



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO.426 OF 2017

GAYE MADIODIO.....CLAIMANT

VERSUS

SOCIETE INTERNATIONALE DE TELE COMMUNICATION

AERORNAUTIQUES (SITA).....RESPONDENT

JUDGMENT

1. The dispute before the court concerns a claim for extra terminal dues and extra temporary accommodation costs on returning to county of origin of an expatriate employee upon retirement. By memorandum of claim dated 14th November 2016 the Claimant sought the following reliefs:-

a. A declaration that the Respondent's withholding of the Claimant's terminal dues is unfair and unlawful;

b. An order that the Respondent does forthwith:-

i. Pay the Claimant:-

a. Four month salary for each completed year(4/12x 1.5x1,167,763.79) Kshs. 583,881.90

b. Ex- gratia payment equivalent of six months basic salary (1,167,763.79 x 6) Kshs. 7,006,582.74/-

c. Refund of accommodation costs duly incurred 4,445,000

d. Costs of the suit

e. Interest on (i) above

2. The Claimant through the law firm of Owino Bukachi & Company Advocates filed together with the claim, a verifying affidavit dated 14th November 2016 sworn and commissioned at Dakar, Claimant's list of witnesses dated 14th November 2016, Claimant's list of documents dated 14th November 2016, and Claimant's witness statement dated 27th November 2017.

3. The Respondent entered appearance through the law firm of Kaplan & Stratton Advocates and filed memorandum of defence dated 4th April 2017 and attached bundle of documents, a Respondent's witness statement of Mpho Nkadameng dated 28th September 2017.

4. The case was heard inter partes on the 5th August 2021 with each party calling one witness.

5. The Claimant's written submissions are dated 17th August 2021. The written submissions of the Respondent are dated 7th September 2021

6. The matter was mentioned before the Deputy Registrar on the 14th September 2021 and the record indicates that both parties have filed written submissions.

The Claimant's case

7. The Claimant gave evidence on oath on his own behalf. He told the court that he lives in Senegal currently doing small business. The Claimant adopted his statement dated 27th November 2017 as his evidence in examination in chief.
8. On prayer one, the Claimant told the court that there are 4 extra months salary not computed for service. He was supposed to retire on the 1st August 2015 but his contract was extended to 31st December 2015. He told the court that he is entitled to payment for service for those 4 months which are acknowledged in his retirement letter.
9. On prayer 2 the Claimant told the court that in his employment position with the Respondent he knew about the practice of those retiring and that exgratia was paid. That he signed exgratia cheques for other retiring employees.
10. On prayer 3 the Claimant told the court that he moved from Senegal to Zimbabwe, South Africa then to Kenya working for the Respondent. Every time he moved from one country to another he needed accommodation. The Claimant told the court that he paid extra accommodation as the arrival of his goods to Senegal delayed which compensation he said was paid in his previous movement.
11. During cross-examination the Claimant told the court that he lives in Senegal which is his country of origin and he is Senegalise. That when he joined the Respondent he was at Senegal where he held several positions. After that he moved to Zimbabwe, then South Africa and to Kenya where he retired upon reaching the age of 60 years. He travelled with family. That he is currently doing small business to keep busy. He was in Kenya from December 2002 upto January 2016 and during that period he visited Senegal.
12. The Claimant during cross-examination told the court he was in management of area operations and used to represent the Respondent in many places including courts. That he was in Transport and Allied Workers Union and was deducted union dues from his salary. The Claimant confirmed that no union dues were deducted from his payslip of December 2015 when he retired. (Exhibit no. 3 of the Claimant's documents). The Claimant told the court that he is aware that management is not unionisable.
13. The Claimant told the court during cross-examination that he was aware of the Respondent's international assignment policy. That on relocation, the Respondent's policy is to pay one month's accommodation. Clause 3.8 of the policy provides for payment for accommodation for 1 month and any additional costs need approval from the company. The Claimant told the court that during his employment he moved to many countries and was never asked about his accommodation. That while at Senegal he did inform the Respondent of delay of his goods meaning he needed accommodation longer. That he was in communication with the Respondent during his relocation to Senegal. At page 14 of the documents by the Respondent there is communication with the Respondent on accommodation on email and at page 15 the Claimant confirms he did not seek permission on accommodation and costs. The Claimant told the court that he stayed in a rented residence at Dakar. He made a request to Respondent to pay cost of 1 month accommodation and cannot recall if the Respondent paid. At page 21 of the Respondent's documents is a request for accommodation cost by the Claimant and at page 25 is payment for shipping charges and accommodation for 1 month at Dakar. The case for relocation from Nairobi to Dakar was on retirement. The Claimant told the court there was need for extension as he had not received his stuff which he needed to move into his house. The Claimant confirmed he had a residence at Dakar which he had rented out. The Claimant told the court that he has not provided proof of exceptional circumstances that required extension of his accommodation. He said that the Respondent never required him to give the circumstance of the extension. The Claimant disagreed that his claim was frivolous and stated that he stayed at the rented apartment until he received his stuff.
14. The Claimant during cross examination told the court that he understood the meaning of ex-gratia payment. That it was an appreciation and that in practice he knew the Respondent was paying ex-gratia. The Claimant told the court that the only evidence he can give was his experience of signing cheques for other staff as he checked documents before signing cheques in his role. At page 26 of the Respondent's documents (exhibit 3) is a response on ex-gratia which was declined on the ground that it was discretionary and the correct payment to the Claimant was given in the letter. The Claimant told the court that ex-gratia payment was a practice in SITA Kenya but he had not produced evidence. He said he was not being malicious in making claim for ex-gratia.
15. The Claimant further during cross examination told the court that his request for extension of contract was approved by the Respondent and that completed year of service is January to December. The extension was granted for 4 months and he worked for 32 years and 4 months. The gratuity was paid at 1.5 months for each year of service completed. The Claimant confirmed that he was paid severance pay for 32 years having been employed in month August 1983. His completed year of service was August 2015 when he retired. The Claimant told the court that he had not produced evidence to show it was a policy to pay for extension of accommodation.
16. On re-examination the Claimant told the court that clause 3.8 of the policy page 7 of the Respondent's documents it read '*if receipt of employee household goods is delayed for reasons beyond the employee's control the hotel stay may be exceptionally extended*'. The Claimant told the court he did not have alternative goods, that his house was not available and had stayed in Kenya for 14 years, that after he got his goods he gave the tenant 1 month notice to move out but his house was in a state he could not live in. That he did inform the company of the delay at page 19 of the Respondent's bundle of documents is email dated 19th February 2016, he did not know when the vessel would arrive and he informed the Respondent when the vessel arrived. The one month accommodation was paid after he moved to Senegal.
17. On re-examination the Claimant told the court he had attached evidence of payment of ex-gratia to other staff. That a full year is completed January to December. He said the basis of the ex-gratia claim was because everyone else was paid except him and another person who was on temporary employment. He stated that he worked 4 extra months and was entitled to all his prayers. That he served the Respondent from 1983 to 2015 a total of 32 years and 4 months.

The Respondent's case

18. The Respondent called as its witness Mpho Mkadimeng (RW) who told the court that he was the Human Resources Manager for the Respondent and was based in South Africa. RW adopted his statement dated 28th September 2017 as his evidence in examination in chief

and produced a bundle of documents by Respondent annexed to his statement as his evidence in examination in chief.

19. RW told the court that ex- gratia is a discretionary payment. It is not a right that employees have but it is done in good faith. On the list of employees paid ex-gratia as produced by Claimant, RW told the court that the said list was of unionisable employees for the period 2001 to 2012 and that majority of the employees in the list were on redundancy. That this was a redundancy list of employees who were in the union. The Claimant was not unionisable. He was part of the management team. The negotiations for ex-gratia payment were between the company and the union. RW told the court that he joined the Respondent in 2014 and since then no ex-gratia payment had been done. The Claimant was not entitled to ex-gratia. That at the discretion of the Respondent the Claimant was paid severance pay a benefit not under his contract. RW told the court that the Claimant was frivolous as he knows he was not entitled to the ex-gratia package.

20. RW told the court that there is no record of the Claimant being malicious nor does he have a disciplinary record with the Respondent . RW told the court the policy applies equally to everyone. At page 7 title temporary living expenses, RW stated that accommodation is for one month. The accommodation may be extended meaning it is approved by the company. The employee will reach out to the company and seek approval for extension of accommodation considering a number of factors like budget. The Claimant testified that he received his house goods after one month. RW told the court that they were in communication with the Claimant and they had communicated to the Claimant that the approval for accommodation was for one month. On whether the company had investigated the extra expenses claimed by the Claimant, RW told the court that the Claimant cannot incur expenses before approval. RW told the court that the Claimant sought the accommodation at Senagal on his own but no list of hotels had been issued.

21. RW told the court that the Respondent had not retired many employees. The list produced by the Claimant was for union members. That there was no exgratia payment list because the Respondent had not paid any other employee outside the union ex-gratia. The Claimant had served 32 years and 4 months. RW told the court he calculated the claimant's dues and excluded the 4 months as they do not amount to a completed year of service. That completed year of service meant the year had been completed in full. He was aware that the Claimant was leaving for Senegal. There was evidence of email communication between the parties on shipping and accommodation.

22. During re- examination RW told the court the issue was retirement and not disciplinary issue and entitlement to the Claimant was according to employer's policy and the law. RW said he applied the policy in the case of the Claimant. That the Claimant did not seek approval for extra expenses. Approval was to be sought under the policy. RW stated that the Claimant sought accommodation on his own, that by the time the Respondent sought to get him accommodation the Claimant was in a luxurious hotel he had sought and had already incurred expenses. The company then paid for the hotel one month as per the policy. RW confirmed that the employees paid ex-gratia under the schedule payment was for redundancy and were union members. They were also paid severance pay.

23. RW told the court that in calculating retirement severance payment for the Claimant they used the formula of 1.5 months for completed year of service. That the claim is not justified considering the package was offered by the company in good faith considering the 32 years of service. That the Respondent paid shipment costs and accommodation for one month. The severance pay was based on the CBA for the union which is clear severance pay if for completed year of service.

Legal analysis and findings

24. The parties have identified issues for determinations as follows:-

The Claimant in written submissions identified 2 issues for determination by court:-

- a. Whether the Claimant is entitled to compensation sought?
- b. Whether the Respondent's act of withholding Claimant's terminal dues is unfair and unlawful?

The Respondent in written submissions identified the following issues for determination:-

- a) Whether the claimant's terminal dues were duly and properly computed and paid by the Respondent according to terms and conditions of service governing his employment;
- b) Whether the Claimant proved his claims against the Respondent ;
- c) Whether the Claimant is entitled to reliefs sought

25. After carefully analyzing the parties' list of issues and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- i. Whether the Claimant is entitled payment of gratuity pay for the extra 4 months worked
- ii. Whether the Claimant is entitled to payment of exgratia
- iii. Whether the Claimant is entitled to payment for extra accommodation costs incurred
- iv. Whether Claimant is entitled to reliefs sought.

The court addressed the issues as follows: -

26. Whether the Claimant is entitled payment of gratuity pay for the extra 4 months worked

The Claimant in his statement states that he retired from the Respondent on the 31st December 2015 having served for a period of 32 years 4 months. The Respondent paid gratuity for 32 years instead of 32 years and 4 months. The Claimant now claims to be paid gratuity for the 4 months.

It was the evidence of RW that at the discretion of the Respondent the Claimant was paid gratuity pay in good faith considering his long period of service a benefit not under his contract. RW told the court that the additional 4 months were not factored in the computation for gratuity pay as they constituted incomplete service year. That the payment was under Collective Bargaining agreement with the union agreed at 1.5 months for complete year of service and that is the formula applied in computing the gratuity paid to the Claimant. The Claimant was not unionisable. The Claimant in submissions cites the annexure 3 of the Respondent's bundle of documents being email dated 15th December 2015 which the Respondent indicated it had erroneously included the 4 months in computation and submitted the correct tabulation of terminal dues being 1.5 months for every completed year of service. The Claimant submits that the contract having been extended by 4 months gratuity pay is due for the extended period.

The Respondent submits that a completed year of service means continuous service for one year as paid under his retirement letter dated 17th December 2015 (page 28 of the Respondent's bundle of documents).

27. The court has examined the letter of employment (exhibit 1 of the claimant's documents). There is no provision for payment of gratuity. The Respondent had a pension scheme. The next document is an agreement between the Respondent being an international organization and the government of Kenya in what is called terms of service (exhibit no. 2 of the Claimant's bundle of documents). No gratuity is addressed. The Respondent produced the international assignment policy of which clause 4 (b) addresses the practice on pension.

28. The Respondent's witness told the court the Claimant was not entitled to gratuity pay and the same was paid under terms negotiated with the union for its members. The Claimant was not unionisable. The Respondent exercised discretion in good faith and paid gratuity to the Claimant for 32 complete years of service under the approved terms for unionisable employees being 1.5 months for every completed year of service.

29. To buttress its submissions the Claimant relies on **Ben Panhill Sifuna v Kenya Urban Roads Authority (2014)eKLR** where the court prorated the Claimant's gratuity at 31% basic salary for 17 months completed in employment instead of the full contractual period of three years appreciating it was not the employee's fault that he did not complete 3 years.

This authority is distinguishable from the instant case as in that case gratuity was provided for in the contract to be paid at 31% provided the Claimant served the 3 years contract to completion. In the instant case, gratuity was not payable under terms of service but was paid for every completed year of service by discretion of the employer. Further in the cited case gratuity was the only payment for social security benefit. In the instant the Claimant was not entitled to gratuity under terms of employment and was under pension scheme. The terms of the two cases are different hence the authority in the opinion of the court is not applicable in the instant case.

30. The Claimant states that the earlier email by the Respondent created legitimate expectation that gratuity for the 4 months would be paid. The court finds the submission to be shallow and baseless for the reason that the Claimant was not entitled to gratuity pay in the first place and secondly the payment was done as per approved terms.

The court found that gratuity payment to the Claimant was not under letter of employment or his terms of service under the Respondent's policies. That gratuity was paid in accordance with approved terms of unionisable employees in good faith not as an entitlement. The claim has no basis in law.

The claim for gratuity payment for extra 4 months is dismissed.

ii. Whether the Claimant is entitled to payment of exgratia.

31. The Claimant claims that the Respondent withheld exgratia payment as is the practice of the Respondent yet the Claimant had served diligently and his performance has led the company to tremendous growth. To support his claim the Claimant produced exhibit 5 being a copy of retirement calculation for previous retired employees. At the outset the court notes that exgratia was not provided for in the employment letter of the Claimant nor in the respondent's policies (exhibit 2 of the Claimant's bundle of documents and exhibit no.1 of the Respondent's bundle of documents respectively).

What is *exgratia* payment?

In Nicolas Wachira Koiga v NCR Kenya Limited (2013) eKLR the court held that: *the fact that an intended benefit is called exgratia means it is not a right. The court in this case it is submitted 'dismissed a claim for over one year salary as exgratia since the Claimant could not have legitimately expected that which was not a normal payment by the company'*

The court adopts the above definition of *exgratia* to apply in the instant case.

32. The Claimant said it was a practice of the Respondent as it had been paid before. The exhibit no. 5 of the schedule of payment indicates staff paid exgratia payment. RW told the court these were unionisable staff declared redundant and their benefits had been negotiated by the union. The Claimant was not unionisable hence cannot rely on the information to claim payment of exgratia as a practice of the Respondent to all exiting employees. In the exhibit the seniority of staff is indicated in the schedule being a factor to be considered in redundancy. The Claimant retired. The court believes the evidence of the Respondent's witness that the schedule is irrelevant as the Claimant was not

declared redundant.

33. The Respondent submits that vide email dated 15th December 2015 the Claimant had been informed that his request for 6 months *exgratia* payment had been declined. The Respondent submits that the Claimant cannot compel the Respondent to pay a discretionary payment once the discretion has been exercised and not in his favour as was held in the case of *Stephen K Kachila V Bamburi Cement Ltd (2015)eKLR*.

34. The court finds that there was no prove of existence of practice by the Respondent to pay all exiting employees *exgratia*. There was no prove that the Claimant was entitled to payment of *exgratia*. *Exgratia* payment is not a right as held in *Nicolas Wachira Koiga v NCR Kenya Limited (2013) eKLR (SUPRA)*.

The claim is found to be baseless and is dismissed.

iii. Whether the Claimant is entitled to payment for extra accommodation costs incurred

35. The Claimant bases the claim on basis that his house goods shipped from Kenya delayed and hence he incurred accommodation costs of more than the one month paid by the Respondent. To buttress his claim the Claimant relies on paragraph 3.8 of the international assignment policy that, ‘ *the company will pay for a maximum one month’s stay in a hotel or other appropriate furnished accommodation for the employee and his family following arrival in host location , if this is convenient, the company may pay for hotel stay in the home county, however such stay will count towards the one month limit, if receipt of employee household goods is delayed for reasons beyond the employee control, the hotel stay may exceptionally be extended.*’

The Claimant admitted the Respondent paid for one month’s hotel stay and for his air tickets and luggage shipment. But he wants more for extended stay.

36. The Claimant told the court he had returned to his country of origin on retirement, that he had a residence which he had rented out to a tenant, that the delay of his luggage meant he could not move into the house. The Respondent said there was no approval of extra accommodation. The Claimant submits that previously he stayed in hotel until he received his goods. The Claimant submits that the Respondent admitted to having received the receipts of extra costs and having failed to raise any incongruity or investigated fraud the Claimant is entitled to refund as claimed. The Claimant submits that from the correspondence between parties there was no clear policy on appropriate hotel and exceptional circumstances that would warrant extension apart from delay of goods. That the Respondent had not provided the Claimant with list of accommodation or alternative accommodation where he was. The Claimant during cross examination told the court that he has not provided proof of exceptional circumstances that required extension of his accommodation.

37. The court finds this to be a unique claim seeing the Claimant was already retired. He was no longer an employee of the Respondent. He was paid for 1 month’s accommodation after return to his country of origin upon retirement and for air ticket and shipping of luggage costs. He was also paid retirement dues and is on pension scheme. At his own will and without approval by the ex-employer the Claimant extended the stay in the hotel in contravention of the international assignment policy (see email correspondence at pages 14-16 of the Respondent’s bundle of documents). The Claimant told the court he had his house occupied by tenant and gave notice on receipt of goods. He admitted he used to go on holiday to his country of origin. This is a demonstration that the Claimant was not desperate and took advantage of the generosity of his former employer. I say so because he was paid over and above his legal entitlement.

38. It is the opinion of the court that the Respondent was right to decline the payment for extra accommodation after the one month. The ex-employer had no extra obligation on the accommodation of a retired officer outside what was provided. The court finds that the claim for extra accommodation is baseless the Claimant having been fully compensated as per the policy. The Claimant incurred the extra expenses at his own will and in retirement bliss having received all his terminal dues under the letter of retirement. The claim is dismissed for lack of merit.

iv. Whether Claimant is entitled to reliefs sought.

39. In view of the findings on the 3 issues above the Claimant is not entitled to any of the reliefs sought. The court finds that the Claimant was paid his retirement package under the letter of retirement and in compliance with the terms of his employment, was fully compensated for relocation to country of origin upon retirement as per the international assignment policy and that there was no discrimination in the manner the Respondent executed the entire retirement process. The Claimant is not entitled to any relief as sought.

Conclusion And Disposition

40. The claim has failed in totality. The entire claim is dismissed with costs to the Respondent.

WRITTEN AND DATED THIS 9TH DAY OF NOVEMBER 2021 AT BUNGOMA

.....

J.W. KELI

JUDGE

DELIVERED AND DATED THIS 9TH DAY OF NOVEMBER 2021 AT NAIROBI

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JUDGE