



**Mwanzia (Suing as the Legal Representative of Patrick Mwanzia Mutua - Deceased)) v Excel Chemicals Limited (Cause 1166 of 2017) [2023] KEELRC 1574 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1574 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 1166 OF 2017**  
**BOM MANANI, J**  
**JUNE 22, 2023**

**BETWEEN**

**FRANCIS MULI MWANZIA ..... CLAIMANT**  
**SUING AS THE LEGAL REPRESENTATIVE OF PATRICK MWANZIA MUTUA**  
**- DECEASED)**

**AND**

**EXCEL CHEMICALS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claim before me relates to unpaid retirement benefits. Patrick Mwanzia Mutua, now deceased, instituted the action alleging that the Respondent had failed to settle his terminal benefits after he retired on medical grounds. By this claim, the deceased sought the court's intervention to compel the Respondent to settle the benefits.
2. The Respondent does not admit the claim. According to the Respondent, all terminal dues that the deceased was entitled to were paid on his exit. As a result, nothing remains outstanding between the parties.

**Brief Facts**

3. The parties do not dispute the fact that the deceased was an employee of the Respondent between October 1999 and July 2015. The deceased was serving as a driver.
4. It is also agreed that the deceased retired from employment on medical grounds at the close of July 2015. What the parties are not agreed on is whether the Respondent was required to pay the deceased terminal dues upon his retirement.



5. From the amended Memorandum of Claim, the deceased had expected to be paid terminal dues to cover the sixteen (16) years of service to the Respondent. Particulars of the expected terminal dues are set out in the amended Memorandum of Claim. They include: salary in lieu of notice; salary for days worked in July 2015; leave pay; gratuity; wages deducted from the deceased's salary during his admission in hospital; and overtime pay.
6. On overtime pay, the deceased filed a schedule of what he considered to be days on which he worked beyond the agreed work hours. The schedule was tendered in evidence by the current Claimant, the administrator of the deceased's estate.
7. The Respondent has denied liability to pay these claims. According to the Respondent, the deceased voluntarily retired from service. Therefore, he was not eligible for pay in lieu of termination of his contract in terms of sections 35 and 36 of the *Employment Act*. Further, as the deceased was enrolled with the National Social Security Fund (NSSF), he was not eligible to benefit from service pay in terms of section 35(6) of the *Employment Act*.
8. The Respondent also disputes the claim for overtime. In the Respondent's view, any overtime earned by an employee is captured in its system and settled at the close of every month. Therefore, there is no chance that the deceased had accrued overtime as alleged. In any event, the deceased used to work between 8.am and 5.pm during working days. Therefore, he had no outstanding overtime pay at the time he retired from employment.
9. It is the Respondent's case that all benefits due to the deceased were settled on the deceased's exit. As evidence of this, the deceased signed a release voucher confirming that he had no further claims against the Respondent. Therefore, the claims for unpaid salary, leave days and withheld salary are all a figment of the deceased's imagination.

#### **Issues for determination**

10. The parties did not file a joint statement of issues. However, they formulated their individual sets of issues.
11. In my view, the cause presents a narrow set of issues comprising of the following:-
  - a. Whether the deceased was entitled to claim the various terminal benefits that are pleaded in the amended Memorandum of Claim.
  - b. Who is to bear the costs of the action?

#### **Analysis**

12. The *Employment Act* does not comprehensively provide for the nature of terminal benefits that an employee may claim upon retirement. Apart from service pay that is envisaged under section 35 of the Act, there is no other provision entitling an employee to other benefits.
13. Often and apart from the benefits that are sanctioned under the *National Social Security Fund Act*, what comprises retirement benefits for an employee is left to the agreement between the employer and the employee. The funds that comprise the agreed benefits are usually managed by a trustee or manager as sanctioned under the *Retirement Benefits Act*.
14. In terms of service pay, section 35(5) of the *Employment Act* provides as follows:-

“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.”



15. This provision has to be read together with section 35(6) of the Act which provides as follows:-

“This section shall not apply where an employee is a member of:-

- a. a registered pension or provident fund scheme under the [Retirement Benefits Act](#);
- b. a gratuity or service pay scheme established under a collective agreement;
- c. 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
- d. the National Social Security Fund.”

16. Clearly, whilst an individual who has exited employment is entitled to claim service pay, this right is limited. One of the limitations arises where the employee is a member of the National Social Security Fund. In such case, the employee is expected to receive gratuity from the Fund and not the employer.

17. Although the Claimant’s advocates have suggested that an employee enrolled with the NSSF can still claim service pay if the benefits due from NSSF are inferior to the assessed service pay, I do not think that this proposition represents the legal position on the subject. The decision of [Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Limited](#) [2014]eKLR relied on by the Claimant’s advocates to advance this position appears to be at cross purposes with the express provisions of section 35(6) of the [Employment Act](#). Nowhere in this provision of statute is it suggested that an employee is entitled to make such claim. Thankfully, the Court of Appeal has addressed the matter and made it plain that where an employee is enrolled with the NSSF, he cannot claim service pay under section 35(5) of the [Employment Act](#) (see [Patrick Lumumba Kimuyu v Prime Fuels \(K\) Limited](#) [2018] eKLR).

18. The Claimant has asserted that the Respondent was required to have paid the deceased service pay for the sixteen years that the deceased worked for the Respondent. This claim is contested by the Respondent who asserts that the deceased was enrolled with the NSSF for the entire duration of his service. The Respondent has contended that for the entire period, it religiously remitted NSSF deductions on the deceased’s behalf.

19. I have looked at the NSSF statement that was presented in evidence. From the statement, it is clear that the deceased’s account began receiving credit notes from October 1999 when he was hired by the Respondent until July 2015 when he retired. Clearly, the Respondent was remitting the deceased’s NSSF dues throughout the duration of their contract. Therefore, and in terms of section 35(6) of the [Employment Act](#), the deceased’s estate is not entitled to pursue payment of service pay from the Respondent.

20. In relation to the other claims relating to outstanding leave pay, unpaid salary and overtime, it is perhaps necessary to point out that apart from the unauthenticated handwritten schedule prepared by the deceased for alleged overtime, no material that is of probative value was provided by the Claimant on these claims. Although it is true that the employer has an obligation to maintain employment records and produce them in court whenever there is a dispute on an aspect of a term of the employment contract, the employee nevertheless has the obligation of laying before the court a prima facie case. The employee has to present some acceptable preliminary evidence on the claim in the first instance.

21. To controvert the claims aforesaid, the Respondent contended that it settled all terminal dues that the deceased was entitled to when he exited employment. In support of this contention, the Respondent produced a voucher dated 5<sup>th</sup> August 2015 through which the deceased acknowledged receipt of



Kshs. 9,812.00 as his final dues from the Respondent. The voucher is signed by the deceased and a representative of the Respondent. The Claimant did not dispute the authenticity of this document. The voucher reads as follows:-

“I Patrick M Mutuaholder of ID No. xxxx hereby confirm that I have received Ksh. 9,812/= (nine thousand eight hundred twelve only) being full and final payment of all my terminal dues from Excel Chemicals Limited.

I also confirm that I have no further claims from the company whatsoever.

Employee: .....

Employer: .....

Witness: .....”

22. If it is true that at the time he was leaving employment, the deceased was owed overtime pay, unpaid leave days and withheld salary, why did he sign this instrument confirming that the Respondent owed him nothing? The fact that the deceased signed the document is consistent with the Respondent’s position that it owed the deceased nothing at the time that the parties closed their relation.
23. Importantly, executing a discharge voucher in respect of a contested issue has been held to have the potential of closing the issue unless the party contesting the effect of the voucher is able to demonstrate that it was signed under duress, mistake, misrepresentation or undue influence (see [Ronald Kipngeno Bii v Unliver Tea Kenya Limited](#) [2022] eKLR). In the case before me, there was no evidence to suggest that the voucher signed by the deceased was procured through coercion, undue influence, mistake or misrepresentation.

#### **Determination**

24. Having regard to the foregoing, I find that the claim before me is without merit. Accordingly, it is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED ON THE 22<sup>ND</sup> DAY OF JUNE, 2023**

**B. O. M. MANANI**

**JUDGE**

ORDER

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

**JUDGE**

