



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MACHAKOS

CAUSE NO. E02 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

CHRISTABEL ACHOLA OYOMBE.....APPELLANT

VERSUS

EAST AFRICAN PORTLAND CEMENT PLC.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein instituted this claim against the Respondent, her former employer for its failure to pay her terminal benefits. In her Memorandum of Claim dated 13th November 2020 she pleads that she was employed by the Respondent as a depot clerk in Webuye on 6th February 2009. As from the year 2011, she was working under a 3 year renewable contract. Sometime in 2015 the Claimant was promoted to the position of a Stores Superintendent earning a salary of Kshs.133,200. She pleads further that vide a letter dated 27th August 2019, the Respondent communicated to the Claimant that her contract would not be renewed.

2. It is the Claimant's case that her gratuity was set at 25% of her monthly basic salary for each completed year. Despite the Claimant having worked for a contractual period of 3 years the Respondent declined to pay her gratuity as stipulated. She claims terminal dues of Kshs.1,374,381 tabulated as follows:

(i) Disturbance allowance

(Transfer from Nakuru depot to dispatch office) Kshs.133,200

(ii) Gratuity $\times 133,200 \times 3 \times 12$ Kshs.1,198,800

(iii) Pro-rata leave days – 7 days

($\times 7$) Kshs.13,696

(iv) School fee refunds Kshs.38,000

Total Kshs.1,374,381

3. This is an undefended claim as the Respondent entered appearance on 23rd January 2021 but did not file a response nor did it participate in the case. Pursuant to the court's directions of 9th July 2021 the Claimant canvassed the claim by way of written submissions.

Claimant's Submissions

4. The Claimant began by briefly rehashing her version of events leading up to the institution of her claim. Aside from gratuity, she also claims transfer allowance from the Nakuru depot to the Nairobi dispatch office, pro-rata leave and a school fees refund all of which she claims are entitlement in accordance with the terms of her contract as well as company policies.

5. It is submitted that the Respondent having been duly served with summons to enter appearance, the statement of claim and supporting

documents it entered appearance through the firm of Daly and Inamdar Advocates but did not file a response or any documents to counter the claim.

6. The Claimant adopts her witness statement and bundle of documents both dated 13th November 2020 as evidence. She submits that the same remain unchallenged, uncontroverted and not discredited by any other evidence hence it should be deemed as such by the court. She cited the case of **Bamburi Cement Limited v Farid Aboud Mohammed (2016) eKLR** in which the court observed as follows:

“(Gratuity) denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act. It is usually payable under the terms set out in a contract of service or collective bargaining agreement”

7. Therefore, by virtue of the Claimant’s gratuity being provided for in her employment contract, she submits that she is rightfully entitled thereto and that the same should be granted by this court.

Analysis and Determination

8. Being an undefended claim it is the Claimant’s prerogative to establish the existence of an employment relationship between herself and the Respondent in accordance with the holding in the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & Another [2018] eKLR** in which Court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment. I am satisfied that employment has been sufficiently proved vide the Claimant’s letter of employment dated 2nd September 2011 and her contract renewal letters dated 17th September 2013, 7th October 2017 and 27th August 2019.

9. As per the letter of 27th August 2019 it is evident that the Respondent decided not to renew the appellant’s contract. It therefore ended via effluxion of time or the operation of the law. The Claimant is therefore entitled to her terminal dues. Her claim and evidence remain uncontroverted being undefended. In the case of **Elijah Kioko Kitavi v Allied Plumbers Limited [2019] eKLR**, the court cited the case **CMC Aviation Limited v Cruisair Limited (NO1) 1978) KLR 103, (1976-80) 1 KLR 835** wherein Madan J. (as he then was) stated thus:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them, or any of them, by the parties, they are not evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, until their truth has been established or otherwise, they remain unproven...”

10. A perusal of the Claimant’s addendum to the contract dated 2nd September 2011 reveals that her gratuity from then henceforth was to be calculated at the rate of 25% of her basic monthly salary for each completed year of service. This letter varies the terms of the first contract and it must have been the basis on which her contract was extended. The Claimant was also entitled to 21 working days leave after 12 consecutive months. The entitlements of disturbance allowance and school fee refund are not reflected in the aforementioned documents.

11. For the foregoing reasons, I make the following orders in respect of the prayers of the Claimant –

(i) Gratuity (x 133,200 x 3) Kshs.99,800

(ii) Pro-rata leave days – 7 days

(x 7) Kshs.42,382

12. **In conclusion, judgment is entered in favour of the Claimant against the Respondent in the total sum of Kshs.142,282/=.** The Respondent will pay the Claimant’s costs of this suit.

13. **Interest shall accrue at Court rates on the decretal sum from date of judgment until payment in full.**

DATED, SIGNED AND DELIVERED AT VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE