



**Orodo v University of Nairobi (Cause 1191 of 2018)  
[2023] KEELRC 2454 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2454 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1191 OF 2018  
MN NDUMA, J  
OCTOBER 5, 2023**

**BETWEEN**

**REUBEN ONDIGU ORODO ..... CLAIMANT**

**AND**

**THE UNIVERSITY OF NAIROBI ..... RESPONDENT**

**JUDGMENT**

1. The suit was filed on 13/7/2018 by the claimant seeking the following reliefs:-
  - (i) A declaration that the deliberate refusal to pay terminal benefits was irregular, wrongful and unlawful.
  - (ii) The claimant be paid his terminal benefits as set out in the suit.
  - (iii) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
  - (v) The Respondent to pay the costs of this claim in any event.
  - (iv) Interest on the above at Court rates.
  
2. The claimed terminal benefits are set out at paragraph 11 of the Statement of Claim as follows:-
  - (i) Gratuity pay for 28 years being 31% of yearly basic pay 31% (19,659 x 12) = 73,131.48 x 28 years ... 2,047,681.44
  - (ii) 104 off-days admitted but not paid in 2002 44340/30 = 1478 x 104 days.....153,712
  - (iii) Basic underpayments for the period January, 2013 - June 2017 – 25,000 – 19,659 = 5,341 x 40 months.....213,640



- (iv) Overtime from the year 2007 when module II started 6.00 am – 9.00 p.m (15 hours – 8 hrs) = 7 hrs x 6 days x 4 weeks x 12 months x 10 years x 184.75 hourly pay x 1.5....5,586.840
- (v) Uniform refund for the duration worked
- (a) Jackets 2 pairs per year @ 2,500 = 2,500 x 2x28 years.  
.....140,000
  - (b) Trousers 2 pairs per year @ 1.000 – 1000 x 2 x 28 years.....56,000
  - (c) Shirts 2 pairs per year @ 1,000 - 1000 x 2 x 28 years.....56,000
  - (d) Sweaters 2 per year @ 1,500 = 1,500 x 2 x 28..... 84,000
  - (e) Weather coats 2 per year at 2,000 = 2,000 x 2 x 28....112,000
  - (f) Socks 2 pairs per year @ 200 = 200 x 2 x 28.....11,200
  - (g) Lanyards whistle 2 per year @ 200 = 200 x 2 x 28.....11,200
  - (h) Ties 2 per year @ 200 = 200 x 2 x 28.....11,200
  - i. Boots 2 pairs per year @ 1,500 = 3,00 x 28 years.....84,000
  - (j) Berets 2 per year @ 500 = 500 x 2 x 28.....28,000
  - (k) Belts 2 per year @ 500 = 500 x 2 x 28 .....28,800
  - (l). Bar soap 2 pieces per month at 150 = 300 x 12 x 28 years..... 100,800

3. The claimant filed verifying affidavit sworn to on 12/7/2018; a witness statement dated 12/7/2018 and bundle of documents with six documents marked ‘1’ to ‘6’ dated 12/7/2018 and attached to the Statement of Claim. The claimant filed further documents dated 13/5/2019 marked exhibit ‘7.’.

**Response**

4. The respondent filed a memorandum of response on 18/3/2019 denying the claim in toto; statement of Damaris M. Kavoi, a witness for the respondent dated 11/3/2019 and bundle of documents dated 11/3/2019 marked exhibits ‘1’ to ‘4’ as per the list of the even date.



## Consent

5. The parties entered into a written consent dated 15/3/2023 filed before Court in which the parties agreed as follows:-
  1. By a consent and in accordance with rule 21 of the Employment and Labour Relations Court Rules, 2016 the suit herein be determined by documentary evidence.
  2. That the witness statements on record be admitted as evidence.
  3. That the documentary evidence filed herein be produced as exhibits.
    - i. Claimant's list of documents dated 12<sup>th</sup> July, 2018.
    - ii. Claimant's supplementary list of documents dated 24<sup>th</sup> February, 2023.
    - iii. Respondent's list of documents dated 11<sup>th</sup> March, 2019.
  4. That the suit be canvassed by way of written submissions to be filed by parties.”
6. The matter then proceeded on the basis of the aforesaid consent. The parties filed written submissions which the Court has carefully considered together with the evidence tendered by the parties.
7. The issues for determination are:-
  - (a) Whether the claimant has proved that he is owed the terminal benefits set out in the Statement of Claim by the respondent.
  - (b) Who will bear the costs of the suit?
8. The case of the claimant as set out in his witness statement dated 12/7/2018 is that he was employed by the respondent as a security guard on 1/9/1989. That he worked faithfully and diligently for the respondent until 30/6/2017 when he retired and was asked to clear with all departments of the respondent and would then be paid his terminal benefits.
9. That the respondent deposited Khs.313,673.35 in his bank account as gratuity. The claimant states that this was a gross underpayment having served the respondent for a period of 28 years.
10. That there was in place a collective Bargaining Agreement (CBA) between the union and the respondent in terms of which gratuity is payable at 31% of the yearly basic pay upon retirement.
11. That he did not get refund for the staff uniform and protective gear he had purchased for himself as per the Collective Bargaining Agreement. That he was entitled to payment of arrear salary for 104 days which he had been following and had been admitted by the respondent in the year, 2002.
12. That he was entitled to payment of overtime from the year 2007 when Security Guards were mandated to serve up to 9 p.m. in the evening thereby serving 15 hours daily from 6.00 a.m. but was never paid overtime in respect thereof.
13. That in terms of the Collective Bargaining Agreement, he was grossly underpaid since he was entitled to payment of Kshs.25,000 per month at grade (IV) Security Guard.



14. That the advocates for the claimant wrote a demand letter to the respondent dated 25/6/2018 seeking payment of the balance of terminal benefits not paid but the respondent did not reply to it and make the payment.
15. That the non-payment was unlawful and unfair and in violation of the Collective Bargaining Agreement; Security Service Order and the *Employment Act*, 2007.
16. That the claimant be granted as prayed.
17. The respondent in the statement of Damaris M. Kavoi, dated 11/3/2019 admits that the claimant was employed by the respondent as a Security Guard in September, 1989. That he was engaged on permanent basis on 1/5/1994. That on 20/9/2013, the claimant was promoted to Senior Security Supervisor Grade (IV) in the Security Section at a monthly salary of Kshs.15,702 as per the promotion letter dated 1/10/2013 effective 20/9/2013.
18. That the claimant accepted the appointment terms from the respondent, and was aware that all other terms and conditions of service remained unchanged.
19. That the claimant retired from service of respondent on 30/6/2017. That the claimant was duly paid his gratuity at the rate of 28 days salary for every completed year of service for the period 1/5/1992 to 30/6/2015 as per the computation produced before Court.
20. That further the claimant was duly paid his service gratuity as expected at the rate of 31% of his basic salary for the period 1/7/2015 to 30/6/2017 as per the computation before Court dated 15/8/2017.
21. That the claim for basic underpayment for hours worked on overtime arose due to signing of a Collective Bargaining Agreement that was not in force at the time when the services by the claimant were rendered to the respondent.
22. That the amount of underpayment was neither in the budget nor was it factored in the capitation from the Government of Kenya when it was purported to be payable to the claimant.
23. That when the claimant retired on 30/6/2017, the respondent's accountant and Wages Officer remitted his overtime payment (module 11) from the year 2007 up to June, 2017. That the claimant received a payment of the 104 off days having been recommended by the respondent as per memo dated 29/5/2017.
24. That the security uniform register of the respondent for the years 2009 to 2015 show that the claimant received and signed for uniforms as per his terms of service including bar soaps for the said years.
25. That security uniforms were issued to the claimant while in service at the Respondent's institution. However, due to financial constraints; all uniforms were not purchased for all staff members in the department for some years.
26. That it is notable that the respondent is funded by the Government of Kenya to the extent of the approved budget and government estimates.
27. That the claimant having retired from service at the respondent's institution has no basis to claim for the uniforms as uniforms remain the property of the Respondent.
28. That further, uniforms are supposed to be worn while on duty at the respondent's institution which the claimant is no longer attached to.
29. That the claim lacks merit and it be dismissed with costs.



## Determination

30. In terms of the evidence adduced and submissions filed by the claimant, it is not in dispute that the claimant was a member of Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) which had a Collective Bargaining Agreement with the University of Nairobi for the period 2013 to 2017.
31. That Clause 40 of the Collective Bargaining Agreement on gratuity provides:-
- “(a) Subject to the provision of the Agreement, gratuity shall be payable to an employee as follows:-
- i. Where an employee attains the age of fifty (50) years has thereafter worked for 5 years continuously and has resigned.
  - ii. Where an employee retires in accordance with the Retirement Clause of this Agreement after serving for two (2) continuous years.
  - iii. ....
  - iv. ....
  - v. ....
  - vi. The employer shall pay such an employee gratuity at the rate of 31% of basic salary and the gratuity shall be payable upon the expiry of the employee’s appointment.”
32. The claimant dispute the payment of gratuity to the claimant for the period 1/5/1992 to 30/6/2015 at the rate of 28 days for each completed year of service instead of calculating gratuity for every completed year of service for 28 years, served by the claimant at 31% of his basic salary. The respondent applied the 31% calculation only for the years from 1/7/2015 to 30/6/2015. The claimant states that this was a violation of the Collective Bargaining Agreement and the respondent should pay the balance of gratuity for the period 1/5/1992 to 30/6/2015 upon calculating the same at 31% of the basic salary. The amount payable as set out in the statement of claim was to be calculated as follows:-
- Basic pay of Kshs(19,659 x 12) = 73,131.48 x 28 years completed service making a total of Kshs.2,047,681.44.
- This payment should be made Less the amount of gratuity already paid to the claimant.
33. That the claimant retired on 30/6/2017. That a Collective Bargaining Agreement once signed becomes a term of the individual contracts of employment in terms of Section 59(3) of the *Labour Relations Act*, (No. 14 of 2007). That Clause 40 of the Collective Bargaining Agreement became part of the contract of the claimant and was binding on the respondent in terms of Section 59(1) of *Labour Relations Act*. The Collective Bargaining Agreement was active between the years 2013-2017. Clause 40 on gratuity covers the entire period of service done by the claimant up to the date of retirement.
34. The Court finds that the respondent fell into error by directing that the claimant’s gratuity for the period 1/5/1992 up to 30/6/2015 be calculated at the rate of 28 days for every year of completed



service. Gratuity is calculated in terms of the contract/law applicable at the time of separation for the entire period of service.

35. The claimant has proved on a balance of probability that he was entitled to payment of gratuity calculated for a period of 28 years at the rate of 31% of the basic salary he earned at the date of retirement. The Court so finds and awards the claimant accordingly, less gratuity received from the respondent upon retirement.

36. In *H. Young & Company (E.A) Limited -vs- Javan Were Mbango* [2016] eKLR, the Court held:-

“There is no express provision for gratuity in the *Employment Act*. It is usually payable under terms set out in a contract of service or Collective Bargaining Agreement.”

37. The Court further relies on the case of Nairobi ELRC Appeal No. E015 of 2021 – *Ali Buule Isaack -vs- University of Nairobi* where Monica Mbaru J. stated:-

“The parties therefore agreed on the modalities of payment of gratuity. Such benefit is due based on the number of years of service. This is a practice adopted in a majority of CBA as parties have the freedom to negotiate and agree on the terms and conditions of employment for the period of entire service from 1989 to 2018 a total of 29 years, gratuity pay is due at the rate of 31% based on the subsisting CBA for the period 2013-2017 as held in *Alfred O. Amombo -vs- Lake Victoria North Water Service Board* [2020] eKLR. And in the case of *Kenya Kazi Services Ltd. -vs- Dickson Onjwaya Wasike & 42 Others* [2021] eKLR the Court held that gratuity becomes due provided any applicable conditions are present. In other words where a contract provides for gratuity, it is payable as a general rule.”

#### **104 off days; admitted but not paid in 2002.**

38. The claimant stated that he was not paid in respect of 104 off days admitted by the respondent. Damaris M. Kavoi, however at paragraph 14 of her witness statement stated that the claimant received payment in respect of 104 off days having been recommended by the respondent as per the memo dated 29/5/2017. The witness for the respondent did not however provide evidence of payment of this admitted amount. The Court awards the claimant the sum of Kshs.153,712 as claimed in respect of 104 off days not taken by the claimant.

39. Overtime for the year 2007

Overtime is claimed by the claimant in respect of the period Module II started and work hours changed from 6.00 a.m to 9 pm (15 hours) – 8 hours) = 7 hours x 6 days x 4 weeks x 12 months x 10 years x 184.75 hourly pay x 1.5 = 5,586,840. R.W.1 Damaris Kavoi testified that the claim for basic underpayment for hours worked overtime arose due to signing of a Collective Bargaining Agreement that was not in force at the time when the services by the claimant were rendered to the respondent. It is however not in dispute that the Collective Bargaining Agreement was in force between the years 2013 – 2017 and module II was introduced from the year 2007 upto the date of retirement. This means that the overtime is payable for the period 2013 to the year 2017, a period of four (4) years but not 10 years as claimed by the claimants. It is not in dispute that the overtime was done but was not paid for. The only issue is whether payment should be from the year 2007 or from the year 2013 to the year of retirement, which is 2017. The law of limitation is applicable to this claim and is limited in terms of Section 90 of the *Employment Act* to three years from the date the cause of action arose.

40. The Court therefore finds that the claimant has proved that he is entitled to payment of overtime which fell due and owing within 3 years before the date the suit was filed on 13<sup>th</sup> July, 2018. The Court



therefore directs the respondent to pay overtime due and owing to the claimant from 13<sup>th</sup> July, 2015 to date of retirement on 30/6/2017. The rest of the claim for overtime is time barred and is dismissed accordingly.

### **Uniform Refund**

41. There is conflicting evidence between the claimant and the respondent as to whether the claimant got free uniform from the respondent or the claimant paid for the uniform as he alleged. This is a claim for refund of payment made by the claimant and is in the nature of special damages that must be specifically proved by the claimant by production of tangible evidence such as receipts for the payment made. This claim is made in respect of 28 years of service. Firstly, any claim falling outside 13<sup>th</sup> July, 2015 is time barred, the suit having been filed on 13<sup>th</sup> July, 2018. Furthermore, no tangible evidence by way of receipts has been placed before Court to prove this disputed claim. Accordingly, this claim is dismissed for want of prove and secondly is largely time barred.
42. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows:-
- (a) Gratuity calculated at 31% of the basic salary of 19,659 for the 28 completed years of service in the sum of Kshs.2,047,681.44. This award is to be made Less gratuity already paid by the respondent in the sum of Kshs.313,673.35. Gratuity payable is also subject to lawful taxation.
  - (b) Kshs.153,712 in respect of 104 admitted off days.
  - (c) Overtime from 13/7/2015 to 30/6/2017 calculated at 7 hours x 6 days x 4 weeks x 184.75 hourly pay x 1.5. Computation to be done and filed within 30 days of judgment by the respondent failing which the claimant is to file the computation within 45 days of judgment.
  - (d) Interest at Court rates from date of judgment till payment in full.
  - (e) Costs to follow the event.

43. It is so ordered.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

