

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT ELDORET
ELRC CAUSE NO. E012 OF 2024

STEPHEN MOGAKA NYAMONGO.....
.....CLAIMANT

VERSUS

RAI PLYWOODS (KENYA)
LTD.....RESPONDENT

JUDGMENT

1. Vide a Statement of Claim dated 23rd April 2024 and filed in court on 24th April 2014, the Claimant seeks the following orders against the Respondent:
 - a. A declaration that the withholding and/or refusal to pay the Claimant's gratuity was discriminatory and/or unfair and unlawful
 - b. An order for payment of Kshs.1,596,000 being unpaid gratuity
 - c. An order for payment of Kshs.158,174 being unpaid salary arrears

- d. An order that the Claimant be issued with a certificate of service forthwith
 - e. General damages for discrimination
 - f. Costs of the claim and interests at court rates from the date of filing suit.
 - g. Any other relief as this honourable court may deem fit to grant
2. It is the Claimant's case that he was employed by the Respondent on 22nd September 2004 as the Production In-Charge in the Foam Plant Department and that he rose through the ranks to become a Manager by the time he left employment.
 3. The Claimant avers that vide a letter dated 8th January 2024, he applied for early retirement on medical grounds, a request that was accepted by the Respondent through its letter dated 6th February 2024.
 4. It is the Claimant's case that despite accepting his application for retirement on medical grounds, the Respondent deliberately refused to pay him gratuity on the basis that payment of gratuity was only provided for under

the Collective Bargaining Agreement (CBA) and that, as a Manager, he was not a party to the CBA.

5. The Claimant contends that upon his retirement, he was entitled to gratuity at the rate of 21 working days for each completed year of service up to 6th February 2024, calculated as follows: $21/30$ (rate) \times 120,000 (basic salary) \times 19 (years served), amounting to Kshs. 1,596,000.
6. The Claimant avers that other employees within his cadre who either retired voluntarily, were retired, or resigned, were paid gratuity and that none of them had their NSSF contributions converted into gratuity as was done in his case by the Respondent.
7. The Claimant therefore contends that the Respondent's refusal to pay him gratuity and the conversion of his NSSF contributions into gratuity was discriminatory and unlawful as he was subjected to different treatment from that accorded to similarly placed employees, contrary to Section 5(2) of the Employment Act and Article 27 of the Constitution.

8. The Claimant further asserts that the Respondent owes him unpaid salary arrears amounting to Kshs. 158,174 and has also failed to issue him with a Certificate of Service.
9. The Claimant states that the Respondent's conduct violates his right to fair labour practices and the right to fair remuneration under Article 41(1) and (2) of the Constitution.
10. The Respondent filed a Reply to the Statement of Claim dated 31st May 2024, denying the Claimant's claim in toto.
11. According to the Respondent, the Claimant was employed in a management role as the person in charge of production in the Respondent's Foam Manufacturing Plant and enjoyed the benefits and privileges conferred by virtue of the position he occupied.
12. It is the Respondent's case that the cadre occupied by the Claimant during his employment is excluded from the application of the Collective Bargaining Agreement between the Timber Industries Employers Association and the Kenya Building, Construction, Timber, Furniture and Allied Industries Employees' Union (the CBA).

13. The Respondent maintains that the payment of gratuity is only provided for under the CBA and that, as a Manager, the Claimant was not a party to the CBA.
14. The Respondent further maintains that the Claimant voluntarily retired with all his terminal dues settled and is therefore not entitled to any further payments under the CBA.
15. It is the Respondent's case that even if it wished to extend gratuity to employees excluded from the application of the CBA, such as the Claimant, it has been experiencing financial difficulties following the gazetted logging ban in 2018, which remains in force to date and has adversely affected the Respondent's business.
16. The Court was urged to dismiss the Claimant's claim with costs.

The Evidence

17. The Claimant testified on 29th September 2025 as CW1 and adopted his witness statement dated 23rd April 2024 as his evidence in chief. He also relied on the documents he filed in court in support of his case as part of his evidence.

18. The Claimant urged the Court to grant the prayers sought in his Statement of Claim.
19. On cross-examination, the Claimant maintained that at the time of his retirement he was the head of department. He denied being exempted from benefits under the CBA. He stated that he was not a member of the Union at the time of his retirement.
20. In support of his case, the Claimant called Mispah Nandalwe, who testified as CW2. She stated that she was an employee of the Respondent, having worked for 18 years and had retired on medical grounds. She adopted her witness statement as her evidence-in-chief and relied on her pay slips filed in the Claimant's bundle of documents.
21. During cross-examination, CW2 stated that she retired on 4th January 2024 from the position of Secretary and was paid gratuity by the Respondent upon retirement. She stated that she worked in the same department as the Claimant. She admitted that as a Secretary she did not perform the same duties as the Claimant, who was a Manager.

22. Paul Wavakalwa Makomere testified as CW3 and adopted his witness statement recorded on 23rd April 2024 as his evidence-in-chief.
23. On cross-examination, CW3 stated that he resigned from employment in 2015 and was paid gratuity. He further stated that he served on the same terms as the Claimant, although he was a Production Technician and part of management in the Foam Plant.
24. The Respondent on its part called Henry Okola, who testified as RW1. Mr. Okola introduced himself as the current Human Resource Manager of the Respondent. He adopted his witness statement as his evidence in chief and relied on the documents filed by the Respondent.
25. On cross-examination, RW1 stated that the Claimant was not paid gratuity because he was a Manager and was therefore excluded from enjoying benefits under the CBA. Referring to the Industrial Relations Charter revised on 30th April 1984 annexed to the Respondent's bundle of documents, RW1 maintained that employees in management were excluded from union representation,

though the Charter did not make any reference to payment of gratuity.

26. RW1 admitted that CW3, who was also in management, was nonetheless paid gratuity upon resignation. He also confirmed that CW2, a non-unionisable employee, was paid gratuity. He added that the Claimant's NSSF contributions were converted to gratuity and that employees covered by the CBA were entitled to payment of gratuity.
27. At the close of the Respondent's case, parties were directed to file written submissions. The Claimant's submissions are dated 21st October 2025 while the Respondent's submissions are dated 1st December 2025.
28. I have considered the submissions filed by both parties and see no need to reproduce them herein as they largely reiterate the parties' respective positions.

Determination

29. From the pleadings on record, the evidence adduced in court and the submissions filed by the parties, the only issue for determination is whether the Claimant is entitled to the reliefs sought.

30. The Claimant's case against the Respondent is that despite serving the Respondent for approximately nineteen (19) years and retiring on medical grounds, the Respondent declined to pay him gratuity on the basis that gratuity was only payable under the Collective Bargaining Agreement (CBA) applicable to unionisable employees. The Claimant contends that this refusal amounted to discrimination as other employees, in positions similar to his were paid gratuity upon leaving employment.
31. The Respondent, on the other hand, maintains that the Claimant served in a management position and was therefore excluded from the application of the CBA negotiated between the Timber Industries Employers Association and the Kenya Building, Construction, Timber, Furniture and Allied Industries Employees' Union. According to the Respondent, gratuity is a benefit created under the CBA and since the Claimant was not a unionisable employee, he could not benefit from it.
32. It is not in dispute that the Claimant was employed by the Respondent on 22nd September 2004 and served until 6th February 2024 when his request for early retirement on

medical grounds was accepted. It is also not in dispute that at the time of leaving employment the Claimant held a managerial position.

33. During cross-examination, the Respondent's witness, RW1, stated that the Claimant was not paid gratuity on account of being a manager as he was excluded from the CBA. RW1 however admitted that other employees who were not unionisable had nonetheless been paid gratuity upon leaving employment. In particular, he stated that CW2, who served as a secretary and was a non-unionisable employee, was paid gratuity upon retirement. RW1 further confirmed that CW3, who was part of management in the Foam Plant was also paid gratuity upon leaving employment.

34. *Section 5(2) of the Employment Act* prohibits employers from discriminating directly or indirectly against an employee on various grounds, including discrimination in respect of terms and conditions of employment, termination of employment and other matters arising out of employment. See section 5(1)(3)9b) of the Employment Act. Further, *Section 5(2)* obligates employers to promote

- equal opportunity in employment and eliminate discrimination in employment policies and practices.
35. Similarly, *Article 27 of the Constitution* guarantees equality before the law and equal protection and benefit of the law. It prohibits unfair discrimination and requires that persons in similar circumstances be treated equally unless there is a justifiable and lawful basis for differential treatment.
36. Although in the instant case, the Respondent justified the denial of gratuity solely on the ground that the Claimant was a manager and therefore not covered by the CBA, while evidence on record demonstrates that the Respondent had previously extended gratuity benefit to employees who were not covered by the CBA, like the Claimant. The Respondent did not sufficiently explain the criteria used in determining which employees outside the CBA would receive gratuity and which ones would not.
37. Based on the foregoing, I am persuaded that the Claimant has established that he was treated differently from other employees who were similarly placed or who were outside the scope of the CBA but nonetheless received gratuity. In the absence of a clear and objective justification for such

differential treatment, the Court finds that the Respondent's conduct amounted to unfair and discriminatory treatment.

38. Having found that the Claimant was unfairly denied gratuity, I hold and find that the Claimant is entitled to payment of gratuity in the same manner as other non-unionisable employees of the Respondent.

39. The Claimant computed his gratuity based on the formula provided in the CBA, being 21 days' salary for each completed year of service. Although the Respondent argued that the CBA did not apply to the Claimant, the Court notes that this is the same formula that appears to have been applied in paying gratuity to other non-unionisable employees of the Respondent leaving employment. In the circumstances, the Court finds the Claimant's computation reasonable and justified.

40. The Court therefore finds that the Claimant is entitled to gratuity calculated as follows: $21/30 \times \text{Kshs.}120,000 \times 19$ years totaling **Kshs.1,596,000**

41. With regard to the claim for salary arrears of Kshs. 158,174, the Respondent did not provide evidence to rebut

the Claimant's assertion that the said amount remained unpaid. The Court therefore finds that the Claimant has proved the claim on a balance of probabilities.

42. On the issue of a Certificate of Service, *Section 51 of the Employment Act* obligates an employer to issue a certificate of service to every employee upon termination of employment unless the employment lasted for less than four consecutive weeks. The Claimant served the Respondent for close to two decades and is therefore clearly entitled to such certificate.

43. The Claimant also prayed for general damages for discrimination. Having considered the circumstances of the case, I find that although the Respondent treated the Claimant differently from other employees who had been paid gratuity, I am not persuaded that the Respondent's conduct was actuated by malice, bad faith or an intention to discriminate against the Claimant. The Claimant further did not articulate any injury that he suffered from the actions of the Respondent that would necessitate compensation by way of damages. Consequently, I find no

basis to warrant an award of general damages for discrimination.

44. Lastly, it is important that the court addresses the issue regarding the Respondent's decision to convert the Claimant's NSSF contributions to gratuity. The Respondent's witness, RW1 stated that the Claimant's NSSF contributions were converted to gratuity. However, the Respondent did not produce any contractual provision, policy or legal basis permitting such conversion.
45. NSSF contributions and gratuity are distinct benefits. NSSF contributions are a statutory social security benefit regulated under the National Social Security Fund Act, while gratuity is a contractual or negotiated terminal benefit payable where it is provided for in an employment contract, policy or collective bargaining agreement. In the absence of evidence showing that the Claimant consented to such conversion or that it was provided for under the applicable employment framework, the Court finds that the Respondent can not rely on the alleged conversion of NSSF contributions as a basis for declining to pay gratuity.

46. In the end, judgment is entered in favour of the Claimant against the Respondent as follows:

- i. A declaration is hereby issued that the Respondent's refusal to pay the Claimant gratuity was unfair, unlawful and discriminatory.
- ii. The Respondent shall pay the Claimant Kshs. 1,596,000 being gratuity.
- iii. The Respondent shall pay the Claimant Kshs. 158,174 being unpaid salary arrears.
- iv. The Respondent shall issue the Claimant with a Certificate of Service within thirty (30) days of this judgment.
- v. The Claimant shall have the costs of the suit together with interest at court rates from the date of filing suit until payment in full.

47. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON
THIS 16TH DAY OF APRIL, 2026**

**MAUREEN ONYANGO
JUDGE**

