



**Kanyi v Gatimu Secondary School & another (Cause 463 of 2014)
[2022] KEELRC 1323 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1323 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 463 OF 2014
DN NDERITU, J
JULY 13, 2022**

BETWEEN

JEREMIA KIRUTHI KANYI CLAIMANT

AND

GATIMU SECONDARY SCHOOL 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant commenced this cause by way of a memorandum of claim dated 30th September, 2014 filed in court on 3rd October, 2014. In the said memorandum the Claimant prays for the following:-
 - (i) A declaration that the Claimant is entitled to gratuity/severance pay.
 - (ii) Underpayment Kshs.2,420/= X 36 months = Kshs.87,120.
 - (iii) Severance pay Kshs.9,420/= X 20 = Kshs.188,400.
 - (iv) A certificate of service.
2. Several documents were filed with the memorandum of claim and a witness statement.
3. Upon service the 1st Respondent entered appearance and filed a response dated 5th December, 2014 in which it prayed for dismissal of the entire claim for want of merits.
4. The Claimant then filed a response to the defence in which he reiterated the contents in the claim.
5. When this cause came up for hearing on 1st December, 2021 Counsel for both parties by consent agreed that the matter be disposed of by way of written submissions, the pleadings, and the exhibits filed by the respective parties.



6. On the same date Counsel for the Claimant applied for and was granted leave to amend paragraph 5 of the claim to insert the figure of Kshs.7,100/= in place of kshs.9,420/=. However, the amended memorandum of claim dated 17th December, 2021 reads Kshs.71,000/= instead of the Kshs.7,100/= as proposed during the oral application in court. For all intents and purposes this court shall treat the intended figure, in monthly pay, as Kshs.7,100/=. There is no way a watchman/guard would earn a monthly salary of Kshs.71,000/= in Kenya!
7. The 1st Respondent filed an amended response to the amended memorandum of Claim dated 23rd March, 2022 and reiterated the contents of the earlier response to the claim and specifically denying the contents of paragraph 5 of the amended memorandum of claim alluded to above.
8. On 30th March, 2022 Counsel Wanjeri for the 2nd Respondent attended a mention of the matter and informed the court that the 2nd Respondent had not filed any papers and did not intend to file written submissions as there is no specific claim against or liability attributed by the Claimant to the 2nd Respondent.
9. Claimant's Counsel Mr. Muthanwa filed his written submission dated 14th March, 2022 on 15th March, 2022 and Counsel for the 1st Respondent Miss Ndegwa filed her written submissions dated 15th March, 2022 on 30th March, 2022.

II. Claimant's Case

10. The Claimant's case is that he was employed by the 1st Respondent as a watchman in January 1993 at a monthly salary of Kshs.7,100/=. It is not clear whether this monthly salary was paid throughout the entire period of employment or it was the last salary. The Claimant retired on 30th April, 2012.
11. The Claimant alleges that for the entire period of his employment with the 1st Respondent he was underpaid as he was paid below the minimum monthly wage recommended under the applicable regulations and schedules thereof.
12. Further the Claimant alleges that he was denied his gratuity under the law and Collective Bargaining Agreement (CBA) between his union and the 1st Respondent.
13. The Claimant further alleges that he was denied severance pay and a certificate of service.
14. The Claimant attached a demand letter to the 1st Respondent dated 20th August, 2014, letter of appointment signed on 19th September, 2006, letter dated 30th March, 2012 from the 1st Respondent to the Claimant which sent the Claimant on leave pending retirement with effect from 1st May, 2012.
15. There is a letter by the 1st Respondent dated 23rd May, 2012 instructing the NSSF, Nyahururu Branch, requesting that the Claimant's retirement benefits be processed having retired on 30th April, 2012.
16. There is a memorandum from the Claimant's union (KUDHEIHA) attached to a letter dated 20th August, 2012 in which the said union ostensibly confirms that the Claimant was their member.
17. It appears that the dispute between the Claimant and the 1st Respondent at some point became the subject of reconciliation in the County labour office, Nakuru, as the Claimant has displayed a letter dated 6th September, 2013 from the labour office and a memorandum from the said labour office demanding that the Claimant be paid his alleged dues.
18. The Claimant has also displayed a letter dated 14th November, 2013 from the 1st Respondent addressed to the said labour office wherein the 1st Respondent denied owing any dues to the Claimant.



19. It is on the basis of the foregoing that the Claimant prayed as set out in part I of this judgment.

III. 1st Respondent's Case

20. As far as it can be gathered from the amended response to the claim, the witness statement of Samuel Muriuki Kiragu, and the written submissions, the 1st Respondent's case is that the Claimant was employed by the 1st Respondent as a watchman at a monthly salary of Kshs.9,420/=.
21. The Respondent was retired on 30th April, 2012. He was a member of NSSF and that the 1st Respondent made all remittances thereto. The 1st Respondent points out that in a letter dated 23rd May, 2012 it advised NSSF to process the retirement benefits of the Claimant.
22. The 1st Respondent denies that the Claimant was a member of a trade union and alleges that the Claimant was issued with a certificate of service.
23. It is on the basis of the foregoing that the 1st Respondent prayed that this cause be dismissed with costs.

IV. 2nd Respondent's Case

24. The 2nd Respondent has been sued as the chief legal advisor to the Government of the Republic of Kenya. There is no specific allegation or claim made against the Attorney General (AG) of the Republic.
25. The AG entered appearance on 28th October, 2014 vide a memorandum of appearance dated 23rd October, 2014. As stated in an earlier part of this judgment, the AG decided not to defend or file submissions and Counsel thereof informed the court that there were no specific allegations or claims against the AG.

V. Issues for determination

26. From the foregoing analysis, the following issues commend themselves to this court for determination:-
 - (a) Is the Claimant entitled to the reliefs prayed for in the Claim?
 - (b) Between the 1st and 2nd Respondent who is liable to settle the claim, if (a) above is in the affirmative?
 - (c) Costs.
27. There is no dispute that the Claimant was engaged by the 1st Respondent as a watchman in 1993 at a starting salary of Kshs.1,300/=. The Claimant produced the letter of appointment as an exhibit.
28. The Claimant worked over the years until 30th April, 2012 when he retired. The evidence on record by the Claimant is that his monthly salary as at the date of retirement was Kshs.7,200/=. The 1st Respondent, being the custodian of employment records under Section 10 and 74 of the Employment Act (the Act) did not produce any evidence to the contrary and so this court holds that as at the time of retirement the Claimant was on a monthly salary of Kshs.7,100/=.
29. There is no dispute as well that the Claimant was retired on attaining the mandatory retirement age and hence this is not a case of redundancy, unlawful termination, or wrongful dismissal.
30. Prima facie, the letters from the union (KUDHEIHA) and memorandum on the dispute confirm that indeed the Claimant was a member of the said union. The union has identified him as a member



No.xxxx in a letter dated 23rd May, 2012 which the Claimant produced as an exhibit. This court therefore holds that the Claimant was a member of the said union.

31. Before dealing with the issue of the reliefs let me deal with the issue of liability. In paragraph 3 of the amended memorandum of claim the Claimant pleads as follows:-

“That the said Respondent is the Chief Government Advisor sued in that capacity.”

32. This above pleading means that other than for being the chief legal advisor to the Government there is no other nexus or capacity in which the 2nd Respondent has been joined in this cause. In fact, no liability has been attributed to the AG. In the circumstances this court holds that the AG is not liable for any of the reliefs sought for by the Claimant or at all. This explains why Counsel for the 2nd Respondent opted not to file any defence or written submissions but only entered appearance to acknowledge receipt of summons to enter appearance and hence acquire a right to address the court if such need arose.

33. Prayer (i) is for “a declaration that the Claimant is entitled to gratuity/severance payment.” Before making such a declaration let the court examine the merits or lack thereof in that claim.

34. Severance pay is payable under Section 40 of the Act to employees who have been declared redundant and hence terminated on redundancy. As noted above the Claimant was lawfully and procedurally retired.

35. Gratuity on the other hand is a gratuitous payment made by an employer to an employee who has stopped working for such an employer as a way of saying “thank you”. It is purely voluntary unless the same is provided for in the contract or letter of appointment and where the employee meets the agreed conditions.

36. The letter of appointment of the Claimant does not provide for gratuity and hence none is payable – See Onyango J in *Simon Kipkorir Keter v. ACK Christian Intermediate Technology Centre & Another* (2016) eKLR.

37. For the foregoing reasons prayer (i) must fail.

38. Prayer (ii) is on underpayment of salary amounting to Kshs.87,120/=. In his submissions Counsel for Claimant has submitted that the Claimant was supposed to be paid Kshs.9,420/= and not Kshs.7,100/= as at the time of retirement. In the relevant paragraph Counsel for Claimant has submitted as follows:-

“We submit that the Claimant earned a monthly salary of Kshs.7,100/= which was below the prescribed minimum wage under the various Labour Institutions Act Regulations Under Job Group A where the Claimant falls, he was supposed to earn a monthly salary of Kshs. 9,420/= and not Kshs.7,100/= and thus was being underpaid.”

39. This court has painstakingly gone through documents annexed to the Claimant’s Counsel submissions and those annexed to the memorandum of claim and is unable to establish the Job Group A that the Counsel alleges the Claimant belonged to. The allegations that the Claimant was supposed to earn Kshs.9,420/= is unsupported and no evidence has been tendered or highlighted to persuade this court to find in favour of the Claimant.

40. On the other hand the 1st Respondent has tendered and relied on Legal Notice No.64 of 2011 proclaimed by the Minister of Labour on 3rd June, 2011 which clearly declares the minimum salary of the highest paid watchman as Kshs.7,586/= for Nairobi, Mombasa and Kisumu, Kshs.4,827/= for areas such as where the Claimant worked in Ol Joro Orok, Nyandarua County.



41. In view of the foregoing this court is unable to detect any underpayments and that plea is dismissed.
42. The other item in prayer (ii) is on severance pay which has already been dealt with in an earlier part of this judgment and dismissed.
43. The final item in prayer (ii) is certificate of service. There is no evidence that the Claimant was issued with a certificate of service and none has been displayed by the 1st Respondent. The 1st Respondent is ordered to issue and deliver a certificate of service to the Claimant within 30 days of this judgment.
44. On the issue of costs, the Claimant's cause has to a large extent not succeeded. However, in the interest of justice, each party shall meet own costs.
45. The Claimant has withheld information/evidence on whether he received any dues from NSSF.
46. The net effect is that except for the issuance of certificate of service the Claimant has failed to prove his cause to the required standard and hence all the other items are denied.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 13TH DAY OF JULY, 2022.

.....

DAVID NDERITU

JUDGE

