



**Kaharu v Ark Limited (Appeal E005 of 2021)  
[2025] KEELRC 441 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 441 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
APPEAL E005 OF 2021  
ON MAKAU, J  
FEBRUARY 20, 2025**

**BETWEEN**

**DAVID GACHURU KAHARU ..... APPELLANT**

**AND**

**THE ARK LIMITED ..... RESPONDENT**

**RULING**

1. On 30<sup>th</sup> January 2024, I delivered judgment in favour of the appellant by awarding him the following:
  - a. Salary for the eleven (11) months suspension period.
  - b. Gratuity under clause 27(b) of the CBA
  - c. The employer to assess and pay within 45 days from the date of the judgment.
  - d. The award is subject to statutory deductions.
  - e. The appellant is awarded costs of the appeal and the court below.
2. Thereafter, Appellant brought the Notice of Motion dated 11<sup>th</sup> October 2024 under Order 50 Rule 1 of the Civil Procedure Rules, seeking the following orders:
  - a. That the Respondent calculates the appellant's 11 month's salary of Kshs. 595,999.47 (Kshs. 54,181.77 x 11) as per order a of the judgment dated 30<sup>th</sup> January 2024 subject to the last payslip of the Appellant.
  - b. That the Respondent pays the gratuity of Kshs. 45,475.75 to the Appellant without subjecting it to PAYE tax.
  - c. That the Respondent pays the balance of the award subject to the calculations in a & b above.
  - d. That the costs be provided for.



3. The Application is premised on the grounds set out in the body of the Motion and the supporting affidavit sworn of the even date by the appellant. In brief, the applicant alleges that this Court, in its judgement on 30<sup>th</sup> January 2024 awarded him 11 month's salary and gratuity calculated as per the CBA; that his last salary was Kshs.54,181.77 but the Respondent paid the 11 month's salary at the rate of Kshs.15,996.84 per month; and that the respondent further calculated his gratuity at Kshs.45,475.74 and subjected it to PAYE which is unfair, irregular and illegal. Consequently, he prayed for the orders sought contending that it was in the interest of justice for the same to be granted.
4. The Respondent opposed the motion vide its Replying affidavit sworn on 7<sup>th</sup> October 2024 by Nancy Gichovi, its Human Resource Manager. She deposed that the Respondent calculated and made payments to the Appellant as per the judgement of 30<sup>th</sup> January 2024. She denied that the Appellant was earning a salary of Kshs.54,181.77 and clarified that the last payslip included service charge of Kshs.31,058.51 which was not a fixed monthly pay but a benefit that depended on monthly sales.
5. She further deposed that the amount of Kshs.45,475.75 sought for payment as gratuity was already paid and added that on the basis of advice received from counsel, gratuity was subjectable to PAYE. She further made reference to section 5(2) of the *Income Tax Act* which provides for the gains and profits from employment including salary, wages, pay in lieu of leave, fees, gratuity or any other allowance received; and therefore, they were right in their calculations of the payable dues. She contended that the Appellant had not annexed calculations to show the alleged unpaid dues. She argued that they had complied with the terms of judgement having paid Kshs.214,371/= and thus the Appellant had no basis for further claims. She therefore contended that the Application lacks merit and urged the Court to dismiss it with costs.

#### Submissions

6. The Applicant raised the following issues for determination: whether service charge forms part of the Appellant's entitlement for the suspension period, and who should bear the costs. On the first issue, it was submitted that the Court had found in its judgement that it was the Respondent that prevented the Appellant from working and therefore the Respondents cannot claim that the service charge is only tied to his services and stopped when he was suspended. In support of the argument, reliance was placed on the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 (KLR). It was submitted that the Appellant's gross salary includes money he was getting prior to taxation which included the service charge, and thus the same should form part of the compensation.
7. On the second issue, it was argued that the Applicant was forced to file the application by the respondent's inaction/misaction and therefore he is entitled to costs. For emphasis, reliance was placed on the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR.
8. On the other hand, it was submitted for the Respondent that the applicant was paid according to the judgment of the Court and subjected to taxation as required under the *Income Tax Act*. It was submitted that payments received by employees upon termination or retirement are taxable, and as such every employer was required to recover the appropriate tax from any lump sum amount before releasing the balance to the employee. As such, the Court was urged to dismiss the application with cost.
9. For emphasis, reliance was placed on the case of *County Government of Kakamega vs Commissioner of Legal Services and Board Coordination Tax Appeal No. E051 of 2023* (no citation and copy not attached) and the section5(2) of the *Income Tax Act*.

#### Determination



10. Having considered the application, the response and the rival submissions, the issues that arise for determination are;
  - a. Whether service charge should form part of the Appellant's salary for purposes of assessing the decreed sum herein.
  - b. Whether the gratuity should be subjected to PAYE tax.
  - c. Whether costs of the application should be awarded.

Service charge

11. The Respondent's case is that the Appellant's salary of Kshs.54,181.77 in his last pay slip was inclusive of Kshs. 15996.84 basic pay, Kshs.7,126.42 housing and kshs.31,058.51 service charge made from sales. The Black's Law Dictionary, 10<sup>th</sup> Edition defines service charge as:
  1. A charge assessed for performing a service, such as the charge assessed by a restaurant for waiters or by a bank against the expenses of maintaining or servicing a customer's checking account.
  - 2 ...”
12. The above definition clarifies that a service charge is not constant, but a figure that is depended on actual performance of a service and the amount achieved in the services rendered. Having perused the pleadings and the entire record of appeal, the appellant did not raise the issue of service pay anywhere. In fact, the reason as to why I never assessed his dues was because he did not plead his salary.
13. The appellant further failed to particularise his claim and he also never prayed for any specific sum to be awarded. The whole pleading and witness statement do not mention figures, whether salary or the sums claimed. As such, the salary of Kshs.54,181.77 was only mentioned too late in the appellant's submissions in the appeal.
14. It is trite law that employment dues are in the nature of special damages and as such they ought to be specifically pleaded and strictly proved.
15. The applicant cited the case of Postal Corporation of Kenya vs. Andrew K. Tanui [2019] eKLR in which the Court of Appeal defined gross salary as follows: -

“Gross salary would then be the amount calculated by adding up one's basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary.”
16. In the case of Richard Erskine Leakey & 2 others v Samson Kipkoech Chemai [2019] eKLR, the court of Appeal clarified that:

“In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.”
17. As observed above, the applicant's Claim was not sufficiently pleaded and no evidence was adduced to prove that his monthly salary was inclusive of a fixed service charge of Kshs.31,058.77. As such the service charge of Kshs.31,058.77 must be excluded when calculating the actual salary ordered by the Court in the judgement delivered on 30<sup>th</sup> January 2024.



Tax on gratuity

18. In the said judgment, I directed that the appellant be paid gratuity in accordance with clause 29(b) of the CBA subject to statutory deductions. The applicant has not demonstrated that gratuity is tax free under the *Income Tax Act*. He also did not appeal or any other manner challenged my judgment in which I directed that the award of gratuity was subject to statutory deductions. Consequently, the said direction remains.

Disposition

19. In view of the finding that the applicant's salary was exclusive of service pay and that he has not challenged the direction subjecting payment of his gratuity to statutory deductions, the application fails and it is dismissed for lack of merits. Since the applicant has dragged the respondent back to Court without any justification, he is condemned to pay its costs of the application.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF FEBRUARY, 2025.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

