



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1396 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

PETER MUNYIRI MAINA.....CLAIMANT

VERSUS

FAMILY BANK LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed his Statement of Claim dated on 18th July 2017 and filed in Court on the 19th July 2017, alleging unfair and/or unlawful withholding of dues rightfully owed to him by the Respondent as a result of the employee-employer relationship that existed between himself and the Respondent Bank.

In his statement the Claimant avers that he was employed by the Respondent Bank on or about 15th July, 2011 as the Managing Director and Chief Executive Officer of the Bank. He further averred that the employment was on a fixed term contract for a period of five years at the end of which he would be paid gratuity *“to be calculated at 10% of the Gross Basic for the year one of employment and thereafter the applicable rates will be aligned with banking industry rates.”*

The Claimant states that his contract lapsed on or about 14th July, 2016 and that he was entitled to gratuity of 31% of his gross salary which was the same as what was provided by other Banks in tier 2.

In his Statement of Claim the Claimant seeks the following reliefs:

- a) Kshs.57,057,300/-being gratuity payment.
- b) Interest on the same based on the ruling 364 days treasury bond rates.
- c) Alternative to b) above, interest at Court rates from 14th July, 2016.
- d) Costs.
- e) Any other relief the Court may deem fit to grant.

The Respondent in its Statement of Response filed in Court on 15th September, 2017 states that the Claimant is not entitled to the reliefs sought in his Statement of Claim and urges the Court to dismiss the same with costs to the Respondent as the same is based on erroneous assumptions and extraneous gratuity rates covering wrong dates.

The Respondent further contends that the Claimant was duly paid all his dues at the time of separation save for gratuity and that the delay was occasioned by lack of standard banking industry rates.

The parties agreed to canvass the Claim by way of written Submissions.

Submissions

In the written submissions the Claimant reiterated the contents of the Statement of Claim and relied on the documentary evidence dated 18th

July, 2017 and filed in Court on 19th July, 2017.

It is submitted by the Claimant that what is in contention and is pending before this Court for adjudication is the computation of the Claimant's gratuity for the last 4 years of his Contract of employment. He contends that the rate applicable is 31% and that he relies on surveys conducted by Price Waterhouse Coopers (PWC) for Banks that fall under tier two, which provided that the rate of 31% was payable to National Bank of Kenya and Housing Finance Company of Kenya Limited.

It is further his submission that the rate of 18% that the Respondent seeks to rely on is not supported by its experts and as such the Court ought to disregard the same. The Claimant urged the Court to allow his Claim as drawn. To fortify this position the Claimant relied on the Authority of **Franklin Njeru Vs Kenya Kazi Services Limited & 2 Others (2018) eKLR** where it was held that terminal benefits are to be calculated based on the terms of the actual contract.

The Respondent on the other hand avers that the Claimant has grossly exaggerated the gratuity payable by Tier two banks, where the Respondent Bank herein falls. It is the Respondent's submission that the gratuity payable is 18% of the Claimant's basic Salary and that the rate of 31% was payable in two banks, National Bank of Kenya and Housing Finance Company of Kenya Limited, that both are government owned. The Respondent submits that the Claimant is entitled to gratuity of Kshs.30,655,800/- calculated at 18%.

In conclusion the Respondent urged the Court to award the Claimant Kshs.30,655,800/- as the same is fair and just compensation due to the Claimant. The Respondent further urged the Court to exercise its discretion to order that each party bears its own costs and relied on the case of **Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & Another (2016) eKLR**.

Determination

There is no dispute that the Claimant was employed by the Respondent under a fixed term contract running from 15th July, 2011 to 14th July, 2016. There is further no dispute that the Claimant is entitled to payment of gratuity for the years he worked for the Respondent Bank. The only issue for determination is the rate at which the said gratuity is payable.

The Claimant's letter of Appointment dated 6th June, 2011 at clause 8 provides as follows:

“Gratuity

Will be calculated at 10% of Gross Basic Salary for one year of employment and thereafter the applicable rates will be aligned with banking industry rates.”

The Claimant seeks to rely on the rate of 31% that was applicable to National Bank of Kenya and Housing Finance Company of Kenya Limited, which banks are under tier two as the Respondent Bank.

The Respondent on the other hand claims that the rate of 31% is not applicable but rather 18% of Gross Basic Salary as per the report prepared by Price Waterhouse Coopers (PWC). They further submit that the two banks the Claimant is using as a benchmark are state owned and their gratuity is similar to the rates for parastatals.

Indeed the two banks that the Claimant has used as benchmarks are government owned and the rate of gratuity for parastatals is coincidentally 31% of Gross Basic Pay.

In the circumstances I opine that the two banks would not give a true reflection of the banking industry with the policies skewed towards those of parastatals.

The report prepared by Price Waterhouse Coopers at Page 10 provides the gratuity rate for two tier banks on average at 18%. The Court is therefore inclined to apply the same. It was incumbent on the claimant who alleges that the industry rate is 31% to demonstrate so using private banks in the same category as the respondent. He does not deny that the two banks which he has based the gratuity rate on are government owned and their gratuity is based on that in the public sector.

For the foregoing reason, I award the claimant gratuity at the rate of 18% for the 2nd to 5th year. For the first year the appointment letter clearly provides that the rate to be used is 10% and the same shall remain as such.

In summary, the Court awards the gratuity as follows:

1st year of Employment at 10%.....Kshs.2,700,000.00

2nd year of employment at 18%.....Kshs.6,696,000.00

3rd year of employment at 18%.....Kshs.6,696,000.00

4th year of employment at 18%.....Kshs.6,696,000.00

5th year of employment at 18%.....Kshs. 6,696,000.00

Total **Kshs. 30,655,800.00**

Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE