



**Banking Insurance and Finance Institutions Union (K) v Elimu Sacco Society Limited  
(Cause E6536 of 2020) [2024] KEELRC 778 (KLR) (28 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 778 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E6536 OF 2020**

**J RIKA, J  
MARCH 28, 2024**

**BETWEEN**  
**BANKING INSURANCE AND FINANCE INSTITUTIONS UNION  
(K) ..... CLAIMANT**  
**AND**  
**ELIMU SACCO SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This Claim is brought by the Claimant Union on behalf its two members [Grievants], Francis Kioko and John Kithure.
2. The Statement of Claim was filed on 9<sup>th</sup> December 2020.
3. The Claim is based on clause 40 of the Collective Bargaining Agreement, executed between the Claimant and the Respondent.
4. Clause 10 regulates gratuity benefit, payable at the end of service. It states that every Employee of the Respondent, who leaves employment other than on the ground of gross misconduct, shall be entitled to gratuity, at the rate of 10 days' salary for each complete year of service.
5. The Grievants retired on 30<sup>th</sup> June 2020. The Claimant avers that their gratuity was not paid in accordance with clause 40.
6. Kioko joined the Respondent in 1983. He worked for 37 years. Kithure joined in 1987, and worked for 33 years.
7. Kioko earned a monthly salary of Kshs 55,843, while Kithure earned Kshs 74,241.
8. There were some Employees who had allegedly been promoted in 2011-2012, from unionisable ranks to management ranks, by the Respondent.



9. On promotion they were denied benefits payable under the CBA.
10. Kioko was among these Employees.
11. In 2012, the Claimant Union filed before the Industrial Court Court, Cause Number 543 of 2012 to challenge the promotions.
12. After service with the Summons, the Respondent immediately withdrew enhanced house and telephone allowances in the sum of Kshs 58,760 already paid to Kioko. The Respondent slashed housing benefit from Kshs 13,000 to Kshs 6,655 monthly, creating an underpayment of Kshs 6,345 monthly. The Respondent also withdrew Kshs 1,000 paid to Kioko as monthly telephone allowance.
13. The Claimant Union pleads that withdrawal of benefits already paid to Kioko upon promotion, after the Claimant filed the Court action challenging promotions, was illegal and unfair.
14. The Claimant asks the Court to rework gratuity based on the last salaries earned by the Grievants as follows: -
  - a. Francis Kioko – Kshs 55,760 divide by 30 days, x 10 x 37 years = Kshs 688,730.
  - b. Refund of Kshs 58,760 in house and telephone allowances deducted from Francis Kioko, from March to October 2012.
  - c. Payment of Kshs 959,328 to Francis Kioko, being underpayment of salary and allowances from November 2012 to 30<sup>th</sup> June 2020.
  - d. John Kithure- Kshs 74,241 divide by 30 days, x 10 x 33 years = Kshs 816,651.
  - e. Costs.
15. The Respondent filed its Statement of Response, on 3<sup>rd</sup> March 2021. It is conceded that Parties have a Recognition Agreement executed in 1994, and at all material times, had concluded CBA covering Unionisable Employees. It is true that the Grievants retired, on attainment of mandatory retirement age of 60 years.
16. They were entitled to gratuity under clause 40 of the CBA. Gratuity however, was computable from 1994 to 2020, not from 1983 and 1987 respectively, as claimed by the Claimant.
17. The Grievants were paid pensions, from the years of their employment, 1983 and 1987 to 1994. The CBA came into force in 1994, and could not apply retrospectively, back to 1983 and 1987.
18. It is conceded that the Grievants were promoted to management ranks, with enhanced benefits.
19. The Claimant Union however filed Industrial Court Cause Number 543 of 2012, challenging the promotions. In its Judgment, the Court concurred with the Claimant, declaring that promotions were unlawful, unfair and void.
20. The Respondent could not sustain benefits paid under unlawful contracts, and the Grievants could not benefit from promotions that had been declared unlawful. The Respondent therefore recovered benefits that had been paid upon promotion of the Grievants. They reverted to salaries and allowances payable before promotion.
21. The Respondent states that it paid the correct benefits to the Grievants, upon their retirement. The Claim is without foundation. The Respondent prays the Court to dismiss the Claim with costs.



22. Grievant Francis Kioko gave evidence on 24<sup>th</sup> February 2022, 1<sup>st</sup> July 2022, and 1<sup>st</sup> November 2023. The Respondent's Chair Angela Nyanjong' gave evidence on 1<sup>st</sup> November 2023 when the hearing closed. The Claim was last mentioned on 15<sup>th</sup> December 2023, when the Parties confirmed filing and exchange of their Submissions.
23. Kioko told the Court that he was employed as a Clerical Officer. He was paid gratuity based on 12 years of service, while he had worked for 37 years. He was paid gratuity based on a monthly salary of Kshs 40,714, instead of the last salary payable, of Kshs 55,843.
24. Adopting his Witness Statement and Documents on record, Kioko told the Court that house and telephone allowances were enhanced upon promotion. He confirmed that the Claimant filed Cause at the Industrial Court, and that the Industrial Court found promotions were unlawful and unfair. The Respondent recalled benefits paid upon promotion, and discontinued payment of enhanced benefits given on promotion. The Respondent was not supposed to deduct anything.
25. Cross-examined, Kioko told the Court that he joined the Claimant in 1994. He was not in any other trade union before. He was employed in 1983. The Grievants became beneficiaries under the CBA, from 1994. He was paid gratuity from 1994-2020. He was paid Kshs 147,000 in November 2020, having retired on 30<sup>th</sup> June 2020. The Court, moved by the Claimant, nullified promotion, which had been conferred on the Grievant on 24<sup>th</sup> February 2011. The enhanced benefits were not nullified.
26. Redirected, Kioko told the Court that he worked for 37 years, but was paid gratuity based on a period of 12 years. He was denied 25 years of service.
27. General Manager of the Respondent, Angela Nyanjong' confirmed the employment details and history of the Grievants. She told the Court that the Parties had executed a CBA dating from 1994. The Grievants were not in the Union, prior to 1994.
28. Before 1994, the Grievants were remunerated in accordance with their individual contracts. The Grievants were members of a Provident Fund. The Respondent contributed 10% of the Grievants' basic salary towards the Fund. It could not pay gratuity and pay pension. The Court declared promotions void and salaries reverted to those payable prior to promotions.
29. Cross-examined, Nyanjong told the Court that the CBA granted gratuity to Employees, unless they left on account of gross misconduct. Kioko was paid gratuity based on a period of 12 years. He worked for 33 years. Paragraph 7 of the Statement of Response, states that the Grievants were entitled to gratuity from 1994 to 2020. Nyanjong stated that the correct position was that they were entitled to provident fund, from 1994 to 2020. The Court action concerned promotions. It was held that 9 Employees were promoted cosmetically. Employees were to retain the salaries they earned, since promotions. Gratuity was based on the last basic salary. Clause 40 adopts the term, last salary. Kioko had a basic salary of about Kshs 40,000, and gross salary of about Kshs 55,000. Kithure earned a basic salary of about Kshs 46,000 and gross salary of Kshs 74,000.
30. The issues are whether the gratuity benefits paid to the Grievants were paid in accordance with the prevailing CBA; and whether deductions made on the Grievants' salaries upon Judgment in the Cause filed at the Industrial Court, were made lawfully.

**The Court Finds: -**

31. There is no dispute that the Claimant and the Respondent have a Recognition Agreement, and at all material times, had a valid Collective Bargaining Agreement. It is common ground that the Grievants



- were Clerical Clerks, and worked from 1983 and 1987 respectively, to 30<sup>th</sup> June 2020 when they retired, on attainment of the mandatory retirement age of 60 years.
32. Judgment in Industrial Court Cause 543 of 2012, declared promotions carried out by the Respondent in favour the Grievants among other Unionisable Employees, unlawful. It was held that the jobs into which the Employees were promoted, were not management jobs. The Grievants had been coerced to leave their Union through cosmetic promotions.
  33. The Court held at order [4] that: -  
“The Employees shall retain the salaries and allowances that they have been receiving, since the purported promotions.”
  34. There was no basis for the Respondent therefore to recall benefits it had paid, or to cease paying those benefits, on the basis that the Court had declared promotions unlawful, and the contracts upon promotion, deemed unlawful and unenforceable.
  35. There was an express order [4], that the Grievants would retain the salaries and allowances conferred, through the cosmetic promotions.
  36. The order [4] was not challenged and reversed on appeal. It was perhaps informed by the finding that the Respondent merely moved the Grievants to jobs which were unionisable, rather than management jobs, in the purported promotions. The promotions were aimed at compelling the Employees to leave their Union, rather than genuinely progress their careers. The contracts were not found to be unlawful, but rather, the act of alleged movement of the Grievants to management cadre, was held to be unlawful. In the mind of the Court, the Respondent could not be allowed to benefit from its own mischief.
  37. If the Respondent was not satisfied with order 4 of the Judgment, it had recourse in an appeal. It was the wrong option to ignore order 4, and reverse the salaries and allowances given to the Grievants, upon the cosmetic promotions. It was the wrong option for the Respondent to hold that the Court had declared the contracts of employment unlawful, and therefore unenforceable. The Respondent had the option to appeal, or go back to the Trial Court and seek clarification of order 4, rather than take unilateral action.
  38. The Court agrees with the Claimant Union that Grievant Francis Kioko is entitled to refund of Kshs 58,760 in house and telephone allowances, recovered by the Respondent, after the Judgment of the Industrial Court.
  39. The Court agrees further that Grievant Francis Kioko is entitled to underpayment of house and telephone allowances from November 2012 to 30<sup>th</sup> June 2020 at Kshs 959,328.
  40. The Grievants were paid gratuity based on the period preceding the CBA, 1983-1994 and 1987-1994 respectively. The Respondent argues that the Grievants were not members of the Union prior to 1994, and the years of service before 1994, are not compensable.
  41. The respectful view of the Court is that clause 40 refers to complete years of service, not years of membership to the Claimant Union.
  42. The clause states: -
    - (i) Any Unionisable Employee who leaves employment for any reason other than gross misconduct, shall be entitled to gratuity compensation at the rate of 10 days’ salary for each complete year of service.



- (ii) The salary to be used in computation of gratuity compensation is at the salary at the end of the employment contract.”
43. The years of service were to be computed from the date an Employee entered the Respondent’s service, to the period they left service. Nyanjong was not clear in her evidence, on excluded years of service. She spoke about a Pension Scheme and a Provident Fund. She stated that Pension Scheme came into force, in 1994. She said nothing about the statutory NSSF Scheme. On cross-examination, she told the Court that Employees were entitled to gratuity under clause 40 of the CBA, unless they left employment on account of gross misconduct. There was no other ground stated by her, to deny Employees gratuity pay, based on their complete years of service.
44. The extent of the Respondent’s confusion in explaining exclusion of certain years of service, is captured through the evidence of Nyanjong, regarding paragraph 7 of the Statement of Response. The paragraph states that the Grievants were entitled to gratuity, from 1994 to 2020. Nyanjong then corrected her evidence, saying that she meant that the Grievants were entitled to provident fund.
45. The Respondent did not establish any grounds, under clause 40 of the CBA, that would justify the reduction in the years of service. There was no evidence of Pension Scheme, Provident Fund, contract or policy in place, ousting or limiting clause 40 of the CBA. The clause does not state that the years of service, were pegged to the years of the Grievants’ membership to the Claimant Union. Creditable years of service were not affected by the point at which Parties decided to execute the CBA. These were pre-existing or accrued benefits, at the time the CBA was executed. If gratuity was intended to be applicable from the year 1994, nothing would have been easier than for the Parties to state so, at the time they negotiated clause 40 of the CBA, which is on complete years of service, rather than complete years of Union membership.
46. It was a departure from the text and intent of clause 40 of the CBA, for the Respondent to compute gratuity based on the basic salaries last earned by the Grievants. Clause 40 refers to salary, not basic salary. The salary payable to an Employee, unless specified to be basic, is the total remuneration payable monthly. In the wording of Section 2 of the *Employment Act*, remuneration is the total value of all payments. Salary under clause 40 could only refer to the total monthly earnings of the Grievants. There was no reason for the Respondent to adopt the position stated by Nyanjong, that salary meant basic salary. The term ‘basic,’ is not in clause 40 of the CBA.
47. The Claimant has established that the Grievants ought to have been paid gratuity based on 37 and 33 years of service respectively.
48. Kioko was paid Kshs 87,312 and Kithure Kshs 102,105 in gratuity, as shown in the Witness Statement of Nyanjong, dated 26<sup>th</sup> January 2021.
49. Kioko last earned a monthly salary of Kshs 55,843, and Kithure Kshs 74,241.
50. Kioko worked for 37 years. Based on 26 working days in a month, he was entitled to gratuity of Kshs 55,483 divide by 26 days, x 10 days, x 37 years= Kshs 789,565 less Kshs 87,312 paid = Kshs 702, 253.
51. Kithure worked for 33 years. He was entitled to gratuity of Kshs 74,241 divide by 26 working days, x 10 days, x 33 years = Kshs 942, 289 less paid Kshs 102,105 = Kshs Kshs 840,184.

**It is ordered:-**

- a. The Respondent shall pay Grievant Francis Kioko-
- I. Refund of house and telephone allowances at Kshs 58,760.



- II. Underpayments of these allowances from 2012 to 2020 at Kshs 959, 328.
- III. Balance of gratuity at Kshs 702,253.
- b. The Respondent shall pay to Grievant John Kithure, balance of gratuity at Kshs 840,184.
- c. Costs to the Claimant.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 28<sup>TH</sup> DAY OF MARCH 2024.**

**JAMES RIKA**

**JUDGE**

