55 years, and all dues under that contract were settled.
16. It is the Respondent's case that on 25th May 2016, it offered the Claimant a post retirement contractual position for one year, subject to renewal, which he accepted. It avers further that under this second contract, he was to earn a monthly salary of Kshs.75,920.76.
17. The Respondent states that the Claimant's second contract was renewed twice for six months each, with the final renewal ending the engagement. It maintains that after his retirement on 25th July 2016, the employment relationship became strictly contractual.
18. The Respondent asserts that all dues under the first, permanent contract of employment, including the provident fund, were fully paid, and no gratuity was payable because employees under the provident fund scheme are not entitled to gratuity.
19. The Respondent further avers that upon expiry of the second, fixed term contract on 30th June 2018, the Claimant became entitled only to gratuity, as he was an NSSF member. It states that it calculated the gratuity which amounted to Kshs.283,524.37, but for reason that the Claimant had previously taken a Super Loan of Kshs.1,390,000, and at the end of his second contract, he

still owed Kshs.350,612.77, and having defaulted on repayment, the Respondent on 10th May, 2021 applied the Claimant's gratuity towards the outstanding loan, leaving an unpaid balance of Kshs.67,043.86, which continue to accrue interest.

20.RW1 told the court on cross-examination that the Claimant's dues for the contract that ended in 2016 were fully paid by the provident fund, which is not part of the Respondent. He confirmed that the amount of gratuity owed under the 2018 contract was Kshs. 283,524, and which, though computed, was not paid.

21.RW1 told the court that the Claimant's employee status was distinct from his Sacco membership, and that his loan agreement was different from his employment contract.

22.He further confirmed that the Claimant's loan statement has not been produced in evidence before this court. It is his testimony that he did not know how much money the Claimant held as savings and shares in the Sacco, but could confirm that the minimum share is Kshs.30,000/-.

23.It is his evidence that the Claimant's gratuity dues were applied to his loan since he was in default, and that their policy requires that dues be applied. He confirmed that this policy is also not before the court.

24.It is RW1's testimony that the Claimant was not entitled to gratuity in the period 2004 to 2016, since he was a member

of the Respondent's provident fund, and NSSF was being deducted and remitted.

25. The Respondent avers that the Claimant's case lacks merit, is incompetent, and constitutes an abuse of the court process and prays that it be dismissed with costs.

Analysis and Determination

26. I have considered the pleadings, the witnesses' testimonies, and the Parties' written submissions. The issues that fall for determination are:-

- i. Whether the Claimant is entitled to pension/service pay for the period 2004-2016.
- ii. Whether the Claimant is entitled to gratuity for the contract ending 30th June 2018.
- iii. Whether the Respondent lawfully applied the Claimant's gratuity to offset a Sacco loan.

Whether the Claimant is entitled to Pension/Service pay for the period 2004-2016

27. The Claimant seeks pension/service pay at 3 months' salary per year for the entire employment period, which he contends was not paid by the Respondent.

28. The Respondent's position is that the Claimant was a member of the Respondent's provident fund and that he received his dues in 2016 upon retirement. It contends that under the Respondent's company policy and statute, he was not entitled to gratuity or payment of service pay.

29. Section 35(6) of the Employment Act, 2007 provides that an employee is not entitled to service pay if they are a member of NSSF, a registered pension or provident fund, gratuity scheme, or any other social security scheme. In ***Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR***, the Court of Appeal held that where employees are members of a pension or provident fund, they cannot claim service pay, as this would amount to double benefit.

30. Further in ***David Muthomi v National Bank of Kenya (2020) eKLR***, the court confirmed that pension/provident contributions exclude one from entitlement to gratuity unless expressly provided by contract.

31. The Claimant admitted on cross-examination that he received the provident fund benefits in 2016 when he retired from the Respondent's employment on age grounds. Further, the Respondent's evidence that provident fund dues were settled remains uncontested, and the Claimant produced no contract obligating additional pension, gratuity, or service pay.

32. In light of the foregoing, I find and hold that the Claimant is not entitled to service pay or further payment of pension for the period 2004–2016.

Whether the Claimant is entitled to gratuity for the contract ending 30th June 2018

33. It is not disputed that the Claimant entered into a fixed-term contract with the Respondent after retirement, and which ended on 30th June 2018.

34. The Respondent, through their witness RW1, confirmed that the Claimant was entitled to payment of gratuity since he was serving on contract. He further admitted that the Respondent computed the gratuity for the period, which amounted to Kshs.283,524.37, but that the gratuity was not paid.

35. Employees on fixed term contracts are entitled to benefits expressly provided in the contract. In **Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki [2017] eKLR**, the Court of Appeal held that an employee is entitled to gratuity where the contract expressly provides for it, regardless of the length of service. Further in **Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR**, the court affirmed that gratuity must be paid if it is a contractual term, and the employer must honour it upon separation.

36. The Respondent admitted that the Claimant was entitled to gratuity, and which it confirmed having computed in the sum of Kshs.283,524.37.

37. The court therefore returns that the Claimant is entitled to full payment of the amount of the gratuity computed.

Whether the Respondent lawfully applied gratuity to a Sacco loan

38. The Respondent claims that the Claimant owed a Sacco loan of Kshs.350,612.77, and that his gratuity was computed and applied to offset the said loan.

39. By law, deductions from an employee's dues require either a written consent, a statutory authorization or a court order. This position is not any different when the deductions concern terminal dues, and the employer therefore, bears the burden of proving lawful deductions. In ***Kenya Plantation & Agricultural Workers Union v James Finlay (K) Ltd [2015] eKLR***, it was held that an employer must justify any deduction from an employee's wages or terminal dues.

40. The Respondent herein, provided no documentary evidence to prove the existence or the amount of the loan. The Respondent's witness further confirmed that the Sacco membership and contract with the Claimant in respect of the loan, is distinct and separate from his employment contract.

41. The Respondent did not also lead any evidence to show that the Claimant did not have sufficient savings and shares to cover the amount of loan owed. He instead, told the court that he did not know how much money the Claimant held in savings and share in the said Sacco.

42. In my considered view, I find and hold that the application of the Claimant's gratuity to a loan arbitrary and unlawful.

43. In conclusion, the Claimant's claim partly succeeds and orders granted as follows:-

- a) The claim for pension/service pay for the period 2004-2016 is dismissed.
- b) The Respondent shall pay the Claimant Kshs.283,524.37 on account of gratuity.
- c) Interest shall accrue on (b) at court rates from the date of this judgment until payment in full.
- d) The Respondent shall bear the costs of the suit.

44. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 18TH DAY OF DECEMBER, 2025.

C. N. BAARI

JUDGE

Appearance:

Ms. Thande present for the Claimant

N/A for the Respondent

Ms. Esther S- C/A