



**Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals
Workers (KUDHEIHA) v B.O.M Kibos School for the Blind (Cause
E021 of 2021) [2022] KEELRC 13270 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13270 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E021 OF 2021
CN BAARI, J
NOVEMBER 24, 2022**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITALS WORKERS (KUDHEIHA) CLAIMANT**

AND

B.O.M KIBOS SCHOOL FOR THE BLIND RESPONDENT

JUDGMENT

Introduction

1. The claimant's memorandum of claim is dated February 9, 2021, and filed on March 9, 2021. The claimant's prayers are for payment of a sum of Kshs 225, 756.00, comprising of a service gratuity, unpaid leave travel allowance and salary under payment.
2. The respondent entered appearance through the office of the Attorney General on May 3, 2021, and thereafter filed a reply to the memorandum of claim together with the respondent's witness statement and list of documents on June 22, 2021.
3. The case was first heard on December 1, 2021, when the grievant testified in support of his case. He adopted a witness statement filed in the matter, and produced documents as exhibits in aid of his case.
4. The respondent's case was heard on July 26, 2022, after several adjournment sought by the respondent on various grounds, including an attempted out of court settlement that did not bear fruits. The respondent presented two witnesses, a Ms Caroline Adhiambo and a Mr James Onyango Adede to testify on her behalf. The witnesses sought the adoption of their witness statements and produced the bundle of documents filed in support of the respondent's case.
5. The respondent filed submissions. The claimant did not.



The Claimant's Case

6. The claimant's case is that the grievant, one Philip Opiyo Nyanweso, was employed by the respondent as a grounds-man, at job group C and on a basic salary of Kshs 3,310/-, through a letter dated January 23, 2004.
7. The claimant states that the appointment letter clearly stated that the grievant's appointment was subject to the terms and conditions of service applicable in the Collective Bargaining Agreement (CBA) between KUDHEIHA and the Ministry of Education.
8. It is the claimant's case that the grievant's salary was later appraised to Kshs 5,922, house allowance of Kshs 2,500, medical allowance Kshs 528, all amounting to Kshs 9,325 per month, and which he earned until the time when he voluntarily terminated his services.
9. The claimant states that the grievant worked with due diligence and care as a grounds-man and at times as an artisan from January 1, 2004 to January 2, 2018 (14 years) when he tendered his resignation due to personal reasons as per his letter dated October 3, 2017.
10. The claimant states that the grievant's letter informing the respondent of his intention to terminate his services gave the requisite 3 months' notice as required. The claimant further states that the grievant's resignation was accepted by the respondent *vide* a letter dated May 4, 2018 and was subsequently released.
11. It is the claimant's further case that through a letter dated December 28, 2017, the secretary to the BOM wrote to the ministry of education science and technology (director of special needs education) notifying the ministry of the grievant's exit from their service, and further requested for tabulation of his terminal benefits/service gratuity which amounted to Kshs 82,908.
12. The claimant states that through a letter dated January 2, 2018, the grievant was issued with a certificate of service in accordance with section 51 of the *Employment Act* 2007.
13. The claimant states that they wrote a letter dated February 16, 2018, informing the respondent that the tabulation of service gratuity according to their letter was erroneous having been calculated based on an underpaid salary that was contrary to the DPM circular for the year 2017, and also noted the fact that the grievant had been underpaid throughout the 14 years he worked for the institution.
14. The claimant states that the grievant being a public servant was to be placed on allowances, terms and conditions of service similar to other public servants and as per the applicable scheme of service.
15. The claimant states that their letter of February 16, 2018, was not responded to, and they once again wrote another letter dated June 22, 2018, requesting for payment of service gratuity due to the grievant and another employee known as Flora Wakhuka based on the applicable scheme of service.
16. The claimant states that for reason that no response was forth coming on the payment, the grievant had to report to the dispute to the secretary general in-line with the *Labour Relations Act* 2007 *vide* a letter dated August 22, 2018. It is the claimant's case that, their secretary general in-line with section 62(i) of *Labour Relations Act* 2007, reported the matter to the Ministry of Labour through a letter dated July 29, 2019.
17. The claimant states that the ministry of labour accepted the dispute and through its chief industrial relations officer, appointed Mr A M Makori of Kisumu Labour Office to conciliate on the matter through a letter dated August 19, 2019 and parties were notified to file their submissions.



18. The claimant states that upon filing of submissions by both parties, a meeting was set to deliberate on the issue on November 27, 2019, when both parties met, but the meeting was not fruitful.
19. It is the claimant's case that throughout the conciliatory meetings, the respondent maintained that service gratuity for employees of special schools are usually processed at the ministry of education head quarters (Jogoo House B) and that the institution did not have the money to pay the grievant.
20. The claimant states that through a letter dated July 28, 2020, the conciliator left with no option, issued a certificate of unresolved dispute recommending that the grievant be paid his service gratuity.
21. The claimant states that respondent's action is contrary to article 41 & 43 of the Constitution of Kenya 2010, on the right to fair labour practice and right to social and economic security.
22. The claimant states that the ministry of education has stated in its circulars that each school should save 5% of personal emolument towards service gratuity and the savings to accrue in a savings account such that when an employee retires or is terminated as per the parties CBA then they should be paid from this account.
23. The claimant further states that according to clause 20 of the ministry of education science and technology circular, Ref MIN/P/SP/93 which gives guidelines on special schools, provides that grants for service gratuity shall be paid from personal emolument and further the head-teacher has to inform the ministry of the same.
24. The claimant states that a personal emolument component as per the guidelines, is meant for payment of monthly salary, allowances, social security and service gratuity.
25. The claimant prays that she be awarded the prayers listed in her memorandum of claim.

The Respondent's Case

26. The respondent states that it was established in August, 1963 as the second public primary school for the blind in Kenya, and that it is managed by a legally constituted board of management in accordance with the Basic Education Act, No 14 of 2013.
27. The respondent further states that the grievant; Philip Oyoo Nyangweso was employed by the board of governors (now board of management) of Kibos school for the blind on January 1, 2004 as a grounds man in "job group C" at a basic salary of Kshs3310.00.
28. The respondent states that the letter of appointment states that the grievant's employment, was subject to the terms and conditions of the agreement between the ministry of education and KUDHEIHA in force at the time of his appointment.
29. It is the respondent's case that the grievant's basic salary was later appraised to Kshs 5,922.00, and that in addition, he earned a house allowance of Kshs 2500.00, NSSF contribution of Kshs 528.00 and a Medical allowance of Kshs 375.00, all amounting to Kshs 9,322.00 per month.
30. The respondent states that the grievant was paid his salary and allowances up to December 31, 2017, when he voluntarily resigned. The respondent further states that at the time Mr Nyangweso resigned, he had served the school for a total of 14 years.
31. The respondent states that like other special primary schools in Kenya, she receives grants in aid to subsidize food and payment of non-teaching staff salaries. The respondent further states that unlike other special secondary schools and regular secondary schools in the country, she is not given facilitation per student per vote head.



32. The respondent states that payment of service gratuity in secondary schools is paid from school, while for special primary schools is paid directly from the ministry of education, and that the role of the respondent in relation to the claimant's gratuity is only tabulating the amount payable.

The Respondent's Submissions

33. It is submitted for the respondent that the suit herein arose from a contractual agreement, whose defined period of 3 years had since lapsed before the grievant decided to take legal action. The respondent further submits that time started running from January 1, 2018, when the grievant resigned, whereas the suit was filed on March 9, 2021, and thus the suit filed out of time. The respondent sought to rely in the holding in *Bernard Malesi v TSC & another* [2022] eKLR for this proposition.
34. It is the respondent's submission that for reason that the grievant was not a civil servant, he can not claim to be accommodated by the DPM circular. The respondent further submits that the grievant never complained about his alleged underpayment throughout the 14 years and that he only raised the issue after his resignation. They placed reliance in *Musyoka Muia v Board of Governors, Machakos Girls High School* [2020] eKLR to buttress this position.

Analysis and Determination

35. I have considered the pleadings herein, the witnesses' testimonies and the parties' submissions. The issues that arises for determination are: -
- i. Whether the suit is time barred.
 - ii. Whether the grievant through the claimant, is deserving of the reliefs sought.

Whether the suit is time barred

36. The claimant's claim is dated February 9, 2021 and filed on March 9, 2021. The grievant herein issued a notice of resignation dated October 3, 2017, and which was to take effect on January 2, 2018.
37. The claimant contends that the respondent acknowledged receipt of the grievant's resignation through a letter dated May 4, 2018. The issue then become when the grievant's resignation took effect, following which, the three-year statutory time limitation begun to run.
38. The Court of Appeal in *Attorney General v Andrew Maina Gitbinji & another* (2016) eKLR, held that once the employee received the termination letter, the termination took effect and the cause of action accrued and that was the date time began to run.
39. In *Hilarion Mwabolo v Kenya Commercial Bank* (2013) eKLR, the court stated thus on when time starts to run:

“... termination kicks in from the date stated in the termination letter...”

40. The Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) held thus:

“A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act. The Black's Law Dictionary (tenth Edition) defines resignation as follows:



“The act or an instance of surrender or relinquishing once, right or claim. A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one’s job or organization, often in the form of a written statement.”

41. Further, in *David Ngugi Waweru v Attorney General & another* (2017) eKLR, The Court of Appeal stated that the time of dismissal or termination is the time contained in the letter of termination/ dismissal and not the time of conclusion of internal disciplinary mechanisms.
42. In the same breath, the date when the grievant’s resignation was to take effect is the date time begun to run for purposes of section 90 of the *Employment Act*, 2007. There is therefore no doubt in my mind that time in respect of this claim began to run on January 2, 2018, being the date the grievant’s resignation took effect. The claimant did not lead any evidence to show that the grievant continued working with the respondent until May, 2018, awaiting the acknowledgment of his resignation letter.
43. This suit thus ought to have been filed on or before January 2, 2021, but was instead, filed on March 9, 2021. In the Ugandan case of *Okeng Washington v Attorney General*, H C Civil Suit No 16 of 2004 the court relied on the case of *Iga v Makerere University* (1972) EA 65, where it was held:

“In considering whether or not a plaint is time barred or discloses no cause of action, the court must look only at the plaint and nothing else; and that a plaint that is deficient in that it shows that the action is time barred or discloses no cause of action must be rejected.”

44. The claim herein, is for all intents and purposes statute barred, and I so hold.

Whether the claimant is entitled to the reliefs sought

45. The claimant’s claim is for payment of salary underpayment, unpaid leave travel allowances and a service gratuity.
46. The claims for salary underpayment and unpaid leave travel allowances fall on the finding that the suit is state barred, and are hereby dismissed.
47. Concerning the claim for payment of a service gratuity, the respondent told the court that service gratuity in special primary schools, is paid directly from the ministry of education, and that it had tabulated the amount payable, and which has since been released to them for payment to the claimant. In this regard, and gratuity being a benefit that has already vested, coupled with the fact that the delay in payment is not attributed to the claimant, I find the claim merited and I order that the service gratuity be released to the claimant.
48. In sum, the claimant is awarded service gratuity at Kshs 82,908/-
49. The claim having partially succeeded, parties are ordered to bear their own costs of the suit.
50. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF NOVEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Okwach Present for the Claimant



Ms. Kimberly h/b for Mr. Kobimbo for the Respondent
Christine Omollo- C/A

