

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
ELRCA APPEAL NO. 1061 OF 2025

SURYA COMPANY LIMITED.....
APPELLANT

-VERSUS-

MUSEE KIMANZI
RESPONDENT

(Being an Appeal from the Judgment and Order of the Magistrate's Court at Milimani Commercial Court of Hon. T.M. Olando (Mr.) delivered on 6th February 2025 in Milimani MELRC Case No. E160 of 2023)



JUDGMENT

1. Through the Memorandum of Appeal dated 28th February, 2025 the Appellant appeals against the Judgment of Honourable T.M Olando delivered on 6th February, 2025.
2. The Appeal was based on the grounds that:
 - i. *The learned Magistrate erred in law by awarding the Respondent ex gratia payment in the absence of any contractual, legal or statutory basis for such an award.*
 - ii. *The learned Magistrate misapprehended the principles governing ex gratia payments and failed to appreciate that such payments are discretionary and not legally enforceable.*

iii. The learned Magistrate erred in awarding the Claimant the costs and interest of the claim even after dismissing his claim.

3. The Appellant prayed that this appeal be allowed costs of the Appeal and the proceedings in the lower court and the judgment and decree of the lower court including *ex gratia* payment to the Respondent be set aside.

4. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's Advocates, M. S. Srinivas & Company Advocates filed written submissions dated 02 July 2025.

6. On the issue of whether the trial court erred in awarding the Respondent *ex gratia* payment despite absence of any contractual, legal or statutory basis for such award counsel submitted that *ex gratia* payments are discretionary and gratuitous. That such payments do not stem from any legal obligation and are typically made out of goodwill. That the *ex gratia* payment could not be claimed as a matter of right and was not enforceable in law unless it arises from an express contractual provision, a statutory obligation, or an established

and binding custom or practice within the employer's organization.

7. Counsel relied on the case of **Benson Owenga Anjere V Kivati Ntuto & Another (2013) eKLR** on definition of the *ex gratia* payment as per Black's Law Dictionary and on the case of **Gaye Radiology Societe Internationale De Tele Communication Aeronauique (IRA) (2021) eKLR** that *ex gratia* payment is not a legal obligation.
8. Counsel submitted that in this case neither the Respondent pleaded nor proved any entitlement to an *ex gratia* payment in his claim before the trial court. His pleadings were silent on such relief and no evidentiary material was placed before the court to suggest that an *ex gratia* payment was due. That parties were bound by their pleadings and the court cannot grant a relief that was not specifically pleaded nor substantiated by evidence.
9. Counsel further submitted that the trial court expressly found that the Respondent had failed to prove his claim for unlawful termination and proceeded to dismiss the principal claim. That the court therefore erroneously proceed to award *ex gratia*

payment of Kshs 126,546.90/= which decision was not supported by pleadings and evidence but also contradicted established principles governing judicial discretion in employment matters.

10. Counsel submitted that the court failed to identify or rely upon any legal foundations for granting such an award like a term of the contract of employment, a company policy or consistent practice and a similar decision. That without such basis the award was irregular and amounted to a gratuitous conferment of benefit outside the scope of pleadings and the law.

11. On the issue of whether the trial court was in awarding the Respondent the costs and interest of the suit even after dismissing the suit counsel submitted that it is a well-settled principle that costs follow the event and a successful litigant is ordinarily entitled to costs unless there exists good reason to depart from that rule. That in this case the Respondent's claim was dismissed in its entirety having failed to prove any of the reliefs sought. That despite this the trial court proceeded to

award him costs and interest a decision that lacked both factual and legal justification.

12. Counsel relied on section 12(4) of the Employment and Labour Relations Court Act on the discretionary power of court in awarding costs. That the said discretion should be exercised judicially and in accordance with established principles of law. Counsel relied on the case of **Avon Distributors Limited V Ochieng (Civil Appeal No. 1510 of 2021) (2024) KEHC 1510(KLR) (14 February 2024) ruling** on the court exercising the discretion judicially and capriciously.

13. Counsel submitted that the court failed to offer any reason, judicial or otherwise for awarding costs and interest to a litigant whose claim had been dismissed. The absence of reasons renders the exercise of discretion arbitrary and inconsistent with both statutory guidance and judicial authority.

RESPONDENTS' SUBMISSIONS

14. The Respondent did not file his submission at the time of preparation of this judgment despite the Applicant filing an affidavit of service of their submissions to his advocates.

DETERMINATION

15. The court has considered the grounds of appeal, the record of appeal and submissions filed by the counsel for the Appellant herein and proceeds to analyse them as follows.

16. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal stated that: -

"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

17. In this case, the judgment of the trial court was a declaration that the Claimant failed to prove on a balance of probabilities on unlawful termination. The trial Magistrate awarded the Claimant *ex gratia* pay of Kshs. 126,546.90/= which was 12 years' service with gratuity and interests. The Appellant being aggrieved by the judgment appeals on the

Judgment award of *ex gratia* payment and costs and interests awarded to the Respondent raising 3 grounds.

18. The court finds that the grounds will be condensed in to two issues namely: -

a. Whether the trial court erred by awarding the Respondent *ex gratia* payment of Kshs 126,546.90/-

b. Whether the trial court erred by awarding the Respondent costs and interests of the suit.

Whether the trial court erred by awarding the Respondent *ex gratia* payment of Kshs 126,546.90/-

19. The trial court awarded the Respondent *ex gratia* payment which to this court notes was more than service pay for the years worked. This court notes if the trial court intended this amount to be service pay the same would not be applicable since the Respondent was a member of NSSF as per section 35(6) of the Employment Act which exempts members of NSSF from service pay. Black's Law Dictionary defines *ex gratia* as follows: -

Out of grace; as a matter of grace, favor, or indulgence; gratuitous. A term applied to anything accorded as a favor; as distinguished from that which may be demanded ex debito, as a matter of right.

20. From the above definition it is clear the same payment is not of right but of grace. This court notes that the Respondent claimed the same in the memorandum of claim as service pay but there was no evidence supporting if he was promised the same by the Appellant. In **Nicholas Waga Koigia v NCR Kenya Limited [2019] KEERC 86** the Court held that an *ex gratia* payment is purely discretionary and not a matter of right.

21. In **Kenya Union Of Journalists & Allied Workers v Nation Media Group Limited [2014] KEERC 589 (KLR)** the court stated as follows regarding *ex gratia* payment: -

“Ex gratia is not provided for under the law. It is defined in the concise Oxford English dictionary (2011) edition (with reference to payment) done from a sense of moral obligation rather than because of any legal requirement. Black’s Law Dictionary (10th edition) defines ex gratia as a favour; not legally necessary and Ex gratia payment as “A payment not legally required”.

22. From the foregoing this payment is not legally binding although recognized by the Employment Act among the considerations to be taken in to account under section 49(4) when the court is awarding damages for unfair termination the same is discretionary. The Respondent never produced any evidence either the employment contract or policy or practice

of the Appellant or statutory provision that he was entitled to the same. The Respondent was therefore not entitled to *ex gratia* payment and the court overturns the trial court award of the same payment.

Whether the trial court erred in awarding the Respondent costs and interests of the suit.

23. The trial court awarded Respondent costs and interests of the suit. This was despite the fact that the Respondent not having proved his claim for unfair termination. This court notes that the trial court ought to be guided by the well-established principles that costs follow events. It is therefore meant after finding that the Respondent did not prove his case then there was no way the trial court would award him costs. Whereas the court has discretion to award costs under section 12(4) of the Employment and Labour Relations Court Act the same should be exercised judiciously.

24. In **Jasbir Singh Rai & 3 others V Tejochan Singh Rai & 4 others [2014] eKLR**, the Supreme Court discussed the issue of costs. The Court stated: -

“that as a general rule, the costs follow the event and the Court must give reasons whenever costs do not follow the event.”

25. In this case there was no reason given by the trial court why costs did not follow the event yet the Respondent’s case was dismissed apart from the *ex gratia* payment which this court has overturned.

26. In the upshot the Appeal is found merited and is hereby allowed with each party bearing the costs of this appeal.

27. It is so ordered.

Dated at Nairobi this 30th day of January, 2026

Delivered virtually this 30th day of January, 2026

Abuodha Nelson Jorum

Presiding Judge-Appeals Division