



Kakunzu v Sameer Africa Company Limited (Cause 617 & 619 – 638 of 2018 & 55 of 2017 (Consolidated)) [2023] KEELRC 1495 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1495 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 617 & 619 – 638 OF 2018 & 55 OF 2017 (CONSOLIDATED)**

**MA ONYANGO, J
JUNE 21, 2023**

BETWEEN

BENSON MUTUKU KAKUNZU CLAIMANT

AND

SAMEER AFRICA COMPANY LIMITED RESPONDENT

JUDGMENT

1. The judgment herein impacts on Cause Nos. 617, 619 to 638; all of 2018 and Cause No. 55 of 2017. The Claimants are all former employees of the Respondent a limited liability company incorporated and carrying on business in Kenya.
2. The Respondent had a recognition agreement with Amalgamated Union of Kenya Metal Workers which had negotiated Collective Bargaining Agreements (CBAs) with the Respondent. The CBA had among other clauses, provision for termination, gratuity, retirement gratuity and severance pay upon redundancy.
3. Sometime in 2015, the Respondent decided to transfer all its unionisable employees from the gratuity scheme provided for in the CBA to a Provident Fund Scheme.
4. At a meeting held between the Respondent and the Union on 8th May 2015, it was agreed that all employees will be moved from the gratuity scheme effective 1st June, 2015. It was further agreed that the Respondent would tabulate what was due to every employee as at 31st May, 2015 and the same would be transferred to the Provident Fund Scheme.
5. It was further agreed that the money would be disbursed to the provident fund scheme in instalments over a period of 3 years based on the cash flow of the Respondent.



6. The meeting was held between the shop stewards who were five in number led by the chief shop steward, members of management from human resource and one from payroll, and a Mr. Fred Waswa from Octagon Pentagon Limited.
7. It was agreed that the Union Head Office would be informed about the proposal to move the employees from gratuity to provident fund scheme by the chief shop steward before the next meeting.
8. The last issue discussed at the meeting was how to calculate the gratuity. Below is a reproduction of what is stated in the minutes:

“How do we calculate the gratuity that will be transferred to pension for all employees?

Currently, calculations are based on;

- (a) Retirement (60 years' age) – Under 6 years' service – 22 days basic wage per each completed year of service.
6 years' service or more – 32 days' basic wage per each completed year of service.
- (b) Early retirement (45 years' age; 10 years' service – 32 days' basic wage per each completed year of service.
- (c) Termination – 19 days per each completed year of service.

Union officials were requested to go and discuss amongst themselves and give their proposal during the next meeting.”

9. Be that as it may, by an agreement dated 6th July 2015, a Memorandum of Understanding was signed between the Respondent and Amalgamated Union of Kenya Metal Workers for the establishment of the Provident Fund.
10. Of relevance are clauses 1.0, 2.0 and 3.0 which are reproduced below:

Now This Agreement Witnesseth As Follows:-

1. Establishment Of The Fund

The parties hereto have agreed as follows:

- 1.1 That pending the establishment of a provident fund the Employer will with effect from the 1st of June 2015 contribute 6% of the gross monthly pay of each affected employee (the monthly contribution) to a fund established by the Employer. The gross pay for this purpose would be the non-variable gross pay.
- 1.2 That It shall be the Employers responsibility to seek and obtain the requisite approvals necessary to establish a provident fund and shall take such action to ensure compliance with all requirements set forth under the Retirement Benefit Authority Act.
- 2.0. Transfer of Accrued Liability
- 2.1 That the total accrued liability in respect of the gratuity currently in the sum of Kenya Shillings as at 30th May 2015 will be transferred to this fund in installments over a period on not more than three (3) years commencing from the 1st of June 2015 (the transition period).



- 2.2 The total accrued liability shall be transferred from this fund to a provident fund established by the Employer upon accumulation of the gratuity liability that shall then be outstanding in respect of the affected employees. .
- 2.3 It is hereby resolved that the parties to this agreement shall meet on a quarterly basis to review the progress made in respect of payment of the accrued liability.
- 3.0 Transition Period
- 3.1 1 During the transition period any affected employee exiting from the services shall so far as gratuity is concerned be paid the current agreed entitlement under the Collective Bargaining Agreement entered into between the parties hereto dated 1st October 2014 together with the accumulated sum of the monthly contribution of the exiting employee.
11. It is material to note that the Memorandum of Understanding does not mention the method of calculation of the gratuity. The amounts payable is blank in the agreement at Clause 2.1 thereof.
12. Under the preamble to the memorandum of understanding, it is stated that:
- a. Whereas the Employer desires to establish a provident fund (hereinafter referred to as the fund) for members of its staff who are currently entitled to gratuity under the company's scheme of service (the affected employees); and
 - b. Whereasthe Employer desires to transfer the affected employees from the gratuity scheme to the provident fund upon its establishment; and
 - c. Whereasthe parties have agreed on the terms and conditions in respect of the management of the affected employees during transition from the gratuity scheme to the provident fund and desire to record such terms and conditions in this agreement.
13. It would appear that the Respondent had to carry out redundancies before the transition from Gratuity to Provident Fund Scheme was completed. The Respondent declared employees redundant on 30th September, 2016.
14. According to the letters of redundancy, the employees declared redundant were to be paid the following:
- (a) Salary and allowances up to and including 30.09.2016.
 - (b) Severance pay at the rate of 18 days for 21 completed years of service totaling to Kshs.716,689.
 - (C) 2 months' pay in lieu of notice.
 - (d) Accrued leave days earned but not taken as at 30.09.2016.
 - (e) Pro-rata leave travelling allowance earned but not taken.
 - (f) One month's salary being baggage allowance to assist in transportation of personal effects.



In addition to the above payments, you will be paid your entitlement from the Pension Fund/Provident Fund (whichever is applicable) according to the Trust Deed Rules and Regulations.

15. The Respondent had earlier, on 16th July 2015, communicated to each employee the amount of gratuity they were entitled to which would be credited to their account in the Provident Fund Scheme.
16. At least one of the employees affected had by letter dated 8th September 2015, complained about the formula for tabulation of the gratuity which he termed disappointing. The first 3 paragraphs of the letter are reproduced below:

“ Human Resource Manager

Sameer Africa Limited

Box 30429 – 00100

Nairobi

Complain on The Criteria Used To Handle Gratuity/Provident Fund

I humbly wish to launch a complaint over the criteria used to handle the above subject. I have served the company diligently from 8th March, 1994 and this is my 22nd year in service.

Madam, since I got this notification letter on 6.8.2015, I have had sleepless nights because I feel disappointed by the gratuity amount I have got for the years I have worked.

I kindly wish to request you to review the whole issue again and because what has taken place surely is not pleasing. May you categorize by the years one has rendered the service to the company and not by the years of birth for every employee to get satisfied. Madam, almost three quarter of the employees are crying and this may not be very health to the company due to negative attitude.

For me, I have felt if I don't speak out, I may end up to the hospital and this may not be helpful to neither me nor the company.

I consulted our Union representative Mr. Owino but what he only told me is that it is too unfortunate for me to consider it as having got a new born, and then passes on and continue with life. I totally felt offended because he knows very I have lost two kids in 2009 and 2013.

For this case of 2013, I always have fresh memories because I incurred a hospital bill of Shs.789,000 which by the time the child was being treated at Avenue I had exhausted the medical cover. He was treated by Gertrude's for six months but later on he passed on at Aga Khan.

Currently, I am even walking to work all the way from Umoja. The rest of the family is also having challenges due to lack of food to an extent. I have a son who is a second year student in the university and another one in high school. They all require my attention and the rent also is an issue.

My hope in life and for those boys is that scheme. So, kindly consider my complaints positively.

Attached, is a copy of the notification letter.

Thanks in advance.

Yours faithfully,



Signed

Raphael Muthee Kalula”

17. The full list of gratuity tabulation for all affected employees is produced by the Claimant’s demand letter dated 14th July, 2017 (Document No. 13 of Statement of Claim).
18. In the letter of demand, the Claimant’s advocate points out that there was discrimination in the calculation of gratuity which was based on age rather than years of service.
19. The Respondent, through its Counsel, denied the allegations in the demand letters, insisting that the redundancy was done in accordance with Section 40 of the *Employment Act*.
20. In their statements of claim dated 9th March 2018 and 12th January 2017 respectively, the Complainants seek the following remedies respectively:

(Claim dated 9th March 2018)

- (i) A declaration that the decision of the Respondent vide the letter dated July 16th 2015 to freeze the Claimant’s gratuity on the basis of age and categorization of employees on the basis of age amounts to an act of discrimination on the basis of age and that it offends the provisions of *the Constitution*;
- (ii) A declaration that the gratuity benefits paid to the Claimant were grossly undervalued in the light of the unfair, discriminatory, unprocedural, improper, unlawful, wrongful and oppressive gratuity calculation system and categorization of the Claimant;
- (iii) A declaration that the Respondents fundamentally breached her statutory obligations under *the Constitution* of Kenya and the *Employment Act*, 2007 by categorization of the claimants and/ or unfairly adopting a gratuity calculation system that was discriminatory to the claimant.
- (iv) An order directing and/or compelling the Respondents to pay the Claimant equally and without discrimination the sum of Kshs. 464, 977.5 as particularized in Paragraph 24 of the statement of claim.
- (v) The Claimant is awarded compensation of 12 months’ salary for procedural unfairness.
- (vi) An order be issued for compensation on constitutional rights violation.
- (vii) General damages.
- (viii) Interest on iv), v), vi) and vii)
- (ix) An order that the costs of this suit be awarded to the Claimant with interest thereon at court rates from the date of filing of the claim.
- (x) Any other relief as the Court would deem just and expedient to grant.

(Claim dated 12th January 2017)

- (i) A declaration that the decision of the Respondent vide the letter dated July 16th 2015 to freeze the Claimant’s gratuity on the basis of age and categorization of employees on the basis of age amounts to an act of discrimination on the basis of age and that it offends the provisions of *the Constitution*;
- (ii) A declaration that the declaration that the gratuity benefits paid to the Claimant were grossly undervalued in the light of the unfair, discriminatory, unprocedural, improper,



unlawful, wrongful and oppressive gratuity calculation system and' categorization of the Claimant;

- (iii) A declaration that the Respondents fundamentally breached her statutory obligations under *the Constitution* of Kenya and the *Employment Act*, 2007 by categorization of the claimants and/ or unfairly adopting a gratuity calculation system that was discriminatory to the claimant.
 - (iv) An order directing and/or compelling the Respondents to pay the Claimant equally and without discrimination the sum of Kshs.426,075 as particularized in Paragraph 24 of the statement of claim.
 - (v) The Claimant is awarded compensation of 12 months' salary for procedural unfairness.
 - (vi) An order be issued for compensation on constitutional rights violation.
 - (vii) General damages.
 - (viii) Interest on iv), v), vi) and vii)
 - (ix) An order that the costs of this suit be awarded to the Claimant with interest thereon at court rates from the date of filing of the claim.
 - (x) Any other relief as the Court would deem just and expedient to grant.
21. The Respondent filed replies to each of the statements of claim denying the allegations therein. The Respondent averred that the gratuity was paid in accordance with the number of years served in line with the CBA, employment contracts for each employee and consultations with the Claimants' Union.
22. The Respondent asserted that there was no dispute for determination as the Claims are misconceived, misplaced and an abuse of the court process.
23. At the hearing of the two claims herein, the Claimants called 2 witnesses CW1 Samuel Wanyahora Jeremiah And Cw2 David Kareithi Kathuri.
24. CW1 testified that when their services were converted from gratuity to provident fund they were paid, according to age and not according to years of service. He gave an example of Jackson Kariti and himself who were employed on the same day doing the same job and were earning the same salary. At the time of tabulation of terminal dues, he was paid at the rate of 19 days while Jackson Kariti was paid at 32 days per year worked. He stated that this was his grievance. He stated that had all of the employees been paid at 19 days he would have had no complaint as his only complaint was that some employees were paid more than others.
25. CW2 testified that some union members tried to address the issue through a Memo dated 7th September, 2016 at page 32 of his statement of claim.
26. CW2 stated that his claim is that the formula used when transferring gratuity to provident fund scheme where age was used instead of years of service was unfair. He testified that he was familiar with minutes of the meeting that took place on 8th May, 2015. That in the last paragraph, the resolution was that Union officials would go and discuss and give their proposal at the next meeting. He testified that there was no other meeting after the first meeting and the issue was never agreed on. He stated that his prayer was for the additional 13 days between 19 days paid and 32 days which he should have been paid.
27. For the Respondent, RW1 testified that she was Head of Human Resource at Sameer PLC, the Respondent. She stated that she took part in the negotiations held on 8th May, 2015 and the



termination of employment of the Claimants. She further testified that the Claimants were paid service gratuity which went to the provident fund according to number of years worked. That after that, they were declared redundant and paid severance, leave due, baggage allowance and salary due up to the date they left service.

28. She stated that she had attended court while the Claimants were testifying and noted that the issue in dispute was discrimination, that they used age for early retirement and paid all dues as per retirement clause.
29. Under cross examination, RW1 stated that those above 45 years were paid 32 days per year worked while those below were paid at 19 days per year worked. RW1 stated that she was aware of the complaint by Memo at page 33 of the claim. She stated that the issue of age does not arise in the CBA Clause 17 on termination and Clause 20 on redundancy.
30. RW1 further testified that the Clause of the CBA on retirement refers to 45 years and categorizes employees into those who have served for under 6 years and those over 6 years. She testified that there were employees who were engaged on the same day and left on the same date but were paid at different rates. She stated that this was because the company was moving from gratuity scheme to provident fund scheme as explained in the letter dated 16th July, 2015 at page 26 of Claimant's bundle.
31. She testified that the payment of gratuity according to age was agreed upon at the meeting held on 8th May, 2015. That since the Union did not get back to the Respondent with a proposal as agreed during the meeting of 8th May, 2015, there was no second meeting.
32. She further testified that the documents before Court reflect that there were employees employed later but were paid more. She testified that the Respondent applied the CBA in paying the workers declared redundant.

Analysis and determination

33. I have considered the pleadings and evidence adduced before the court. I have also considered the submissions by all parties. The issues arising for determination are whether the Respondent complied with the Collective Bargaining Agreement in assessing gratuity and whether there was discrimination in the payment of gratuity.

(i) Whether the Respondent complied with the CBA.

34. The Respondent insists that it complied with the Collective Bargaining Agreement. It however states that it used the retirement Clause in the payment of gratuity.
35. The Claimants are explicit that they do not contest their redundancy. Their Complaint is that in payment of gratuity, the Respondent discriminated against them on grounds of age.
36. Clause 20 of the Collective Bargaining Agreement provides for redundancy as follows:

“ Clause 20

Redundancy

1. Redundancy shall mean the loss of employment, occupation, job or career through no fault of an employee involving termination of employment at the initiative of the employer where the services of the employee are superfluous, and includes the practices commonly known as abolition of office, job or occupation retrenchment, or any other term giving rise to loss of employment.



2. In the event of Redundancy, the Company undertakes to give the Union the reasons for and the extent of the intended Redundancy.
 - (a) If the Union wishes to contest the necessity for such redundancy, it shall do so within fifteen days of receipt of the above advice (by meeting the Company).
 - (b) If the Union does not communicate with the Company within the fifteen days referred to in (a) above, the matter may immediately be referred to the Joint Industrial Council.
 - (c) If an agreement is reached at the meeting referred to in (b) above or at the Joint Industrial Council Meeting, this agreement, duly signed by both parties shall be referred to the Ministry of Labour for the formal approval of the Industrial Court.
 - (d) If no agreement is reached at the Joint Industrial Council, then the matter may be 'referred to the Minister for Labour as a Trade Dispute with a request for appropriate action.
 3. The principles covering redundancy as set out in the Industrial Relations Charter are accepted by both the Company and the Union.
 4. If, at a later date the position of the Company should improve to such an extent that it wishes to engage staff, then, in considerations for employment, preference will be given (within a particular category and trade) to those employees who were previously declared redundant.
 5. Should an employment opportunity occur in the particular category and trade of an employee previously declared redundant, but in a lower grade than which the employee occupied prior to being declared redundant, then he shall still be offered the job but, if he wishes to take the lower grade job he shall signify his voluntary acceptance thereof and shall have no right to his previous grade.
 6. When with the agreement of the Union and/or the approval of the Industrial Court, an employee is declared redundant, shall be paid for severance 18 days and service gratuity 19 days' basic wage or salary for each completed year of service with the Company, having been paid the appropriate notice in accordance with the Clause 17 of this Agreement (Termination of Service). Payment in respect of completed months, over and above red years, will be calculated on a pro-rata basis.
 7. An employee declared redundant will be entitled to 100% of his consolidated monthly salary as Baggage Allowance to cover the cost of transporting personal effects.
37. The Redundancy Clause makes reference to severance pay of 18 days per completed year of service and gratuity at 19 days. It further makes reference to the termination clause which provides as follows:

Termination of Service



After the completion of the probationary period, notice of termination of employment may be given by either party to the other in writing in accordance with the length of service of the employee with the employer, thus;

- (a) From completion of probationary period to 5 years' service: 1 months' notice or pay in lieu of notice.
- (b) From 5 years but under 10 years' service: 2 months' notice or pay in lieu of notice.
- (c) From 10 years onwards: 3 months' notice or pay in lieu of notice.
- (d) Provided that an employee who resigns or whose services has been terminated by the company shall be paid terminal benefits/service calculated at the rate being earned at a such termination but where an employee is covered by an existing provident fund, he should get the benefits most advantageous to him either from the existing provident fund or under this agreement, but NOT both."

39 The Respondent further made reference to the retirement Clause which provides as follows:

“Retirement

1. When employees are retired on reaching the retirement age fixed by the Company or on the grounds of ill health, the following payment will be made:
 - (a) 22 days' basic wage per completed year of service.
 - (b) 6 years' service or more: 32 days' basic wage per completed year of service.
2. Optional early retirement”

39. It is not in dispute that all the employees were declared redundant. According to the letter of redundancy, the employees were to be paid the following:

- a. salary and allowances up to and including 30.09.2016.
- b. severance pay at the rate of 18 days for 21 completed year of service totaling to Ksh.716,689
- c. 2 month's pay in lieu of notice.
- d. Accrued leave days earned but not taken as at 30.09.2016.
- e. Pro-rata leave travelling allowance earned but not taken.
- f. One month's salary being baggage allowance to assist in transportation of personal effects.

40. In addition, the employee severance be paid “your entitlement from the Pension Fund/Provident Fund (whichever is applicable) according to the Trust Deed Rules and Regulations.”

41. What is contested is the payment from the pension fund, according to the Trust Deed Rules and Regulations. Unfortunately, Trust Deed Rules and Regulations were provided fund was not availed to the court for the court to ascertain what the same provided in terms of pension or provident fund. The parties further did not clarify whether the Rules and Regulations exist.



42. The Memorandum of Understanding between the Respondent and the Union did not state the amount to be transferred from the gratuity scheme to the Provident Fund Scheme. It also did not provide the formula for tabulation of the same. It is therefore not helpful in ascertaining the formula for conversion of gratuity into Provident Fund.
43. It is material that the memorandum of understanding at Clause 1.1 refers to payment of 6% of gross monthly pay as a monthly contribution to the Provident Fund. No mention is made by the Respondent if this was done and no tabulation for any of the Claimants was provided to the court to prove that such payment was ever made to the Provident Fund.
44. RW1 made reference to the agreement with the Claimant during the meeting held on 8th May, 2015. In the first place, that meeting was held with shop stewards, not the Union. Secondly, the meeting did not conclude on formula for the conversion from gratuity to provident fund as this was subject to confirmation at a later meeting which the parties are in agreement did not materialize. This therefore means that no formula for conversion of gratuity to provident fund was agreed upon.
45. The CBA is a document negotiated with the Union and registered by the court. Any amendment of the same must therefore be agreed upon by both parties. From the record before Court, there is no such agreement.
46. According to the memorandum of understanding, the gratuity was to be transferred to the provident fund scheme over a period of 3 years beginning 1st June, 2015. This means that the transition period was to run from 1st June, 2015 to 2018.
47. The memorandum of understanding further provides for the transition period at Clause 3.0 as follows:
Clause 3.0 transition period
- 3.1 During the transition period any affected employee exiting from the services shall so far as gratuity is concerned be paid the current agreed entitlement under the Collective Bargaining Agreement entered into between the parties hereto dated 1st October 2014 together with the accumulated sum of the monthly contribution of the exiting employee.
48. From the foregoing, it is clear that the document that was applicable at the time of redundancy of the Claimants was the CBA as it was carried out during the transition period.
49. According to RW1 and the Respondent, the employees above 45 years were paid at the rate of 32 days while those below 45 years were paid at the rate of 19 days.
50. The redundancy Clause on the other hand provided for payment of 18 days' severance pay and 19 days' service gratuity for all employees, irrespective of either years of service or age. The Respondent therefore did not comply with the redundancy clause in the tabulation and payment of service gratuity and neither did it comply with the memorandum of understanding. Instead, it paid according to the retirement clause 23 o the CBA which provides that employees under 6 years of service would be paid at the rate of 22 days basic wage per computed year of service while employees with 6 years of service or more would be paid at the rate of 32 days basic wage per computed year of service. However, instead of years of service, the Respondent used age and paid employees below 45 years at 22 days and those above 45 years at 32 days.



Whether the payment was discriminative

51. Article 27 of *the Constitution* of Kenya provides for equality and freedom from discrimination. Sub-Articles 27(4) and (5) particularly prohibit discrimination on grounds of age among other grounds. The said provisions are reproduced below:
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 - (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
52. Besides *the Constitution*, Section 5 of the *Employment and Labour Relations Court Act* prohibits discrimination in employment. Section 5 provides as follows:
1. It shall be the duty of the Minister, labour officers and the Industrial Court—
 - a. to promote equality of opportunity in employment in order to eliminate discrimination in employment; and
 - b. to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.
 - (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
 - (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
 - (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
 - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
 - (4) It is not discrimination to—
 - (a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;
 - (c) employ a citizen in accordance with the national employment policy; or
 - (d) restrict access to limited categories of employment where it is necessary in the interest of State security.
 - (5) An employer shall pay his employees equal remuneration for work of equal value.
 - (6) An employer who contravenes the provision of the section commits an offence.
 - (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.



- (8) For the purposes of this section—
- (a) “employee” includes an applicant for employment;
 - (b) “employer” includes an employment agency;
 - (c) an “employment policy or practice” includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures.
53. According to the payments made by the Respondent there are employees who were employed on the same job on the same day and left employment on the same day but were paid at different rates. CWI gave an example of himself and Jackson Kariti who was 48 years who were employed on the same day, were doing the same job, earning the same salary and left on the same day. Kariti was however paid at 32 days per year worked while CW1 who 41 years was paid at 19 days per year worked. This is a classic case of discrimination on grounds of age.
54. What the Respondent did is both unconstitutional and unlawful. As provided in Section 5 of the *Employment Act*, no employer should discriminate any employee either directly or indirectly. Discrimination on grounds of age is specifically prohibited in both *the Constitution* and the Act. The Act gives the employer the obligation to ensure that there is no discrimination in the workplace.
55. In the instant case, the Respondent failed to comply with the law and its CBA when it tabulated gratuity. It also failed to comply with the memorandum of understanding signed between it and the Union.
56. In the Respondent’s tabulation it discriminated against employee below 45 years at the time of redundancy by paying them gratuity at the rate of 19 days per year worked while employees above 45 years were paid at the rate of 32 days per year worked.
57. I find that the Claimants have proved that the calculation of gratuity was neither in accordance with the CBA nor with the memorandum of understanding signed between the Respondent and the Union. I further find that the Respondent discriminated against the Claimants.
58. For the foregoing reasons, I make the following orders:
- i) A declaration be and is hereby made that the decision of the Respondent vide the letter dated July 16th 2015 to freeze the Claimant's gratuity on the basis of age and categorization of employees on the basis of age amounts to an act of discrimination on the basis of age and that it offends the provisions of *the Constitution*;
 - ii) A declaration be and is hereby made that the Respondent fundamentally breached her statutory obligations under *the Constitution* of Kenya and the *Employment Act*, 2007 by categorization of the Claimants and/or unfairly adopting a gratuity calculation system that was discriminatory to the Claimants.
 - iv) An order be and is hereby issued directing and/or compelling the Respondent to pay the Claimants equally and without discrimination.
59. Prayers (v), (vi) and (vii) of the Claims are rejected as the Claimants were not unfairly terminated.



60. Having elected to pay in accordance with the retirement clause, the Respondent is directed to pay each of the Claimants as follows:
- (a) For employees with 6 years' service and below at 22 days' pay per year worked.
 - (b) For employees with 6 or more years of service 32 days per year worked.
 - (c) The amounts already paid to the Claimants in respect of gratuity shall be recovered from what is payable under this judgment.
 - (d) The decretal sum shall attract interest from the date of Judgment in view of the fact that this was a redundancy.
 - (e) The Respondent shall pay the Claimants' costs of this suit.
61. This judgment shall apply to all Claimants in Cause No. 633 of 2016, 617 and 619-638 of 2018 as agreed in the consent dated 21st February, 2020 and adopted by the Court on 3rd February, 2021. Respondent to pay costs of all the suits.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF JUNE, 2023

MAUREEN ONYANGO

JUDGE

