Mutisya v Kalu Works Limited (Cause 1131 of 2018) [2025] KEELRC 1730 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1730 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1131 OF 2018

JW KELI, J

JUNE 12, 2025

BETWEEN

MICHAEL MUTISYA .... CLAIMANT

AND

KALU WORKS LIMITED .... RESPONDENT

JUDGMENT

1. The claimant, subsequent to voluntary retirement from employment of the respondent, on receipt of terminal dues he was not satisfied with the payment and filed the instant case vide memorandum of claim dated 17th May 2018 received in court on the 5th July 2018 against the Respondent seeking Orders as follows:-

   a. 1,028,567.00(gratuity payment , unpaid 10% salary increment from July 2016 to June 2017 and leave pay at rate of 1.75 for January to june 2017)

   b. Issuance of certificate of employment

   c. Collections charges amounting to Kshs. 90,000.00

   d. Costs of the suit

   e. Interest on (a) and (c) above.

2. The Claimant relied upon his memorandum of claim dated 17/05/2018, list of witnesses dated 17/05/2018 and the statement attached thereunder, the list of documents dated 17/05/2018 and the documents attached under the same, the further witness statement of the claimant dated 16/10/2023, the notice to produce dated 1/10/2023, the further list of documents dated 1/10/2023 and the attachments thereunder as well as the reply to defendant's defence dated 5th November 2019.

3. The claim was opposed by the respondent who entered appearance through the Federation of Kenya Employers and filed memorandum of defence dated 23rd September 2019 together with list and bundle of documents dated 23rd September 2019 , further list of documents dated 4th March 2024 and the witness statement of Hezrone Ogutu Rachilo dated 4th march 2024 and the authority to represent the company dated 3rd January 2024.

Hearing and Evidence

4. The claimant's case was heard on the 19th June 2024 before Justice Ocharo Kebira where the claimant was the witness, he testified on oath, adopted his 2 witness statements of 5th July 2018 and 16th October 2023 respectively as his evidence in chief. The Claimant produced his filed documents under list dated 11th May 2018 as C-exh 1-8 and further list dated 1st October 2023 as C-exh 9-13. He was cross-examined by counsel for the respondent, Oketch and was re-examined by his counsel, Ms Kinuthia.

5. The respondent's case was heard on the 19th February 2025 before me where RW1 was Hezrone Rachilo who testified on oath, adopted his witness statement dated 4th March 2024 as his evidence in chief and the memorandum of defence dated 23rd September 2019. He produced the respondent's documents under list dated 23rd September 2024 as R-exh 1-4 and further list dated 4th March 2024 as R-exh 5. He was cross-examined by counsel for the claimant, Ms Kinuthia and re-examined by his counsel, Mr. Ouma . RW2 was Johnson Mwaigho Mwashwa who testified on oath on even date , adopted his witness statement dated 2nd March 2024 as his evidence in chief and the documents produced by RW1. He was cross-examined and re-examined. The Respondent closed its case.

6. The parties complied with directions on filing of written submissions.

Claimant's case

7. The Claimant was an employee of the Respondent within the provisions of the *Employment Act* 2007. He was employed as a personnel and administrative officer from 2004 to 2017 at a monthly salary of Kshs. 151,580.00/= which was revised upwards to Kshs. 165,360.00/= in July 2016 and a contract of employment existed to that effect. On 12/06/2016 the claimant wrote to the Respondent's chief operating officer on his wish to take up early retirement. After discussions with the Respondent representatives, it was agreed that retirement issue as from 30/06/2017. The Claimant was entitled to gratuity, salary arrears factor of 10% salary increment from July 2016 and leave pay from January 2017 - June 2017, all of which amounted to Kshs. 1,447,330.00/=. The Respondent company, however paid part of his dues being Kshs. 448,763.00/=. The Respondent is yet to get the balance totalling to Kshs. 1,028,567.00/=. The Claimant thus filed the instant suit mainly seeking orders that the Respondent pays him terminal dues in the tune of Kshs 1,477,330.00/=. The same comprising of (gratuity in tune of Kshs. 1,258,917.37/=, salary payable factoring 10% increment from July 2016 to June 2017 in tune of Kshs. 165,360.00/= as well as leave pay from January to June 2017 at a rate of 1.75 in tune of Kshs. 53,053.00/=)

Respondent's case in brief

8. This case is rather unique in that it does not revolve around the usual unfair separation, but rather the terminal benefits arising from voluntary retirement. The Respondent takes the liberty to rehash the Claimant's tenure with the Respondent to bring out the real facts surrounding the retirement and the alleged attendant benefits claimed. The brief facts on the Claimant's relationship with the Respondent is as follows:-

(i) Claimant was employed by the Respondent on 19th August 2004 on permanent basis till 31 December 2014;

(ii) That being an employee in the Management Category of the Respondent, the Claimant joined the Respondent's Staff Group Pension Scheme from 1st January 2010;

(iii) That the Claimant received his pension contribution statement annually until his exit from the scheme on 31st December 2014 as evidenced in his pension discharge letter dated 29th January, 2015;

(iv) At the time of his retirement, the Claimant and the Respondent then jointly tabulated all dues payable to the Claimant. Such terminal benefits included an ex-gratia payment of Kshs. 448,763/= in the form of service pay for each year the Claimant. The said ex-gratia excluding the years he was pensionable.

(v) That the Claimant did execute the discharge document by affirming that he would have no further liabilities pending or due from the Respondent upon receipt of his pension dues;

(vi) Upon exit from the permanent and pensionable engagement, the Respondent offered the Claimant extended employment on term contract basis effective 1st January 2015, the terms of which the Claimant understood by appending his signature to the contract letter on 15th January 2015;

(vii) That the Claimant accepted the terms of the temporary employment contracts as offered by the Respondent which did not include pension contributions from 1 January 2015 to 30th June 2017 when he voluntarily retired from the service of the Respondent.

(viii) It is to be noted that there was no obligation on the part of the Respondent to include such ex-gratia in the Claimant's terminal dues. There was no instrument of engagement that explicitly stipulated that the employer shall pay an ex-gratia dues upon separation. But the Respondent still went ahead and paid him the same.

9. The Respondent stated that the facts set out and constituted the substantive evidence of both Hezron Rachillo and Johnson Mwashwa, RW1 and RW2 respectively and which was not materially challenged.

Determination

Issues for determination

10. The claimant identified the following issues for determination :-Whether the claims were time barred and whether he was entitled to the terminal dues sought

11. The respondent addressed the same issues as the clamant.

12. The court was of the opinion that the issue before the court was whether the claim was merited.

Whether the claim was merited.

13. The claimant having retired voluntary and being dissatisfied with the paid terminal dues filed the instant claim seeking the following terminal dues :-

    a. 1,028,567.00(gratuity payment , unpaid 10% salary increment from july 2016 to june 2017 and leave pay at rate of 1.75 for January to june 2017)

    b. Issuance of certificate of employment

c. Collections charges amounting to Kshs. 90,000.00

d. Costs of the suit

e. Interest on (a) and (c) above.

Claimant's submissions

14. Whether the Claimants claim is time barred? The *Constitution* of Kenya 2010 under chapter 10 establishes the judiciary and its mandate. Under article 159 (2)(a)(b)…in exercising judicial authority, the courts and tribunals shall be guided by the principles- "justice shall be done to all irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); justice shall be administered without undue regard to procedural technicalities ; and the purpose and principles of this constitution shall be protected and promoted." One of the core purposes of the 2010 constitution is to ensure that justice is served to all. The *constitution* makes it clear that justice should be available to all persons regardless of any procedural technicalities. Section 4(1) of the *Limitation of Actions Act* provides that: 'The following actions may not be brought after the end of six years from the date on which the cause of action accrued- (a) Actions founded on contract (b)Actions to enforce a recognizance; (c) Actions to enforce an award (d)actions to recover a sum recoverable by virtue of a written law, other than penalty or forfeiture or sum by way of penalty or forfeiture; a (e) Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law." The respondent at paragraph 12 of its memorandum of defence states that the claim for gratuity is time barred basing its argument on section 4(1) of the Limitation of Action Act. It is prudent to note that six years have not lapsed since the claimant terminated his work contract with the respondent. The claimant retired on 30/06/2017 and this suit was filed on 5/7/2018 which is barely a year after the cause of action realized. The quoted law stipulates that claims should be brought within 6years from the date on which cause of action accrued.

15. Whether the claimant is entitled to gratuity? The Claimant is entitled to gratuity in tune of Kshs. 1,258,917.37/=. The respondent has only paid Kshs. 448,817.0/= thus there still stands a balance in tune of Kshs. 810,154.37/= under gratuity payable to the Claimant. The Claimant having served the Respondent for 13 years, protecting its trade secrets, serving diligently and in a great and loyal manner sought early retirement. Notably the Claimant had served the larger Comcraft group of companies for a total of 45 years. He was so great at his job that the Respondent negotiated and he served for an extra year from the time of notice to retire as dated 12th July, 2016. There was no disciplinary process which took place and therefore there cannot be any argument that the claimant was guilty of any misconduct. Having served diligently and for so many years, even when the Respondent withheld an appointment letter, the Claimant is as per law surely entitled to payment of gratuity for the period served. The Claimant equally having been privy to employee records and being the person tabulating employee terminal dues confirmed that all other personnel managers before him were awarded both benefits; gratuity and pension contributions. The Claimant provided evidence to that effect, evidence that was not rebutted at any given point. That the Claimant is duly entitled to gratuity as well tabulated under his statement of claim Para 8 (a). just as all others before him were. In Frederick Kariuki Kamau v Bank of India [2015] eKLR the learned judge at paragraph 58 stated that "Gratuity pay is herein claimed. The evidence of the Claimant is that he was entitled to his gratuity for the period served. The Respondent on their part stated that gratuity was discretionary and based on unblemished service pegged at 21 years. That the Claimant had 2 caution letters dated 30th May 2007 and 3rd July 2008 that blemished his record and thus not entitled to gratuity. Mr. Allan Mburu confirmed that indeed all employees of the Claimant who attained 21 years and above of service were eligible for gratuity. The

Claimant had served for over 25 years vide his Milestone Award issued in 2008. In labour relations a caution or warning has a time limit. Such notices cannot be kept hanging over the shoulders or neck of an employee until retirement. Reason demands that fair relations should factor employee benefits as such and where earned due to good and long service there is no discretion. Gratuity is a work benefit that can only be removed by consent or a statutory provision. I find no justification for the Respondent to remove the gratuity benefit from the enjoyment of the Claimant on a caution letter that had lapsed in time at the time of his unfair dismissal. This shall be awarded at 30 day's pay per year for the 21 years that it was due......." Gratuity can only be removed by consent or a statutory provision. The claimant has not consented to the removal of gratuity benefits and he is entitled to gratuity benefits for the years he has worked with the Respondent Company.

16. Whether the claimant is entitled to leave pay?- Each employee is entitled to leave or payment in lieu of leave. The Claimant never got any leave day or payment for the same as from January 2016 - June 2017. Section 28, *Employment Act* 2007 states that: ‘after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay; where employment is terminated after the completion of two or more consecutive months of service during any twelve months'leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.”It is indeed in the interest of justice that the claimant is compensated for the months he worked without leave day. It will be against the law if he is denied his right which is stipulated under the said law. The claimant claims Kshs. 53,053.00/= which has been calculated at the rate of 1.75 for each complete month. In the case of Fancy Jeruto Cherop & another V Hotel Cathay Limited (2018) eKLR where the learned judge used decision in the case of Rajab Barasa & 4 others Versus Kenya Meat Commission (2016) eKLR. The employer must ensure each employee has taken the annual leave when due or make payment in lieu thereof.

17. Whether the claimant is entitled to salary arrears factory 10% increment?- The Claimant was entitled to a 10% salary increment as were other employees under him and those holding managerial positions just as he did. Notably, the 10% increment from July 2016 did not reflect for him. This in itself is discrimination as such the Claimant is entitled to Salary arrears factoring the 10% increment as of July, 2016 to June, 2017 in the tune of Kshs. 165,360.00.

18. Whether the claimant suffered discrimination? The claimant having worked with the respondent as the Personnel and Administrative officer the same being a managerial position for a long period of time is aware of all practices which take place in the company. The Claimant is privy to terms of employment for employees, payments as done upon retirement or termination, trade secrets among other elements within the Respondent's order of business. When the matter come up for hearing the Claimant was able to illustrate clearly the extend of the discrimination as against himself. He was able to confirm he was not given any appointment letter. He was further able to identify different employees who benefited from both gratuity and pension holding similar positions and under same circumstances. The similar fact rule dictates that there be harmony in how employees are treated, paid and maintained under similar positions, circumstances and occurrences. Yes, the Claimant was and still is entitled to gratuity, leave pay and salary arrears factoring the 10% increment as per law, notably he still is entitled to all the above as guided by the tenets of the similar fact rule. The Respondent has been and still does pay employees their gratuity, leave pay and salary arrears, after all the Claimant was the person approving all the above. The move by the Respondent to pay the claimant less than a quarter of his total terminal dues is discriminatory in the sense that he is the only employee who has not been paid his arrears as he ought to be paid. It is the work of the employer to ensure that all employees are treated the same during the working period and also at the termination of the work. This right is provided for under the *Employment Act* 2007 section 5(2) where it states that 'An employer shall

promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice' It is discrimination and unfair practice for the Respondent to pay the Claimant differently as compared to other employees. In Frederick Kariuki Kamau v Bank of India [2015] eKLR at paragraph 53 the court held that "On the question of whether there was discrimination against the claimant, this Court in the case of Collins Osoro Lukhele versus AAA Growers Limited, Cause No. 100 of 2012 held; ... where a person is treated differently from others similarly situated like him, this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the Claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified." The same decision was reaffirmed in the case of Peter Wambua Nzioka v AsL Limited [2017] eKLR at paragraph 47 where the court stated that "... where an employer fails to act and promote equality of opportunity in employment; fails to promote and guarantee equality of opportunity; and proceeds to terminate the employment of any employee in a manner that is discriminatory - that is without setting out the reason(s), without justification and in setting out such an employee aside and separate from other employees so as to deny them a legal right without any justification - such an employer commits discrimination against the employee and such is specifically prohibited under section 5 of the *Employment Act*, it is unconstitutional practice under article 27 of the *constitution* and the same is an unfair labour practice under article 41 of the *constitution*." In the case of Frederick Kariuki versus Bank of India, Cause no.2424 of 2012, the Court held that where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified" The two cases touch on the issue of discrimination where the employer treats employees differently from others similarly situated. In our case the Respondent's attempt to steal what rightfully belongs to the Claimant is a move to deny him right without justification. The Claimant is entitled to all prayers as itemized under his Statement of Claim.

Respondent's Submissions

19. That the Claimant asked to retire was not an issue to be determined as parties were in agreement that the retirement was at the instance of the Claimant. The Respondent exhibited a letter requesting for early retirement and Appendix 2 was the tabulation of the ex-gratia service pay. At the time of retirement, the Claimant was a member of the Respondent's management as a Personnel and Administration Officer. The payslip attached on page 20 of the Claim is testament to this fact as it clearly states that the Claimant is in 'Snr Management' and this fact is also captured in his certificate of service cum recommendation letter on page 25 of his statement of claim. The Respondent consequently submits that the Claimant was therefore not unionisable and cannot seek to benefit from the CBA annexed to his claim on page 9 thereof. He is not in any job group categories therein. In its analysis of applicability of a CBA by non-union members Justice Rika stated as follows in the case of Kenya Union of Journalists and Allied Workers V Nation Media Group Limited & another (2013)';

> " By being compelled to pay agency fees, an employee who is not a trade union member is not forced into membership. It cannot be said that one has been forced into an association, in violation of freedom of association. Agency fees aim at ensuring employers are not compelled to adopt multiple wages and benefits scales. Non-union members are not allowed to ride the collective bargaining train for free. The agency fees spread the benefits of trade union security and make it easier for employers to have a collective answer, to a

collective issue of labour management. The arrangement strengthens industrial relations, without compromising constitutional principles such as freedom of association and the right to work." The Claimant was not a beneficiary of the CBA that provides for gratuity entitlements at Clause 27 thereof which he purportedly relies on to calculate what he deems is payable to him in terms of gratuity. Gratuity is not a statutory right granted under any employment law in Kenya. In the absence of a legal or contractual foundation of this prayer, the Respondent submits that this must fail. To further support its standpoint, the Respondent relies on the case of Daniel Charo Karani v Daniela Malanchini (2022)2 where the learned judge stated; "In relation to gratuity, it must be emphasized that it is not payable to an employee as of right unless it is specifically included in the contract of service between the parties. This sum is payable at the employer's discretion. The point is made in Bamburi Cement Limited v William Kilonzi [2016] eKLR. There was no evidence provided that either the parties had agreed on this benefit in their contract or that the Respondent had offered to pay it." The Respondent further submitted that between 19th August 2004 when the Claimant was employed by the Respondent and enactment of the *Employment Act* 2007, the repealed *Employment Act*, Cap 226 did not make any provision for gratuity. Consequently, for this period the Claimant was not and could not have been entitled to any gratuity. It was not in the law neither was it in his contract. The Respondent submits that even if there was such a provision for gratuity under the repealed *Employment Act*, Cap 226, a claim for the same would be statutorily time barred by dint of Section 4 (1) of the *Limitation of Actions Act* Cap 22 of Laws of Kenya. It is the Respondent's contention that for the period beginning enactment of the *Employment Act* 2007 until 30th June 2017 when the Claimant retired, the legal right that could possibly accrue to an employee accruable to an employee is Service Pay and not Gratuity. The Respondent submits that Service Pay accrues only if it is a contractual term, i.e it is expressly stipulated in the service contract or it accrues conditionally under Section 35 (6) of the *Employment Act* which provides thus;

(6) This section shall not apply where an employee is a member of-

a) a registered pension or provident fund scheme under the *Retirement Benefits Act*

b) a gratuity or service pay scheme established under a collective agreement;

c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

d) the National Social Security Fund."

20. That the evidence of the claimant being pensionable cannot be overemphasised. It is clear the Claimant was pensionable between 2nd January 2010 and 31 December 2014 before his employment was converted to fixed term contracts and that he was a contributing member of NSSF all through his employment with the Respondent both being exceptions to payment of service pay under Sections 36 (6) (a) and (d) above. The Respondent similarly led evidence via Appendix 3 to demonstrate that the Claimant was admitted into and contributed to the Respondent's pension scheme and Appendix 4 being a discharge voucher by the Claimant upon receipt of his pension dues. Similarly, at Paragraph *3* on page 29 of the Statement of Claim, NSSF deduction on the Claimant's payslip (being page 20 of his claim), paragraphs *2* and *3* on page 2 of the Statement of Claim and the remuneration clause on page

32 of the Claim are all testament of the fact of the Claimant being a contributor to the national social security fund. The Respondent similarly refer to Appendix 5 being the Claimant's NSSF remittances all through his employment with the Respondent. The Respondent also submits that nowhere did the Claimant deny that he was not pensionable between 2nd January 2010 and 31ª December 2014 before his employment was converted to fixed term contracts. The Claimant did not allege that the Respondent failed to remit the Claimant's NSSF dues.

21. That the Claimant cannot claim and is not entitled to salary arrears factoring 10% increment from June 2016 to July, 2017. This is a special damage which ought not only be pleaded but proven as well. This prayer is not supported by any legal or contractual justification. The Respondent prays that the Honourable Court finds that it is not merited. The Respondent further submits that the above prayer is statute barred by dint of Section 90 of the *Employment Act* because it constitutes a continuing injury which ought to have been sought within 12 months after cessation. The Claimant retired on 30th June 2017 being the date of cessation of the continuing injury but he filed his Claim on 6th July 2018, clearly outside the 12 months stipulated period. This prayer must fail.This position is emphasized in the case of Attorney General & another v Andrew Maina Githinji & another (2016)[3] which stated; "Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof." Such provision did not exist in the repealed *Employment Act*, Cap 229 which did not have elaborate provisions on 'Termination and Dismissal' as its supplanter does. Time limits in the former Act were subject to the *Limitation of Actions Act* which in some cases could be as long as 12 years and amenable to extension. By expressly inserting Section 90, the intention of Parliament, in its view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'.

22. That the prayer for leave pay (01-16/2017 at the rate of 1.75 for each complete month) is not maintainable on account of being ambiguous. The Respondent is unable to respond to the same because of the ambiguity of the leave earning period. Further, as is clearly demonstrated in the Claimant's final payslip on page 20 of his claim, he was paid all his outstanding leave. The Respondent similarly relies on the decision by Justice Rika in the case of Kithuku v Toyota Tsusho East Africa Limited (Cause 1410 of 2018) [2024][1] where he held as follows;- 'If the Claimant was frustrated at repeated non-approval of her leave application, she ought to have engaged the Respondent's grievance policy, not take matters in her own hands, and just leave. Her own leave application form dated 28th February 2018, indicates that she was owed a balance of 16.5 annual leave days. This is not indicative of an Employee who had been denied annual leave persistently. In her Claim, she does not specify the number of annual leave days owed, simply stating the she prays for accrued leave pay."The above notwithstanding, this prayer is statute barred by dint of Section 90 of the *Employment Act* because it constitutes a continuing injury which ought to have been sought within 12 months after cessation. The Claimant retired on 30th June 2017 being the date of cessation of the continuing injury but he filed his Claim on 6th July 2018 after the statutory period. This prayer must fail.

23. The upshot of the foregoing is that on prayers sought in the claim, the Respondent submits that the claimant is not entitled to any gratuity, outstanding salary arrears or leave. Further the Claimant was issued with a 'certificate of employment' which he attached to his pleadings. The Respondent submits that it is a stranger to the prayer seeking 'collecting charges' of Kshs. 90,000/=. Further, the Claimant is not entitled to costs or interest because he has no valid cause of action against the Respondent and

is solely seeking unjust enrichment outside what was agreed between him and the Respondent yet the Respondent was not obligated to pay him any gratuity.

Decision

24. It was not in dispute that the claimant voluntarily retired from service on 30th June 2017. The letter of retirement was dated 1st February 2017 (R-exh 1). It was also not in dispute that the claimant was in employment with the respondent for 13 years from 2004 to 2017. The issue in dispute is the payment of terminal dues with the claimant making claim of underpayment as follows:- 1,028,567.00(gratuity payment , unpaid 10% salary increment from july 2016 to june 2017 and leave pay at rate of 1.75 for January to june 2017)

25. On claim for gratuity;-The claimant 's case was that he was entitled to gratuity for all years worked for total sum of Kshs 1258917.37 but was only paid Kshs. 448763.00 hence sought to be paid the balance. The Respondent position was that the claimant was only entitled to gratuity for 7 years that is 2004-2009 and 2015-2017 (total 7 years) as in 2010 he joined pension scheme (NSSF) and his pension dues were paid as per the discharge voucher dated 29th January 2015 (Rexh 4) for Kshs. 539,759 of which the claimant discharged the staff pension scheme. Thereafter the claimant was on contracts and the respondent produced NSSF statements as evidence to show they remitted his contributions and the employer's to NSSF (R-exh5). The respondent on various authorities to effect that the claimant was not entitled to gratuity outside the 7 years (R-exh 2 was tabulation of gratuity upto august 2009 paid to the claimant)he was on a pension scheme/ NSSF and relied on the provisions section 35 (5 and 6) of the *Employment Act*.

26. The Court on perusal of the claim and the witness statement found the claimant did not prove the basis of the claim for gratuity. The court however noted the claimant produced a CBA dated 9th November 2016. The respondent submitted that the CBA was not applicable to the claimant as he was not unionisable. The court perused the payslip produced by the claimant and there was no union dues. The claimant admitted he was in management. During evidence in chief the claimant told the trial court that the gratuity paid was for 7 years' service. During cross- examination the claimant told the court that he was a member of the respondent's pension scheme from 2010 to 2014 before he was given fixed term contracts. That he was paid benefits under the scheme. He told the court he was not a member of the union. He stated that clause 27 (ii) of the CBA an employee is entitled to gratuity or service pay but the same was not applicable to management level. During re-examination the claimant told the court he was claiming gratuity as he used to prepare final dues for employees and that some of them were paid gratuity for all years they served the company. He gave example of Boaz Omolo and Nathan Mwangi who he said were in management just like him.(The court took note that the tabulation of dues of the 2 officers was placed before the court).

27. RW1 was Hezrone Rachilo who told the court he was the Human Resources and Administration Manager of the Respondent. He told the court he was based in Mombasa and in charge of the entire company. He confirmed he was not involved in tabulation of the claimant's dues and that the claimant retired in 2014 and thereafter was re- engaged in 2015 on contract basis. He confirmed that the claimant was privy to documents on employment benefits. RW2, Johnson Mwaigho, worked in the IT department. He confirmed his signature was only in the discharge letter. He confirmed that his role in the IT department was to key in data that formed the basis of the computation of the claimant's dues.

28. The claimant relied on the tabulation of benefits of Boaz Omollo and Nathan Mwangi to say he was discriminated against. Omollo retired in 2002. He was paid gratuity and exgratia. The letter at page 48 of the claimant's documents did not disclose what category of employee he was(whether unionisable or in management) and his terms of service. The court found then without disclosure of the category

of employee that Omollo was, the court had no basis to make a finding on discrimination. The letter of computation of dues payable to Nathan Mwangi was dated 27th july 2010 (page 48 of the claimant's bundle). He was paid gratuity at 15 days for period worked from February 2002 to July 2010. The claimant was also paid gratuity at same rate up to 2009. The court did not understand the basis of claim of discrimination as there was no evidence of Nathan having been on pension scheme.

29. The court guided by section 35 (6) of the *Employment Act*, finds no basis of claim of service pay in the period 2010 -2014 when the claimant was on pension scheme and he acknowledged payment of pension. He was paid service pay for 7 years taking care of his entire service. Payment of gratuity has to be supported by contract and that was not proved to have existed. The said CBA also came into force 2016 post the period claimed for gratuity and the court found the claimant was not unionisable. In Daniel Charo Karani v Daniela Malanchini (2022)e KLR it was held ; "In relation to gratuity, it must be emphasized that it is not payable to an employee as of right unless it is specifically included in the contract of service between the parties. This sum is payable at the employer's discretion. The point is made in Bamburi Cement Limited v William Kilonzi [2016] eKLR. There was no evidence provided that either the parties had agreed on this benefit in their contract or that the Respondent had offered to pay it." I uphold the decision to apply in the instant case. The claim for gratuity fails.

The claim for salary arrears. (unpaid 10% salary increment from July 2016 to June 2017)

30. The claimant simply stated there was a due 10% salary increment from July 2016 to June 2017 but no document in support was produced. During the hearing he stated that the increment was given to all managers but he was not given. During cross-examination he said he gave the lawyers documents indicating increment of 10% from July 2016-june 2017 but on re-examination, the advocate did not lead the court to the said documents. The claim was not proved. The court further agreed with the respondent the claim was a continuing injury and statute barred. the claimant retired 30th June 2017 and filed claim on 5th July 2018 which was outside the 12 months contrary to the provisions of section 89 of the *Employment Act* to wit :-' 89. Limitations

    Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof." The issue of continuing injury is now settled by the Court of Appeal in The German School Society & another v Ohany & another [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- ''There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90''(Section 90 is now 89 (2024 amendment) *Employment Act*).

31. On the claim for prorated leave pay January 2017 to June 2017, during cross-examination, the claimant agreed that his June 2017 payslip had an item of leave pay. At page 19 of the claimant's of documents the payslip had item of leave pay of Kshs. 68382.00. The claim for leave baseless in the circumstances.

32. In the upshot the entire claim had no merits. Taking into account that the claim was only for terminal benefits the claimant having retired, the court to temper justice with mercy orders each party to bear own costs in the suit. The file is marked as closed.

33. It so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant : -absent

Respondent: Ms. Okello h/b Ouma