



Kithinji v Jamii Co-operative Savings & Credit Society Ltd (Cause 707 of 2017) [2025] KEELRC 648 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 648 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 707 OF 2017
JW KELI, J
FEBRUARY 28, 2025**

BETWEEN

JAMES KITHINJI CLAIMANT

AND

JAMII CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD RESPONDENT

RULING

1. The applicant filed a notice of motion application dated 3rd April 2024 brought under Order 45 Rules 1, 2 and 3, Order 51 of the Civil Procedure Rules, (2010) Section 80, Sections 1A and 3A of the [Civil Procedure Act](#), 2010 (Cap 21 of the Laws of Kenya), and all other enabling provisions of the law seeking the following orders:-
 1. That the Judgment of Honourable Justice Ocharo Kebira made on the 8th March, 2024 be reviewed, varied and/or set aside.
 2. That the costs of this application be provided for.
2. The application was premised on the ground on the face of the application and supporting Affidavit of James Kithinji, the applicant herein.

Grounds of the application

3. That the Applicant filed this suit on 12/4/2017 seeking that his dismissal from employment be found to be unlawful/wrongful, gross salaries not earned during the period the Claimant was out until reinstatement, Reinstatement, Gross salary for the remainder of the period before retirement which is thirteen(13) years, One month's salary in lieu of notice, Gratuity for the rate of one month's salary for every year worked as provided for in the Respondent's HR regulations for the twenty five years (25) served, Eighty eight (88) annual leave days earned but not taken, Compensation for twelve month's(12) gross salary, Wages for the period between 04/11/2015 to 14/12/2015, Bonus for the year 2015 as



passed in the resolution by the ADM, Outstanding Loans by the Claimant to be cleared at Staff rates, plus costs against the Respondents. The suit resulted from the dismissal of the Claimant from employment.

4. That the suit came up for interparties hearing and judgment was delivered on the same by Honourable Justice Ocharo Kebira on 8/3/2024. Honourable Judge entered judgement for the Claimant against the Respondents. In the said judgment the Honourable Judge made an error on the face of the record by:-
 - a) Failing to address the prayer in the Claimant's memorandum of Claim for gratuity at rate of one month's salary for every year worked as provided in the Respondent's HR Regulations for twenty-five (25) years.
 - b) Failing to address the prayer in the Claimant's memorandum of Claim for Eighty-eight (88) annual leave days earned but not taken.
5. That no appeal has been preferred against the said Judgment. This application has been made without unreasonable and/or undue delay. There is good and sufficient cause for the review of the Judgment made herein by the Hon. Justice Ocharo Kebira on 8/3/2024. It is in the interests of justice, that the said Judgment be reviewed, varied and/or set aside. That the application is meritorious within the relevant provisions of the law.
6. The application as opposed by the respondent who filed grounds of opposition dated 21st June 2024 to the effect that the application for review did not meet the threshold of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. That the application was brought with delay of 3 months which they stated was unreasonable and not justified. That the application based on failure to award gratuity and leave did not constitute error apparent on the face of the judgment and this was attempt to appeal the judgment.

Decision

7. The application was canvassed by way of written submissions. The applicant filed his submissions in person dated 18th June 2024 and a supplementary submissions dated 30th jolly 2024 in response to the grounds of opposition and the respondents submissions dated 21st June 2024 filed the Federation of Kenya Employers.
8. The court was invited to review the Judgment by justice Ocharo Kebira of 8th March 2024 in [*Kitbinji v Jamii Co-operative Savings & Credit Society Ltd \(Cause 707 of 2017\)*](#) [2024] on 2 grounds:-
 - a) Failing to address the prayer in the Claimant's memorandum of Claim for gratuity at rate of one month's salary for every year worked as provided in the Respondent's HR Regulations for twenty-five (25) years.
 - b) Failing to address the prayer in the Claimant's memorandum of Claim for Eighty-eight (88) annual leave days earned but not taken.
9. There is no appeal and the court was open to review the decision. The judgment was delivered on the 8th March 2024 and the application for review dated 3rd April 2024 filed in court on the 16th April 2024. The application was amended on the 20th of May, 2024. The applicant stated that the court having held his termination to be unlawful and unfair it ought to have considered his prayer for gratuity at rate of one month's salary for every year worked as provided in the Respondent's HR Regulations for twenty-five (25) years which was now available. The applicant further stated that the court should order for the payment of Eighty Eight (88) annual leave days as the dismissal was declared unfair. That



the respondent is the custodian of the leave record and now that the dismissal was declared unfair the court should tabulate and compensate the applicant for the unutilised/ unused annual leave days. That the claimant did not proceed on leave in most cases as a result of office exigency.

10. The respondent in opposition to the application for review filed grounds of opposition dated 24th June 2024 To the effect the application did not meet the threshold provided under Rule 33 of the ELRC (procedure) Rules 2016 . that the application ought to have been brought without unreasonable delay which should be justified. That the application was brought 3 months without justification, that there was no mistake or error apparent on the face of the judgment, and that the contention that the court ought to have made an award on gratuity and leave does not constitute error on the face of the record. The application for review was an attempt appeal the judgment to this court.
11. The judgment sought to be reviewed was delivered on the 8th March 2024 by justice Ocharo Kebira. The part of the judgment on remedies is as per the excerpt below:-

‘90. The reliefs section of the Claimant’s pleadings is couched in a manner that one cannot by a casual glance see the wood from the trees. However, doing the best I can, I deduce that he inter alia seeks an order of reinstatement. Considering that the termination of the Employment of the Respondent took effect on 4th November 2015, by operation of the law, Section 12 of the *Employment and Labour Relations Court Act*, the remedy cannot be availed to him. Three years lapsed a long time after the separation.

91. In my view, the Claimant’s employment was in nature one terminable by a twenty-eight days’ notice under Section 35 of the Act. There is no dispute that the notice was not issued. This entitles him to notice pay per Section 35 read together with Section 36 of the Act.

92. I have considered; how the Claimant’s employment was terminated, without fair and valid reason, and fair procedure; the length of time that he was in the service of the Respondent; and that I am not convinced that he in any way influenced the termination of his employment, and hold that he is entitled to the compensatory award contemplated under Section 49[1][c] of the Act to the extent of 7 months gross salary.

93. The Claimant asserted that at the material time, he had a facility with the Respondent The facility was not on commercial interest rates. Apparently, it was at a lower rate. To allow the Respondent to move to charge a rate different from the preferential rate, shall be tantamount to allowing the Respondent to benefit from its wrongdoing to the prejudice of the wronged, the Claimant.

94. In the upshot, judgment is hereby entered for the Claimant for;

- i. A declaration that the termination of the Claimant’s employment was both procedurally and substantively unfair.
- ii. One month’s salary in lieu of notice, KShs.78,094.
- iii. Compensation for unfair termination, 7 months’ gross salary, KShs. 546,658.
- iv. Interest on the awarded sum in [ii] and [iii] above at court rates from the date of this judgment till full payment.



v. Costs of the suit.”

12. The application was filed under rule 33 of the ELRC (Procedure) Rules 2016 which have since been amended in 2024 Rule 74 to wit:-

“74. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

“Review.

- (a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- (b) on account of some mistake or error apparent on the face of the record;
- (c) if the judgment or ruling requires clarification; or
- (d) for any other sufficient reason.

(2) An application for review of a decree or order of the Court under sub-rule (1) shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.”

13. The application was based on ground of on error of omission to make findings on prayer of gratuity and leave as prayed, by the trial court. The trial judge is no longer in the station. In the claim the applicant had sought for the 2 reliefs which the Court finds, on face of the record of the judgment outlined above, the prayers were not considered. As held in *Kenya Building Construction Timber & Furniture Employees Union v Sagoo & Nyota Limited (2023)* e KLR an omission to consider and make a finding on a relief sought is an error on the face of the record. The court did not find the delay unreasonable. The court held that the application for review was properly before the court.

On claim for payment of Gratuity.

13. The prayer was for gratuity at rate of one month's salary for every year worked as provided in the Respondent's HR Regulations for twenty-five (25) years. The claimant submitted that on the finding by the trial court that the dismissal was unfair the right to gratuity crystallized. He stated it was an error of omission of the trial court to have failed to consider the prayer for gratuity. He relied on the decision of the *Postal Corporation of Kenya v Andrew K. Tanui (2019)* e KLR which upheld the decision in *Bamburi Cement Limited vs William Kilonzi [2016]* eKLR where court held as follows on claim of gratuity:- "Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment." [Emphasis added].



13. The respondent submitted that gratuity is not, under the law a right unless it is incorporated in the contract of service. Further gratuity is a form of social security benefit. Where service pay is payable, gratuity cannot be paid as it would amount to double payment of a social security benefit. Where NSSF is deductible and payable and that is done, service pay is ousted by operation of the law and thus gratuity was not payable. On leave days, the same was special damages and was not pleaded with specificity and proved.
13. Undertaking my duty on review, the claim for gratuity as pleaded crystallized on the trial judge holding the dismissal to have been unfair termination. The trial court ought to have considered the claim which I proceed to do. The claim was for payment of gratuity at the rate of one month for every year worked (as provided in their HR regulation) for twenty five years served. I perused the court record and did not find a contract of employment for the claimant in support of the claim for gratuity. What was filed was KMJK.L 1 being a document dated 27th August 1990 whose contents was about termination notice in letter of appointment dated 20th June 1990 . Further filed was a document (KMJK-2) which was untitled and was blank in places of signing. The authenticity of the said document was not established.
13. The Court upheld the decision of the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (2019)e KLR which upheld the decision in *Bamburi Cement Limited vs William Kilonzi* [2016] eKLR to wit: “ But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment” Consequently this court held that there was no contract of employment of the applicant providing for gratuity and the claim was not proved. It is disallowed.

On claim for payment of untaken leave

13. The applicant submitted that the court should order for the payment of Eighty Eight (88) annual leave days as the dismissal was declared unfair. The respondent is the custodian of the leave record and now the that the dismissal was declared unfair should tabulate and compensate the applicant for the utilised/ unused annual leave days. The claimant did not proceed on leave in most cases as a result of office exigency. The respondent submitted leave days are special damages and must be pleaded with specificity and proved. There was no evidence laid for evidence of outstanding leave days. The court perused the witness statement of the claimant and the basis of the prayer for leave was not pleaded. The claimant sought for 88 days of untaken leave without justifying the basis. Section 107 and 108 of the *Evidence Act* state:- “107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”
13. The court on the perusal of the court record, found the claim for leave was not justified by the claimant to pass the burden to the employer to produce records. The Court held that the prayer for leave was not pleaded with specificity. For example, the statutory leave days being 21 what was the accrual period of the 88 days? Did the claimant apply for the leave and was it rejected? The employment period was pleaded as 25 years. It would be a fishing expedition to expect the employer to produce records without specificity of the claim. The prayer for leave did not crystallize on finding of unfair termination as leave falls under continuing injury. The claimant failed to discharge his burden of prove by failure to plead in



his witness statement, admitted as evidence in chief, with specificity the basis of the claim for leave. The duty to produce records of leave by the respondent did not crystallize. The claim for leave is dismissed.

Conclusion

13. The court held that the application had established a basis of review on error of omission by the trial court to consider the reliefs sought of gratuity and leave days. On review, the court found no contract of employment in support of the claim for payment gratuity having held the termination was unfair. The alleged HR code of regulations produced by the claimant was not titled or signed hence of zero evidence probative value. The court further held the claim for leave was not pleaded with specificity to invite the Respondent to produce leave records.
13. On review, the court held that the claims for gratuity and leave were not proved on a balance of probabilities and were disallowed. The application dated and amended on the 20th May 2024 is held to lack merit and dismissed with costs to the Respondent. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Applicant – absent

Respondent – Obiayo

