



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.13 OF 2019**

**ALFRED MUMPASOI KERIOLALE.....CLAIMANT**

**VERSUS**

**NAROK COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**NAROK COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

The claimant is a male adult and the 1<sup>st</sup> respondent is a county government constituted under the County government Act and the 2<sup>nd</sup> respondent is a statutory body in charge of all employees of the 1<sup>st</sup> respondent.

The claimant was employed by the 1<sup>st</sup> respondent on 2<sup>nd</sup> January, 2014 as secretary and chief executive officer of the Bursaries Management Board until 7<sup>th</sup> February, 2017 when he resigned from his employment and last earning ksh.187, 148 per month.

The claim is for payment of gratuity pursuant to the Salaries and Remuneration Commission (SRC) vide Gazette Notice dated 1<sup>st</sup> March, 2013 and the Circular to the Governors dated 5<sup>th</sup> September, 2017 by the Council of Governors.

The claim is for payment of gratuity of Ksh.1, 287,952 tabulated at basic salary of 60% for years worked at 31%; issuance of the Certificate of Service; interests and costs of the suit.

The claimant testified in support of the claims made and that he worked for 3 year and one month for the respondents and from his contract of service and circulars issued by the SRC and Council of governors he was entitled to payment of gratuity as pleaded.

That the payment of gratuity was a benefit in his contract of service. He had been appointed for a term of 5 years but only worked for 3.1 years.

The contract had no clause on payment of gratuity. He had been transferred from medical services to the respondents without the benefit of gratuity. He resigned and the respondents accepted the resignation.

The basis of the claim for gratuity is Gazette Notice dated 7<sup>th</sup> July, 2017 that all state officers are entitled to 31% gratuity pay on gross pay. His position was not one of the ones listed in the circular by SRC or Council of governors but he was a state officer. The circular by the Council of governors was issued 7 months after his resignation and the Gazette Notice was to take effect from August, 2017 a period of 7 months after he resigned.

The claimant also testified that based on the SRC and Council of Governors circulars other employees of the respondents who left employment were paid. The chief officer Douglas Ngare was a chief officer and was paid. The chief officer to the Public Service Ziporah Gad was paid since gratuity was available and due per the Gazette Notice.

Defence

In response, the respondents' case is that the claimant was an employee vide letter dated 2<sup>nd</sup> January, 2014 as Secretary and Chief Executive Officer of the Bursaries management Board at a month salary of Ksh.187,148 for a contract period of 5 years. By letter dated 4<sup>th</sup> October, 2016 the claimant as re-assigned to be the Senior Administrative Officer, Medical Services Narok Referral Hospital and where he worked until 7<sup>th</sup> February, 2017 when he resigned vide hi letter and notice dated 19<sup>th</sup> December, 2016 and which the 2<sup>nd</sup> respondent received on 9<sup>th</sup>

February, 2017.

The claimant is not entitled to payment of gratuity as alleged. The SRC Gazette Notice of 1<sup>st</sup> March, 2013 only provided for retirement benefits of county officer who served on contract as had a gratuity at the end of term at 31% of the annual basic pay for every year served.

The payment of gratuity is conditional of completion of service term. The claimant had a 5 years contract from 2<sup>nd</sup> January, 2014 and he resigned two years less of his term and therefore not entitled to gratuity pay.

The defence is also that section L.15 of the County Public Service Human Resource Manual, 2013 provides that an officer is eligible for the grant of pension or gratuity under the Pensions Act upon retirement from the service of the county government in the instance of age not less than 50 years; abolition or reorganisation of office; ill-health; and public interest. An officer who has resigned from service is not forfeits all claims to the retirement benefits.

A similar position subsists under section D.32 of the Human Resource Policies and Procedures manual for the Public Service, 2016. An officer is eligible for pension or gratuity under the Pensions Act when he retires from the service on the grounds of age not less than 50 years; abolition of office and ill health. An officer who resigns forfeits all claims and retirement benefits.

The claimant's reliance on the council of governor's letter dated 5<sup>th</sup> September, 2017 which makes reference to the SRC circular in Gazette Notice dated 7<sup>th</sup> July, 2017 cannot apply retroactively to benefit the claimant, who resigned from his employment on 7<sup>th</sup> February, 2017.

The claimant was registered as a member of a non-contributory scheme, the Lap Fund Secured Retirement Scheme to which the 1<sup>st</sup> respondent remitted payments and by virtue of voluntary resignation the claimant forfeited his benefits of the same as follows;

July, 2013 to June, 2014 Ksh.201, 814.65;

July, 2014 to June, 2015 ksh.414, 264.78; and

July, 2015 to January, 2017 Ksh.250, 333.68.

Total Ksh.866, 413.11.

The claims made should be dismissed with costs.

In evidence, the respondent called Queen Kimorgo the Deputy director of Human Resources of the 1<sup>st</sup> respondent and who testified that at all material times the claimant was appointed vide letter dated 2<sup>nd</sup> January, 2014 as secretary and chief executive officer of the Bursaries Management Board at a salary of Ksh.187, 148 per month for a contract term of 5 years. By letter dated 4<sup>th</sup> October, 2016 the claimant was re-assigned to the senior administrative officer, medical services Narok Referral Hospital.

The claimant served until 7<sup>th</sup> February, 2017 when he resigned vide letter and notice dated 19<sup>th</sup> December, 2017. He worked for 3 years. The claim for payment of gratuity is not due for the reasons that the SRC Notice dated 1<sup>st</sup> March, 2013 only provides for retirement benefits of county state officer who served on contract and entitled to gratuity at the end of the contract term at 31% of annual basic pay for every year served. The claimant was not converted under such provisions.

Payment of gratuity is conditional of completion of the end of service term and the claimant served less than the stipulated 5 years. Section L.15 of the County Public Service Human Resource Manual, 2013 and section D.32 of the Human Resource Policies and Procedures Manual for the Public Service, 2016 do not provide for a gratuity payment to an officer who has resigned.

The Council of Governors letter dated 5<sup>th</sup> September, 2017 and SRC Gazette Notice of 7<sup>th</sup> July, 2017 came into force after the claimant had resigned from his employment and cannot operate retrospectively to his benefit.

Ms Kimorgo also testified that the claimant has claimed to be a state officer but state officers are defined under the constitution while public officers are regulated under the respondent policy and under the public service commission. According to the respondents, state officers are the governor, deputy governor and the county members of assembly. All chief officers are regulated under the County Government Act.

The claimant was a public officer and the appointment was by the 2<sup>nd</sup> respondent on terms in his contract of service and there was no benefit of gratuity. For the respondent to make any payment of gratuity, this must be stated in the letter of appointment.

The claimant was a member of a non-contributory fund, Lap Fund and following his resignation, he forfeited his contributions.

Ms Kimorgo also testified that Ziporah Gad was a chief executive officer and was not paid any gratuity as alleged by the claimant. Mr Senteyo and Nkodila ole Lenkes who was political advisor to the governor have not been paid any gratuity. Mr Gabriel Tanyasis was member of County Public Service Board a commissioner which was a higher job group on 6 years contract and had the benefit of gratuity.

When the claimant resigned from his employment the County Public service Board directed him on the steps to follow as a public officer. His certificate of service is ready for collection.

At the close of the hearing the parties filed written submissions.

The claimant reiterated and restated the claims made and relied on the case of **Cecilia Wangechi Ndungu versus the County Government of Nyeri & another Cause No.1222 of 2015 (Nyeri)** where the court held the claimant was entitled to payment of gratuity upon termination of employment.

The respondent submitted that the claimant is not entitled to payment of gratuity. In **Nelson Keshei versus Narok County Government & another [2019] eKLR** the court held that the payment of gratuity is granted and based on the practice of an employer or as agreed under the contract of service. There is no express provision for gratuity payment in the Employment Act and is only payable under terms set out in a contract of service or a collective bargaining agreement.

The claimant has based his claim for gratuity payment under Gazette Notice published by the SRC allegedly published on 1<sup>st</sup> March, 2013 but the attached Notice is dated 7<sup>th</sup> July, 2017 applicable after the claimant had resigned from his employment with the respondents.

Under the letter of appointment the claimant had no benefit of payment of gratuity. In the case of **Tom Otieno Odongo versus Cabinet Secretary Ministry of Labour Social Security Services & another [2013] eKLR** the court held that parties bound by a contract of service are also bound by its terms and the court should be bound by the intentions of the parties. Save for application of the Public Service Commission terms and conditions of service the claimant cannot claim for any benefits from the respondents that was not part of his contract of service.

The respondent also submitted that the various advices by the SRC on remuneration and benefits such as house allowance are often announced through various gazette notices outlining the remuneration and benefits for each job group category in the public service both at national or county government. The claimant's job group and house allowances were not included in the letter of appointment as these are determined in the scheme of service as well as in the various SRC circular and notices.

The SRC Gazette Notices of 1<sup>st</sup> March, 2013 and 8<sup>th</sup> August, 2017 makes provision for remuneration of state officers in the national and county government. Retirement benefits for a county state officer are based on completion of a contract term at 31% of annual basic pay for every year served. The claimant was not a county state officer to enjoy the benefits stipulated in the SRC notice.

Article 260 of the constitution defines state officer as a person holding a state office and defines such officer by listing them and the office held by the claimant is not such state officer.

The respondent also submitted that the circular by the Council of Governors is dated 5<sup>th</sup> September, 2017 which is 10 months after the claimant had resigned from his position. Such circular cannot operate retrospectively as held in **David Ngugi Waweru versus Attorney General & another [2017] eKLR**.

The 1<sup>st</sup> respondent had established a non-contributory scheme and appointed Lap Fund Secured Retirement Scheme as manager and in this scheme gratuity payments of the respondents' employees have such benefit. Upon the resignation of the claimant, he forfeited the same.

The claims made should be dismissed with costs.

#### Determination

The substantive question for determination is whether the claimant is entitled to payment of gratuity.

It is common cause that by letter dated 2<sup>nd</sup> January, 2014 the respondents appointed the claimant as Secretary and Chief Executive Officer of the Bursaries Management

Board on a contract of 5 years. His terms of service were outlined in the letter and by another letter of equal date the respondents' noted that;

- *hereby appoint you as the Secretary and Chief Executive Officer of the Bursaries Management Board pursuant to Section 6 and 7 of the Narok County Bursaries Act 2013 for a period of five (5) years from the date hereof.*

*You are expected to discharge your duties conscientiously and in accordance with the Narok County Bursaries Act 2013 and incidental laws. ...*

By letter dated 4<sup>th</sup> October, 2016 the respondents transferred the claimant from;

- *Financial and Economic Planning to Medical Services Narok Referral Hospital to perform duties of a Senior Administrative Officer with immediate effect. You are responsible to the Chief Officer – Medical service for the performance of the duties related to Administration.*

The claimant last worked as Senior Administrative Officer. He resigned effective 7<sup>th</sup> February, 2017. The claim is for payment of gratuity pursuant to the SRC Gazette Notice dated 1<sup>st</sup> March, 2013 and Circular dated 5<sup>th</sup> September, 2017 by the Council of governors.

To support this claims, the claimant attached the Kenya Gazette No.89 of 7<sup>th</sup> July, 2017 and under which there is Gazette Notice No.6518 by the chairperson of the SRC with regard to powers conferred on the Commission pursuant to article 230 (4) a) of the Constitution, 2010 on the review on remuneration and benefits for state officers in the county government and who include the following;

County Governor;

Deputy County Governor;

Speaker of the County Assembly;

Member of County Executive Committee;

Deputy Speaker County Assembly; and

Member of County Assembly.

For these county state officers, the SRC being the constitutional body with power to review remuneration and benefits, with regard to payment of service gratuity directed that;

*Retirement benefits: A State Officer serving or appointed to a fixed term of office shall be paid a service gratuity at the rate of 31% of the basic remuneration package for the term served.*

On the county state officers mentioned and beneficiary of the SRC Gazette Notice No.6518 effective 8<sup>th</sup> August, 2017 the position held by the claimant of Senior Administrative Officer is not among such offices and or officers. The position of Senior Administrative Officer though a public office is not a state office pursuant to Article 260 of the Constitution, 2010.

Even where the claimant was to define himself as a state officer, which is not the case, the SRC notice took effect on 8<sup>th</sup> August, 2017. This was after his employment with the respondents had ceased.

The claimant cannot claim for payment of gratuity from the respondent based on the SRC Gazette Notice issued and taking effect on 8<sup>th</sup> August, 2017. There is no legal basis for such a claim as this was not a term of his employment and was not provided to him under any policy or private treaty or agreement with the respondents.

The claimant has also relied on the Council of governors Circular dated 5<sup>th</sup> September, 2017 to claim for payment of gratuity. Clause (2) of the circular stipulated as follows;

*With respect to retirement benefits, the Gazette Notice [by the SRC] states as follows;*

*A State Officer serving or appointed to a fixed term of office shall be paid a service gratuity at the rate of 31% of the basic remuneration package for the term served.*

The court reading of the circular by the Council of Governors is to reinforce the SRC Gazette Notice dated 7<sup>th</sup> July, 2017 and taking effect from 8<sup>th</sup> August, 2017. The circular issued way after the claimant had left his employment with the respondents by resignation and not retirement.

The Circular of the Council of Governors is not applicable to the claimant.

Without the parties to the employment contract dated 2<sup>nd</sup> January, 2014 providing for payment of service gratuity, there being no agreement or a private treaty or a policy of the respondent to pay such benefit of service gratuity, the claimant has no legal basis or justification to claim the same. The position held of Senior Administrative Officer is not a state office under Article 260 of the Constitution, 2010 with the benefits outlined by the SRC Notice of Council of governors Circular dated 7<sup>th</sup> July, 2017 and 5<sup>th</sup> September, 2017 respectively.

The claimant is seeking for his certificate of service. Such certificate is due to all employees at the end of employment pursuant to section 51 of the Employment Act, 2007.

**Accordingly, the claim herein is found without merit save the claimant shall be issued with a Certificate of Service pursuant to section 51 of the Employment Act, 2007. Each party shall bear own costs.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF JANUARY, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

.....and .....