



**Kituku v Garden Hotel Limited (Employment and Labour Relations Cause 1637 of 2014) [2023] KEELRC 3201 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3201 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1637 OF 2014  
MA ONYANGO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JOHN KITUKU ..... CLAIMANT**

**AND**

**GARDEN HOTEL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Vide a Memorandum of Claim dated 14<sup>th</sup> July, 2014 and filed on 17<sup>th</sup> September 2014, the Claimant avers that he was an employee of the Respondent, as Chef De Cuisine from 1<sup>st</sup> January, 1993 to 24<sup>th</sup> November, 2012. His salary was Ksh.50,000.
2. By a notice dated 23<sup>rd</sup> November, 2012 the Claimant voluntarily resigned from the Respondents employment. The Claimant avers that at the time of resignation the Respondent owed him Ksh.38,335 in unpaid salaries.
3. It is the Claimants case that the Respondent failed to pay his terminal dues which he sets out as follows-
  - a. Unpaid salaries Ksh. 38,335/=
  - b. Gratuity (severance pay) Ksh. 405,000/=
  - c. Sacco dues Ksh. 57,800/=
  - d. Target sales incentives Ksh. 39,000/=
4. The Respondent filed a Memorandum of Reply dated 29<sup>th</sup> October 2014 in which it admitted that the Claimant was its employee and resigned from its employment as pleaded in the Memorandum of Claim. It however denied owing the Claimant the sums claimed.



5. Vide an application dated 21<sup>st</sup> November, 2021, the Claimant Prayed for judgment on admission against the Respondent in the sum of Ksh.425,985 less Ksh.102,000 paid, leaving a balance of Ksh.323,985.
6. In a ruling dated and delivered on 14<sup>th</sup> July, 2022, the Court entered judgment for the Claimant against the Respondent in the sum of Ksh.323,985 with interest from date of filing suit.
7. The court directed in the ruling that the balance be subjected to hearing and further that in view of the fact that the claim relates to the tabulations of terminal dues only and as the facts were not contested, that the parties proceed on the balance of the claimed sum by way of written submissions.
8. The Claimant filed submissions dated 22<sup>nd</sup> September, 2022. The Respondent, even though given several opportunities to file its submissions, failed to do so.
9. In his submissions the Claimant states that the disputed sum of Ksh. 114,015 arises from gratuity. That whereas the Claimant based his computation on 21 years' service, the Respondent based its computation on 19 years' service.
10. It is further the Claimant's submission that the parties also disagreed on computation of tax incentive, deduction of one month's salary in lieu of notice and target sales incentive. I will consider each of the items separately.

### **Gratuity**

11. According to the Claimant the differences in the tabulation by the Claimant and the Respondent on gratuity arises from the use of different number of years of service, with the Respondent using 19 years while the Claimant worked for 21 years from 1993 to 2012.
12. According to paragraph 6 of the Memorandum of Claim which the Respondent admitted at paragraph 3 of the Memorandum of Reply, the Claimant worked for the Respondent from 1<sup>st</sup> January, 1993 to 24<sup>th</sup> November 2012.
13. Neither the Claimant nor the Respondent have submitted to court the document that provided for the gratuity benefit. In the absence of a rebuttal by the Respondent and taking into account, section 10(6) and (7) of the *Employment Act* which require the employer to keep and produce employment records when there is a dispute, it is the Respondent who should have produced such records. Having failed to do so, the Court will go by the unrebutted averments of the Claimant and hold that the Claimant worked for 21 years for the Respondent and that the gratuity payable is at half a months' salary per year worked as computed by the Claimant being  $50,000 \div 2 \times 21 = 525,000$ .

### **Target sales incentive**

14. The Claimant submitted that vide letter dated 14<sup>th</sup> February 2013 the Respondent admit that the Claimant met targets for food sales in the months of September, 2011 and February 2012 and awarded the Claimant Kshs. 13,600. That the Claimant Claims Kshs. 39,000. That no material was placed before court to rebut the Claimants evidence.
15. In the absence of rebuttal by the Respondent, I award the Claimant Kshs. 39,000 as prayed.



## Salary in lieu of notice

16. The Claimant submitted that the Respondent deducted Kshs. 50,000 from his dues on account of salary in lieu of notice. The Claimant states that he gave sufficient notice in his resignation letter and there is no justification in the deduction of the same.
17. In the resignation letter the Claimant offers to forfeit his 23 days annual leave pending and 7 days salary for November 2012 to cover 30 days' notice. In his tabulation for salary for November 2012 he claimed only 16 days even though he worked up to 24<sup>th</sup> November, 2012.
18. The letter of resignation is reproduced below:

Joseph Kituku J

Box 170

Machakos

23/11/2012

The General Mnager

Garden Hotel Ltd

Box 223

Machakos

Dear Sir,

RE: RESIGNATION

I refer to the above and humbly tender my resignation from Garden Hotel Ltd, employment effective 24/11/2012.

I thank the management and the director for the opportunity accorded to me to serve in various capacities in the 20 years working period. Glory to God, for all these years he has seen me through in Garden establishment.

A one month notice should be recovered from my pending days of 23 days, plus 7 days working in November, 2012 to read 30 days.

Kindly, organise to pay me the following.

1. Pending salaries due
  - a. August 2012
  - b. September 2012
  - c. October 2012
  - d. November 2012 16 days.
2. My Sacco dues of Ksh.57,800/=
3. My pending incentives for the moths of September, 2011 and February, 2012.
4. My gratuity
5. Any other benefits due to me.



God Bless Garden and its Workforce.

Yours faithful servant

Joseph Kituku

signed

19. I find that the Claimant already forfeited his leave and part of his salary to cover the notice and there is no justification for the Respondent to deduct the same from his outstanding terminal dues.
20. For the foregoing reasons I enter judgment for the Claimant in the sum of Kshs. 114,015 in addition to the sum of Kshs. 323,985 awarded to the Claimant in the ruling dated and delivered on 14<sup>th</sup> July 2022.
21. Costs and interest are as awarded in the ruling.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**M. ONYANGO**

**JUDGE**

