



**Ochola v Board of Management, Lenana School (Cause 144 of 2017)
[2022] KEELRC 1439 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1439 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 144 OF 2017**

**JK GAKERI, J
MAY 26, 2022**

BETWEEN

ALICE OCHOLA CLAIMANT

AND

BOARD OF MANAGEMENT, LENANA SCHOOL RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a statement of claim filed on 27th January 2017.
2. The Claimant avers that she was employed by the Respondent on 6th January 1986 and worked until 31st December 2015 when she officially retired from the school after attaining the retirement age of 60.
3. That after retirement, the Respondent refused and/or neglected to provide retirement benefits and arrears of the Claimant and the same remain outstanding.
4. The Claimant prays for –
 - a. Terminal benefits and arrears as follows: -
 - i. Service gratuity Kshs.944,008
 - ii. Overtime between July 2014 to December 2015 Kshs.73,986
 - iii. Leave pay/due 30 days x years x
gross salary
26 Kshs.713,640
 - iv. Salary arrears



July 2012 to June 2015 Kshs.220,752

1996 to 2011 Kshs.480,000

v. House allowance arrears Kshs.52,000

vi. Commuter allowance 2006 to
2015 Kshs.36,000

- b. Costs and interest of this claim.
 - c. Any other or further relief as Court may deem fit.
5. It is the Claimant's case that gratuity is provided by the CBA between Kenya Union of Domestic, Hotels and Education Institutions, Hospitals and Allied Workers (KUDHEIHA) and Ministry of Education.
 6. The Respondent filed a response to the statement of claim on 9th March 2017.
 7. The Respondent avers that the Claimant was seconded by the Ministry of Education as a nurse. That in 1993, the Ministry of Education transferred all responsibilities of payment of salaries and other benefits including gratuity for all non-teaching staff in public secondary schools by Legal Notice No. 263 of 1993. However, service gratuity due before 1993 was payable by the Government.
 8. That employees of public secondary schools previously employed by the Ministry of Education prior to 1993 and were holders of GP33 forms were entitled to gratuity payable by the Ministry for the duration they were in the employment of the Ministry.
 9. It is the Respondent's case that after the Claimant retired on 31st December 2015, the Respondent gave her a letter dated 18th May 2016 together with GP33 form and the last payslip to forward to the Principal Secretary, Ministry of Education for purpose of processing of service gratuity for payment. That the Claimant failed and/or neglected to deliver the documents to the Ministry of Education.
 10. The Respondent admits that the Claimant is entitled to gratuity payable by the Ministry of Education and the Respondent. That the Claimant is not entitled to overtime pay or leave. That all her leave days were paid.
 11. That the Claimant was housed by the school and no house allowance is due.
 12. Finally, the Respondent avers that commuter allowance was not part of the Claimant's contract of employment.
 13. Regrettably, the Respondent did not participate in the proceedings in any way after filing the statement of response. Hearing notices to the Respondent's Counsel were unresponded to until Counsel filed a chamber summons application dated 17th January 2022 seeking leave to cease acting for the Respondent on the ground that attempts to seek instructions from the Respondent had fallen through inhibiting Counsel's capacity to proceed with the case.
 14. The chamber summons was served upon the Respondent by email dated 20th January 2022 but elicited no response. The application was allowed on 16th February 2022.
 15. The suit proceeded to hearing on 21st October 2021.



Claimant's Evidence

16. The Claimant adopted the written statement which states that she was employed by the Respondent on 6th January 1986 as a nurse. That her duties included providing health care to staff and students, health screening, coordinate referrals to private health care providers and serve as liaison between the school personnel, family and community health providers and the community.
17. It was her testimony that on 8th May 2015, she was summoned to the Principal's office at 10.45 am where she received a letter dated 8th May 2015 informing her that she would retire on 31st December 2015 on attaining the age of retirement.
18. That the Principal was adamant on terminal dues and salary arrears. That upon consulting the union, she was informed that she was entitled to service gratuity as contemplated by the CBA between KUDHEIHA and the Ministry of Education.
19. It was the Claimant's testimony that thereafter she engaged a firm of advocates to represent her. The statement makes no reference to the prayers set out in the statement of claim.
20. In her oral testimony, the Claimant stated that she become a registered community health nurse in 2014. That she was in job group J and was not paid gratuity yet she was offered Kshs.500,000/- which she regarded too low after 30 years of service. That she was earning Kshs.24,662/- per month and expected to receive Kshs.29,918/- as per the Circular dated 1st July 2012.
21. That she prayed for salary arrears and leave allowance since she did to proceed on leave by reason of being on call throughout. That from 2012 she did not proceed on leave till retirement. That she was entitled to house rent arrears as per the Salaries and Remuneration Commission (SRC) Circular effective dated 10th December 2014.
22. That she worked alone for ten months and was not compensated for the extra work. That she would report to work at 6.30 am. The Claimant confirmed that she was housed in the school compound and was not paid commuter allowance as per the SRC Circular.
23. Hearing of the Respondent's case was scheduled for 14th December 2021 but the Respondent did not appear. Despite attempts by the Claimant's Counsel to have the Respondent's case closed for nonattendance, the Court granted the last adjournment for defence hearing.
24. On 21st January 2022, the proposed hearing date, the Respondent's Counsel appeared and informed the Court that he had filed an application to cease acting for lack of instructions. Counsel was directed to serve the application upon the Respondent and file return of service. The application was heard on 16th February 2022 and allowed.
25. Parties were accorded seven days to file submissions. The Respondent did not file submissions.

Claimant's Submissions

26. As regards service gratuity, the Claimant submits that the letter of appointment provided that her appointment was subject to the terms of any agreement between the Ministry of Education and the union having worked from 6th January 1986 to 31st December 2015.
27. That clause 31 of the memorandum of agreement between the Ministry of Education and KUDHEIHA provided for service gratuity. That the Respondent did not contest service gratuity save for the period 1986 to 1992 when the Claimant served under the Ministry of Education. That the Respondent was responsible for gratuity from 1993 to 2015, a sum of Kshs.716,144/-.



28. On overtime it is submitted that from July 2014 to December 2015 the Claimant used to report to work at 6.00 am and leave at 6.00 pm without payment of overtime at three hours per day for 18 months. The Claimant in her oral testimony testified that she worked alone for ten months. The decisions in *Milton Wanyonyi Omaka v Board of Management Nambalayi D.E.B Primary School* [2020] eKLR and *Erasmus Omoiti Eroto v Board of Management Kapsoya Secondary School Eldoret* [2016] eKLR are relied upon to urge the Court to award overtime pay.
29. As regards leave pay, the Claimant submits that from 1986 she did not proceed on leave as she was the only nurse and is claiming leave pay for 19 years 1996 to 2015 at Kshs.468,578/-. The decision in *Ishmael Otieno Ondigo v African Portland Cement Company Limited* [2015] eKLR is relied upon to reinforce the submission.
30. As regards salary arrears, it is submitted that the Claimant was underpaid contrary to Staff Regulations 1993, Clause 4. The decision in *Kudbeiba v B.O.G Ngaru Girls Secondary School* [2014] eKLR is relied upon.
31. It is the Claimant's submission that the scheme of service was attached and the Claimant was under job group J and claims arrears for 2010 to 2011 Kshs.110,040/-, 2012 to 2014 Kshs.145,104/- and 2015 Kshs.141,796/-.
32. It is submitted that the claim for house allowance was abandoned since the Respondent housed the Claimant.
33. As regards commuter allowance, it is submitted that Legal Notice 56 of September 1993 provided for commuter allowance and the Claimant was claiming Kshs.36,000/- for being in job Group J.
34. Despite being accorded sufficient time, the Respondent did not file submissions.

Analysis and Determination

35. The singular issue for determination is whether the Claimant is entitled to the reliefs sought.
36. Before delving into the issue, it is imperative to provide a summary of the facts of this case.
37. The Claimant was employed by the Respondent as a nurse effective 1st January 1986 with a three months probationary period and a monthly salary of Kshs.1,880/-.
38. As at the date of retirement in December 2015, the Claimant's gross salary was Kshs.32,552/- per month having risen from Kshs.12,290/- in 1999 to Kshs.25,674/- in 2010, Kshs.27,199/- in 2012 and Kshs.27,714/- in 2013.
39. It is not in dispute that on 8th May 2017, the Respondent's Secretary to the Board of Management notified the Claimant that she was due for retirement age on account of attaining retirement age.
40. There is no record on how the Claimant responded to the letter but it does appear that the Claimant retired as envisaged by the letter.
41. It is also unclear as to what the Claimant and Respondent did or agreed in light of the impending retirement. No evidence was led on what transpired from 8th May 2015 to 31st December 2015.
42. From the evidence on record, it is clear that apart from the claim for gratuity, and perhaps salary arrears, no other claim was raised by the Claimant before the retirement date.
43. Puzzlingly, the Claimant attaches the reviewed scheme of service for nursing personnel dated May 2014, Circulars Ref DPM/2/8AVOL.III/(164) dated 29th August 2006, on harmonisation of terms



and conditions of service in the public service, travelling and annual leave Circular Ref. MSPS2/6/4A Vol.X/(2) dated 25th June 2012 on realignment of the salary structure for civil servants, Circular Ref. No. DPM16/44 Vol.IX/(33) dated 13th August 2008 on harmonisation of terms and conditions of service for public service, review of salaries for civil service, Circular Ref. No. OP18/1A/VIII/141 dated 18th June 2010 on harmonisation of terms and conditions of service in the public service housing and the Salaries and Remuneration Commission Circular Ref. No. SRC/ADM/CIR/1/13 Vol.III(126) dated 10th December 2014 on review of allowances in the public service.

44. However, no evidence was led on the relevance and applicability of these documents to the Claimant's prayers. Overall, the Claimant's witness statement is reticent on the prayers set forth in the statement of claim. The statement makes no reference to leave, overtime, house allowance, commuter allowance, service gratuity or salary arrears.
45. I will now proceed to analyse the specific prayers sought.
46. Granted that the suit herein is undefended, the Court will proceed on the basis of the required standard of proof as ordained by Sections 107 and 108 of the *Evidence Act*.
47. Section 107 of the *Evidence Act* provides as follows:
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
48. Section 108 of the *Evidence Act* provides that:
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
50. In the instant case, the burden of proof lies with the Claimant. The Claimant is required to prove on a balance of probabilities that she is entitled to the reliefs sought.
51. It is trite law that the standard of proof remains the same whether the suit is defended or not.

(a) Service Gratuity

52. As submitted by the Claimant, the Respondent has not denied owing the Claimant a portion to her gratuity. To justify payment and computation of gratuity, the Claimant relies on copies of four printed pages of a document with a cover page styled as follows:
- “Memorandum of agreement
Between
Ministry of education
and
Kenya union of domestic hotels, educational institutions, hospitals and allied workers
(kudheiha workers)”
53. The Claimant has not attached a copy of the alleged CBA between the parties. Intriguingly, the preamble and the signature pages are missing and it has neither a date nor time frame.



54. In other words, the four (4) pages lack authenticity. The Court is not persuaded that it would be judicious to ground an award of the sum claimed by the Claimant as gratuity on these pages.
55. Whereas the Claimant may be entitled to gratuity as alleged and the Respondent as not denied the same, other than the apportionment with the Ministry of Education, the Court is disinclined to make an award on the basis of unauthenticated pages of a document.

(b) Overtime

56. As adverted to elsewhere in this judgment, the Claimant's statement makes no reference to any overtime claim nor the amount claimed.
57. The Claimant's attempts to remedy the situation by oral evidence were largely unsuccessful. She stated as follows "In 2014, I worked alone for 10 months and was not compensated. I would report at 6.30 am day and night." The Claimant led no evidence on how many extra hours she worked, for how many days and how much she was claiming for the overtime.
58. Attempts by Counsel to correct the omission through submissions is unpersuasive and unconvincing to the Court.

The claim is dismissed.

(c) Leave

59. Analogous to the prayer for overtime, the Claimant's statement makes no reference to leave pay or leave generally.
60. In her oral testimony, the Claimant stated that she would proceed on leave during the early years of employment but did not do so from 2012 till retirement.
61. More puzzling, is how the Claimant retired with pending leave days, if this was ever the case without any written communication from her employer on how the days would be dealt with. Typically, an employee is supposed to ensure that no leave days are pending by the retirement date. Retirement in the Court's view is not an event, it is a process an employee must prepare and be prepared for. The process commenced earlier on and in the Claimant's case it commenced in May 2015. The Claimant was obviously aware of her age and the impending retirement.
62. The Court finds it inconceivable that the Claimant had unknown pending leave days till retirement and had no express arrangement on how they would be paid for or made good.
63. Intriguingly, in the submissions, the Claimant is claiming leave pay for 19 years, Kshs.468,578/-.
64. It is not in dispute that the Claimant led no evidence on whether she engaged the Board of Management of the Respondent on these issues, in particular leave, overtime, salary arrears and others. The Court doubts the genuineness of the claim for leave pay.
65. In the Court's view an employee who proceeds to retirement with pending leave days can only be deemed to have forfeited them for the reason that he/she is no longer an employee.
66. For the foregoing reasons, it is the finding of the Court that the Claimant has not placed sufficient material before the Court on which to find a sustainable claim for leave pay. The prayer is dismissed.



(d) Salary arrears

67. The Claimant's written statement makes no reference to salary arrears. It is silent on the issue and the Claimant led no evidence of the amount due nor when the underpayment arose but has attempted to do so in the submissions which is undoubtedly not evidential material. In addition, although the Claimant testified in Court, that she was in Job Group J, she led no evidence to prove that fact. Neither her letter of appointment dated 6th January 1986 nor the letter from the Secretary to the Board of Management of the Respondent or any other official document make reference to her job group as alleged.
68. Needless to emphasize, job groups in the public service in Kenya is constitutionally a preserve of the Public Service Commission. The various job groups in the public service were initially meant for the main stream civil service only but have over time been extended to the entire public service to promote harmony in the service and ensure fairness among other things. For employees outside the main stream civil service, mapping is necessary to ensure proper placement of employees. This is the function of the Public Service Commission. There is no evidence on record that the Claimant's position was mapped against the Public Service Commission job groupings.
69. Be that as it may, copies of payslips for September 2010, November 2012, March 2013 and December 2015 make reference to the Claimant's job group by way of an entry. The payslip for September 2010 is explicit that the job group of the Claimant was "J".
70. This would appear to confirm that the Claimant was in job group J as alleged. The Claimant led no evidence on when she joined job group J or what her salary was before 2010 or whether there was underpayment or not. Attempts by Counsel to do so by way of submissions could not ameliorate the situation.
71. In oral evidence the Claimant testified that she was earning Kshs.24,662/- per month and expected to receive Kshs.29,918/- as per the Circular dated 1st July 2012.
72. For the foregoing reasons, it is the finding of the Court that the Claimant has on a balance of probabilities established that she was in job group J from 2010 and was thus entitled to the salary due to employees in job group J from 2010.
73. Accordingly, the Claimant is awarded salary arrears from 2010 to December 2015.

(e) House Allowance

74. The Claimant prays for Kshs.52,000/- as house allowance arrears. Noteworthy, the Claimant led no evidence on how the arrears arose, but more significantly, the payslips for September 2010, November 2012, March 2013 and December 2015 show that the Claimant was paid a housing allowance of Kshs.6,000/- per month. It is unclear how the arrears arose. The claim is dismissed.

(f) Commuter allowance

75. The Claimant prays for commuter allowance from 2006 to 2015 of Kshs.36,000/-. Regrettably, the Claimant led no evidence of the amount due per month and how the arrears came about. In essence particulars of the claim were not articulated. The claim is dismissed.
76. In conclusion, judgment is entered for the Claimant against the Respondent in the following terms:
 - a. Respondent is directed to compute and pay its portion of gratuity and facilitate the Claimant to access the Ministry of Education portion by availment of the requisite documentation.



- b. Respondent to compute and pay the Claimant's salary arrears from September 2010 to December 2015.
- c. The Claimant is awarded costs of this suit with interest at Court rates.

77. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF MAY 2022

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

