



**Omondi v Associated Motors (Cause 1306 of 2018)  
[2023] KEELRC 3092 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3092 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1306 OF 2018  
NZIOKI WA MAKAU, J  
NOVEMBER 29, 2023**

**BETWEEN**

**DAVID BRIAN OMONDI ..... CLAIMANT**

**AND**

**ASSOCIATED MOTORS ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit praying for Judgment against the Respondent for payment of his gratuity in the sum of Kshs. 453,200.09, interest thereon, costs of this suit, and any other relief this Honourable Court deems fit to grant. The Claimant's case was that the Respondent employed him as a Vehicle Sales Co-ordinator under a renewable employment contract dated 21<sup>st</sup> November 2010 with effect from 1<sup>st</sup> December 2010 and at a gross salary of Kshs. 25,000/-. He averred that he was put on probation and upon completion, the Respondent confirmed his contract of employment. That on the strength of his outstanding performance, the Respondent extended his contract for another three (3) years through a letter dated 30<sup>th</sup> July 2013 and reviewed his remuneration upwards to Kshs. 50,000/- as basic salary and Kshs. 35,000/- as responsibility allowance, all totalling Kshs. 85,000/- per month. That his exceptional performance yet again led to his pay being improved from Kshs. 85,000/- to Kshs. 100,000/-. It was the Claimant's averment that he discharged his duties as a Sales Administrator faithfully until he tendered his resignation through a letter dated 18<sup>th</sup> September 2017, to pursue other interests. His last working day at the company was 19<sup>th</sup> October 2017 after which he was cleared and discharged from the Respondent's employment.
2. The Claimant averred that the Respondent computed the terminal dues payable to him on 23<sup>rd</sup> January 2018 and certified the same to be Kshs. 453,200.09. That despite the Respondent preparing a payment discharge voucher and making him execute the same, no payment was channelled to him in terms of the executed voucher. That he had on various occasions demanded payment of the said dues but to no



avail and that the Respondent had in fact failed, neglected and/or refused to honour its commitment to pay his terminal dues as required by law.

3. In response, the Respondent averred in its Reply to Memorandum of Claim that the Claimant was employed under fixed-term contract, which was subsequently extended and was to come to an end on 30<sup>th</sup> November 2017. According to the Respondent, the Claimant only served as a Vehicle Sales Co-ordinator throughout the period he was employed in the company even though his salary and allowances were varied upwards. It further averred that when the Claimant voluntarily resigned, all his terminal dues payable to him were settled in full as shown in the copy of the payslip at page 53 of the Respondent's List of Documents. That the computation and ensuing payment discharge voucher were erroneously issued to the Claimant considering his Employment Contract did not capture an entitlement to gratuity payment upon termination thereof. Moreover, the Respondent company did not as a practice or policy make gratuity payments to its employees upon termination. That it had dutifully paid all NSSF deductions relating to the Claimant through his NSSF No. xxxx throughout his employment with the company and he was consequently not entitled to any gratuity payment as alleged. The Respondent's stance was that the Claimant should not be allowed to profit off an erroneously issued computation of non-existent and irregular terminal dues and that he could not also rely on the same in support of his claim for the said dues. It prayed that the entire suit be dismissed with costs.
4. The suit was disposed of by way of written submissions. The Claimant did not file any submissions in the matter.
5. The Respondent on the other hand submitted that in the case of [\*Postal Corporation of Kenya v Andrew K. Tanui\*](#) [2019] eKLR, the Court referred to the case of *Bamburi Cement Limited v William Kilonzi* [2016] eKLR where it was held that an employee would only be awarded gratuity if the same was provided for in the contract of employment. Further, in the case of [\*Alfred Mumpasoi Keriolale v Narok County Government & another\*](#) [2021] eKLR, the Court held that without parties to the employment contract providing for payment of service gratuity and there being no agreement/a private treaty/a policy of the respondent to pay such service gratuity, the claimant had no legal basis to claim the same. The Respondent asserted that a perusal of the Claimant's Employment Contract demonstrates that there was no provision of entitlement and payment of gratuity. That when the Claimant entered into a contract with the Respondent, he knew very well that he was not entitled to payment of gratuity at the time of termination.
6. It was the Respondent's submission that the mistake of tabulating the gratuity payment was unilateral but at no point did that mistake form the basis of the Claimant's Employment Contract. That in the case of [\*Nebart Njeru Munyi v Nicholas Muriithi Zakaria\*](#) [2015] eKLR, the learned Judge defined a unilateral mistake as follows:

“...In the General Principles of the Law of Contract by K. Laibuta, ... A unilateral mistake is described in the same literature as follows:-

“Mistake is unilateral where only one party is mistaken while the other is clear minded as to the terms of the contract”.”
7. The Respondent submitted that having made up-to-date NSSF deductions on behalf of the Claimant, payment of gratuity would be unjustly enriching the Claimant as all his terminal dues were paid out to him. That the Claimant, on his part, had not produced any evidence before this Court indicating his entitlement to payment of gratuity, which in any case is not payable under contract and/or policy. It was the Respondent's submission that in view of the entirety of the foregoing, the Claimant had failed



to prove to the requisite evidentiary standard that he was entitled to payment of gratuity and the suit should as such be dismissed with costs.

8. The Claimant herein is entitled to gratuity. A contract of employment may exclude such a payment but once the parties entered into the arena of a discharge voucher tabulating the sum of Kshs. 453,200.09 as gratuity, the Respondent formed a contract with the Claimant which must be honoured. It was not a mistake as the intention was clear, the Respondent intended to pay the Claimant gratuity as calculated in the contract it entered into with the Claimant. The Claimant will therefore be entitled to Kshs. 453,200.09 as well as costs of the suit as the suit was unnecessary since the Respondent knew its obligations to the Claimant yet made him wait through a trial and for over 5 years. The interest on the sum is to run from the date of filing suit and shall be at court rates.
9. In the final analysis I enter judgment for the Claimant against the Respondent for:-
  - a. Kshs. 453,200.09 being gratuity
  - b. Costs of the suit.
  - c. Interest at court rates on the sum in a) above from the date of filing suit till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

