



**Moseti v University of Nairobi (Appeal E014 of 2021)
[2023] KEELRC 3023 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3023 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E014 OF 2021
JK GAKERI, J
NOVEMBER 22, 2023**

BETWEEN

CALLEN N. MOSETI APPELLANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

RULING

1. By Judgement delivered on 1st February, 2023, the court awarded the Appellant gratuity at 31% from 1st July, 2013 to 30th June, 2014 and 1st July, 2014 to 30th June, 2015, a duration of 2 years with interest at court rates from 1st February, 2023 till full payment.
2. Subsequently, the Respondent filed a Notice of Motion dated 17th March, 2023 seeking stay of execution pending an intended appeal.
3. The court dismissed the Notice of Motion on 16th May, 2023 on the premise that the Applicant neither offered nor indicated its readiness or willingness to provide security as ordained under Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010.
4. Clause 40(h) of the 2013 – 2017 CBA provides as follows;

Unless otherwise stated herein the gratuity payable under agreement shall be at the rate of 31% of the basic salary for every completed year of service.
5. Surprisingly, while the Claimant computed gratuity for 24 months and arrived at the sum of Kshs.182,049.36, the Respondent computed gratuity per year, a paltry sum of Kshs.15,170.78 for the 2 years.
6. The Respondent took the view that gratuity is computed per year perhaps because of the phrase “for every completed year of service” while the Claimant used monthly pay.



7. The Respondent maintains that it paid Kshs.511,110/= as gratuity in 2018 as evidenced by the Claimant’s payslip for September 2018, a fact the Claimant admitted.
8. The records availed by the Respondent reveal that the Respondent paid gratuity for 2 months in 2014 and 2015.
9. Admittedly, the sum paid from July 2013 to June 2015 is Kshs.15,170.78.
10. In *Pravin Bowry v Ethics & Anti-Corruption Commission* (2013) eKLR, the court stated that gratuity payable to an employee for only the served term of the contract.
11. Since payment of gratuity is a contractual term agreed upon by the parties, the amount payable to an employee is computed in accordance with the relevant clause of the contract or the CBA.
12. In *Katiwa Kanguli v Bamburi Cement Ltd* (2014) eKLR, the relevant clause provided that the applicable pay in the calculation of gratuity was basic pay.
13. A similar scenario was replicated in *Tailors & Textiles Workers Union v African Cotton Workers* (2013) eKLR.
14. In *Paul Billy Nyagito v East African Portland Ltd* (2018) eKLR, O.N. Makau stated as follows;

“The summary of the foregoing opinions is that the pay applicable in computing pension or gratuity is dictated by the express agreement between the parties to the contract or CBA or the Scheme’s Trust Deed ...”
15. In the instant case, Clause 40(h) of the CBA provided for gratuity “at 31% of the basic salary for every completed year of service.”
16. Typically, gratuity is earned every month and set aside (sinking fund) and is available to the employee in accordance with the terms of the contract or CBA or the trust deed.
17. In the court’s view, since Clause 40(h) of the CBA made no reference to the number of days per year or other rates, the monthly salary becomes the basis of the computation of gratuity as follows;

$$31/100 \times 24,469 \times 12 \times 2 = 182,049.36$$

Less 2 months paid 15,170.78

$$166,878.58$$
18. Contrary to the Respondent’s construction of Clause 40(h) there is no “basic salary for every completed year”.
19. Some CBAs or contracts provide for 31% of or any percentage of the annual basic salary for every completed year of service.
20. In the premises, the gratuity payable to the Appellant is assessed at Kshs.166,878.58 together with interest till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2023

DR. JACOB GAKERI



JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

