



**Wangui v Primafosa Flowers Limited (Cause E1028 of 2021)
[2024] KEELRC 13548 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13548 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1028 OF 2021
CN BAARI, J
DECEMBER 19, 2024**

BETWEEN

PETER KIBE WANGUI CLAIMANT

AND

PRIMAFOSA FLOWERS LIMITED RESPONDENT

JUDGMENT

1. For determination is the Claimant's Memorandum of Claim dated 7th December, 2021 and filed on 9th December, 2021. The Claimant's claim against the Respondent is for payment of terminal benefits, which he contends were not paid upon his resignation.
2. The Respondent filed a Memorandum of Response to the Memorandum of Claim and a Counterclaim dated 21st May, 2024.
3. Under the Counterclaim, the Respondent seeks the following reliefs:
 - i. Kshs. 5,533.33 with interest at court rates from the date of filing suit until payment in full; and
 - ii. Costs of both the claim and the Counterclaim
4. The Claimant's case was heard on 1st October, 2024, when the Claimant Mr. Peter Kibe Wangui (CW-1), testified in support of his case. He adopted his witness statement dated 7th December, 2021 and produced his list and bundle of documents of even date as exhibits in the matter.
5. The Respondent's case was heard on the same day and the Respondent presented its Financial Controller named Mr. Charles Kiamba(RW-1), to testified on its behalf. Mr. Kiamba adopted his witness statement dated 22nd May, 2024, and produced documents filed in support of the Respondent's case.
6. Submissions were received from both parties.



The Claimant's case

7. It is the Claimant's case that he was employed by the Respondent on 7th August, 2012 as a Compliance Officer at a gross monthly salary of Kshs. 83,000/=, and was promoted to the position of Head of Compliance which he held until 11th September, 2020, when he resigned from the service of the Respondent.
8. The Claimant avers that he wrote a resignation letter to the Respondent's Human Resources Office giving one- month notice and proceeded to clear with the Respondent.
9. The Claimant states that his final dues were computed in the amount of Kshs.326,835/= and which amount remains unpaid by the Respondent. It is further averred that the conduct of the Respondent amounts to an unlawful retention of his final dues.
10. On cross-examination, the Claimant (CW-1) stated that he was paid for the whole month of September, 2020. He further told court that in this notice month, he worked on days when work was assigned to him.
11. It is his contention that the Respondent's Finance Manager, one Mr. Ray computed his dues and that the computation was hand-delivered to him.
12. The Claimant testified that he seeks payment of gratuity for the 12 years he worked for the Respondent. On further cross-exam, the Claimant told court that his employment contract did not provide for payment of gratuity, and further that the Respondent deducted and paid NSSF.
13. It is his case that he was yet to clear from the Respondent since Mr. Ray did not give him an opportunity to clear.
14. On re-examination, the Claimant stated that clearance was to take place at the Respondent's HR offices at Nyahururu, and that on several occasions he sought clearance from the Respondent to no avail.
15. The Claimant urges the Court to grant the prayers sought in his Memorandum of Claim.

The Respondent's case

16. The Respondent states that the Claimant resigned from its employ effective 11th September, 2020. It states further that at resignation the Claimant had risen to become the Head of Compliance.
17. The Respondent denies that the Claimant was employed as a Compliance Manager, and states instead, that he was employed as a Compliance Officer vide a letter of appointment dated 2nd August, 2012.
18. The Respondent denies that the Claimant earned a gross salary of Kshs. 83,000/= and states that he earned a gross salary of Kshs. 27,500/= (inclusive of housing allowance) as set out in the letter of appointment.
19. It is the Respondent's case that the Claimant sent his resignation letter to the Assistant Human Resources Manager, and not the Head of Human Resources and further that he did not clear with the Respondent upon his resignation to enable the Respondent compute his dues.
20. The Respondent avers that the Claimant did not complete his notice period which was to end on 11th September, 2020. It asserts that in the month of September, 2020, the Claimant worked from 1st-4th September, 2020. The Respondent contends that the Claimant failed to attend his duties from 5th-11th September, 2020.



21. The Respondent states that it was forced to deduct the proportionate salary in lieu of notice from the Claimant's final dues. It avers further that after the deduction, the Claimant was left with a negative balance of Kshs.5,5333.33/= which forms the subject of the Counterclaim against the Claimant.
22. The Respondent denies that the Claimant undertook his duties with unrivalled passion, earnest zeal as claimed and denies that it unlawfully retained the Claimant's final dues.
23. It is the Respondent's case that the Claimant is yet to clear with it in order to be issued with a Certificate of Service.
24. It is the Respondent's case that the Claimant failed to adhere to the employment contract or letter of appointment breaching its terms.
25. The Respondent particularized the breach by the Claimant to wit: Failing to work until 11th September, 2020 and absenting himself from work from 1st September, 2020 to 7th September, 2020 and only resuming work on 8th September, 2020-11th September, 2020.
26. The Respondent claims that as a result of the Claimant's breach, it suffered loss and damage in the amount of Kshs. 5,5333.33/= being the amount the Claimant owes the Respondent for failure to serve for the entire notice period.
27. During cross-examination, the Respondent's witness Mr. Charles Kiamba (RW-1), testified that he knew the Claimant and had worked with him for almost 8 years up to the time he tendered his resignation on 11th August, 2020. He confirmed that Mr. Ray was the Finance Manager of the Respondent and denied knowing whether he had given the Claimant a computation of his final dues.
28. It is RW-1's testimony that being the one who generates pay slips for the Respondent, he did a computation which showed that the Claimant owed the Respondent a sum of Kshs. 5,000/=.
29. RW-1 further stated that the Respondent uses a Payroll system where the Claimant's basic pay from the months of January-March 2020 was the sum of Kshs. 84,620/=, 72,174/= and 35,275/= respectively. He explained the reason for the discrepancy as closure in March, 2020 that occasioned all staff to receive 50% salary. He stated that he had not produced any documents indicating the working modalities.
30. On re-examination, RW-1 testified that he was based in Nairobi and so was the Claimant at the time of his resignation.
31. It is the Respondent's prayer that the Claim be dismissed with costs and Judgment entered against the Claimant as prayed for in the Counterclaim.

The Claimant's Submissions

32. The Claimant submits that what is in contention is whether the Claimant served his notice period, and maintains that he indeed attended to his work station during the notice period.
33. The Claimant further submits that the Respondent did not substantiate their allegation of him failing to report to work for 7 days prior to the lapse of his notice, either by way of an attendance sheet, letter of inquiry or by a form of notice issued by the Respondent.
34. The Claimant submits that the amount of Kshs. 5,533/= claimed by the Respondent is based on an incorrect gross salary and is therefore not a true reflection of any amount owed by the Claimant to the Respondent.



35. The Claimant relied on the case of *Jonathan Spangler -vs- Centre for African Family studies (CAFS) Cause 108 of 2015* 2017 KEELRC1242(KLR) to stress the point that the unlawful withholding of the Claimant's final dues amounts to unfair labour practice. That the Respondent should release the dues with no deductions as all statutory deductions were already accounted for in the computation presented to the Claimant.
36. On whether the Claimant is entitled to the remedies sought, the Claimant submits that the Claim should be allowed as he has aptly proved its case by providing evidential documents, letters, emails addressed to the Respondent's HR.
37. The Claimant contends that the Respondent on the other hand, failed to substantiate its allegations against the Claimant on the discrepancies in the payslips, non-attendance by the Claimant and non-clearance for the Respondent to retain the Claimant's final dues.
38. The Claimant cited Article 41 of *the Constitution* which provides a right to fair labour practices and remuneration, and which the Claimant claims that the Respondent has violated by failing to pay his final dues and failing to issue him with a certificate of service.
39. It is the Claimant's final submission that he has proven his case of unfair and unprocedural retainment of his final dues, and urges the Court to find the claim in his favour.

The Respondent's Submissions

40. On whether the Claimant is entitled to the reliefs sought, the Respondent submits that the document relied upon by the Claimant being annexure PKW-2 containing the final dues is not signed by Mr. Kiamba or Mr. Rey.
41. Further relying on the case of *Mugo Mungai & 4 others -vs- Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others* [2019] eKLR the Respondent submits that an unsigned document has no probative value as the contents' genuineness cannot be proved, and therefore, the Respondent contends that the Claimant cannot rely on a document in evidence the contents and author of whom is unknown and origin unstated.
42. It is the Respondent's submission that during cross-examination, Mr. Kiamba denied preparing the document containing the computation. It is the Respondent's case that the annexure is not a genuine document from the Respondent.
43. The Respondent further disputes the genuineness of the final dues computation by stating that it contains July, 2020 salary, yet the Claimant was paid for that month. The annexure further contains entry for gratuity for 12 years in the total sum of Kshs. 332,000/=.
44. It submits further that during cross-examination, the Claimant confirmed that his letter of appointment dated 2nd August, 2012 did not provide for payment of a gratuity. The Respondent relied on the holding in the case of *Kenya National Private Security Workers Union -Vs- KK security Limited (Cause E045 of 2022)*[2023] KEELRC 2770 (KLR) to emphasize when gratuity is payable.
45. On payment of service pay, the Respondent submitted that it was not applicable since the Claimant admitted during cross-examination that the Respondent deducted NSSF dues from his payslips at the end of the month.
46. It is the Respondent's case that the Claimant is neither entitled to gratuity nor service pay as stipulated in the computation annexure PKW-2.



47. Relying on the holding in the case of Fredrick Adika Mugita -Vs- Appolo Onyango Sigana t/a Mwandu En-Kinda Investments [2013] eKLR, the Respondent contends that the travelling allowance indicated in annexure PKW-2 is without merit as none of the Claimant's payslips produced in Court contained any entry for travelling allowance and neither did the Claimant's appointment letter provide for the same.
48. On the issuance of the certificate of service, the Respondent contends that the Claimant failed to complete his notice period and only worked until 4th September, 2020 and did not clear with the Respondent so that he could be issued with a certificate of service.
49. It is the Respondent's case that the Claimant failed to adduce sufficient evidence that he had attempted to clear with the Respondent and was frustrated in the process.
50. On whether the Respondent's counterclaim has merit, the Respondent submits that it was an express term of the letter of appointment that a party terminating the employment contract would give the other party one month's notice or pay one month's salary in lieu of notice.
51. It is further submitted that the Claimant having worked for only 4 days in the month of September, 2020, the Respondent was entitled to deduct the days that he did not work from his final dues resulting in a negative balance in the sum of Kshs. 5,533.33/= which the Claimant owes the Respondent.
52. The Respondent submits further that costs follow the event and are awardable at the discretion of the Court. The Respondent contends that the Court finding that it is owed a sum of kshs. 5,533.33/= by the Claimant, it is entitled to costs of defending the Claimant's claim and for successfully prosecuting its counterclaim.
53. The Respondent urges the Court to dismiss the Claimant's claim with costs and allow the Counterclaim with costs.

Analysis and Determination

54. Upon careful consideration of the pleadings, the evidence adduced, witnesses' testimonies and the parties' submissions, two issues crystalize for my determination:-
 - i. Whether the Claimant is entitled to the reliefs sought; and
 - ii. Whether the Respondent is entitled to the counterclaim

Whether the Claimant is entitled to the reliefs sought

55. The Claimant's claims against the Respondent concerns payment of final dues which he says was computed by the Respondent in the sum of Kshs. 326,835, and issuance of a certificate of service.
56. The Respondent on her part, contends that the Claimant failed to adhere to the employment contract for having failed to work until 11th September, 2020, and therefore absenting himself from work between 1st September, 2020 and 7th September, 2020, and only resuming work on 8th September, 2020 to 11th September, 2020.
57. It is the Respondent's assertion that the Claimant did not serve his entire notice period, hence the breach of contract which in its view, disentitles him to payment of final dues. It contends that the Claimant also failed to clear from their service to enable it prepare and issue him with a certificate of service.



58. The Claimant's position is that he served for the entire notice period and that he made several follow-ups with the Respondent for an acknowledgement of his resignation and clearance modalities which were not forthcoming.
59. Indeed, the record is awash with emails by the Claimant to the Respondent's Human Resources office seeking a response to his resignation and approval of his clearance, which he says the Respondent's Finance Manager then, named Mr. Rey did not sign.
60. The Claimant has also placed before court a computation of his final dues which includes the number of days worked in July, 2020, payment for accumulated leave days (40 Days), a 12-year gratuitous pay and a travel allowance.
61. The Respondent contested the computation asserting that it did not originate from the Respondent on the basis that it was not signed by both the person who is said to have generated (RW1) and a Mr. Rey-the Finance Manager.
62. It is however telling that the Respondent has not placed before court what they deem as an accurate computation of the Claimant's final dues, and only laying a counter claim of Kshs. 5,533.33 which it argues is owed to it by the Claimant on account of days of the notice period that the Claimant did not serve. The computation giving rise to the amount of the counter claim was not produced in evidence to allow the court an opportunity to compare it with the computation produced by the Claimant.
63. The Respondent has further contested items 1, 3, & 4 in the computation which relate to days worked in July, 2020, gratuity and travel allowance. I note from the computation that days worked in July and travel allowance were not allocated any figures in the computation, hence do not constitute part of the Claimant's total claim. In the circumstances, let the claims rest.
64. The items for the court's consideration therefore, are in relation to accumulated leave and gratuity. The Respondent challenged the computation of gratuity on the premise that the Claimant's contract did not provide for payment of gratuity. The Claimant on cross-examination did confirm that his appointment letter did not entitle him to payment of gratuity. He further told court that his employer/ Respondent deducted and remitted NSSF deductions on his behalf.
65. Gratuity is either a contractual or statutory entitlement payable on termination of contract, and for an employee to claim gratuity, he must clearly state that it was a benefit conferred under his employment contract or by statute. (See Dickson Mwendwa Munuve v. Oceanfreight (E.A) Limited (2013) eKLR).
66. In the case of John Karanja Mbogo v Leah Wangui t/a Gilgil Distributors Limited [2020] eKLR the court in dismissing a prayer for gratuity stated thus: -
- “The claim for gratuity is not due. The Claimant had no written contract giving him such benefit. The Respondent was paying statutory dues and even where a service pay was claimed, with such payment of PAYE, NSSF no service pay is due.”
67. By dint of the foregoing, it is clear that payment of gratuity is presently at the discretion of the employer and the Respondent having denied owing the Claimant such a benefit, coupled with the Claimant's confirmation that his employment contract did not provide for payment of gratuity, the claim for gratuity fails and is dismissed.
68. On the accumulated leave, the Respondent did not at all rebut the Claimant's claim. It did not also contest the number of leave days that the Claimant claims nor provided a different number of days of such leave. I am further reminded of the employer's obligation to keep employee records, which would



in this matter have come handy in determining the number of leave days that were unutilized as at the time of the Claimant's resignation.

69. In the premise I return that the Claimant's claim for accumulated/unutilized leave days, and forming part of his global claim for final dues is not contested. I find the claim merited and is awarded at Kshs. 94,913.75/-
70. Regarding issuance of a certificate of service, the Respondent's position is that the Claimant did not clear as to enable it prepare and issue him with a certificate of service.
71. The evidence before court shows that the Claimant severally followed up on clearance, but his emails on the subject did not elicit a response from the Respondent. The Respondent cannot therefore be heard to lay the blame on the Claimant, when it frustrated every effort he made to clear with them.
72. I order that the Respondent issues the Claimant with a certificate of service within 7 days of this judgment.

The Counterclaim

73. The Respondent's counterclaim is premised on the argument that the Claimant only worked for four (4) days of the notice period, and that the amount of Kshs.5,533.33 is on account of salary recovery equivalent for the period nor served.
74. The Respondent has not placed their computation of the Claimant's final dues before court, as to show that the deductions from the days not worked resulted in a negative balance.
75. Further, the Respondent as correctly submitted by the Claimant, did not lead evidence to show that the Claimant did not serve to the end of his notice. No clock-in records or attendance register has been produced to confirm that the Claimant left the service of the Respondent before expiration of his notice period.
76. The Respondent similarly did not write any letter (s) to the Claimant inquiring of his whereabouts in the 7 days he was said to have been absent from work, while still an employee of the Respondent.
77. In the end, I reach the conclusion that the Respondent's counterclaim is unfounded and totally devoid of merit. It is hereby dismissed with costs to the Claimant.
78. In whole, the Claimant's claim partly succeeds, and orders granted as follows: -
 - a. That the Respondent pays the Claimant a sum of Kshs. 94,913.75/- on account of final dues.
 - b. That the Respondent issues the Claimant with a certificate of service within 7 days of this judgment
 - c. That the Respondent's Counterclaim is dismissed with costs to the Claimant
 - d. That the Respondent will bear the costs of the suit and interest at court rate from the date of judgment until payment in full.
79. Judgment accordingly.

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

C. N. BAARI
JUDGE



Appearance:

Mr. Nyaga Present for the Claimant

Ms. Bundi h/b for Ms. Odero for the Respondent

Ms. Esther-CA

