



REPUBLIC OF KENYA



**Hayer Bishan Singh & Sons Ltd v Odemba (Appeal E047 of 2023)  
[2024] KEELRC 498 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 498 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E047 OF 2023  
S RADIDO, J  
MARCH 6, 2024**

**BETWEEN**

**HAYER BISHAN SINGH & SONS LTD ..... APPELLANT**

**AND**

**DOMNIC OBIERO ODEMBA ..... RESPONDENT**

*(Appeal from the judgment of the Senior Principal Magistrate Court at Winam  
of the Hon R.M. Oanda delivered on 23rd July 2023 in ELRC No E008 of 2022)*

**JUDGMENT**

1. Domnic Obiero Odemba (the Respondent) sued Hayer Bishan Singh & Sons Ltd (the Appellant) before the Senior Principal Magistrates Court at Winam alleging unfair termination of employment and breach of contract.
2. The Cause was defended and after a hearing, the Senior Principal Magistrate entered judgment for the Respondent.
3. The Appellant was aggrieved and through a Memorandum of Appeal lodged with the Court on 15 August 2023, it contends that:
  - i. The Learned Trial Magistrate erred in law and in fact in making an award to the Appellant under a termed ‘gratuity as worked alone’ and in holding that the Appellant was entitled to payment of Kshs 371,800 notwithstanding that the Respondent was a paid up member of the National Social Security Fund.
  - ii. The award of Kshs 371,800/- gratuity does not fall under the provisions of section 49 of the [Employment Act](#) (Cap 226).



- iii. The Learned Trial Magistrate erred in holding that the Respondent was entitled to gratuity pay when the Respondent pleaded and proved that it had made all payments for the Respondent to the National Social Security Fund.
  - iv. The Learned Trial Magistrate disregarded the principles of precedent and stare decisis on comparable and like cases thereby employing wrong principles in determining the gratuity as to occasion a travesty of justice.
  - v. The Learned Trial magistrate erred in law and fact in failing to take into account the totality of the material placed before him by way of exhibits and submissions, therefore, arriving at the wrong assessment of the gratuity payable to the Respondent.
4. The Record of Appeal was filed on 23 November 2023, and the Court issued directions on 29 January 2024 (the parties were unable to settle out of court, despite the Court encouraging such an endeavor).
  5. The Appellant filed its submissions on 31 January 2024 and the Respondent's submissions were not on record (should have been filed and served by 23 February 2024).
  6. The Court has considered the Record of Appeal and submissions.

#### **Membership of the National Social Security Fund and gratuity**

7. The Appellant admitted before the Senior Principal Magistrate that the termination of the Respondent's employment was on account of redundancy.
8. One of the terminal dues due to an employee upon termination of employment on account of redundancy is severance pay as provided for in section 40(1)(g) of the *Employment Act*, 2007 at the rate of not less than fifteen days' pay for each completed year of service.
9. The severance pay is different from the service pay envisaged under section 35(5) and (6)(d) of the *Employment Act*, 2007.
10. The service pay envisaged under section 35(5) and (6) of the *Employment Act*, 2007 is in the nature of contributory social protection benefit. Under the current legal framework, both the employer and employee contribute to the Fund.
11. However, the severance pay contemplated by section 40(1)(g) of the Act is from the employer's own resources, and is more or less compensation for involuntary loss of employment on the part of the employee.
12. The Appellant computed the Respondent's dues upon separation as Kshs 284,825/-. The schedule did not have a breakdown of the payment or indicate for which terminal benefit it was. The witness statement which was adopted as part of the evidence did not give a breakdown or categorise the payment.
13. Even during the oral testimony, a disclosure was not made of the payment, whether it was gratuity or service pay.
14. While allowing the claim for gratuity, the Senior Principal Magistrate rendered himself thus:

the termination of employment/service in this case was for a good cause. The world economy was affected by the Covid-19 pandemic and both the employer and employees were affected. There was no contract produced by either side, addressing on the issue of gratuity.



However, the Claimant herein was in the Respondent's employment for 26 years.

In my view, despite the challenges that led to the termination of his service, he is entitled to gratuity.

Section 40(g) (sic) of the *Employment Act* provides payment of gratuity as one of the conditions precedent in determining whether termination of service of an employee on account of redundancy was fair and procedural. I will therefore allow the claim for gratuity at the rate of 15 days' pay per each completed year of service.

The Claimant herein worked for 26 years and was earning a monthly salary of Kshs 28,600/-, half of which is Kshs 14,300/-. For 26 years, gratuity will amount to Kshs 14,300/- x 26 = 371,800/-.

15. The Senior Principal Magistrate made direct reference to section 40(g) of the *Employment Act*. The section provides for severance pay. It is apparent that the Senior Principal Magistrate miscategorised or mislabeled the severance pay as gratuity.
16. Section 40(1) of the *Employment Act*, 2007 contemplates various categories of dues upon redundancy and an employer should clearly itemise what dues it is paying.
17. The Court cannot fault the Senior Principal Magistrate for mislabeling the severance pay as gratuity when he indicated the statutory provision underpinning the award.

#### **Conclusion and Orders**

18. In consideration of the above, the Court finds no reason to disturb the judgment of the Senior Principal Magistrate. The Appeal is dismissed with no order on costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 6<sup>TH</sup> DAY OF MARCH 2024.**

**RADIDO STEPHEN, MCIArb**

**JUDGE**

Appearances

For Appellant Onsongo & Co. Advocates

For Respondent Odhiambo Ouma & Co. Advocates

Court Assistant Chrispo/Chemwolo

