



**Kenya Union of Pre- Primary Education Teachers v County Public Service Board Kakamega County Government & another; Salaries And Remuneration Commission (Interested Party) (Employment and Labour Relations Cause 9 of 2023) [2024] KEELRC 826 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 826 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 9 OF 2023  
JW KELI, J  
APRIL 16, 2024  
(FORMERLY BUNGOMA ELRC CAUSE NO. E010 OF 2022)**

**BETWEEN**

**KENYA UNION OF PRE- PRIMARY EDUCATION TEACHERS ..... CLAIMANT**

**AND**

**COUNTY PUBLIC SERVICE BOARD KAKAMEGA COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY KAKAMEGA COUNTY GOVERNMENT .... 2<sup>ND</sup> RESPONDENT**

**AND**

**SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY**

**JUDGMENT**

1. The Claimant is a registered trade union to represent interests of ECDE teachers in the country. Alleging unfair labour practices against its 408 members by the Kakamega County Government brought suit dated 27<sup>th</sup> April 2022 and filed in court on the 5<sup>th</sup> May 2023 against the Respondents and joined the Interested Party seeking the following reliefs:-
  - a. That this honorable court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> respondents to convert the engagement of the grievants to permanent and pensionable terms considering the applicable ECDE teachers schemes of service , the terms and conditions under the *Employment Act* whichever is more favourable to the grievants with effect from November 2016.



- b. That this honorable court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay the 408 grievants herein , the salary difference between the actual salary as per appropriate job groups and the Kshs 10,000 they have been earning with effect from November 2016 when the order for regularization was issued in the High Court decision in Petition No 127 of 2014.
  - c. That this honorable court do order that NSSF deductions be submitted to NSSF for all other months for which gratuity under prayer 4 does not cover in respect to the 408 grievants.
  - d. That the respondents be ordered to pay the grievants herein gratuity at the rate of 31% percent of the total basic pay for the entire period between January 2015 to April 2020.
  - e. That this honorable court be pleased to order that the Teachers Service Commission and the Salaries and Remuneration Commission to strictly offer technical support and ensure compliance with the Orders of this Court in the process of conversion and with regard to the term and conditions of service of the greivants.
  - f. That costs of this suit be provided for by the respondents.
2. The claim was verified by Samuel Opiyo the General Secretary of the Union who also filed his witness statement and filed list of documents being certificate of referral from the conciliator dated 18<sup>th</sup> March 2022, contract letters of the grievants, their NSSF statements , Pay slips, Judgment in Petition No 127 of 2014 and list of 408 grievants.
  3. The claim was brought together with notice motion of even date seeking the following substantive orders:-
    - i. The Salaries and Remuneration Commission be directed to file a report in Court detailing the job evaluation report providing for the salary and job grading of the ECDE teachers.
    - ii. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein be directed to provide a detailed report on the level of compliance with the judgment in Constitutional Court Petition No 127 of 2014 as well as a employment records of all 408 ECDE grievants.
    - iii. That this Honorable Court be pleased to direct that the Teachers Service Commission do file a report in court as an expert on the issue in dispute.
  4. The Notice of Motion raised substantive issues and did not seek any interim order. The court gave directions for the filing of responses and later parties informed the court they had settled all the issues in dispute save for the gratuity claim. The court then finds that the Notice of Motion stands disposed or abandoned as the claimant on the 21<sup>st</sup> of September 2023 told the court that the only issue outstanding was the gratuity.
  5. The Respondents entered appearance through its County Attorney and filed a Replying affidavit of Doreen Muhambe Omwaga dated 21<sup>st</sup> June 2022 and received in court on the 22<sup>nd</sup> June 2022. The County Attorney further filed reply to the statement of claim which was dated 15<sup>th</sup> November 2022 and received in court on the 16<sup>th</sup> November 2022, and annexed the County Government of Kakamega scheme of service for Early Childhood Development and Education (ECDE) Teachers and Officers dated April 2022 as approved by the 1<sup>st</sup> Respondent.
  6. The Respondents in further response filed Notice of Preliminary Objection dated 15<sup>th</sup> November 2022 on the ground of lack of recognition agreement under section 54 (1 and 2) of the [Labour Relations Act](#) between the respondent and the claimant to clothe the claimant with authority to file the suit on



behalf of its ECDE employees. (The PO was canvassed by way of written submissions of parties. The court delivered a ruling on the same on the 23<sup>rd</sup> February 2023 and dismissed the same.

7. On the 21<sup>st</sup> March 2023 the Respondents filed a witness statement of Leah Khasandi Shisia dated 20<sup>th</sup> March 2023 and notice of intention to cross-examine 18 of the listed Grievants on even date.

### **Preliminaries**

#### **Out-of-court settlement order**

8. On the 7<sup>th</sup> July 2022 the Respondents' Counsel told the court they were amenable to out-of-court negotiations. The court granted the parties 60 days to attempt an out-of-court settlement. The interested party was also granted leave to file a response.
9. On 26<sup>th</sup> October 2022 the parties were granted more time to settle all issues out of court.
10. On the 21<sup>st</sup> September 2023 the issue of gratuity was still unsettled. The claimant told the court the outstanding issue was payment of gratuity to the grievants for the period 2015 to October 2020. Parties agreed to proceed to hearing on that issue only.

#### **Further pleadings and documents**

11. On the 31<sup>st</sup> October 2023 the claimant filed a further list of documents dated 30<sup>th</sup> October 2023 being amended list of grievants, schedule of claim per grievant, and proof of membership (bi-product). On even date, the claimant further filed amended list of witnesses and filed witness statements of Casper Alugoye, Shapaya, Jacklyne Adhiambo Oluoch, Lacklyne Ingato Stedi and Gilbert Lumiti Ikutwa.
12. The Respondents on the 27<sup>th</sup> November 2023 filed a replying affidavit by Vivien Ayuma who described herself as the Chief Officer for the Department of Education, Science and Technology in the County Government of Kakamega sworn on the 23<sup>rd</sup> November 2023 and annexed as VA-1 a copy of tabulation of payments made to the ECDE trainers.
13. The Interested Party in response on the 29<sup>th</sup> November 2023 filed replying affidavit sworn on the 20<sup>th</sup> July 2023 by Anne R. Gitau who described herself as the Chief Executive Officer of the Commission and annexed its letter dated 10<sup>th</sup> December 2021, wherein, she stated the interested party issued a comprehensive advice to the Council of Governors with respect to the grading and salary structure for ECDE teachers and caregivers as in compliance with its constitutional mandate(ARG1). The deponent took the position that the issues raised in the Notice of Motion and the claim herein were distinct from the cited in the Petition High Court decision in Petition No 127 of 2014.

### **Hearing**

14. The matter proceeded to a hearing on the outstanding issue of payment of gratuity to the Grievants for the period 2015 to September 2020 and NSSF deductions remittance.

#### **The Claimant's case**

15. The claimant's case was heard on the 27<sup>th</sup> of November 2023 with 4 witnesses of fact testifying on oath and being cross-examined by Counsel for the respondents and the interested party. The witnesses produced their documents annexed to their witness statements adopted as evidence in chief.



### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' case**

16. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents informed the court that they relied on the replying affidavit of Vivien Ayuma of 23<sup>rd</sup> November 2023 filed on the 27<sup>th</sup> November 2023 and the reply to the statement of claim which was dated 15<sup>th</sup> November 2023 as their evidence in response. No witnesses were called.

### **Interested party's case**

17. Counsel for the Interested Party informed the court that they would not call any witness and relied on the replying affidavit of Anne Gitau of 20<sup>th</sup> July 2023 and filed in court on 20<sup>th</sup> November 2023. They also relied on the further list of documents dated 6<sup>th</sup> November 2023, being advisory on the instant remuneration claims save for gratuity.

### **Claimant's case in summary**

18. The Claimant's case as concerns the issue of gratuity and NSSF was as per witness statements of the 4 witnesses and the Claimant's documents.
19. Casper Alugoye Shapaya(CW1) was engaged as ECDE teacher effective 4<sup>th</sup> January 2017 (C1). From employment till September 2020 he was not subjected to NSSF deductions (C2 was his NSSF statement which the court found had NSSF deductions from April 2020 to May 2022). He stated that on the 4<sup>th</sup> July 2023, his bank account was credited with Kshs 62, 157 paid by CPF (C3) which says this was his pension for the period October 2020 to July 2022. He claimed gratuity for the service period from 4<sup>th</sup> January 2017 to September 2020.
20. Oluoch Adhiambo Jackline (CW2) was engaged on 1<sup>st</sup> May 2015 as per employment letter (J1). That from time of employment upto September 2020 she was not subjected to NSSF or provident fund(J2 was her NSSF statement which the court found had random NSSF remittances ). That on the 21<sup>st</sup> July 2023 her bank account was credited Kshs 57, 126 paid by County Pension Fund (herein after referred to as CPF) as her pension for the period October 2020 to July 2022 (J3 was her bank statement ) and CPF statement. She sought to be paid gratuity for period of service before October 2020.
21. Stedi Ingato Jackline( CW3) was engaged as ECDE teacher by the Respondents effective 1<sup>st</sup> June, 2015 as per employment letter (J1). From the time of employment up to September 2020, she was not subjected to NSSF or provident fund(J2 was her NSSF statement which the court finds had random remittances). On the 21<sup>st</sup> of July 2023, her bank account was credited Kshs 59,963 paid by the County Pension Fund (CPF) as her pension was for the period October 2020 to July 2022(J3 was her bank statement ) and CPF statement. She sought to be paid gratuity for a period before October 2020.
22. Gilbert Lumiti Ikutwa(C4) was employed as ECDE teacher by the respondents effective 1<sup>st</sup> June 2015(C1). From the time of employment till September 2020 he was not subjected to NSSF or provident fund (C2 was his NSSF statement which reflected there was NSSF remittances). That on the 13<sup>th</sup> June 2023 his bank account was credited with Kshs 61, 102 .30 paid by CPF as his pension which he stated was for the period October 2020 to July 2022(C3 was the bank statement and the CPF statement.) He claimed gratuity for the period of service from the date of employment to September 2020. Gilbert produced a letter by the County Public Service, Chief Officer, Prisca Otipa, dated 14<sup>th</sup> February 2022 changing his terms of service to permanent and pensionable and stating he would be entitled to end-of-contract payment. As a permanent employee, it was stated he would be under the County Pension Scheme(CPF).



23. The 4 witnesses were chosen by the claimant to represent the rest of the grievants. The witnesses were cross-examined by the counsel of the respondents and the interested party.

### **Respondents 'case in summary**

24. The Respondents' case was as per the replying affidavit of Vivien Ayuma dated 23<sup>rd</sup> November 2023 adopted as their evidence. As regards the outstanding issue of gratuity Ayuma stated as follows:-

“

8. That the gratuity of ECDE teachers prior to their absorption to permanent and pensionable terms was calculated on the basis of their pensionable emolument which was computed on the basis of sixty (60) per cent of the monthly consolidated remuneration package of the ECDE teachers.
9. That the ECDE teachers who were on contract terms were thus eligible to service gratuity of 31% of annual pensionable emoluments outlined herein above.
10. That the County Government of Kakamega remitted the amounts with respect to gratuity of the ECDE teachers to the County Pension Fund(CPF).
11. That on transition from contractual terms to the permanent and pensionable terms, most of the teachers opted to claim for payment of the gratuity which monies have since been paid as per the attached list(Annexed and marked VA-1 is a copy of the tabulation of payments made to the ECDE trainers)”

25. The list(VA-1) had a total of 1644 and indicated personnel number, name of employee, and the exit reason was indicated as gratuity. The amounts paid were not indicated.

### **Interested party case in summary**

26. The interested party relied on the replying affidavit of Anne Gitau of 20<sup>th</sup> July 2023 and filed in court on 20<sup>th</sup> November 2023. They also relied on the further list of documents dated 6<sup>th</sup> November 2023 being advisory on the instant remuneration claims. The response was on the remuneration payable to ECDE trainers and caregivers and did not address the question of gratuity or pension.

### **Written Submissions**

27. The court issued directions on filing of written submissions after close of the hearing. The parties complied.
28. The claimant's written submissions drawn by Samuel Opiyo were dated 18<sup>th</sup> January 2024 and received in court on 23<sup>rd</sup> January 2024.
29. The Respondents' written submissions drawn by Kakamega County Attorney were dated 23<sup>rd</sup> February 2024 and received in court on 23<sup>rd</sup> February 2024.
30. The interested party's written submissions drawn by Ruth Bikambo were dated 7<sup>th</sup> February 2024 and received in court on 13<sup>th</sup> February 2024.



## Decision

### Issues for determination

31. The claimant addressed the following issues:-
  - a. Whether the claim seeks both gratuity and NSSF at the same time.
  - b. Whether the gratuity is calculated at the rate of 31% of the total basic pay for the completed years of service.
  - c. Whether the grievants were entitled to gratuity.
  - d. Whether the grievants were entitled to NSSF.
32. The Respondents addressed the following issues:-
  - a. Whether there is a proper claim for gratuity.
  - b. Whether gratuity is calculated on gross pay
  - c. Whether an employee is entitled to gratuity and pension within the same period.
  - d. Costs of the suit.
33. The interested party identified the issue for determination to be whether an employee is entitled to both gratuity and pension as social security within the same period.
34. The court holds that it is trite that parties are bound by their pleadings. Applying that principle in the instant claim the court finds that the replying affidavit of the Respondents admitted that gratuity was payable for the period served before the grievants transitioned to permanent and pensionable terms as follows:- The replying affidavit of Vivien Ayuma dated 23<sup>rd</sup> November 2023 adopted as their evidence was as follows:-
  8. That the gratuity of ECDE teachers prior to their absorption to permanent and pensionable terms was calculated on the basis of their pensionable emolument which was computed on the basis of sixty (60) per cent of the monthly consolidated remuneration package of the ECDE teachers.
  9. That the ECDE teachers who were on contract terms were thus eligible to service gratuity of 31% of annual pensionable emoluments outlined herein above.
  10. That the County Government of Kakamega remitted the amounts with respect to gratuity of the ECDE teachers to the County Pension Fund(CPF).
  11. That on transition from contractual terms to the permanent and pensionable terms, most of the teachers opted to claim for payment of the gratuity which monies have since been paid as per the attached list(Annexed and marked VA-1 is a copy of the tabulation of payments made to the ECDE trainers)”
35. Consequently the court finds that the payment of gratuity and the formula for payment was confirmed by the Respondents’ evidence of Ayuma as outlined above.



36. The claimant's case under the witness statements was that the grievants were not deducted NSSF in the period 2015 to September 2020. It is trite that parties are bound by their pleadings. There was evidence of payment of gratuity to the grievants from November 2020 to July 2022(CPF statements produced by the claimants). The respondents through Ayuma stated gratuity was paid for period served before transition to permanent and pensionable terms(paragraph 8).
37. The court finds that the only issue in dispute is whether or not the grievants were paid gratuity for the period claimed between 2015 to September 2020 as claimed and are entitled to be paid.
38. The court framed the issue for determination as follows:-

Whether the grievants were entitled to payment of gratuity for the period served from the dates of engagement till September 2020.

39. During cross-examination, the Claimant's witness CW1 stated that NSSF was remitted for few months. That his salary was consolidated at 16,000 before confirmation . He said the county owed him gratuity for 40 months. Gratuity was not in the letter of employment. CW2 repeated the same save to add that she based the gratuity claim on 31% of the consolidated salary.CW3 repeated same to add that she agreed with the formula for calculation of gratuity in the replying affidavit of Ayuma. CW4 stated that the NSSF remittances in his statement were done by an NGO he was working with and further agreed with the formula under the replying affidavit of Ayuma.
40. The court guided by letter produced by CW4 dated 14<sup>th</sup> February 2022 finds that the grievants were under contracts of different dates which terminated and the respondent transited them to permanent and pensionable terms under pension scheme by CPF. The letter indicated that the exiting employees would be entitled to end of contract gratuity payment. The letter was admitted as evidence of the claimant.
41. The Court finds that the replying affidavit of Ayuma produced as evidence of the Respondents ( paragraph 8) corroborates the content of the letter dated 14<sup>th</sup> February 2022.
42. The grievants produced letters of engagement that did not provide for any social security. Section 35 of the Employment Act applies on benefits payable in termination of contracts to wit:-

“35

- (5) 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.
- (6) This section shall not apply where an employee is a member of— (a) (b) (c) (d) a registered pension or provident fund scheme under the Retirement Benefits Act; a gratuity or service pay scheme established under a collective agreement; 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 the National Social Security Fund.” In the instant case, there was an exit of employees from contractual engagement and transition to permanent and pensionable terms.

43. The Employer stated gratuity was payable under the Replying affidavit of Ayuma to wit: “paragraph 8. That the gratuity of ECDE teachers prior to their absorption to permanent and pensionable terms was calculated on the basis of their pensionable emolument which was computed on the basis of sixty (60) per cent of the monthly consolidated remuneration package of the ECDE teachers.



9. That the ECDE teachers who were on contract terms were thus eligible to service gratuity of 31% of annual pensionable emoluments outlined herein above.
  10. That the County Government of Kakamega remitted the amounts with respect to gratuity of the ECDE teachers to the County Pension Fund(CPF).
  11. That on transition from contractual terms to the permanent and pensionable terms, most of the teachers opted to claim for payment of the gratuity which monies have since been paid as per the attached list(Annexed and marked VA-1 is a copy of the tabulation of payments made to the ECDE trainers)”
44. The court holds that submissions are not pleadings. The employer admitted gratuity was payable and demonstrated how it was to be paid. The court cannot interfere with the formula of the employer on gratuity which affects other employees. The submissions on the basis of the calculation of the gratuity by the parties stand disregarded.
37. The court then proceeds to address the only outstanding issue of whether the period of employment till September 2020 gratuity was paid. Ayuma in paragraph 10 of her affidavit on behalf of the Respondents stated: -
- “
10. That the County Government of Kakamega remitted the amounts with respect to gratuity of the ECDDE teachers to the County Pensions Fund(CPF).
  11. That on transition from contractual terms to the permanent and pensionable terms, most of the ECDE teachers opted to claim for payment of the gratuity which monies have since been paid as per the attached list.” The attached list (VA-1) did not have details on the period of payment of the gratuity nor the amount.
45. The Claimant produced sample statements by CPF with respect to its witnesses which were not disputed by the Respondent, indicating payment of gratuity November 2020 to July 2022. CPF did not pay pension as per the said statemnets. The Claimant produced evidence of contracts of employment of the greivants from 2015. The letters were admitted as evidence without dispute. The court then finds that the grievants were not paid gratuity for the period from date of engagement to end September 2020 relying on the CPF statements and the witnesses bank account statements. The employer as the custodian of records under section 74 of the Employment Act had the duty to provide documents to controvert the evidence of the claimant alleging failure to pay gratuity for the full period before transition to permanent and pensionable terms.
46. The court perused the written submissions of the parties and noted the authorities cited. The court holds that the gratuity is payable as per paragraph 8 and 9 of the Respondent replying affidavit of Ayuma to wit:- “
- “
8. That the gratuity of ECDE teachers prior to their absorption to permanent and pensionable terms was calculated on the basis of their pensionable emolument which was computed on the basis of sixty (60) per cent of the monthly consolidated remuneration package of the ECDE teachers.



9. That the ECDE teachers who were on contract terms were thus eligible to service gratuity of 31% of annual pensionable emoluments outlined herein above.”
47. The court finds that under section 35 of the *Employment Act* an employee cannot be awarded at the same time gratuity or pension unless it was a term of written contract. There was no evidence before court of payment of pension to the grievants in the period between 2015 to september 2020. The grievants in their witness statement stated they were not subjected to NSSF. Parties are bound by their pleadings. The submissions on NSSF is thus outside their witness statement adopted as evidence in chief.
48. The court upholds the observation by Justice Rika on the application of section 35 of the *Employment Act* in *Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Limited* to wit:-
- “
9. This law is intended to ensure employees do not enter into retirement without social security. At the same time, the interest of employers is safeguarded, through the restriction on employees being paid double social security benefits. Service pay is therefore payable under Section 35 [5] only to employees who are not covered under the different social security mechanisms elaborated under Section 35 [6].
10. Basic membership to the National Security Fund or other Schemes is not in itself a bar to an employee accessing service pay under Section 35[5]. As the evidence in this Claim has shown, an employer could register an employee with the N.S.S.F, but fail to remit the monthly contributions, or remit irregularly.”
49. Consequently the submissions by the Respondents on terms of the contract not having provided for gratuity are misplaced and further contrary to their pleadings vide replying affidavit of Ayuma stating the Respondents were to pay gratuity to the ECDE teachers for the period of service before the effecting of the pension scheme. The Respondent opted not to call witnesses hence the claimant had no opportunity to question the allegation of the full payment of gratuity.
50. The County Pension Scheme was introduced in 2022 or thereabouts by the Respondents. The grievants had no social security before the pension scheme and in its wisdom, the respondents provided for payment of gratuity. The court finds that the respondents ought to have paid gratuity for the entire period of service before change of terms of service to permanent and pensionable to the grievants as per its formula as stated by Ayuma in her affidavit.
51. The court agreed with the submissions of the interested party that the onus was on the party alleging, to proof that within the period in question , no pension was paid and where the party has sufficiently demonstrated non-payment of pension in a contractual employment then the employee is entitled to gratuity at 31%.
52. The court holds that based on the evidence produced by the claimant before court and the replying affidavit of the Ayuma, the grievants were not paid pension in the period between 2015 to September 2020 and are entitled to gratuity at 31% based on the formula stated in the affidavit of Ayuma.



## **Conclusion**

53. The court holds the claim for payment of gratuity to the ECDE teachers members of the Claimant for the period 2015 to September 2020 was proved on a balance of probabilities. The court declines to adopt the calculations in the submissions of the claimant as the grievants were engaged at different times. The Claimant filed amended list of the grievants.

54. The court orders that the Respondents to within 30 days tabulate and pay the Claimant's members/grievants their gratuity at 31% and based on the formula disclosed by Vivien Ayuma in her affidavit for the contracts of employment at varied dates from 2015 to September 2020 to wit:-

‘calculated on the basis of their pensionable emolument which was computed on the basis of sixty (60) per cent of the monthly consolidated remuneration package of the ECDE teachers.’

55. The court considered that the respondents engaged in good faith and settled most of the issues save for one. In the circumstances the court makes no order as to costs. Each party to bear own costs.

56. It is so ordered.

Obiter:- The court appreciates the cordial and diligent conduct of the parties in the proceedings. The court is grateful for the advisory of the interested party which assisted in settlement of the majority of issues in dispute out of court. The Court complements the General Secretary of the Union, Counsel Wabuko instructed by the Kakamega County Attorney for the Respondents and Ms Bikambo for the interested party for their diligence and acting in good faith in the dispute.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 16<sup>TH</sup> DAY OF APRIL 2024**

**J.W. KELI**

**JUDGE**

In the presence of:

C/S Macheso

For Claimant - Opiyo

For Respondents: - Wabuko h/b Mmbaka

Interested Party – Bikambo

