

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E205 OF 2021

LUCAS ONYANGO
OTIENO.....CLAIMANT
-VERSUS-
UNIVERSITY OF
NAIROBI.....RESPONDENT

JUDGMENT

Introduction

ORIGINAL

1. By a Statement of Claim dated 15th February 2021, the Claimant alleged that the Respondent underpaid his gratuity upon his retirement from service. He averred that his gratuity was unlawfully computed at the rate of 28 days' wages per completed year of service instead of 31% of his annual basic salary as provided under the subsisting Collective Bargaining Agreement (CBA) for 2013-2017. Therefore, he prayed for the following reliefs: -

- a) A declaration that the withholding of his gratuity is irregular, wrongful and unlawful;**
- b) Payment of Kshs. 914,700.86 being the balance of unpaid gratuity.**
- c) The Court to issue orders and directions it deems fit.**
- d) Costs of the suit.**
- e) Interest on the said sum at court rates.**

2. The Respondent filed a Memorandum of Response dated 27th February 2022 followed by an Amended Memorandum of Response and Counterclaim dated 17th November 2022. It admitted the employment and retirement of the Claimant but denied any underpayment. It contended that gratuity for the period prior to 1st July 2013 was correctly computed at 28 days' wages per year under the then applicable CBAs, and the rate of 31% under the 2013-2017 CBA applied prospectively only from 1st July 2013. It further pleaded that the Claimant was overpaid and counterclaimed for Kshs. 116,283.00. The Respondent prayed for the dismissal of the

Claimant's suit with costs and for judgment on the counterclaim.

3. The Claimant filed a Reply to the Respondent's defence and counterclaim, reiterating his claim and contending that the counterclaim was time-barred, unmerited, and an afterthought.
4. On 21st October 2025, the parties recorded a consent to have the suit disposed of by way of written submissions. Both parties subsequently filed their respective submissions and lists of authorities, which I have duly considered alongside the pleadings and annexed documents.

Evidence

5. The Claimant filed his own witness statement plus that his witness one Lucas Oyuko Orwa. He further filed a bundle of documents as exhibits including the CBA for 2013-2017. In brief the claimant stated that he worked for the respondent as a Groundsman from 11th August 1998 to 12th December

2017 when he retired from service. He served for a total of 19 years and his basic salary at the time of retirement was Kshs.17,825. His terms of service were governed by CBAs concluded between his trade union and the respondent.

6. Upon retirement, the Claimant was paid Kshs.345,170.14 as his gratuity computed which argued that it was an underpayment. He contended that the CBA in force provided for computation of gratuity at the rate of 31% of his basic salary for every year of service. He prayed for $Kshs.17,825 \times 31\% \times 19 = Kshs. 1,259,871$ less paid Kshs. 345,170.14 equalling Kshs. 914,700.86.

7. His witness, Shop Stewart, confirmed the Claimant's averments and confirmed that he was one of the negotiators and a signatory to the CBA for 2013-2017, which was registered on 1st July 2015. He contended that the CBA provided for payment of gratuity at the rate of 31% of the last basic salary for the years served. He further stated that he has since participated in many disputes, like the instant

one, concerning implementation of Clause 40 of the CBA and the respondent has been found to be wrong in the tabulation of the gratuity. He maintained that the miscalculation of the gratuity by the respondent was not through mistake but deliberate with intention to defraud the employees.

8. On the other hand, the respondent's Ag Deputy Registrar, Industrial Relations, one Harrison S. Akala filed a written statement and a further statement as defence evidence. He also filed a bundle of documents as exhibits including CBAs for the period before 2013. In brief he stated that the claimant was paid the correct amount of gratuity based on the formula of 28 days basic salary from 11th August, 1998 to June 2013 and 31% of the basic salary from 1st July 2013 to 12th December 2017 as per the CBA signed on 13th February 2009, CBA for 2013-2017, and memorandum of Agreement dated 16th October 2018 signed before a Conciliator. He urged the court to reject the claimant's invitation to apply the CBA retrospectively.

Issues for Determination and analysis

9. Having considered the pleadings, evidence and written submissions filed by both sides, the following issues fall for determination:-

- a) Whether or not clause 40(h) of the CBA for 2013 - 2017, ought to be used to compute the claimant's gratuity for the entire period of his service.
- b) Whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim.
- c) Whether the Respondent is entitled to the orders sought in its Counterclaim.
- d) Who shall bear the costs of the suit?

Application Clause 40(h) of the CBA

10. The dispute herein turns on the correct interpretation of Clause 40(h) of the Collective Bargaining Agreement (2013 - 2017) which provides:-

"Unless otherwise stated herein, the gratuity payable also under this agreement shall be at the

rate of 31% of basic salary for every completed year of service."

11. The Respondent, relying on authorities such as **University of Nairobi vs KUDHEIHA (Cause No. E722 of 2022)** and **Callen N. Mosei vs University of Nairobi (ELRCA No. E014 of 2021)**, contends that this clause applies prospectively only from the CBA's effective date of 1st July 2013 and thus cannot govern service rendered prior to that date. It argues that to do so would be an impermissible retrospective application.

12. The Claimant, cited the Court of Appeal decision in **Bamburi Cement Limited vs William Kilonzi [2016] eKLR** and this Court's decisions, including **Reuben Ondigu Orodo v University of Nairobi [2023] eKLR** and **University of Nairobi vs Mayaka, ELRC Appeal E167 of 2021 [2024] KEELRC 2715**, to urge that gratuity is a terminal benefit which crystallizes upon retirement. He urged that the rate applicable at the time of termination should be applied to quantify the benefit for the entire period of service. He

contended that the obligation to pay gratuity existed throughout his employment, and the successive CBAs merely provided improved formulae for its calculation.

13. I agree with the position taken by the claimant since the effect of a CBA on the contract of service of an employee is well captured in section 59(3) of the Labour Relations Act, thus:-

“The terms of a collective agreement shall be incorporated into the contract of employment of every employees covered by the collective agreement.”

14. The above provision is not a suggestion but a mandatory instruction that upon registration of a concluded CBA, the terms therein automatically becomes part of the existing contract of employment of the employee. The corollary to the foregoing is that the CBA automatically amends the existing contract to align it with the terms in the new CBA. As such, neither the employer no the employee can

selectively revert to the old contract and apply it when it is favourable to the detriment of the other party. The ultimate effect a new CBA, going by the mandatory provision of section 59(3), above, is that it replaces the old contract for all purposes and intent.

15. It follows that, in this case, the respondent cannot be right in saying that it can apply a non-existent CBA to a contract governed by an existing CBA. It is the terms of the existing CBA that must apply by dint of section 59(3) of the Act. To that extent I agree with the decision of Nduma J in **Reuben Ondigu Orodo v University of Nairobi, supra**, where he held that:-

“33. That the claimant retired on 30/6/2017. That a Collective Bargaining Agreement once signed becomes a term of the individual contracts of employment in terms of section 59(3) of the Labour Relations Act, (No 14 of 2007). That Clause 40 of the Collective Bargaining Agreement became part of the contract of the claimant and

was binding on the respondent in terms of section 59(1) Clause of the Labour Relations Act. The Collective Bargaining Agreement was active between the years 2013 - 2017. Clause 40 on gratuity covers the entire period of service done by the claimant upto the date of retirement.

34. The court finds that the respondent fell into error by directing that the claimant's gratuity for the period 1/5/1992 up to 30/6/2017 be calculated at the rate of 28 days for every year of completed service. Gratuity is calculated in terms of the contract/law at the time of separation for the entire period of service."

16. The above case involved the same CBA as in the instant suit and therefore I see no reason for reaching a different decision. I entirely concur with the above decision and hold that for an employee who retired during the currency of the 2013 - 2017 CBA, gratuity payable must be computed at the

rate stipulated in Clause 40(h) of the CBA from the date of employment to the date of exit.

17. In the instant case, the respondent did not apply Clause 40 (h) in computing claimant's gratuity for the whole period he served and therefore, I hold that the claimant has proved by evidence that he was paid less gratuity than what was rightfully due to him under his contract of service, as amended by the CBA for 2013-2017. His rightful gratuity was 31% of his last basic pay for the 19 years served, being Kshs. 1,259,871 and not the sum of kshs 345,170.14 calculated by the respondent using 28 days basic pay for every year served.

The reliefs sought

18. I have already made a finding of fact that the claimant was entitled to $\text{Kshs } 17,825 \times 31\% \times 12 \text{ months} \times 19 \text{ years} = \text{Kshs } 1,259,871$ but he was paid Kshs 345,170.14, leaving a balance of Kshs.914,700.86, which I now award to him as prayed.

19. I further award the Claimant declaration that the continued withholding of the said gratuity balance is unlawful.

The Counterclaim

20. The Respondent's counterclaim for Kshs. 116,283.00 is premised on its split-rate computation, which I have found to be incorrect under section 59(3) of the Labour Relations Act. I have further found that the respondent owes the claimant Kshs. 914,700.86 due to its wrong interpretation of Clause 40(h) of the CBA and section 59(3) of the Act. Consequently, I find and hold that the alleged overpayment of gratuity to the claimant does not arise and as such the counterclaim must fail for lack of merit.

Costs

21. It is trite law that costs are at the discretion of the court and unless otherwise shown, they should follow the event. The Claimant, having succeeded in his claim and therefore, he is awarded costs of the suit.

Conclusion and Orders

22. I found that the Claimant's gratuity was unlawfully underpaid by a huge sum of Kshs.914,700.86. Consequently, I enter judgment for the Claimant against the Respondent as follows:-

- a) A declaration that the continued withholding of the said gratuity balance is unlawful.
- b) Payment of the sum of **Kshs. 914,700.86** being the unpaid balance of gratuity.
- c) Interest at court rates from the date of filing suit until payment in full.
- d) The counterclaim is dismissed
- e) costs of this suit and the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2026.

ONESMUS MAKAU

JUDGE

Appearance:

Onega for the Claimant/Applicant

Nyaga for the Respondent

ORIGINAL