



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**

**Civil Appeal 82 of 2005**

**CENTRAL BANK OF KENYA ..... APPELLANT**

**AND**

**DAVIES KIVIEKO MUTETI .....RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Khaminwa, C.A.)  
dated 7<sup>th</sup> day of May, 2003**

**in**

**H.C.C.C. NO. 355 OF 2001)**

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**JUDGMENT OF THE COURT**

The genesis of the entire dispute resulting into this appeal before us is a letter dated 12<sup>th</sup> June, 1984 in which, the Central Bank of Kenya, the appellant appointed Davies K. Muteti, the respondent as its employee in the position of a clerk on probationary terms of service. His salary was in the scale Kshs.30,740/= by Kshs.2,100/= to Kshs.45,440/= per annum. He entered the scale at Kshs.30,740/= per annum. In addition he was paid housing allowance at the rate of Kshs.18,000/= per annum but in the alternative he could claim an allowance as an owner occupier in which case the amount in respect of house allowance could be different. He was to be entitled to local leave at the rate of 30 days per leave year after he completed six months service with the appellant. He would be paid traveling allowance of Kshs.1,500/= on annual leave. That letter stated further towards the end as follows:

**“On successful completion of probation, you will be offered permanent and pensionable terms of service with effect from the date you joined the bank.**

**The appointment is subject to a satisfactory report on security, vetting and medical examination. It is also subject to the Bank’s Staff Terms and Conditions of Service, Rules and Regulations which will be made available to you upon acceptance of the appointment”.**

The respondent appended his signature to a copy of that letter indicating his acceptance of the appointment on the terms and conditions that were set in that letter most of which we have cited hereinabove. In a letter dated 9<sup>th</sup> January, 1986 addressed to the respondent by the appellant, the appellant confirmed the appointment of the respondent. That letter stated:

## **“CONFIRMATION OF APPOINTMENT**

**I am pleased to inform you that it has been decided to confirm your appointment to permanent and pensionable establishment of the Bank with effect from the date you joined the service of the bank.**

**You will now be eligible for benefits from the Bank’s Pension Fund in accordance with the rules and regulations of the Pension Fund and the Widows’ and Orphans Scheme, a copy of which is attached. Please sign the attached certificate of acceptance and return it to this office as an acknowledgement that you have read and understood these regulations.**

**Yours faithfully,**

**J. M. LESHAO**

## **HEAD OF ADMINISTRATION DIVISION”.**

The record shows that the respondent’s service with the appellant was satisfactory. This is confirmed by the fact that in a letter dated 20<sup>th</sup> March, 1996, addressed to him by the appellant, he was promoted to the grade of Senior Clerk. On assuming that position, his salary and other terms of service were changed to reflect his new position after promotion. We need to note here that on 23<sup>rd</sup> January, 1996 only two months prior to his promotion, his terms and conditions of service had been revised. That was contained in the Bank governors announcement made during staff end of year party held on 29<sup>th</sup> December, 1995 and confirmed by a letter to him dated 23<sup>rd</sup> January, 1996. On his promotion, however, his salary was increased to the scale Kshs.19,691.65 by 1,295/= to 35,231.65 per month and he entered that scale at Kshs.26,166.65. His house allowance was fixed at Kshs.7,850/= per month, transport allowance was increased to Kshs.3,950/= per month and leave allowance went up to Kshs.6,200/= per calendar year. The other terms and conditions of service were to remain similar to those applicable to the staff in the same grade and were to be advised as the need arose. Interestingly, while that letter of promotion was being written on 20<sup>th</sup> March, 1996, another letter had been written the previous day 19<sup>th</sup> March, 1996 in which the respondent was advised to report to the Head, Banking Fraud Investigations unit every day until further notice. That letter was copied to the Head, Banking Fraud Investigations Unit, a Mr. Barasa. On 21<sup>st</sup> March, 1996, before the respondent received his letter of promotion, a letter of suspension dated 21<sup>st</sup> March, 1996, was addressed to him. He was suspended with immediate effect, under **Rule 6.39** of the Bank’s Staff Rules and Regulations. Before the end of a month from the date of that letter of suspension a letter of dismissal dated 17<sup>th</sup> April, 1996 was addressed to him. That letter stated:

## **“DISMISSAL**

**Following your suspension from the services of the Bank on March 21, 1996 and the subsequent investigations conducted by Banking Fraud Investigations Department when you unequivocally admitted being engaged in the planning and fraudulent execution of transactions, details whereof were within your knowledge and contained in your statement under inquiry. (sic)**

**The Bank has in this regard decided to dismiss you in accordance with Rule 6.23 of the Staff Rules and Regulations with consequent loss of all benefits due to your contravention of Rules 3.1 and 6.34 of the said Rules and Regulations. Your last day of service in the Bank will therefore be Thursday April 18, 1996. You will be advised under separate cover of your indebtedness to the Bank, if any, for your immediate settlement.**

**Please have the attached clearance Certificate Form completed and returned to the Principal Human Resources Division to facilitate your clearance.**

.....  
Yours faithfully,

**KAK Bett**

**DEPUTY DIRECTOR, PERSONNEL SERVICES**".

Vide a charge sheet showing that the respondent was arrested on 18<sup>th</sup> March, 1996, and taken to court on 28<sup>th</sup> March, 1996, the respondent was charged together with others before the Chief Magistrate's Court at Mombasa with criminal offences in respect of which Standard Chartered Bank Treasury Square was the complainant. That criminal case took sometime to be finalized, but in a ruling delivered on 4<sup>th</sup> August, 1999, the learned Chief Magistrate (A. O. Muchelule) found no prima facie case made out against the respondent and acquitted him under **Section 210** of the Criminal Procedure Code. He was set free.

Armed with that acquittal, the respondent then turned to the appellant for his terminal benefits and in a letter of demand written by the respondent in person, dated 17<sup>th</sup> March, 2000, the respondent stated, *inter alia*, as follows:

**"Under the prevailing circumstances, that basis of the bank's action to dismiss me with loss of ALL MY BENEFITS now stands nullified by the court ruling. The effect is that I am now entitled to payment of my benefits in the eyes of the law since the court ruling has given me a clean bill of health. I was innocent and my innocence has been proved by a competent court of law. Accordingly, I demand from the Bank the immediate payment of:**

- 1. Service dues for the periods I have worked at the Bank. For each year worked, I demand a payment of 3 months gross salary.**
- 2. My salary for the period 01/03/96 to 18/04/1996 the last day of duty (which the Bank withheld) with an interest of 15% p.m. effective from 19/04/96 to 07/07/99 the date of my acquittal.**
- 3. My pension contribution as was paid to retrenched Bank staff and others who had been earlier sacked by the Bank".**

The appellant in response, denied liability in its letter to the respondent dated 4<sup>th</sup> May, 2000. It stated at the end of that letter:

**"Given the foregoing, the Bank denies any liability for the payments as demanded and advises that any litigation brought against the Bank shall be suitably defended".**

The respondent was not satisfied. He obtained the services of an advocate, Mr. Mutisya, who, after a final letter of demand, filed plaint against the appellant seeking damages for wrongful dismissal and malicious prosecution. At paragraphs 9, 10 and 11 of that plaint dated 13<sup>th</sup> July, 2001 and filed on the same date, the respondent claimed special damages against the appellant as follows:

**"9. In consequence of the matters aforesaid, the plaintiff was injured in his reputation and was put to considerable trouble, inconvenience, anxiety and expense and has suffered loss and damages.**

**PARTICULARS OF SPECIAL DAMAGES**

**(a) Costs of counsel for the defence**

- Kshs.50,000/=

(b) Costs of proceedings - Kshs.1,000/=

- Kshs.51,000/=

10. The plaintiff further claims his terminal dues not paid by the defendant upon termination of his employment as follows:

(i) Dues for the period worked i.e. 11 years at 15 days per year i.e

$1,332.20 \times 15 \times 11 = \text{Kshs. } 219,813.00.$

(ii) Salary for March and April 1996

= Kshs. 79,933/30.

(iii) Pro-rata leave for 1999 – Kshs. 6,994/05.

(iv) 3 months salary in lieu of notice

= Kshs. 119,899.30

= Kshs. 426,60.30 (sic)

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and the Plaintiff claims his pension payments.

11. The Plaintiff thus claim special damages as per paragraphs 9 and 8 above totaling to Kshs.477,640.00”.

In a statement of defence dated 6<sup>th</sup> August, 2001, the appellant denied in toto both liability and claims for general damages, special damages and claim for pension. After the procedural requirements, the suit was placed before Commissioner of Assize Joyce Khaminwa (now Khaminwa J) for hearing. After full hearing, the learned Commissioner of Assize dismissed the claim based on malicious prosecution but found for the respondent in respect of wrongful dismissal. She addressed herself thus:

“After considering all the issues in this suit I am convinced that the Defendant is not guilty of the charge of malicious prosecution of the plaintiff and this claim is dismissed. On the issue of termination of employment, I find that the Plaintiff’s dismissal from the Defendant’s employment by letter dated 17/4/1996 was unlawful. The plaintiff was therefore entitled to three months notice or pay in lieu at the rate of salary earned then as claimed Shs.119,899/30. The Plaintiff was also entitled to the salary for the month of March and April 1996 – Shs.79,933/30 (sic). No evidence to rebut his claim for prorata (sic) leave for the year 1996 is offered Shs.6,994/05

Under Rule 6.23 under which the dismissal was made the benefits lost include compensation payable for accrued leave, pension and gratuity or salary due or any other benefits. The Plaintiff claims gratuity for 11 years worked which comes up to Shs.219,813/= . This claim was not disputed or contradicted by defendant by evidence. There is only general denial in the statement of defence. It is my view that the plaintiff is entitled to all benefits he lost on dismissal under rule 6.23 including the gratuity and pension which is clearly admitted. I therefore find the defendant liable to pay the Plaintiff’s claim in the sum of Shs.426,639/65. Judgment is entered against the Defendant in the sum together with costs and interest”.

The appellant felt aggrieved by that decision and hence this appeal before us premised on four

grounds, three of which were abandoned at the time the appeal came up for hearing leaving only one ground of appeal which was the first ground of appeal. That ground of appeal complained:

**“1. That the learned Commissioner of Assize, as she then was, erred in awarding the respondent a sum of Kshs.219,813/= in respect of gratuity when the payment of gratuity was not part of the contract of employment between the parties”.**

Mr. Chacha Odera, the learned counsel for the appellant while not taking up issues with the rest of the learned Commissioner of Assize’s judgment, submitted that the superior court had no business awarding gratuity to the respondent as that claim was not pleaded and proved strictly as is required by law and in any case, there was no provision for gratuity in the contract of employment between the appellant and the respondent as could be deciphered from the letter of appointment, letter of confirmation of appointment and letter of promotion. It was his argument that what was pleaded in the plaint amounted to severance pay which could only have been available to the respondent under the repealed Employment Act Chapter 226 Laws of Kenya if the respondent was declared redundant, but in this case there was no issue of redundancy. He maintained that the fact that the respondent was dismissed in accordance with **Rule 6.23** of the Staff Rules and Regulations did not mean that he (respondent) would be paid all payments cited in that Rule including payments that were not part of his contract with the appellant. He could only be paid what was his due in accordance with staff contract of employment and in this case, Mr. Odera maintained, gratuity was not payment included in the respondent’s contract of employment and thus was not in law payable. He referred us to some authorities on the issue. Mr. Mutisya, the learned counsel for the respondent on the other hand contended that the respondent was rightly awarded gratuity by the learned Commissioner of Assize as he was dismissed pursuant to Rule 6.23 which stated that gratuity would be one of the payments due to him. In his view, that claim was contained in the plaint and was so cited at paragraph 10 (i) of the plaint. The appellant did not challenge it during the hearing and so it was properly awarded. Lastly, Mr. Mutisya submitted that all the authorities to which we were referred by Mr. Chacha Odera were in applicable in this appeal.

We have considered the record of appeal before us, the pleadings, the proceedings, the judgment of the superior court, the submissions by the learned counsel as well as the authorities to which we were referred and the law. Although in the notice of appeal, the appellant stated that it intended to appeal against the whole of the superior court’s decision, Mr. Chacha Odera, in his address to us abandoned the other three grounds of appeal and reduced the appellant’s appeal to only one ground which was a complaint against the award of what the superior court called gratuity to the respondent. In our view, Mr. Chacha Odera’s decision to take that issue only was based on wise counsel. The learned Judge of the superior court was plainly right in dismissing the respondent’s complaint on malicious prosecution. She was also right in awarding the respondent the claim for three months pay in lieu of notice, unpaid salary for the months of March and April and prorata leave allowance for the year 1996. We would have dismissed those grounds of appeal if they had been argued. Thus, the only issue before us is as to whether the award of what the superior court termed “*gratuity*” which was awarded at Kshs.219,813/= was in law and in fact proper.

In the letter of appointment to which we have referred hereinabove at length, the terms and conditions of service were spelt out and what was not specifically stated therein was covered in the general statement that the appointment was subject to the Bank’s Staff Terms and Conditions of service, Rules and Regulations which were to be availed to the respondent after his taking over the appointment. In the letter confirming the appointment no mention was made that the respondent was entitled to gratuity at the end of his service or at any stage of his service. Again in the letter informing him of the Revised Terms and Conditions of Service for 1996, no entry was made to the effect that the respondent would be entitled to gratuity. Lastly in his letter of promotion, gratuity was not made part of his benefits at the end of his services to the bank. It can be safely concluded from the above that the respondent had no contract specifying that he would be entitled to gratuity at any stage. The respondent was apparently aware of this. In his plaint filed against the appellant, he never claimed gratuity as part of the benefits due to him. In fact the word “*gratuity*” never featured in his pleadings at all. What he claimed was Kshs.219,813/= being his dues for the eleven (11) years worked at fifteen days pay per year. Although the respondent did not specifically assign any name to this claim, in his letter of demand drafted by himself in person, a part

of which we have reproduced hereinabove, he refers to it as “*Service dues for the periods I have worked at the Bank. For each year worked, I demand a payment of 3 months gross salary*”.

We deduce from the above that that claim in the plaint is for what used to be called severance pay. In law, there is a wide difference between severance pay which was at the relevant time a payment entrenched in the Employment Act Chapter 226 Laws of Kenya (now repealed) and was payable under provisions of redundancy which was introduced into that Act through an amendment vide Act No. 6 of 1994 in which **Section 16 A (1)** stated, *inter alia*, as follows:

**“16 (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:**

**(a) ..... (b) ..... (c) ..... (d)**

**(e) .....**

**(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay”.**

Gratuity payment on the other hand has nothing to do with an employee being declared redundant. It was not pleaded in the plaint and although the learned counsel for the respondent submitted that the plea for what was clearly severance pay was not specifically denied in the statement of defence, and during the hearing, that alone did not mean that in law the court had to alter the status of the claim for severance pay to that of gratuity and award it as such. In any case, there was a general denial of that claim in the defence and the superior court, in considering the entire matter before her, had a duty to note that only lawful demands were awarded if not challenged, and certainly not claims that were not in law awardable like gratuity awarded in this case which was not claimed. In the case of **Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd** (2000) 2 EA 385, this Court stated as follows:

**“It is trite law, and the provisions of Order XIV of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial Court, by dint of the Provisions of Order XX Rule 4 of the aforesaid Rules, may only pronounce judgment on issues arising from the pleadings or such issues as the parties have framed for the court’s determination”.**

Mr. Mutisya, in his submission, maintained that the respondent was entitled to the gratuity payment on account that he was dismissed pursuant to **Rule 6.23** of the Staff Rules and Regulations which stated that the respondent was entitled to Gratuity on dismissal made under that Rule. **Rule 6.23** states in full as follows:

**“Any employee who is found guilty of gross misconduct may be dismissed instantly with loss of all benefits including compensation payable for accrued leave, pension, gratuity or salary due or any other benefits whatsoever due and payable to such an employee”.**

With respect, if the respondent was entitled to the payment of gratuity as Mr. Mutisya argues, we do not see what made it difficult for him, as he was the respondent’s counsel who prepared the plaint, to plead that specific head. Secondly, and in any event, his client was taken through his evidence by him (Mr. Mutisya) and he never mentioned at any stage of his evidence that he was entitled to gratuity. He never pointed out to the trial court in which document that claim for gratuity was entrenched. All he said was that he “*had worked with the bank Shs.219,813 (sic)*”. In our view, and with respect, **Rule 6.23** relied on by the learned Judge and Mr. Mutisya is a rule of general application and was to be applied to members of staff each according to what was payable to him/her as per his/her contract of service as spelt out in his/her letter of appointment as amended from time to time. In our view, in interpreting **Rule 6.23**, regard must be made to the word “*payable*” in that rule, so that a person dismissed under that Rule would lose only the compensation that was payable to him under his own contract of service with the appellant. That in effect means that if the dismissal made under that Rule is declared wrongful as happened here,

then, all the employee would be entitled to is compensation in respect of what would have been payable to him, or, put another way, compensation which he would have lost had the dismissal stood. An example would help explain what we are saying. If an employee had accrued leave due to him, he would, according to **Rule 6.23** lose that accrued leave if he was dismissed under that Rule, but if he had no accrued leave payable to him then he would not lose that payment as in the first place no such accrued leave was due to him. If his dismissal was later found to be improper, he would not claim accrued leave as he had none in the first place and lost none by dint of his improper dismissal. That scenario applies to gratuity. The respondent had not pleaded it; had not proved it and it was not anywhere in his letter of appointment or in any of the terms and conditions of service applicable to him. He could not claim it simply because **Rule 6.23** which applied to many other members of staff some of whom gratuity was payable and could raise various claim for it, provided for it.

In conclusion, we do not appreciate the basis on which the learned Judge of the superior court awarded this claim for gratuity seeing that it was not pleaded; was not in the contract of service between the appellant and respondent and was not alluded to as such in the evidence before the Court. It is clear to us that the learned Judge equated the severance pay which was pleaded at paragraph 10 (i) of the plaint with gratuity and awarded that claim as pleaded. In doing so, the learned Judge was in error. In any event, as we have stated, severance pay as pleaded could not be awarded to the respondent as that was a claim that would have only been available to the respondent under the Employment Act then in operation if the respondent had been declared redundant, and not otherwise. Thus in either case gratuity or even severance payment was not due to the respondent. We have no alternative but to interfere with the superior court's judgment as far as the award of gratuity is concerned. The rest of the judgment will stand. The appeal is allowed to the extent that the award of Kshs.219,813/= purportedly awarded as gratuity is set aside. It is dismissed as to the other awards. Thus, the claim payable by the appellant to the respondent is Kshs.206,826/65 with interest at court rates for which judgment stands. We make no order as to the costs of the appeal. Orders accordingly.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of March, 2009.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR