



**Wambugu v Technical University of Kenya (Cause 101 of 2015)  
[2024] KEELRC 61 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 61 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 101 OF 2015  
MA ONYANGO, J  
JANUARY 25, 2024**

**BETWEEN**

**JOHN MARK WAMBUGU ..... CLAIMANT**

**AND**

**THE TECHNICAL UNIVERSITY OF KENYA ..... RESPONDENT**

**JUDGMENT**

1. The Respondent is a public university in Kenya having its principal place of business in Nairobi within the Republic of Kenya. The Claimant was until 31<sup>st</sup> July 2013 an employee of the Respondent having been employed as an Assistant Accountant by the Respondent's predecessor, the Kenya Polytechnic University College by letter dated 22<sup>nd</sup> December 2009. The appointment was effective from 1<sup>st</sup> July 2009. The letter of appointment stated that the Claimant's terms of service were governed by the Terms of Service for Teaching, Senior Technical, Senior Library and Senior Administrative Staff dated 1<sup>st</sup> July 2009, 2 copies whereof were issued to the Claimant together with the letter of appointment with instructions to sign and return one copy to the Respondent and retain the second copy.
2. By letter dated 27<sup>th</sup> June 2013 the Claimant tendered his resignation notice which was accepted by the Respondent by letter dated 12th July 2013. By letter dated 6<sup>th</sup> December, 2013 the Claimant sought payment of his terminal dues which he tabulated as reproduced below:

John Ark Nyaga Wambugu

Box 79749-00200

Nairobi

Email:jmakrwambugu@gmail.com

Mobile phone number:0729588677

6<sup>th</sup> December, 2013



The Director  
The Human Resource Management  
Technical University Of Kenya  
Box52428-0020  
Nairobi

Dear sir,

Ref: Request For Unpaid Dues

I resigned and successfully cleared as an employee (staff Number NT0188) of the Technical University of Kenya on 31<sup>st</sup> July, 2013 after more than sixteen (16) years of service to the institution.

The following dues/amounts are still outstanding:

1. Ksh. 10,000 refund for ICPAK Membership fees that was approved for payment in July, 2013 (copy of PCA attached herein)
2. Un-utilised leave days that were outstanding, and for which I had approval to carry forward and utilize before June, 2014 (copy of approval letter attached herein)
3. Gratuity payment for the period I worked before the employer/institution changed my terms of service to permanent and pensionable;
4. Employer's share/remittance of my pension contribution for the period I worked under the Permanent and Pensionable Terms of Service, which I request to be transferred to my current employer's scheme. The Commission on Revenue Allocation Pension Scheme.

I look forward to a favourable and timely response.

Thank you.

Sincerely

Signed

Wangugu J.M. Nyaga

3. It would appear that the Respondent failed to pay the Claimant's terminal dues as requested. The Claimant thereafter sought the services of an advocate who sent a demand letter to the Respondent. The parties thereafter exchanged several letters and held a number of meetings with a view to resolve the issue amicably but failed to agree prompting the Claimant to file the instant suit in which he sought the following payments:
  - i. Share of pension: Ksh.322,181.10/=
  - ii. Un-utilized leave days Ksh.263,296.78
  - iii. Gratuity earned before you changed your terms to permanent and pensionable Ksh.291,876/=
  - iv. Missing NSF contributions for 7 months Ksh.2,560/=
  - v. Refund of ICPAK subscription fees Ksh.10,000/=



The Claimant further sought costs and interest.

4. In the Reply to the Memorandum of Claim the Respondent admitted owing the Claimant items ii and iv as claimed but denied the rest of the Claimant's prayers.
5. The Claimant subsequently filed an application for judgment in respect of the admitted sum and was awarded the same at Kshs. 273,296.78. He now claims the balance of Kshs. 616,617.10 in respect of pension, gratuity and missing NSSF contributions.
6. The parties were directed to dispose of the suit by way of witness affidavits and written submissions in view of the fact that there was no disagreement on the issue of liability, the dispute being on tabulation of the balance of terminal dues only. Both parties complied, albeit well out of the timelines set by the court.
7. The issue for determination is whether the Claimant is entitled to pension, gratuity and NSSF contributions and who should pay costs.

### **Whether the Claimant is entitled to share of Pension in the sum of Kshs. 322,181.10**

8. The Claimant submitted that he is entitled to pension by virtue of sections 9 and 10 of the [Employment Act](#) which provides that a service contract shall include a pension and pension schemes in which an employee is involved. That section 5 of the [Pensions Act](#) further provides that every officer shall have absolute right to pension and gratuity. The Claimant further submits that rule 18(4) of the [Occupational Retirement Schemes Regulations, 2000](#) makes it mandatory for schemes to make provision for transferability of benefits from one scheme to another within 60 days from the date of request by the member. The Claimant submits that he made the request but the Respondent refused to transfer the benefits.
9. For emphasis the Claimant relied on the decision in [Richard Michosi Mwasaru v Beverly Schools of Kenya Limited](#) [2020] eKLR where the court held that:

“...under the RBA Regulations an employee is entitled to 100% of employer's contributions to a pension or provident fund scheme upon completion of one year. The claimant worked for one and a half years and is thus qualified for 100% of employer's contributions...”
10. The Claimant further relied on the decision in [Sarah Mang'oli v Kenya Medical Research Institute & Another](#) [2020] eKLR where the court held:

“That being the position, this claim is distinguishable from the authorities cited where the dispute emanated from failures on the part of the pension scheme administrator....”
11. For the Respondent it is submitted that at the time of the Claimant's resignation the Respondent's retirement benefits scheme was yet to receive a registration certificate from the Retirement Benefits Authority. That it was unable to disburse any pension as the registration of the Scheme does not have retrospective effect. The Respondent relied on section 23(1) on the [Retirement Benefits Act](#) which provides:

“a person proposing to establish a retirement benefits scheme or to act as a manager, corporate trustee, a custodian or an administrator shall apply to the Authority for, and obtain, a certificate of registration before establishing the scheme or commencing the performance of any of the functions of a manager, corporate trustee, a custodian or an administrator.



12. The Claimant's letter of appointment provided that:
- “Under the terms of service you will be required to be a member of the Kenya Polytechnic University College Pension Scheme when it is established.”
13. The Claimant did not submit any evidence to prove that he became a member of the pension scheme or that the pension scheme was ever established during the period he worked for the Respondent. He further did not demonstrate how he arrived at the figure claimed of Kshs. 322,181.10.
14. I find that the Claimant did not prove that he was entitled to the sum of Kshs. 322,181.10 or any other sum on account of pension.
15. This decision does not however bar the Claimant from seeking any pension he may have contributed to the Pension Scheme from the pension administrators, Alexander Forbes who are not party to this suit. I hold so because it is not clear from the evidence on record whether or not the Claimant ever made contributions to the pension scheme upon being absorbed into the employment of the Respondent after its status changed from Kenya Polytechnic University College to its current status as a fully-fledged university. All that the Respondent stated was that the TUK Retirement Benefits Scheme had not been registered by the Retirement Benefits Authority at the time the Claimant resigned from its employment. It is therefore possible that he was a member of the unregistered scheme and made contributions thereto but failed to submit evidence of the same before this court.

**Whether the Claimant is entitled to Gratuity in the sum of Kshs. 291,876.00**

16. The Claimant submitted that since his contract was not terminated by the Respondent on grounds of summary dismissal for lawful cause and he had worked for more than 10 years he was entitled to gratuity. He relied on section 35(5) of the *Employment Act* which provides:

An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.”

17. The Claimant submitted that he was initially employed by the Respondent on gratuity terms of service between 1<sup>st</sup> July 1997 and 21<sup>st</sup> December 2009 when his contract of employment was converted to permanent and pensionable terms. The Claimant relied on the decision in *Martin Ileri Ndwiga v Olerai Management Company* [2017] eKLR where the court held:

“Service pay is dues to an employee who has not enjoyed the benefit of statutory deductions and thus covered under section 35(5) and (6) of the *Employment Act*, 2007.”

The Claimant further relied on the decision of the Court of Appeal in *Bamburi Cement Ltd. v William Kilonzi* [2016] eKLR

“...gratuity 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 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...”

18. For the Respondent it was submitted that the Claimant was employed by the Board of Governors, Kenya Polytechnic whose employment terms dictated that employees were only entitled to gratuity if they served for a minimum of 10 consecutive years or on attainment of the age of 50 or compulsory



retirement age of 55 years. It was the Respondent's submission that the Claimant did not qualify for gratuity as he did not serve for 10 years and neither had he attained the retirement age. For emphasis the Respondent relied on the decision in *Alfred O. Amombo v Lake Victoria North Water Services Board* [2020] eKLR where the court quoted with approval the decision in *Pravin Bowry v Ethics and Anti-Corruption Commission* in which the court held that gratuity is payable to an employee for only the served term of the contract unless provided otherwise in the contract.

19. The Respondent does not contest that the Claimant started working with its predecessor on 1<sup>st</sup> July 1997 or that during that period his terms of service provided for gratuity. The Claimant's services with the Kenya Polytechnic University College did not terminate. He transited to the Respondent when its status changed. The Respondent therefore took over all the liabilities of its predecessor the Kenya Polytechnic University College in so far as the years of service and terminal benefits of its staff were concerned.

20. At the time the Claimant resigned from employment he had cumulatively worked for the Respondent and its predecessor the Kenya Polytechnic University College from July 1997 to July 2013, a period of 16 years without a break in service. He was therefore qualified for gratuity for the period before the Respondent converted his service to pensionable terms. This fact is acknowledged by the Respondent at paragraph 7(c) of the Response to the Memorandum of Claim where the Respondent pleads:

#### Gratuity

The Respondent states that gratuity was paid through the Board of Governors before the pension scheme came into place. The Claimant is not eligible for gratuity pay as he was employed by the Board of Governors, Kenya Polytechnic whose terms of employment stated that the conditions for gratuity were a minimum of

- i. 10 years of continuous service
- ii. Attainment of 50 years of age or compulsory retirement at age 55
- iii. The Claimant does not fall within this bracket and therefore the claim of Ksh.291,876/= is not merited.

21. Indeed paragraph 23 of the Charter of the Respondent provides for "The Staff of the University", the Respondent herein, as follows:

1. The persons who were members of staff of the Kenya Polytechnic University College, prior to the commencement of this Charter, including those on secondment and contract, shall be deemed to be employees of the University subject to the statutes.
2. All members of staff of the University shall be appointed either
  - a. in the manner and upon the terms and conditions of service prescribed by the Statutes; or
  - b. in the case of a person seconded to the service of the University from the service of mother institution, the government or any other public service, on terms and conditions agreed upon between the Council and the seconding body.
3. The Council may, subject to such restrictions as it may impose, delegate, either generally or specially, to any person, committee, or body, the power to appoint any member of staff of the University.



4. All members of staff of the University shall be subject to the general authority of the Council and of the Vice-Chancellor.
22. For the foregoing reasons I find that the Claimant is entitled to gratuity as provided in his terms of service for the period he worked for the Kenya Polytechnic University College in the sum of Kshs. 291,876 as claimed.

### **NSSF Contributions**

23. The Claimant seeks payment of NSSF contributions for 7 months which he alleges were not remitted by the Respondent though his portion of the same was deducted from his salary. The Respondent attached to its Reply to the Memorandum of Claim a Schedule Form for contributions paid but not reflected into member's account. I am satisfied that this is sufficient proof that the Respondent remitted the said sums and that the same was not reflected in error which error the Claimant can follow up with NSSF using the documents attached to the Response to the Claim. NSSF has the statutory mandate and mechanisms and structures to rectify the errors. The Claimant has not demonstrated that he followed up the same and failed to have his contributions updated to warrant any interference by this court. The prayers are accordingly declined.

### **Conclusion and Orders**

24. Having reached the findings above, I find that the Claimant has not proved that he is entitled to the prayers for gratuity and NSSF contributions. He is entitled to gratuity only. I therefore award him gratuity in the sum of Kshs. 291,876.
25. The Respondent shall pay the Claimant's costs and interest shall accrue at court rates from the date of judgment until payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF JANUARY 2024**

**MAUREEN ONYANGO**

**JUDGE**

