



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 18 OF 2019

(Before Hon. Justice Mathews N. Nduma)

ALFRED O. AMOMBO.....CLAIMANT

VERSUS

LAKE VICTORIA NORTH WATER SERVICES BOARD.....RESPONDENT

RULING ON COMPUTATION

1. In this suit filed on 22nd February 2019, the claimant prays for judgment for payment of gratuity and leave pay in the sum of Kshs. 1,816,250 with interest and costs.
2. The dispute is on the quantum of gratuity payable to the claimant.
3. On 27th March 2019, the respondent filed its defence to the statement of claim and stated that calculation of claimant's gratuity for the period 2nd May 2016 to 12th January 2018 when the claimant was on suspension was properly calculated in terms of the contract of Employment.
4. The claimant was employed as the Chief Executive Officer of the respondent on a three (3) year contract with effect from 2nd May 2016. The claimant served in the position for a period of eight (8) months and four (4) days when he was suspended by a letter dated 13th January 2017 pending investigations into several charges leveled against him.
5. The suit filed on 24th January 2017 was heard and determined vide a judgment dated 4th May 2017 in which the claimant was reinstated and the disciplinary process stopped.
6. The respondent appealed the decision and the Court of Appeal lifted the claimant's reinstatement in the interim. The appeal was heard on the merits and judgment rendered on 18th October 2018 in favour of the respondent setting aside the entire judgment and decree of the trial court and the respondent was allowed to proceed with disciplinary process against the claimant.
7. Claimant was invited to a disciplinary hearing on 30th October 2018 but the claimant put in his resignation letter dated 26th October 2018.
8. The respondent accepted the resignation and opted to pay the claimant as follows:
 - a. Half salary up to the date of resignation.
 - b. Accrued leave for the period 2nd May 2016 to 12th January 2017.
 - c. Gratuity for the period 2nd May 2016 to 12th January 2017 being part of contract successfully completed in terms of clause 14 of his letter of appointment.
 - d. To issue a certificate of service
9. The respondent computed and paid all claimant's dues as follows:

a. Gratuity for the period 2nd May 2016 to 12th January 2017, Kshs. 651,000 calculated on basis of basic salary on Kshs. 250,000x31/100x8.4 months and four days.

b. Kshs. 175,000 being prorated leave days not taken of 21 days (250,000/30 days times 21 days).

c. Less liability of Kshs. 13,520.

Total payment Kshs. 564,680.

10. The claimant has disputed the computation of the terminal dues arguing that the claimant had served the respondent from 14th March 2016 to 26th October 2018, a period of 31 months. That on 30th October 2019, the parties filed a consent order in which all the issues for determination were reduced to the calculation of gratuity.

11. The claimant submits that Gratuity payable is Kshs. 1,666,250 calculated as follows:

12. Period worked of 13 months on full salary and 17 months worked on half salary at Kshs. 77,500 per month as follows:

i. Kshs. 77,500x13 months full salary x31% Kshs. 1,007,500 plus

ii. Kshs. 38,750 (half salary) x17 months x31% Kshs. 658,750.

Total gratuity payable Kshs. 1,666,250.

13. Clause 14 on gratuity in the Contract of Employment reads:

“Upon successful completion of each contract term, you will qualify for a one-off taxable gratuity calculated at a rate of 31% of your annual basic salary, which is taxable. The gratuity shall not be paid if your separation from the Board is due to gross misconduct as provided for in the Human Resource Policy Manual and Employment Act, 2007.”

14. It is common cause that the separation of the claimant from the Board was due to resignation which resignation was accepted by the respondents.

15. The acceptance of the resignation pre-empted the planned disciplinary process against the claimant and therefore the issues of misconduct raised were buried in the past by agreement of the parties.

16. In fact, no disciplinary process took place and therefore there cannot be any argument that the claimant was guilty of any misconduct.

17. It is in the court's considered finding that the claimant is entitled to full payment of gratuity in terms of clause 14 of his contract but only for the period served by the claimant.

18. As was stated in *Pravin Bowny vs Ethics and Anti-Corruption Commission (2013) eKLR*, gratuity is payable to an employee for only the served term of the contract unless provided otherwise in the contract.

19. In the present case, calculation of gratuity for the first 13 months is based on full pay whereas, the calculation of gratuity for the rest of 17 months is based on half pay.

20. Accordingly, the court finds that the respondent erred in paying the claimant gratuity based only on a period of eight (8) months and four (4) days.

21. In the final analysis the court makes the final order in favour of the claimant against the respondent as follows:

Gratuity is not payable for the unserved period of the contract unless the contract specifically states so. In this case, the contract does not provide for payment of contract for the unserved term of the contract.

22. The fact of the matter is that the claimant was paid a full salary from 2nd May 2016 up to and including end of May 2017, a period of 13 months.

23. Thereafter, the claimant earned half salary whilst on suspension for a period of 17 months up to 26th October 2018. Gratuity is therefore payable at 31% of the basic salary earned to the claimant calculated as follows:

i. At 31% of the basic full salary for 13 months in the sum of Kshs. 1,007,500.

ii. At 31% of the half salary for a period of 17 months in the sum of Kshs. 658,750.

Total amount payable is Kshs. 1,666,250 less the amount already paid in the sum of Kshs. 564,680.

Net amount payable Kshs. 1,101,570.

iii. Interest at court rates from date of resignation till payment in full.

iv. Costs of the suit.

Ruling Dated, Signed and delivered at Kisumu this 15th day of October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. N'geno for claimant.

Mr. Ngala Owino for respondent

Chrispo- Court clerk