



**Kenya Building, Construction, Timber and Furniture Industries  
Employees Union v Timsales Limited (Cause E029, E030 & E031 of 2021  
(Consolidated)) [2023] KEELRC 1532 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1532 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E029, E030 & E031 OF 2021 (CONSOLIDATED)**

**HS WASILWA, J**

**JUNE 20, 2023**

**BETWEEN**

**KENYA BUILDING, CONSTRUCTION, TIMBER AND FURNITURE  
INDUSTRIES EMPLOYEES UNION ..... CLAIMANT**

**AND**

**TIMSALES LIMITED ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of the Labour officer's report dated March 20, 2023 which tabulated the terminal dues for the grievants as awarded by this Court in the judgement delivered in this suit on the January 17, 2023.
2. The Labour officer was directed by this Court to calculated the Notice pay, leave pay, Gratuity payment as per clause 19 of the CBA, days worked and not paid for and compensation for the unfair termination at the rate of 6 months as directed by Court.
3. Accordingly, the Labour officer calculated the service gratuity at the rate of 21 days per month for the number of years worked, Notice pay at the rate of 2 months' pay. Leave pay for 1 year but not for all grievants and compensation for unfair termination at the rate of 6 months' pay for each of the grievants. The cumulative figure was Kshs 146, 201.406.
4. As soon as these calculations were communicated to the parties the claimants, through their advocates opposed the calculation by their letter of April 21, 2023. In the said Letter the firm of Magatta & Njogu stated that the Labour officer's calculations mirrored the calculation by the Respondent without taking their suggested calculation into consideration. They opposed the fact that out of 165 claim for leave pay, only 48 were considered without any reasons given for the denial of leave pay. He stated that gratuity pay calculation is flawed and also that the months worked by each grievant was not considered



in the tabulations. The award for days worked and not paid was not considered by the labour officer. They however agreed with the labour officer on the calculation with regard to Compensation and Notice pay.

5. It is stated that these concerns addressed to the labour officer was not addressed by the labour officer, forcing them to raise before this Court and seek direction. Consequently, this Court gave direction for the issues therein to be addressed by the parties, who were directed to file submissions with the claimant filling on May 18, 2023 and the Respondent on the May 29, 2023.

#### **Claimant's Submissions.**

6. The claimant submitted that this Court made an order for the payment of grievants notice pay, leave pay, gratuity, days worked and not paid for and compensation for the unfair termination. It was submitted with regard to computation of terminal dues that the labour officer computed the terminal dues using basic pay instead of Gross pay as provided for under Section 49(1) of the Employment Act. In this they relied on the case of Kenya Union of Commercial Food and Allied Workers and another V Choppies Enterprises Kenya Limited & 3 others [2020] eklr and the case of Benjamin Langwen National Environment Management Authority [2016] eklr.
7. Based on that, the claimant submitted that the fact that the tabulation was based on basic pay was erroneous and urged the Court to direct the same be amended and the gross pay be used instead in calculating all the items of the judgement including compensation.
8. The claimant also submitted that the calculation was made using basic salary as earned in the month of June, 2018 and not as per part 1(b) of the CBA which provided that the employees earning over and above their grade as at June 30, 2017 shall have their personal rates increased by 11% for the first year and 11% for the 2<sup>nd</sup> year of the agreement. Accordingly, that there was an automatic pay rise for the grievants pay in the month of July, 2018 which should form the basis for calculation of the terminal dues.
9. On leave pay, the claimant submitted that 165 grievants were due for award of leave pay, however that the labour officer awarded only 48 grievants to the exclusion of 117 grievants, without giving any reason for the denial of leave days.
10. On gratuity pay, the claimant argued that the labour officer used 30 days month instead of 26 days, therefore arriving at an erroneous figure. In support of this they relied on the case of James Chege and 6 others v Aqua Plumbing Company Limited [2013] eklr where Radido J applied a 26 days' month formula in calculating service pay.
11. The Claimant also submitted that the labour officer failed to calculate dues payable for the days worked and not paid, which they prayed for the same to be calculated and awarded. They thus urged this Court to direct that the said corrections be made in calculating the terminal dues for each of the claimant.

#### **Respondent's Submission.**

12. The Respondent submitted that the claimant's allegations that the grievants salaries are understated is not true. He argued that the claimant wants the labour officer to rely on the alleged salary increase which was purportedly effected on the July 1, 2018 when they did not give any evidence of such increase inform of payslips. The Respondent argued further that it is the claimant that came up with these figures and presented to the labour office and therefore they should not be allowed to now disown the very figures they presented before the labour office.



13. On leave pay, the Respondent submitted that the grievants who were awarded leave days are those that had unutilized leave days and therefore that the calculation by the labour officer is a true reflection of the dues payable to the few employees who had not taken their leave days. He added that, by law, computation of leave days is based on basic pay as was held in *Kenya Union of Domestic, Hotels Educational Institutions, Hospitals and Allied Workers Vs Egerton University* [ 2017] eklr.
14. On gratuity, the Respondent submitted that the CBA does not provide for 26 days as the measure to be used in calculating gratuity, neither does the law provide for the said 26 days. He argued that various court have used various calculation in seeking to calculate the service and gratuity pay like the case of *Tailors and Textile Workers Union V Kamyn Industries Ltd* [2014] eklr where the Court used 30 days. Similarly, the case of *Augustina Katuku Isenze V Gursbaran Lal* [2012] eklr where the Court used a multiplier of 30 days. The same view was also stated in the case of *Edward Ngarega Gacheru V Nation Media Group Limited* [2019] eklr.
15. Based on the above case law, the Respondent submitted that there is no standard view of calculating Gratuity and urged this Court to adopted the 30 days of the months.
16. On days worked and not paid for, the Respondent submitted that the Respondent paid the grievants up to July 25, 2018 through their bank accounts and evidence tabled before the labour office demonstrating the said payments. He added that the claimant did not indicate these dates allegedly worked and not paid, neither did the Court express itself on the same, therefore that having paid all the grievants up until July 25, 2018, there was no payments pending under this head, thus the labour officer was correct in making his tabulations. To reiterate their arguments that parties are bound by their pleadings and restricted to what was pleaded, the Respondent relied on the case of *Kenya Power and Lighting Company Limited V County Government of Nairobi & Attorney General* [ 2017] eklr and the case of *Independent Electoral and Boundaries Commissions and another V Stephen Mutinda Mule and 3 others* [2014] eklr.
17. On compensation, the Respondent submitted that grievants terminal dues are calculated based on the last salary earned and since the claimant has not demonstrated that the last salary does not encompass the increment, the claim under this head should fail.
18. In conclusion, the Respondent supported the tabulations by the labour officer and urged this Court to dismiss the objections by the claimant and adopt the Calculations by the County Labour officer.
19. I have examined the submissions of the parties herein. Indeed this court ordered calculation of the dues payable to the claimants but the parties seemed not to have agreed.
20. I will therefore give guidance on how these calculations should be done.
21. This Court delivered its judgment on January 17, 2023, awarding the claimant the following reliefs; Notice pay, leave pay, gratuity as per clause 19 of the CBA, Days worked and not paid for, compensation for the unfair termination at the rate of 6 months' salary together with costs of the suit and interest.
22. The first issue for concern was the scale under which the compensation should be based upon. The claimant submitted that the CBA under Part 1(b) provides for increase of salaries for the employees who are earning over and above their grade as at June 30, 2017 and states that they shall have their personal rates increased by 11% for the first year and 11% for the second year. The Respondent on the other hand submitted that the allegation that the pay used in calculating the terminal dues was understated, in not true. It submitted that there is no evidence that the pay used did not factor in the wage increase, therefore that this Court should ignore the said allegation.



23. Part 1(b) of the CBA provides as follows; the employees earning over and above the grade rates as at June 30, 2017 shall have their personal rates increased by 11% for the first year and 11% for the 2<sup>nd</sup> year of the agreement. This increment is reiterated at clause 38 of the CBA which provided also for increase of salary even for other employees who were not categorized under this Agreement.
24. Its indeed true that there was an automatic increment of salaries for this category of employees which was to be effected by the Respondent as at July, 2018. The Calculation that the labour officer should have used therefore in calculating the terminal dues is the pay after this increase of salary is factored in, which was not done in this case.
25. On leave pay, the claimant submitted that 165 grievants claimed leave pay, however only 48 were awarded leave pay with 117 grievants left out without any reason. The Respondent on the other hand stated that the employees who were not granted leave days by the labour officer, was because they had utilized their leave days. If indeed this was true, this information was to be brought to this Court in form of evidence before judgement. Given that this information was availed to the labour office after the judgment of this court, there was no opportunity to the grievants to ascertain if all the 165 grievants who were awarded leave days' were paid. It is therefore this court's position that all 117 grievants should be paid all their leave pay.
26. On compensation, the claimant submitted that the labour officer used the basic pay in calculating compensation for the grievants. The Respondent alleged that the labour officer used the last salary earned as at July, 2018 in calculating the compensation. What is evident is that the labour officer used the basic pay instead of the Gross pay in calculating compensation due to the grievants. Its trite law that in calculating terminal dues for employees, the scale to use is the gross pay and not the basic pay, having used basis pay the labour officer erred. I therefore direct that the fresh calculation to be carried out using gross pay earned by the grievants and in factoring in the salary increases.
27. Notice pay-the Labour officer should also amend the calculation under this head and calculate the notice pay using gross pay and not basic pay.
28. On gratuity, the claimant submitted that the labour officer used 30 days instead of 26 days of the month. The Respondent on the other hand maintained that 30 days of the month is the standard figure to be adopted. I agree with the respondent that the standard days to be used is 30 days and the same should be adopted in this case. In making this calculation the court has factored in one days each week given as off day provided for under the law but in which an employee is still entitled to pay.
29. On days worked, the claimant submitted that the labour officer has not factored in the days worked and not paid for. The Respondent on the other hand argued that it paid all grievants their July, 2018 salary up until July 25, 2018, therefore there was no claim under this head. He added that evidence of payment was tabled before the labour office. This evidence is not before this Court and the claimants have not been given a chance to confirm it or not. In absence of the same and having awarded the grievants days worked, that award should be factored in by the labour office.
30. I will therefore refer this matter again to the labour officer to redo the calculation based on the above guidelines and re-submit them to court within 14 days.

**RULING DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF JUNE, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**



Magatta for Claimant – present

Muli for Respondent – present

Court Assistant - Fred

