



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT ELDORET**

**CAUSE NO. 148 OF 2017**

**JULIUS KIPROTICH KIPTOO.....CLAIMANT**

**VERSUS**

**KERIO VALLEY DEVELOPMENT AUTHORITY.....RESPONDENT**

**JUDGMENT**

1. By consent of the parties, this matter proceeded without calling oral evidence.
2. In the memorandum of claim filed on 12<sup>th</sup> May, 2016 the claimant averred among others that on about 1<sup>st</sup> April, 1991 he was contracted by the respondent as a surveyor.
3. According to the claimant, he was entitled to payment of gratuity which amount he demanded upon maturity of his fourth term on 31<sup>st</sup> March, 2003.
4. The claimant averred that upon receiving his request the top management informed him that it had been resolved that all staff on contractual terms of employment be retained on permanent and pensionable terms. He was further informed that his gratuity would be forwarded to the Group Staff Pension Scheme (GSPS) and would be paid upon his final retirement.
5. The claimant averred that he retired on 8<sup>th</sup> June, 2015 and was paid Ksh. 900,634/95 less the gratuity which he was entitled to.
6. The claimant therefore claimed from the respondent Ksh.1,977,268/14 being gratuity and compound interest at 14% per annum.
7. The respondent filed a memorandum of response in which it stated among others that the claimant was employed as a surveyor on permanent terms on 18<sup>th</sup> February, 1991. On 15<sup>th</sup> May, 2002 his terms were changed and he was placed on three year fixed term contract effective from 1<sup>st</sup> April, 2000 to run until 31<sup>st</sup> March, 2003.
8. On 11<sup>th</sup> September, 2022, the claimant was served with a letter cancelling the fixed term contract and reverting to the permanent and pensionable terms along with many other employees who were also on contract terms.
9. On 11<sup>th</sup> November, 2002, the gratuity due was authorized and paid lumpsum to cover the contract period being 1<sup>st</sup> February, 2000 to 31<sup>st</sup> August, 2002. On 9<sup>th</sup> January, 2004 the claimant wrote to the respondent demanding payment of gratuity for the three years of the contract but the respondent replied informing the claimant that payment was not possible since his terms of service had reverted to permanent and pensionable terms and that the gratuity claimed had been paid as GSPS as per PCA/165/02/03 to the Pension Scheme.
10. On 5<sup>th</sup> June, 2015 the claimant elected to proceed on early retirement and the administrators of the Pension Scheme tabulated his pensionable amount as Ksh, 951, 335/24 less tax, the amount payable was Ksh. 900.634/95. This amount was on 15<sup>th</sup> September 2015 paid to the claimant by the scheme Administrator – Eagle Africa.
11. From the foregoing, the only single issue to be decided in this matter is whether the sum of Ksh. 951,335/24 paid to the claimant (now deceased) was inclusive of the gratuity earned when his contract reverted to permanent and pensionable terms in September, 2002.
12. By a letter dated 9<sup>th</sup> January, 2004, the claimant requested to be paid gratuity as at 31<sup>st</sup> March, 2003 when his fixed term contract matured.

13. The respondent however declined the request stating that the payment was not possible because the respondent's Board of Directors had directed that all Senior Staff terms and conditions of service be reverted to permanent and pensionable. The money sought according to the respondent was paid under Group Staff Pension Scheme (GSPS).

14. The claimant by a letter dated 12<sup>th</sup> August, 2004 sought from the respondent a copy of the letter PCA/165/02/03 terminating the contractual terms of service, the amount of the GSPS paid to the pension fund including copies of the relevant documents that supported the payment. The claimant further sought to know the amount paid as the employer's contribution to the pension service the payment was made under terms of GSPS.

15. The respondent seemed did not respond to the claimant's letter furnishing the information sought as above.

16. Under paragraph 8(a) of the amended statement of claim, the claimant averred that the expected net gratuity as at 31<sup>st</sup> April, 2003 stood at Kshs.180,000/= and further that the employer contribution was Kshs.180,000/=. Further that the number of years gratuity payment defaulted was thirteen years. The claimant therefore stated that the expected payment due calculated with compound interest at 14% per annum was Ksh. 1,977,268/14.

17. The respondent refuted these claims stating that the gratuity was not payable since the claimant's employment terms had reverted from contract to permanent terms and gratuity due for the period 1<sup>st</sup> February, 2000 to 31<sup>st</sup> August, 2002 was transferred to the Pension Scheme for the benefit of the claimant. Further that the respondent contributed to the scheme the rightful entitlement in line with the scheme rules administered by an outside body supervised by the Retirement Benefits Authority and that the demand for thirteen years gratuity payment defaulted had not been explained since the respondent remitted NSSF and payment of pensionable amount was made.

18. It is a cardinal principle of the law of evidence that whoever alleges a right or entitlement to something has the onus to prove by evidence that he or she is entitled to the right or claim they are making. In this particular case the claimant alleged that he was entitled to Ksh.180,000/= as his employer's contribution to the gratuity kitty. The claimant however did not present any material or evidence before the Court to support the claim. Further, the claimant never gave any basis for calculating the interest on the amount claimed at 14% p.a on compound interest.

19. On the other hand, under section 74 of the Employment Act, it is the responsibility of the employer to keep a written record of all employees particulars which are detailed under section 74 including particulars of remuneration, scale or rate of remuneration and details of any other benefits.

20. The claimant herein sought from the respondent a copy of the letter PCA/165/02/03 terminating the contractual service, the amount of the GSPS paid to the pension fund including copies of relevant documents that supported the payment. The claimant further sought to know the amount paid as employers' contribution to the pension scheme since the payment was made under terms of GSPS.

21. The information sought from the respondent was information they were obligated by law to have and no reason was given why they were not furnished to the claimant.

22. It may or may not be true that the claimant is justified in claiming the additional amounts as gratuity but whatever it is worth, the respondent had the obligation to furnish the information requested by the claimant vide his letter dated 12<sup>th</sup> August, 2004.

23. To this extent and to conclude this matter, the Court hereby orders that the respondent files in Court within 21 days of this judgment, the letter PCA/165/02/03 Changing the claimant's terms from contract to permanent and pensionable terms. The respondent is further ordered to file in court evidence of the amount paid under GSPS including documents that supported the payment and finally the respondent should furnish evidence and or documents showing that the sum of Ksh.900,634/95 paid to the claimant included gratuity for the period claimed.

24. The respondent shall share with the claimant herein the documents referred to above within 14 days of filing.

25. The matter is hereby set for mention on the 25<sup>th</sup> day of April, 2022 for directions and recording of final orders.

26. **It is so ordered.**

**DATED AND DELIVERED AT ELDORET THIS 18<sup>TH</sup> DAY OF MARCH, 2022**

**Abuodha Nelson Jorum**

**Judge ELRC**