



**Mungai v Alibhai Shariff & Sons Ltd (Cause E586 of 2023)
[2024] KEELRC 13469 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13469 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E586 OF 2023
CN BAARI, J
DECEMBER 19, 2024**

BETWEEN

DAVID NDGEWA MUNGAI CLAIMANT

AND

ALIBHAI SHARIFF & SONS LTD RESPONDENT

JUDGMENT

1. In a Memorandum of Claim dated 25th May 2023, the Claimant impleaded the Respondent seeking the following reliefs: -
 - a. Payment on account of severance pay and unpaid leave at Kshs. 3,362,590.00
 - b. Certificate of Service
 - c. Cost of the suit
 - d. Interest on (a) and (c) above from the date of filing suit until payment in full at court rates.
 - e. Any other or further relief that the court may deem just and fit to grant
2. In a Response to the Statement of Claim dated 17th October, 2023, the Respondent refuted the allegations in the Memorandum of Claim and invited the Claimant to strict proof thereof.
3. The matter proceeded for hearing on 4th December, 2024, with the Claimant testifying in support of his case, and one Christine Njeri Ngunjiri, the Respondent's accountant testifying on behalf of the Respondent.
4. Thereafter, both parties filed written submissions.



The Claimant's Case

5. The Claimant states that he was employed by the Respondent as a Sales Executive sometimes in April 1961. It is his case that he worked diligently for the Respondent until 30th November 2021, when he was retired after 60 years of service.
6. He states that at the time of his retirement, he was earning a monthly gross salary of Kes. 84,000.00 and a basic salary of Kshs. 74,400.00.
7. It is his case that he did not go on leave during his employment from the year 1999 to 2021 – a period of 22 years. He further states that upon retirement, the Respondent tabulated the severance pay that he was entitled to for the 60 years of service, and which amounted to Kshs. 2,232,000.00.
8. The Claimant states that out of the 22 years of leave he accumulated, the Respondent only included leave days for the year 2021, whose total payable came Kshs. 59,520.00.
9. It is the Claimant's position that the Respondent committed to paying the severance pay and the leave days not taken in monthly instalments for a period of three (3) years.
10. He states that the first instalment of Kshs. 89,425.00 was paid on 4th May, 2022 and the second instalment of an equal amount was paid on 3rd June, 2022, and thereafter nothing was paid.
11. The Claimant told court that he voluntarily retired from the service of the Respondent in the year 2021 at the age of 83 years. He further told court that his claim relates to retirement package which he also referred as service pay promised by the Respondent for the 60 years of service.
12. It is his case that the computation of the amount payable and which was produced in evidence, bears the rubber stamp of the Respondent's company.
13. He further confirmed on cross-examination that he also claims payment for leave not taken for a period of 22 years. He avers that he sought to take leave, but the leave was not approved, and hence the accumulation.
14. It is his further testimony on cross-examination that he did not have evidence showing that he was denied leave. He further confirmed that he has since processed his NSSF benefits.
15. The Claimant further told court that the document carrying computation of his benefits was given to him by the Respondent at exit.
16. The Claimant prays that he be awarded the reliefs listed in his statement of claim.

The Respondent's Case

17. It is the Respondent's case that the Claimant was her employee and that he retired on his own volition after sixty (60) years of service. It states that the termination of the Claimant's employment on account of voluntary retirement was by mutual consent, and has not pleaded for unlawful termination of employment.
18. The Respondent avers that the Claimant was entitled to an annual leave of twenty-four (24) working days with full pay, which annual leave was to be strictly taken every year without an option of payment in lieu of untaken leave days.
19. The Respondent states that it neither received a formal application for leave days from the Claimant, nor did it howsoever deny/stop the Claimant from taking his leave days. It is the Respondent's position



- that the claim for unpaid and untaken leave days for an incredible period of twenty two (22) years is time-barred, and the Respondent has accordingly raised a preliminary objection thereto in its defence.
20. The Respondent further states that it did not declare the Claimant redundant as he elected to voluntarily retire, hence the claim for severance pay is without any factual and/or legal basis.
 21. It is the Respondent's further case that the alleged computation of Kshs. 2,232,000/= was not an entitlement but a discretionary 'golden handshake' in appreciation of the 60-years of service by the Claimant, which was still the subject of negotiations between the parties herein. The Claimant is therefore not entitled to payment of the golden handshake which is merely discretionary and not obligatory, and which should be founded on the mutual consent of the parties. In any event, the Claimant is a registered NSSF member and the Respondent duly remitted the statutory NSSF contributions which the Claimant is entitled to upon retirement and attaining the age prescribed by statute.
 22. The Respondent avers that the payments of Kshs.89,425/- on 4th May, 2022 and 3rd June, 2022, were not for severance pay or leave days as alleged, but a discretionary token of appreciation for the sixty (60) years of service, which payments the Claimant was not entitled to in the first place.
 23. The Respondent avers that the certificate of service has always been ready and available for collection by the Claimant.
 24. During cross-examination, the Respondent through its witness, admitted that it had no evidence to show the Claimant had taken leave for the 22 years in question. She further confirmed that indeed the Claimant was entitled to leave.
 25. It is RW1's evidence that the Respondent's director spoke on phone with the Claimant in arriving at the agreement to be paid the service/retirement pay package.
 26. It is her further evidence that the instalments were in partial fulfilment of the agreement. She further averred that she never disputed the documents bearing the computation, but assert that it does not have the Respondent's letter head.
 27. The Respondent therefore prays that the Claimant's suit be dismissed with costs.

The Claimant's Submissions

28. It is the Claimant's submission that the Respondent's partial payment is an unequivocal acknowledgment of the obligation to pay. He placed reliance in the case of *Rift Valley Railways (Kenya) Limited v Hawkins Wagonza Musonye & Another* [2016] eKLR for the holding that an employer who starts honoring an obligation is estopped from later disputing the same without compelling justification.
29. He further submits that the Respondent has advanced no reasonable justification for withholding the Claimant's severance pay. He sought to rely in *Elizabeth Washeke & 62 Others v Airtel Networks (K) Limited & Another* [2013] eKLR to buttress this assertion.
30. It is his submission that the Respondent's conduct not only violates statutory obligations but also undermines the Claimant's right to fair treatment after decades of dedicated service.
31. The Claimant submits that the Respondent has failed to provide any evidence of a leave roster, leave application forms, or records indicating that the Claimant took leave for the period from 1999 to 2021. He submits further that this omission is a clear violation of Section 10 (3) of the *Employment Act*, which mandates employers to maintain accurate records of employment entitlements.



32. The Claimant submits that he is entitled to 462 leave days (21 days annually for 22 years), equivalent to KES 1,309,440, calculated as per the Claimant's basic salary. It is his further submission that the Respondent's failure to compensate for these accrued leave days amounts to an unjustified deprivation of a fundamental employment right.
33. The Claimant finally submits that he has demonstrated, through evidence and legal authority, that the Respondent's conduct breaches statutory obligations and violates fundamental labour rights. That the partial payments by the Respondent are sufficient acknowledgment of liability, and their failure to advance any reasonable justification for withholding the Claimant's dues underscores the lack of merit in their defence.
34. The Claimant prays that this Honourable Court grants the reliefs sought to uphold justice, fairness, and the sanctity of labour rights.

The Respondent's Submissions.

35. The Respondent on its part submits that the Claimant's claim of the sum of Kshs. 2,053,150/- falls miles off the ambit of Section 40 (1) (g) and cannot by any stretch of imagination be severance pay. It submits that claim and prayer for severance pay therefore lacks legal and factual anchorage.
36. The Respondent submits that at the very best, the sum of Kshs. 2,053,150/- can only be referred to as ex gratia payment, a mere token of appreciation with no legal obligation. It placed reliance in Kenya Union of Journalists Allied Workers v Nation Media Group Limited to support this position.
37. It is the Respondent's submission that the Claimant did not produce a duly filled leave form or an email to demonstrate that he applied for leave days. That he did not even apply for witness summons, under the Employment and Labour Relations Court (Procedure) Rules, to issue to the Respondent's Director to confirm his allegations that he applied for leave through the Director, who rejected the said application for leave.
38. It submits that the claim for leave for an incredible period of twenty-two (22) years is time-barred, and contrary to the express provisions of Section 90 of the *Employment Act*.
39. The Respondent finally submits that not only did the Claimant fail to discharge the evidential burden which obligates him to demonstrate that he applied for annual leave which application was denied, but also the claim for payment in lieu alleged untaken leave days for a period of 22 years is statute-barred, and this Honourable Court has no jurisdiction to entertain the same.
40. It prays for the Claimants claim to be dismissed with costs.

Analysis and Determination

41. I have considered the pleadings, the witnesses' oral testimonies and the rival submissions. The singular issue for determination is whether the Claimant is entitled to the prayers sought.
42. The Claimant has laid claim for two items before this court. The first is a retirement package which he refers interchangeably as service or severance pay, and which he claims was computed by the Respondent's Director at his exit of the service of the Respondent, and which package the Respondent partially honoured.
43. The Respondent's position in this regard, is that the alleged computation of Kshs. 2,232,000/= was not an entitlement, but a discretionary 'golden handshake' in appreciation of the 60-years of service by the Claimant, which was still the subject of negotiations between the parties herein.



44. It asserts that the Claimant is therefore not entitled to payment of the golden handshake which was merely discretionary and not obligatory, and which should be founded on the mutual consent of the parties. The Respondent further argues that for reason that the Claimant was a registered NSSF member, and whose contributions the Respondent duly remitted, he is not entitled to any other payment on account of retirement.
45. The Respondent further contends that the payments of Kshs.89,425/- on 4th May, 2022 and 3rd June, 2022, were not made on account of severance pay or leave days as alleged, but a discretionary token of appreciation for the sixty (60) years of service, which payments the Claimant was not entitled to in the first place.
46. It is the Respondent's position that what the Claimant seeks is payment of severance pay while he admitted to have voluntarily resigned, and that he was not at all declared redundant as to warrant payment of severance pay. The Respondent further insists that what the Claimant seeks is payment of an ex-gratia which in its view is a mere token of appreciation and which does not give rise to legal obligation.
47. The Claimant's claim in my view is clear. He only seeks that the Respondent be compelled to honour a retirement package promised to him and computed by the Respondent during his exit. The Claimant has not laid a claim for redundancy and nor has he alleged unfair termination or even laid a claim for payment of ex-gratia.
48. Indeed, even the confusion that the Respondent is in as depicted in the foregoing paragraph, is indication that it is merely trying to escape honouring the agreement it has with the Claimant. There is no relationship nor should there be confusion of severance payment, ex-gratia and the retirement package that the Claimant seeks herein.
49. There is nowhere in the pleadings before this court that the Claimant claims payment of ex-gratia as alleged by the Respondent, and its insinuation that the retirement package referred to ex-gratia is unfounded.
50. The Claimant's position is that he left the Respondent's employ after 60 years of diligent service and for which the Respondent insists was voluntary retirement, leaving this court with questions of how much longer the Respondent expected the Claimant to continue working at 83 years of age.
51. The Claimant admitted having processed and received his NSSF benefits. The retirement package in issue which the Claimant interchangeably refers as severance/service pay, was clear in his evidence to have been a package promised to him by the Respondent at exit as a reward for long service.
52. That the Claimant put in long service, is not in doubt. 60 years working for one employer, only to retire at the age of 83 years, is definitely no mean feat. The time served by the Claimant in all fairness deserved a retirement package better than the measly NSSF.
53. Further, payment of NSSF contribution is in itself not a bar to parties agreeing to better retirement terms. Many employers still make pension contributions for their employee even when they have contributed to the NSSF. NSSF contribution is in my view, only a bare minimum provision in respect of pension arrangement.
54. This court has before it a computation of what the Claimant was promised as a retirement package or golden handshake as the Respondent calls it, and which not only bears the Respondent's rubber stamp, but was also partially honoured through two monthly instalments.



55. In my view, having partially honoured the agreement on the retirement package, the Respondent is estopped from denying its existence and its binding nature.
56. The Respondent's witness in her oral testimony does not deny that such an agreement for payment of a retirement package existed between the Claimant and the Respondent's director. It is her testimony that the two instalments that the Claimant was paid, was actually paid by her on the instructions of the same director whom the Claimant had an agreement with. It is her further evidence that the instalments were in partial fulfilment of the same agreement that is now in dispute.
57. RW1's testimony is that she never disputed the documents bearing the computation, and only assert that the computation is not written on the Respondent's letter head.
58. In the case of *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others* [2014] eKLR the Court held:-
- “An employer who acknowledges debt but fails to remit payment cannot, without justification, rely on technical defences to avoid liability.”
59. In the premise, I reach the conclusion that the Claimant is entitled to the payment of the retirement package as computed by the Respondent, and which is hereby awarded in the sum of Kshs. 2,053,150/-.
60. On the claim for leave not taken, the Claimant claims payment on account of leave for a period of 22 years that he served the Respondent without taking leave.
61. The *Employment Act*, 2007 entitles employees to 21 working days of leave with full pay. It is further the obligation of the employer to ensure employee take leave every year. Ordinarily, leave should not be postponed and a directive to an employee by the employer to take leave is not considered a punishment. (See *Rajab Barasa & 4 Others v. Kenya Meat Commission* (2016) eKLR).
62. Leave days not taken become payable upon termination/resignation or expiration of contract. Annual leave is a statutory right which accrues to an employee whether or not he/she has applied for it. It is the employer's primary responsibility to advise an employee to take leave when due or effect pay in lieu of leave. (See *Andrew Mutisya Mwanzia v. Hilal Hardware Limited* (2021) eKLR).
63. When not taken, annual leave becomes an accrued benefit which is monetized and paid out at separation. The Claimant told court that he sought to take his leave, but his request was denied. Although the Respondent contended that the Claimant was not denied leave, it did not provide leave forms as prove that indeed the Claimant utilized his leave days. The court in *Benjamin Aviha v G4S Security Services Kenya Limited* [2019] eKLR held:-
- “Failure by an employer to maintain proper records shifts the evidentiary burden to the employer to prove compliance with statutory obligations.”
64. It was the Respondent's argument that leave not taken within the year, is forfeited in accordance with its policy. The Respondent has not led any evidence to demonstrate that it encouraged the Claimant to take his leave and for this reason, I proceed to award the Claimant leave pay for three (3) years at the rate of Kshs. 59,520/- per year, being the rate agreed to by the parties.
65. In the end, the claim succeeds and orders granted in favour of the Claimant as against the Respondent, in the following terms:-
- a. Payment of a retirement package in the sum of Kshs. 2,053,150/-



- b. Payment on account of leave not taken in the sum of Kshs. 178,560/-
- c. Costs of the suit and interest at court rates from the date of judgment until payment in full

66. It is so ordered.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
19TH DAY OF DECEMBER, 2024.**

C. N. BAARI

JUDGE

Appearance:

Mr. Ayieko present for the Claimant

Mr. Murgor present for the Respondent

Ms. Esther S. – CA

