



**Magonda v Mombasa Parents Club (Cause 10 of 2021)
[2022] KEELRC 1668 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1668 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 10 OF 2021**

**B ONGAYA, J
MAY 27, 2022**

BETWEEN

WINNIE MAGONDA CLAIMANT

AND

MOMBASA PARENTS CLUB RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim on February 4, 2021 through Wandai Matheka & Company Advocates. The claimant's case is pleaded as follows. The claimant was employed by the respondent on January 2, 1990 by a letter of appointment dated December 11, 1989 as a P1 teacher till December 31, 2019 when she was retired from the respondent's service at Nyali school and formerly Nyali primary school. Due to her diligent service she was promoted to the deputy principal at Kshs 119, 585.00 monthly salary. It was agreed that the normal retirement age shall be attainment of 60 years and 55 years of age for male and female staff respectively. Further agreement was that a staff would receive one-month salary for each completed year of service at the last applicable salary after giving six months' notice. As at retirement the claimant earned Kshs 119, 585.00.
2. It is further pleaded that in January 2019 the claimant gave a verbal notice to the principal that she would retire in December 2019. On December 20, 2019 the respondent wrote to the claimant an appreciation letter for her exemplary service and loyalty for the years served and handed her Kshs 100, 000.00 as a token of appreciation. She accepted the token and on December 31, 2019 wrote a letter to the respondent requesting for her gratuity pay for years of service as per terms of the employment contract. The respondent issued her a release letter dated January 14, 2020 but without addressing the issue of gratuity. On January 29, 2020 the respondent wrote to the claimant a letter informing her that she would be paid her gratuity per the forwarded cheque of Kshs 362, 469.00. The claimant protested as that was not the due gratuity per her contractual expectation. The claimant's case is that her due gratuity is Kshs 3, 587, 550.00 less Kshs 362, 469.00 already paid to her. She computes her claim thus



monthly salary Kshs 119, 585.00 x 30 years of service making Kshs 3, 587, 550.00 less Kshs 362, 469 paid thus a claim of Kshs 3, 225, 081.00.

3. The claimant prayed for judgment for:
 - a. A declaration that the claimant is entitled to gratuity.
 - b. The respondent to pay Kshs 3, 225, 081.00 as claimed.
 - c. Certificate of service.
 - d. Costs of the suit.
 - e. Interest on (b) and (d) from date of filing the suit till full payment.
 - f. Any other relief that the honourable court may deem fit and just to grant.
4. At the hearing on December 7, 2021 counsel for the claimant applied to amend the memorandum of claim thus, “She claims 2, 387, 971.00. I apply to amend the claim appropriately.... She worked for 30 years. Formula for gratuity claimed is 14-years x one-month salary per year then 15-years x 18 days per year worked making Kshs 2, 750, 440 less paid gratuity of Kshs 362, 469.00 making a claim of Kshs 2, 387, 971.00.” The Court allowed the oral application and ordered, “The oral amendment is allowed with the consequence that the amount claimed is Kshs 2, 387, 971.00 and Kshs 3, 225, 081.00 is deleted wherever it appears in the memorandum of claim filed on February 4, 2021 and substituted accordingly.”
5. The respondent filed the reply to the memorandum of claim on June 9, 2021 and through Kamami Njoroge & Company Advocates. The respondent pleaded as follows. The claimant retired on December 31, 2019 per her contract of service and she held the position of deputy principal. The respondent admitted that the retirement age for the claimant was agreed to be her attainment of 55 years of age but an employee so retiring from 1998 was not entitled to service pay but was entitled to pensions contributions paid to the pension scheme established by the respondent and less contributions made to NSSF. It was admitted that her last monthly salary was Kshs 119, 585.00. Further, the claimant was required to serve a written notice but she failed to do so. The respondent admitted giving the claimant Kshs 100,000.00 in appreciation of years of service to the respondent as an *ex-gratia* payment. The respondent was surprised to receive the claimant’s demand and notice to sue. The respondent denied the claimant’s claims and prayers. The respondent prayed that the claimant’s suit be dismissed with costs to the respondent.
6. The claimant testified to support her case and the respondent’s witness (RW) was the Nyali school principal one John Etenyi Kombo. Final submissions were filed for parties. The court has considered all the material on record.
7. There is no dispute that the claimant was employed by the respondent and retired upon attaining 55 years of age and effective December 31, 2019.
8. The 1st and main issue for determination is whether the claimant is entitled to the gratuity as prayed. The claimant testified that her claim is based on clause 9 on retirement of her initial letter of appointment dated December 11, 1989 and duly filed. The said clause 9 states as follows:

“The normal ages for retirement shall be males 60 years, females 55 years. Any continuation of employment beyond those dates shall be at the discretion of the committee.



9. In any case where retirement has become due a minimum of six months' notice in writing will be given by the committee.
10. On retirement staff will receive one month's salary for each completed year of service at the last applicable salary."
11. The claimant testified and it was not disputed that she was employed effective January 1, 1990; she retired on December 31, 2019.

Her further evidence was that clause 9 of the letter of appointment applied for 14 years until December 31, 2004 when a new employment manual was introduced. The manual was effective January 1, 2005 as stated on its face. Clause 18 (e) on retirement states, "Upon attaining the retirement age of 55 years or voluntary at 50 years the following will be paid:

1. Days worked up to the time of retirement.
 2. Refund of pension contributions both from the retiree and the employer.
 3. Gratuity will be paid for those who have been in employment for over five years and will be paid at the rate of 18-days wages for every completed year of service."
12. Clause 1 of the manual was introduction and addressed specifically to the claimant by her name and designation as deputy principal and signed for the respondent on 28.04.05 by the club chairman one James Matheka. The 3rd paragraph of that introduction clause 1 stated, "Please confirm your acceptance of this permanent employment manual by signing and returning the original copy. Although the signing of this employment manual is binding to both parties, revokes and supersedes all previous letter (s) of employment issued to you by any other authority in the club, it does recognise the number of years of service rendered to the club prior to January 01, 2005." The manual was effective January 1, 2005 and the claimant's testimony was that it applied until December 31, 2019, the date of her retirement.
 13. The claimant further testified that she was paid Kshs 362, 469.00 for gratuity and she claimed a balance of Kshs 2, 387, 971.00. She also testified that she made 5% pension contribution and the respondent equally contributed for her the 5% and which was refundable per clause 18 (e) (2) of the employment manual. It was her evidence that it was therefore clear that gratuity and contributed pension were separate and she was entitled to both. She testified that the contributory pension scheme had been introduced in 1998 and consequential to retirement she had been paid pension refund at a gross of Kshs 1, 942, 294.37. Further she had been paid only Kshs 362, 469.00 in gratuity and she claimed outstanding amounts because the Kshs 362, 469.00 had only been for the period January 1, 1990 to 1998. The parties had contributed pension as agreed each at 5% since 1998 and it was put in the employment manual in 2005 and effective January 1, 2005. She confirmed that under clause 16 of the employment manual it was discretionary for the employee to join the existing staff pension scheme. Her further testimony was that the retirement clause 18 (e) of the manual on payment of gratuity was not only for those not in the pension scheme. She confirmed she had received NSSF payment of Kshs 270,760.00. Further she did not know whatever was paid to other staff who had retire earlier than her. She stated that she claimed the unpaid gratuity per the manual. She further testified, "Am not aware that an employee cannot receive double pension. Despite whatever was paid I do not think it is unfair. I served 30 years. I went there as a little girl. If it was not provided for maybe, I would have left. I currently author books. Is for business."
 14. RW testified that he was employed by the respondent in December 2016 and the claimant had worked as his deputy principle until she retired on December 31, 2019. He testified that he had not seen any



employee get paid gratuity and only those who were employed prior to 1997 received gratuity for period of service up to 1997. Further the contributory pension scheme had taken over effective 1998 and gratuity system closed. It was his evidence that it would be punitive to give both gratuity and pension. As principal he served on 3-years fixed term contract providing for gratuity and he was not a permanent and pensionable staff. RW testified that the claimant had retired together with 2 other employees and all were paid gratuity for years served effective date of appointment to 1997 and nothing more on gratuity. In that case, the claimant was paid Kshs 362, 469.00 for gratuity from January 1, 1990 to December 31, 1997. She was also paid *ex-gratia* token of appreciation of Kshs 100, 000.00 from management. RW testified, “The Kshs 362, 469.00 was for the period worked before 1997. The manual shows how it is worked out. The gratuity is for work till 1997. The Manual be construed within practice and reason. Manual does not mention 1997 as cut off for those to earn gratuity. I see claim of 2, 387, 971.00 in gratuity. The computation is wrong. One employee would not earn pension, NSSF and gratuity same time. I have never seen that. No one has ever asked for gratuity. Claimant retired honourably. She was the deputy for all those years.”

15. The claimant further testified that she received a certificate of service with wrong dates and she returned it for amendment and she had not received a response.
16. The mutual final submissions for the parties are that the court cannot rewrite the parties’ agreement. The court has perused the submissions as well as the pleadings and the testimonies in court. The parties appear to have missed to see the elaborate provisions in the introduction clause 1 of the employment manual of January 1, 2005 and reproduced earlier in this judgment. It is unambiguous that the manual revoked and superseded all previous letters of appointment issued by any authority of the respondent - nevertheless, the manual would recognise the number of years of service rendered to the club prior to its effective date January 1, 2005. By that provision the court finds that it was misconceived for the claimant to invoke a formula in clause 9 of her letter of appointment towards computing her gratuity for the period January 1, 1990 to December 31, 1997. The court further finds that by that provision in the introduction clause 1 of the manual, it was misconceived for the respondent to urge that after December 31, 1997, the claimant would not be entitled to gratuity. In particular, clause 18 (e) (3) of the manual was elaborate and plain that gratuity was payable to those who had been employment for over five years at the rate of 18 days’ wages for each completed year of service. The provision does not exempt those who may have joined the contributory staff pension scheme as envisaged in clause 16 of the manual. The court holds that nothing in the manual stopped an employee like the claimant from joining the staff pension scheme and as contracted, being entitled to gratuity as well as the statutory benefits under NSSF Act. For avoidance of doubt, the court holds that nothing in section 35 of Employment Act, 2007, or any other provision of the act, stopped the respondent contracting and conferring to the claimant better retirement benefits than the minimum benefits envisaged in section 35 of the act, provisions of the act generally, or other statutory conferment such as under the NSSF Act.
17. The court follows its holding in Mediamax Network Limited Versus Jeff Mwaura Koinange [2018]eKLR thus, “It was urged for the respondent that there must be equality of arms in matters of contracts of service. However, the court holds that the statutory policy and philosophy of minimum terms and conditions of service is clearly meant to protect the employees and not the employers so that the employer can by a contractual provision relinquish any favourable minimum statutory provision. That was what happened in clause 12.1 when the claimant agreed that the respondent could voluntarily resign his office – and in so doing it cannot be said that such surrender by the claimant of the need by the employee to serve a notice or pay in lieu of notice as envisaged in section 35 as read with section 36 of the act, was unlawful; not so! because such minimum protection was in favour of the respondent as the employee and not in favour of the claimant as an employer and who was entitled to surrender the minimum protection in favour of the respondent.



18. The court holds that the statutory policy and philosophy of minimum terms and conditions of service is provided for in section 3 (6) of the *Employment Act*, 2007 which states that subject to the provisions of the act, the terms and conditions of employment set out in the act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms therein set shall be null and void.” Thus, the court holds that the respondent as an employer was entitled to be generous in favour of the claimant by conferring more than the minimum statutory terms and conditions of service on gratuity and generally much better retirement or separation benefits. The converse is not permissible or lawful – the respondent as an employer could not impose terms and conditions of service upon the claimant as an employee below the minimum statutory terms and conditions of service.
19. The court further finds that the respondent was entitled to vary the terms on gratuity from provisions as had been contracted in clause 9 of the letter of appointment to the terms as provided in the manual. In particular, section 10 (5) of the *Employment Act* stipulates that where any terms and conditions of service in a contract of employment changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee on the change in writing. The evidence is that the claimant was provided a copy of the manual and requested to accept and there was no dispute that she did accept the changed terms and conditions of service including variation on clause 9 of her letter of initial appointment. Indeed, she accepted the changes by signing the manual on May 16, 2005.
20. The court has considered the RW’s concerns that he had not seen any employee receive pension, gratuity and NSSF dues concurrently. However, he did not avail records of the respondent’s employees who had previously retired and even if in similar circumstances as the claimant they may not have been paid or demanded payment of gratuity, the court holds that the parties were bound by the express contractual terms and conditions of the contract of service. Thus, the claimant was entitled to enforce the terms and conditions of her contract of service even if employees in similar situation may have failed to do so.
21. The court therefore returns that the claimant is entitled to gratuity at 18-days salary. The claimant has exhibited her December 2019 payslip which puts her 18 –days rate per year at Kshs 63, 666.72 x 30 years; it makes Kshs 1, 910, 001.60 and less Kshs 362, 469.00 already paid therefore giving a balance of Kshs 1,547, 532.60 due to the claimant as unpaid gratuity.
22. The court finds that both parties did not exhibit the certificate of service and in dispute as issued to the claimant and which the claimant testified had erroneous dates. The court returns that the claimant, on a balance of probability, is entitled to delivery by the respondent the proper certificate of service per section 51 of the *Employment Act*, 2007.
23. In conclusion, judgment is hereby entered for the claimant against the respondent for:
 1. Payment of Ksh 1,547, 532.60 by July 1, 2022 failing interest to run thereon at court rates from the date of filing the suit till full payment.
 2. The respondent to deliver the claimant’s certificate of service by July 1, 2022.
 3. The respondent to pay the claimant’s costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 27TH MAY, 2022.

BYRAM ONGAYA

JUDGE

