



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO.1669 OF 2015

ALBERT BERNARD SIMBA.....CLAIMANT

VERSUS

K-REP BANK LIMITED.....RESPONDENT

JUDGMENT

Issues in dispute

- a. Non payment of gratuity
- b. Non payment of terminal dues 13th Month Pay(bonus).

1. The dispute before the court arises from a claim of unpaid bonus and gratuity. By memorandum of claim dated 21st September 2015 and amended on the 17th October 2019 the Claimant sought the following reliefs:-

- a. A declaration that the withholding and /or refusal to pay the Claimant's balance on gratuity and the performance allowance was unfair and unlawful**
- b. Payment of the balance of the Claimant's gratuity of Kshs.795,000/- together with interest thereon from the date of filing suit until full payment.**
- c. Payment of the Claimant's bonus /performance allowance for the year 2012 of Kshs. 188,000/- together with interest thereon from the date of filing suit until full payment.**
- d. Costs of the suit to be borne by the Respondent.**

2. The Claimant filed together with the amended memorandum of claim filed a verifying affidavit dated 17th October 2019, filed list of witnesses and his statement 21st September 2015, List of documents dated 21st September 2015 with bundle of documents exhibits 1-5

3. The Respondent entered appearance and filed response dated 12th October 2015, filed replying affidavit to a notice of motion dated 21st September 2015 by Agnes Mwathi dated 28th October 2015 and annexed a bundle of documents marked exhibit 'KRP-1', a witness statement of Agnes Mwathi dated 29th October 2015, respondent's list of documents dated 29th October 2019 with bundle of documents marked exhibits 1-8. The Respondent filed supplementary witness statement of James Kago dated 4th July 2018. The Respondent filed Supplementary list of witnesses dated 20th November 2020, and a supplementary witness statement by Wangari Muchoki-Gathu dated 18th November 2020.

4. The case was heard inter partes on the 28th July 2021 with each party calling one witness.

5. The Claimant's submissions and authorities are dated 7th August 2021. The submissions and list of authorities of the Respondent are dated 7th September 2021.

6. The matter was mentioned before the Deputy Registrar on the 26th August 2021 for confirmation of the filing of the submissions and it is noted that both parties have filed submissions.

Claimant's case

7. The Claimant testified on oath on his own behalf. The Claimant told the court that he resided in Ngumo estate and he is a farmer and a consultant in human resources management. The Claimant adopted his statement dated 21st September 2015 as his evidence in examination in chief. The Claimant adopted his bundle of documents dated 21st September 2015 as his evidence in chief and marked the same as exhibit 1,2,3,4,5,6 including the demand letter. The Claimant told the court that he relied on his amended memorandum of claim dated 17th October 2019 filed on the 18th October 2019.

8. The Claimant told the court that he was employed on the 1st November 2010 as HR consultant starting with a 6 months contract (Exhibit 1 letter dated 27th October 2010). His nature of work was in human resources management and was to indoctrinate the staff on new management. Some staff were on provident fund and he was not a member of the fund. The Claimant referred the court to exhibit no. 7 clause 7.2.5 by Respondent being the Respondent's Human Resources Policies and Procedures manual and told the court that the practice stipulated in the said manual was that gratuity was paid to contract staff not on provident fund. The payment of gratuity depended on the length of service the rate at the time being 10% of the annual salary for each year of service completed. The Claimant told the court he was entitled to gratuity for 4 years completed but was paid for 1 year.

9. The Claimant told the court that he was not given bonus and that all the employees were on performance contract. That in 2012 the Respondent made a profit and staff were entitled to bonus according to rate of performance. The Claimant told the court that all staff were paid 13th salary and he was left out. The Claimant told the court that he followed up with the managing director that time and was informed he was on a fixed term contract. He stated that his contract was extended and renewed 5 times and that his performance was excellent. The Claimant stated that since he was on payroll from January to December 2012 he was entitled to the bonus. He told the court that the Respondent disregarded advice of its legal department on his payment.

10. On cross - examination by counsel for the Respondent the Claimant told the court he was on contract and the same was renewed every year. That he was the HR consultant for 6 months then the title changed to HR manager and in the letter dated 16th May 2012 the title of the claimant's job was *Interim Manager Employee Relations And Change Management* (page 11 of the Respondent's bundle of documents). That by letter dated 22nd October 2013 the Claimant requested for extension of contract (page 15 of the Respondent's bundle of documents). At page 7 of the Respondent's bundle of documents is a letter dated 1st November 2012 titled '*Fixed Term Contract Manager Employee Relations and Change Management*' which the Claimant told the court he had not seen before and that the letter he was given was dated 16th May 2012 where the title is *Interim Manager*. By letter dated 22nd October 2013 the Claimant requested for extension of contract and by letter dated 6th November 2013 the employer extended the contract for 6 months. There was a subsequent extension of contract for 1 year following the request by Claimant dated 24th April 2014. The Claimant confirmed that he was not necessarily on fixed contract and that his title changed twice on renewal.

11. On further cross examination the Claimant told the court that he was entitled to gratuity and 13th salary under the HR policy. The Claimant was asked to read out clause 7.2.5 which he did, '**Contract staff who are not members of the Bank's provident fund scheme may be eligible for gratuity payment at the rate of 10% of their current annual salary p.a'** (exhibit 7 by Respondent). The Respondent put it to the Claimant that it is was not compulsory to pay gratuity and it was its discretion to pay gratuity. The Claimant told the court that he had not produced evidence of payment of the bonus in 2012. He stated that the 13th salary was paid but he had not placed evidence of that fact before the court and had no witness on the payment. The Claimant told the court that he was discriminated because all the staff were paid leaving him out. He stated that the payment was placed on the pay slips but he had no evidence.

12. On further cross examination on earlier application to injunct the bank from selling his motor vehicle, the Claimant told the court that he had made a claim against the bank and believed that they would pay him and that the motor vehicle issue would be settled as he would have used the dues to clear the outstanding balance with the former employer. The Claimant told the court that they were in the court because the employer did pay his full entitlement for it paid only one year. The Claimant told the court that in practice the bank was paying all exiting employees either from provident fund or gratuity and he knew that as he was the one calculating the payments.

13. In re-examination the Claimant told the court that the Respondent requested him to write a letter for renewal. That he worked continuously for 4 and ½ years despite change of titles there was no gap in his employment. The Claimant told the court that he was paid gratuity for one year. He said that per annum means for every year of service and that he worked for 4 years. The performance contract meant that if he exceeded contract he would be paid and that he ought to have been paid bonus.

14. Further during re- examination the Claimant told the court that injunctive orders were not part of his pleadings. He told the court he was paid all his dues apart from what he is claiming. He was not given a certificate of service.

The Respondent's case

15. The Respondent called Wangari Gathu as its witness(RW). She told the court that she was the head of human resources of the Respondent deployed to head office Nairobi. She joined the bank in 2018. She was aware of the proceedings and recorded a statement and the bank replied to the claim. She came in after the original witness left the bank. RW adopted her statement dated 18th November 2020 as well as list of documents dated 29th October 2015 under witness statement of Agnes Mwathi all identified as exhibits 1,2,3,4,5,6,7,8,9,10,11,12,12,14 as her evidence in examination in chief. The Respondent identified two issues to address being gratuity and payment of bonus.

16. On gratuity RW told the court on expiry of contract the Respondent pays salary and final dues. That in the case of the Claimant the Respondent acceded and paid at its discretion gratuity. The final dues are leave days and salary. RW told the court that anything entitled to the Claimant had been paid by the Respondent. RW referred to the bank's Human resources policy and procedures manual paragraph 7.2.5

(page 37 of the Respondent's bundle of documents) exhibit 7. The award of gratuity is not a right but at the discretion of the Respondents per the manual of that time. RW told the court that gratuity is payable at end of completed year of service. RW told the court that the Respondent made the approval which was exceptional noting the Claimant was not entitled to gratuity. RW told the court that she could not recall any document that entitled the Claimant to gratuity. The Claimant understood gratuity was not payable in his letter of 17th May 2012. The Respondent was considerate to pay a sendoff package because it wanted to.

17. RW told the court that on the issue of 2012 bonus claim by Claimant, the Respondent's policy is that bonus is only paid to permanent staff positions. That from record the Claimant was engaged on contractual basis. That in their record there was a letter by Claimant confirming he was not entitled to bonus. Letter dated 17th May 2012 at page 12 of the replying affidavit. RW told the court that considering the Respondent's policy the Claimant was not entitled to the gratuity and bonus claims.

18. In cross examination by counsel for the Claimant Mr. Upendo RW told the court that her designation is that of head of Human Resources at the Respondent and was employed in April 2018. That the Claimant was employed on 1st November 2010 on fixed term contract. RW read out paragraph 7 of her undated supplementary affidavit filed on the 24th December 2018. The Claimant had 5 contracts and was in employment for total period of 4 and ½ years. RW told the court that clause 7.2.5 of the manual the words per annum means per year hence the Claimant served 4 full years. RW told the court under paragraph 4 of the claimant's letter of 17th May 2012 meant that the Claimant was aware he was not entitled to gratuity. RW stated that all employees in 2012 were on performance contract and the HR manual/policy was clear bonus is payable to permanent staff. RW told the court that she was not aware if in 2012 the 13th salary/bonus was paid.

19. RW told the court when contract ends there has to be a need to renew and that the Claimant's contract was renewed from 2010 to 2015 at his request. RW told the court that payment of gratuity is at bank's discretion and is paid per annum. The payment to Claimant for 1 year was exceptional. That when the staff is leaving the same can be paid to help staff settle. The manual states that gratuity may be paid/eligible. A wrong decision may have been made and the Respondent is being punished for making an exceptional payment. The Claimant was paid gratuity calculated for 1 year. RW told the court that her statement paragraph 12 was in tandem with the HR manual clause 7.2.5. That she was representing the Respondent as a human resource professional and the claim is not valid.

20. In re-examination RW told the court that the claimant's contract was renewed at his request. Considering the Human resources policy the contract employee may be eligible to gratuity. She said the interpretation was 10% of annual salary of the last year of service.

21. RW told the court that she was not aware if certificate of service was issued and it takes one day to be provided.

Legal analysis and findings

22. The court after hearing the case considers that there are only two issues for determination emanating from the claim and from the Respondents case being :

- a. Whether the Claimant is entitled payment of gratuity for the unpaid completed years
- b. Whether the Claimant is entitled to payment of bonus

23. The court address the issues as follows:-

a. Whether the Claimant is entitled to payment of gratuity for the unpaid for completed years

24. The Claimant seeks payment of withheld gratuity for the years worked. It was the evidence of the Claimant that he had worked under various contract for total period of 4 and ½ years and was only paid gratuity for 1 year. He now claims gratuity for the 3 complete years of service not paid for amounting to Kshs. 795,000/-. The Respondent submits that the Claimant was employed by the Respondent between the period beginning 1st November 2010 and 30th April 2015 on several fixed contracts. That at the end of the final contract the Claimant was paid all his terminal dues payable to him including gratuity payment of Kshs.265,000/- . The Claimant submits that his contract of employment dated 9th May 2011 and 27th October 2012 respectively are to the effect that the Bank's Human Resources policies and procedures form part of his employment contract. The Claimant's contract do not provide he is entitled to gratuity. The Claimant relies on clause 7.2.5 of the Respondent's Human Resources Policies and Procedures exhibit no. 7 in list dated 29th October 2015 titled Gratuity which states:-

'Contract staff who are not members of the Bank's Provident Fund Scheme may be eligible for gratuity payment at the rate of 10% of their current annual salary per annum'.

Evidence was led by the Bank to the effect that according to the Respondent an award of gratuity was payable at the Respondent's own discretion and was not a contractual or statutory right in favour of any(ex) employee. Ms. Wangari Gathu told the court that the payment of gratuity for 1 year to the Claimant was exceptional and from the Claimant's letter of 17th May 2012 the Claimant understood gratuity was not payable. That the payment done was a send off package to help the staff to settle. She told the court during cross examination that the Bank is being punished for making an exceptional payment. She told the court that the Claimant was paid gratuity under the Human Resource manual paragraph 7.2.5 for one year.

25. The Respondent submits quoting page 304 of the Penguin Word Master Dictionary that that ***gratuity is a gift of money for services rendered stemming from latin word 'Gratis' which means favour.*** The Respondent to buttress their position cites the case of ***Nicolas Wachira Koiga v NCR Kenya Limited (2013) eKLR*** where 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 this with (sic) was not a normal payment by the company’.

The court does not find this case relevant for unlike the circumstance prevailing in that case, in the instant case the gratuity payment was a defined under the Respondent’s human resources policies and procedures manual the payment terms defined under clause 7.2.5 to apply to staff under contract and indeed the Claimant was paid gratuity under that clause albeit for less period served.

26. The Respondent submits that the words ‘*may be eligible*’ meant there was no obligation to pay. The court on the interpretation of statutes where the words "may" and "shall" have been used is guided by the Court of Appeal in the case of **Peter Muturi Njuguna v Kenya Wildlife Service [2017] eKLR**, the Court of Appeal held that:-

"It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision..... Whether the words “shall” or “may” convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters."

Applying authority above, the role of the court is to discern the intention of the employer in clause 7.2.5 and to enforce the provisions of the manual in accordance to the employment law.

The Claimant in his submissions to support his Claim cites the case of **Coastal Bottlers Ltd V George Karanja Cause No 373 of 2013** where Onesmus Makau Judge found thus:-

‘ for the reasons stated above the award of gratuity in favour of the Respondent by the Subordinate court was proper. Unlike the circumstances prevailing in Central bank of Kenya Supra, the Respondent in the present case had gratuity expressly provided for under the management terms and conditions of service 2012, had pleaded the claim for gratuity and had also conversed the issue in evidence in trial.’ I adopt with approval the decision by my brother Judge to apply in the instant case.

27. In determining this issue the court addresses its mind as to whether the Respondent had discretion as to the period to pay gratuity under clause 7.2.5 of its human resources manual. The Respondent has submitted that the payment itself was at discretion due to the use of the words ‘*may be eligible*’ and that the Claimant was aware of not being entitled to gratuity citing his letter dated 17th May 2012. The court finds the letter irrelevant in this issue as the Respondent choose to pay the gratuity. The court then asked itself whether having decided to pay the Claimant gratuity under clause 7,2.5 it was discretionary on the Respondent to cherry pick on the number of years of service to pay. The Respondent paid for 1 year of service instead of the 4 years the Claimant had served.

28. It was not in dispute the Claimant and Respondent’ employment relationship was, as seen from evidence by both parties, regulated by the Letter of Employment issued by Respondent and the Human Resources policies and procedures Manual by the Respondent. I do add that the Employment Act of 2007 was bidding on the parties.

29. I do agree and adopt with approval the holding by my brother Judge Rika in **Republic v Kenya Airports Authority & another Exparte Moses Echwa [2015] eKLR** at paragraph 25 that, *‘The Human Resources Manual is not a Bye Law. It is a quotidian instrument of Human Resources Management which becomes an enforceable contract, if expressly incorporated in the individual employment contract. It is properly a contract of employment falling within Part 3 of the Employment Act 2007.’*

Clause 7.2.5 of the Respondent’s Human Resources Manual (its exhibit 7 under its list dated 29th October 2015) is part of the contract of the Claimant and binding on the parties. It was a shrewd interpretation of the clause that the Respondent had discretion to determine the number of years of service in calculating the gratuity payable to the Claimant. The number of service years are determined by the number of years of employment under the law. There is no dispute the Claimant served 4 complete years. It was unfair and unlawful for the Respondent to cherry pick and decide one year was sufficient for the Claimant. The court has obligation to enforce the terms of clause 7.2.5 of the Respondent’s human resources manual (exhibit 7) and the law and thus finds that the Claimant was underpaid gratuity by 3 years.

30. The employer’s human resource manual should not be open to discretion of employer as that can misled the potential employees on their expectation after service. Again discretion should be exercised with intention to enforce the provisions of the human resources manual and the prevailing employment laws. In this case the court is bound to enforce the provisions of clause 7.2.5 of the human resources manual of the Respondent and finds the Claimant was entitled to 10% of the annual salary for each year worked. I find it was unfair and unlawful to fail to pay the Claimant’s gratuity for the other 3 years of service.

31. What is the amount payable as gratuity? The Claimant sought kshs.795,000/-. The Respondent had the records of the employee and did not address itself on the balance sought. The Claimant has proved its case on balance of probability to be paid for outstanding the 3 years of service at the amount calculated as gratuity by the employer for one year kshs.265000/= x3 = Kshs. 795,000/-

b. Whether the Claimant was entitled to 13th Month pay/bonus for the year 2012?

32. The Claimant told the court he was entitled to bonus/13th Salary for 2012 which was paid to all the other staff hence he was discriminated against.

The Claimant in submissions has cited the case of **George Onyango Okuti v G4S Security Services Kenya Ltd (2013)eKLR** by Radido J where the Judge stated, inter alia that:- *‘(un)fair practices are not defined in the constitution and statute and this is left to the courts to define and determine the scope, content and extent of what would be unfair labour practice.’..*

I do agree with the position taken by my brother Judge Radido on the definition of unfair practices and will proceed to determine this issue

accordingly.

33. During examination the Claimant admitted that he had not provided evidence of payment of bonus/13th salary in 2012, that he had no witness to prove the bonus/13th salary was paid by the Respondent in 2012 to all other staff, and the payment was placed on pay slips. The Respondent did not produce the said pay slips or any other form of evidence that the bonus /13th salary had been paid. The Respondent's witness Wangari Gathu said she was the head of human resources of the Respondent having joined the bank in 2018. The witness referred the court to the letter by the Claimant dated 17th may 2012(page 12) of the Respondent's bundle of documents marked '**KRP-1**'. The letter is written by the Claimant and indicates that he had been informed he was not eligible to participate in the profit-sharing scheme because he was on fixed contract. The witness said that bonus is only payable to permanent staff under the Human Resources policy of the Respondent. The witness told the court she was not aware that the 13th salary was paid in 2012. It was incumbent upon the Claimant to produce evidence to prove his claim that he was discriminated upon for not being paid bonus or 13th salary and that other staff were paid. The principle of evidence that he who alleges must prove applies. The Claimant did not also prove he was entitled to the bonus/13th salary. The Court of Appeal in **Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR held:-**

' It was also incumbent upon the Respondent to prove that he was accorded differential treatment to warrant the finding by the trial court that severance pay was being paid selectively. Whereas the Respondent had pleaded that some of his former colleagues had been paid severance pay to his exclusion, implicitly bringing his claim within the confines of Article 41 of the Constitution, he did not tender or lead any evidence supporting his allegation as we have observed hereinabove.'

The court applying the above authority by Court of Appeal finds that the Claimant failed to prove this claim for non- payment of bonus/13th salary for year 2012 and the alleged discrimination. The court finds this claim to be meritless and is dismissed.

CONCLUSION AND DISPOSITION

34. I have found that the Claimant was entitled to payment of gratuity for the 4 complete years of service under the terms defined under clause 7.2.5 of the Respondent's human resources policies and procedures manual. The claim of bonus was found to be non-meritorious and baseless. I now enter judgment as follows:-

- a. A declaration that the withholding and /or refusal to pay the Claimant's gratuity for the entire complete years of service was unfair and unlawful.
- b. Payment of the Claimant's gratuity of Kshs. 795,000/- for the outstanding 3 complete years of service. The award is subject to statutory deductions.
- c. The Claimant will have costs plus interest on the award at court rate from the date of filing suit until payment in full.

WRITTEN AND DATED THIS 2ND DAY OF NOVEMBER, 2021 AT BUNGOMA

J.W. KELI

JUDGE

DELIVERED AND DATED 2ND DAY OF NOVEMBER, 2021 AT NAIROBI

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JUDGE

In the presence of :-