



**Kamau v Rai Plywoods(Kenya)Ltd (Cause E008 of 2023)
[2024] KEELRC 550 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 550 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E008 OF 2023
MA ONYANGO, J
MARCH 7, 2024**

BETWEEN

PAUL MUHUHA KAMAU CLAIMANT

AND

RAI PLYWOODS(KENYA)LTD RESPONDENT

JUDGMENT

1. Vide his Statement of Claim dated 6th March 2023 and filed in Court on 7th March 2023, the Claimant avers that he applied for an early retirement from the Respondent's employment but was not paid his terminal dues. He seeks the following reliefs against the Respondent:
 - i. A declaration that the withholding and/or refusal to pay the Claimant's gratuity for the entire compete years of service was unfair and unlawful
 - ii. A declaration that the failure to issue the Claimant with a letter of employment for the entire duration of the Claimant 's employment was unlawful.
 - iii. An order for payment of Kshs 2,146,667 being gratuity
 - iv. General damages for violation of the Claimant's rights as an employee
 - v. Costs of the Claim and interest at court rates from the date of filing suit
 - vi. Any other relief as this Honourable court may deem fit to grant.
2. The Claimant states that he was employed by the Respondent on 1st November 1994 rising through the ranks to the position of Stores Controller at he left employment in.
3. It is the Claimant's case that that vide letters dated 4th October 2022 and 3rd November 2022, he applied for early retirement from the Respondent's employment. The letters were accepted by the Respondent



vide letter dated 8th November 2022. The Respondent however, purported to treat the Claimant's letters as resignation effective 11th November 2022.

4. The Claimant avers that the Respondent failed to pay him his terminal dues and in particular, his gratuity, contrary to law and company practice and usage.
5. He avers that upon his retirement, he was entitled to gratuity at the rate of 20 working days per month for each full year of service up to 11th November 2022 which works out as $20/30(\text{rate}) \times 115,000(\text{basic salary}) \times 28(\text{years})$ totalling to Kshs 2, 146,667.
6. The Claimant has based his claim for gratuity on the allegation that other employees in his cadre who either retired voluntarily or were sent on retirement or resigned were paid gratuity but the Respondent refused to pay him on the ground that the Claimant was employed in a non-unionisable management position.
7. It is the Claimant's case that the Respondent's refusal to pay him gratuity on the stated ground is discriminatory hence illegal as the Respondent afforded him treatment different from that afforded to similarly placed employees contrary to section 5(2) of the Employment Act and Article 27 of the Constitution. The Claimant further contends that the Respondent failed to provide him with a written contract of employment.
8. The Claimant contends that the failure by the Respondent to pay him gratuity coupled with the failure to provide him with a written contract of employment is contrary to section 9 of the Employment Act and a violation of the Claimant's right to fair labour practices and the right to fair remuneration under Article 41(1) and (2) of the Constitution.
9. On 24th March 2023, the Respondent filed a Statement of Response denying the averments made by the Claimant in the Statement of Claim in totality.
10. According to the Respondent, the Claimant opted to terminate his employment on his own volition. The Respondent further contended that the Claimant was not a member of the employees' union and cannot thus place reliance on the Collective Bargaining Agreement which he was not a party to. The Respondent contended that the Claimant cannot claim dues particularly service pay, upon early retirement which benefit is only available to members of the employees' union.
11. The suit was heard on 12th July 2023. Four witnesses testified in support of the Claimant's case and one witness testified in furtherance of the Respondent's case.
12. The Claimant testified as CW1. He adopted his witness statement recorded on 6th March 2023 and relied on his documents filed in court as his evidence in chief.
13. On cross examination, the Claimant contended that at the time he applied for early retirement, he was a Stores Controller which position is under the Management cadre. He stated that from 1994 to 2018, members of Managerial staff were entitled to and were paid gratuity. However, he admitted that he never received communication from his employer stating that he was entitled to gratuity. The Claimant reiterated that other employees under management who held various positions as managers and supervisors were paid gratuity when they separated with the Respondent upon retirement or resignation.
14. In re-examination, CW1 maintained that all employees of the Respondent who left when under management positions were paid gratuity.



15. CW2 was Paul Wavakandwa Makomere. He adopted his witness statement recorded on 6th March 2023 as his evidence in chief. CW2 referred to Exhibit 7A in the Claimant's list of documents which was a letter evidencing he was paid gratuity by the Respondent.
16. On cross examination, CW2 stated that he was employed by the Respondent in 2004 and found the Claimant already working for the Respondent. He stated that he was not a member of the union. CW2 told the court that he was in a management position and his terms and conditions of employment were similar to that of the Claimant.
17. In re-examination, he reiterated that employees in the management positions were not members of the union.
18. Makokha Wafula Nyongesa testified as CW3. He adopted his witness statement recorded on 6th March 2023 as his evidence in chief. CW3 referred to Exhibit 11 in the Claimant's bundle of documents which is his retirement letter written by the Personnel Manager of the Respondent. CW3 stated that in the said letter, the Respondent decided to retire him early at age 47 years and he was paid gratuity.
19. On being cross examined, CW3 maintained that he was in the same employment cadre as the Claimant though as a senior supervisor. He stated that he was employed at around the same time as the Claimant as a manager in the Plywood Department while the Claimant was employed as a supervisor in the Stores Department. It was his evidence that he worked for the Respondent for 23 complete years while the Claimant worked for 28 years.
20. During re-examination, CW3 stated that he did not have any document stating his terms of employment because he was not issued with a contract of employment by the Respondent.
21. William Otieno Mbega testified as CW4 and adopted his witness statement recorded on 6th March 2023 as his evidence in chief. CW3 referred to Exhibit 10 in the Claimant's bundle of documents which was a letter addressed to him by the Respondent informing him that he would go on early retirement but would be paid gratuity. It was his evidence that he was paid gratuity at 15 days for every completed year of service as per item 3 in the letter. He referred to document 11 dated 5th September 2018 which was his full and final payment including gratuity.
22. During cross examination, CW4 maintained that he joined the union when he was employed but after being promoted to a senior position he stopped being a member of the union. He told the court that as at the time he retired, he was in a senior position with the Claimant.
23. The Respondent called Henry Aggrey Okola, who testified as RW1. RW1 introduced himself as the current Human Resource Manager of the Respondent. He adopted his witness statement dated 23rd March 2023 as part of his evidence in chief and also relied on the Respondent's documents as Exhibit 1-9.
24. According to RW1, the Claimant is not entitled to gratuity firstly because the payment of gratuity was derived from the Collective Bargaining Agreement which the Claimant was not party to and secondly, that if it is to be paid to a non-union member, it ought to be in the contract which the Claimant did not have.
25. In cross examination, RW1 conceded that although he is the custodian of the Human Resource Records, he did not produce the terms and conditions under which the Claimant or any of his witnesses were employed.
26. RW1 conceded that CW2, CW3 and CW4 were paid gratuity upon their retirement. He also confirmed that none of the Claimant's witnesses was a member of the union. RW1 admitted that he



did not know the criteria used in paying some employees of the Respondent in management positions gratuity and denying others the same.

27. The Respondent's witness stated that he was aware that the responsibility of preparing contracts of employment for employees rested on an employer.
28. With that evidence, the Respondent closed its case and the court directed the parties to file submissions. The Claimant's submissions were filed on 25th July 2023 while the Respondent's submissions were filed on 11th August 2023.

Determination

29. Upon considering the pleadings herein, the evidence of the respective parties, the submissions and the authorities cited, I find that the only issue for determination is whether the Claimant is entitled to the payment of gratuity.
30. In the case of *Bamburi Cement Limited v William Kilonzi* [2016] eKLR Makau J. stated as follows:

“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 the employer”
31. in the instant case the Claimant has contended that the non- payment of gratuity to him was a clear manifestation of discrimination by the Respondent as other employees who held similar positions as himself were paid gratuity upon separation with the Respondent.
32. The Claimant in support of his case called three witnesses who testified that they were previously employed by the Respondent and that they held senior positions in management like the Claimant. All of them confirmed that they were paid gratuity when they retired.
33. Section 5 of the *Employment Act* is on discrimination in employment and it provides as follows:
 - “(1) (1) It shall be the duty of the Minister, labour officers and the Industrial Court—
 - (a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and
 - (b) to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.
 - (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
 - (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
 - (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; (b) in respect of recruitment, training, promotion, terms and conditions of



employment, termination of employment or other matters arising out of the employment.”

34. The Respondent’s witness, RW1 while giving his testimony was at pains to explain the criteria used by the Respondent in the payment of gratuity to its employees. RW1 testified that the reasons the Claimant is not entitled to gratuity is because payment of gratuity is derived from the Collective Bargaining Agreement in force, which terms did not apply to the Claimant by virtue of him holding a position in Management. He further testified that if gratuity is to be paid to a non-union member, it ought to be in the employment contract which document the Claimant did not have as he was never issued with any by the Respondent.
35. The Claimant’s witnesses in their testimonies told the Court that they were never issued with contracts of employment during the entire period they were employed by the Respondent. Under cross examination, RW1 conceded that he did not have the Claimant’s employment records and particularly, the employment contract setting out the terms and conditions of service.
36. Sections 10(6) and 10(7) of the *Employment Act* requires the employer to keep proper and accurate records of employment. The same provides that:
- “10(6). The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
- 10(7). If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
37. Flowing from the above, the burden of proving that the Claimant was not entitled to payment of gratuity shifted to the Respondent who failed to provide the Claimant’s employment contract or terms and conditions of employment which would have clarified whether or not the Claimant was entitled to payment of gratuity.
38. The evidence of CW2, CW3 and CW4 that they were in the same level of management as the Claimant and were never issued with employment contracts and that they were paid gratuity was not controverted by the Respondent.
39. Consequently, it is the finding of this Court that the Claimant was discriminated upon by not being paid gratuity as was the practice of the Respondent contrary to section 5(3)(b) of the *Employment Act*. It is therefore my finding that the Claimant has proved that he is entitled to gratuity as prayed in his Statement of Claim
40. In the end, I enter judgment in favour of the Claimant in the following terms:
- i. A declaration be and is hereby made that the withholding and/or refusal to pay the Claimant’s gratuity for the years of service was unfair and unlawful.
 - ii. A declaration be and is hereby made that the failure to issue the Claimant with a letter of employment for the entire duration of the Claimant ‘s employment was unlawful.
 - iii. The Respondent is ordered to pay the Claimant of Kshs 2,146,667 being gratuity.
41. The Claimant is awarded costs of this Claim. Interest shall accrue on the decretal sum at court rates from the date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF MARCH 2024



MAUREEN ONYANGO
JUDGE

