



**Sawe v AAR Growers Limited (Employment and Labour Relations Cause E118 of 2021) [2024] KEELRC 2151 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2151 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E118 OF 2021**

**K OCHARO, J  
JULY 31, 2024**

**BETWEEN**

**ROBERT MOKORO SAWE ..... CLAIMANT**

**AND**

**AAR GROWERS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant instituted this suit vide Statement of Claim dated 11<sup>th</sup> February 2021 seeking: -
  - a. The sum of Kshs. 463,458
  - b. Interest on (b) above until payment in full.
  - c. The Respondent be ordered to issue the Claimant with a Certificate of Service.
  - d. Certificate of Fertilizer Advisory Certification Training Scheme.
  - e. Costs of the claim.
  - f. Any other relief this Honourable Court may deem fit to award under the circumstances.
2. In response to the Statement of Claim, the Respondent filed a Memorandum of Reply dated 16<sup>th</sup> March 2021, denying the Claimant's claim.

**Claimant's case**

3. The Claimant's case is that he was employed by the Respondent as a Field Manager on or about 17<sup>th</sup> November 2008 on a contractual basis. The Claimant discharged his duties diligently until 17<sup>th</sup> March 2018 when he resigned by issuing one month's notice in conformity with the terms of his contract.



4. The Claimant asserts that it was a term of his contract of employment that; a gratuity would be payable to him after rendering services for more than five consecutive years; and the gratuity could be computed at the rate of half a month's salary per year worked. Having worked for the Respondent for 9 years, he was entitled to gratuity payment.
5. He stated that on or about the year 2015, he attended a course in the Fertilizer Advisors Certification Training Scheme [FACTS] and the Respondent was to withhold the certificate for a period of two years.
6. Upon resigning, the Respondent refused to pay him salary for the days [18] worked in March 2018; gratuity for 9 years of service calculated at the rate of half a month's salary for every year served; unpaid NSSF dues.
7. It further neglected to release to him, the Certificate of Fertilizer Advisory Certification Training Scheme. and Certificate of Service.
8. Cross-examined by Counsel for the Respondent, the Claimant testified that he was in the employment of the Respondent for nine years. He gave a notice of seven days and forfeited his leave days.
9. He further testified that was not paid his terminal dues. Further, the Respondent didn't at any time call him to pick the dues.
10. The Claimant stated further that though the Respondent was remitting dues to the NSSF on his account, there were months when it didn't. This, he discovered after the separation.
11. He insisted that he was entitled to gratuity even though he was a National Social Security Fund member. Gratuity is a contractual benefit. It was expressly provided for in his contract. Though conditional, he met the condition that was attached to the benefit.
12. In his evidence under re-examination the Claimant stated that before he left the Respondent's employment, the latter did a tabulation of his terminal dues. According to the printout by the respondent, he had twenty-two [22] earned but untaken leave days. He forfeited any compensation for these leave days as he had only issued seven [7] days' notice.

### **Respondent's case**

13. The Respondent presented one witness, Mr. Nathaniel Noti, to testify on its behalf. He testified that the Claimant was an employee of the Respondent until 17<sup>th</sup> March 2018, when he resigned with seven days' notice.
14. According to the stipulations of his employment contract, he was required to issue one month's notice in writing or by paying one month's salary in lieu of notice.
15. The witness stated that in the resignation letter, the Claimant requested the Respondent to allow him offset the balance of his notice period from his unutilized leave days. The Respondent acceded to the request and duly factored the same in the computation of his terminal dues.
16. It was further asserted that the Claimant was not entitled to gratuity as he was a member of the National Social Security Fund for the duration of his employment. Further, all the Claimant's NSSF deductions were duly remitted to the Fund throughout his employment. The claim for 18 days salary in the month of March 2018 is opposed on the premise that the Claimant did not give one month's termination notice.



17. The Respondent states that the Claimant's Fertilizer Advisors Certification Training Scheme certificate and his Certificate of Service are readily available for collection.
18. Cross-examined by Counsel for the Claimant, the witness stated that the Claimant's terminal dues have always been available for collection. However, he has never been available to pick the same.
19. The witness acknowledged that in the resignation letter, the Claimant proposed to forfeit his leave days in lieu of notice.
20. The witness stated that the Claimant's letter of appointment provided that he could qualify for gratuity after working for five consecutive years. The Claimant worked for 9 years.
21. Shown the NSSF statement that the Respondent had tendered as evidence before this Court, the witness admitted that for some months, the Respondent didn't make the requisite remittances to the fund.

### **Issues for Determination**

22. I have considered the parties' pleadings, oral and documentary evidence, and submissions. The sole issue for determination is as follows: -

- a. Whether the Claimant's should be awarded the reliefs sought in his statement of claim.

The circumstances of this case require that I interrogate the reliefs sought individually, so as to answer the identified question effectively.

23. The Claimant sought for salary for 18 days worked in the month of March 2018, KShs. 52,258. The Respondent's Counsel submitted that the Claimant was entitled to salary for the 18 days, however, the same applied to offset the notice period of 22 days, considering that he gave seven [7] days' termination notice instead of the contractual one month's. The Claimant on the other hand contended that he had 22 earned but unutilized leave days, compensation of which he forfeited. The leave days added to the 7 days' notice period, equated the contractual notice period.

24. I have carefully considered the resignation letter which reads in part;

“I hereby wish to tender my resignation from the above mentioned post as from 17<sup>th</sup> March 2018 to give me a break and allow me attend to family matters.

I wish to give a notice of 7 days and forfeit my leave days in lieu of notice.”

And conclude that indeed the Claimant offered to forfeit the compensation for the earned leave days. I have not lost sight of the fact that in his evidence under cross -examination the Respondent's witness admitted that at the time of separation, the Claimant had 22 earned but unutilized leave days which he forfeited.

25. Having accepted the forfeiture, there couldn't be any justifiable reason for the Respondent again to withhold or purport to withhold the salary for the 18 days that the Claimant worked in the month of March 2018.
26. The contract of employment as admitted by the Respondent's witness in his evidence under cross examination provided for gratuity. However, qualification for the same was made subject to the Claimant working for more than 5 years. There is no contestation that the Claimant was in the service of the Respondent for 9 years.



27. The Respondent admitted that notwithstanding the premise foregoing, the Claimant was not paid gratuity as he was throughout the duration of his employment a member of the National Social Security Fund. That section 35[6] of the *Employment Act* militates against his pursuit for the benefit. In my view, the Respondent's position is wholly misplaced. It must be flowing from lack of differentiation between service pay and gratuity, on the part of the Respondent.
28. Gratuity is a contractual benefit, while service pay is a statutory benefit provided for under Section 35 (5) of the *Employment Act* 2007. This difference was highlighted in the Court of Appeal case of *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR relied on by the Claimant in his submissions, wherein it was stated:
- “Turning to the award of gratuity, the first thing that we must emphasise 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 the death of the employee, as a lump sum amount at the discretion of an employer.”
29. In *Kenya Kazi Services Ltd v Dickson Onjwaya Wasike & 42 others* [2021] eKLR, the Court held that: -
- “28. In the view of this Court, gratuity becomes due provided any applicable conditions are present. In other words, where a contract provides for gratuity, it is payable as a general rule.”
30. I take a clear view, that the stipulations of Section 35 (6) of the Act, cannot be construed in a manner so as to oust a contractual benefit of gratuity expressly provided for in an employee's contract of employment. The Claimant having worked for the Respondent for 9 years and 4 months was entitled to gratuity. The Respondent didn't have any justifiable reason to neglect and or refuse to pay him the same. His claim for gratuity succeeds.
31. At the time of resignation, the Claimant earned a gross pay of Kshs. 90,000/- per his pay slips for January 2018 and February 2018 produced as evidence before this Court.
32. I now turn to the claim for unpaid NSSF dues. The Claimant avers that he discovered that his NSSF deductions were not remitted by the Respondent on various dates. He, however, does not specify which dates he is referring to. In the case of *James Orwaru Nyaundi vs Kilgoris Klassic Sacco Limited* [2022] eKLR, I emphasized the need for specificity of pleadings. The Respondent denies failing to make any NSSF payments on behalf of the Claimant and have produced an NSSF remittance breakdown. Nevertheless, I have seen the NSSF Statement of Account produced by the Claimant as evidence. While it clearly shows that NSSF remittances were not made in November 2012, August 2013, October 2013, July-August, October – November 2014, this is directly controverted by the Remittance Breakdown produced by the Respondent. I therefore decline to grant the prayer for unpaid NSSF dues.
33. The claims for the FACTS Certificate and a Certificate of Service, being unopposed, are allowed.
34. In the upshot, judgment is hereby entered for the Claimant as against the Respondent in the following terms: -
- a. The Claimant be paid Gratuity tabulated as follows:  
(Kshs. 90,000/2 x 9) Kshs. 405,000/-
  - b. Interest on (a) above at court rates from the date of Judgment until payment in full.



- c. The Claimant be issued with a Certificate of Service and Certificate of Fertilizer Advisory Certification Training Scheme within thirty days of this judgment.
- d. Costs of the suit be borne by the Respondent.

**READ, DELIVERED AND SIGNED THIS 31<sup>st</sup> DAY OF JULY, 2024.**

**OCHARO KEBIRA.**

**JUDGE**

In the presence of:

Mr. Peter for the Claimant

Ms. Kemunto for the Respondent

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA.**

**JUDGE**

